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## BASING-POINT PRICING AND ANTITRUST POLICY

A RE-EXAMINATION of the legality under the antitrust acts of the widespread practice of basing-point pricing is made appropriate by two recent Supreme Court decisions.<sup>1</sup> Also, in view of a possible postwar resumption of antitrust enforcement, a clear understanding of the system's economic implications is needed so that a definite and consistent policy may be formulated with regard to it.

### I

Under a basing-point system goods are sold at delivered prices computed by adding together the announced price at a basing point and the freight

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1. *Corn Products Refining Co. v. Federal Trade Comm.*, 324 U. S. 726 (1945); *Federal Trade Comm. v. A. E. Staley Manufacturing Co.*, 324 U. S. 746 (1945). For a discussion of these cases, see Aulette and Schaffer, *Legality of the "Basing Point" Pricing System* (1945) 33 GEO. L. J. 439.

therefrom to the purchaser.<sup>2</sup> When only one basing point is used, there exists a "single basing-point system"; when prices are quoted on more than one, there is a "multiple basing-point system." In the latter case the applicable basing point for a given sale is that at which the price combined with the transportation factor results in a lower delivered quotation than could be obtained by the use of any other base.<sup>3</sup> Because there are almost invariably fewer basing points than points of production, many plants have no base price at their location.<sup>4</sup> When these non-base units sell at prices including transportation charges greater than those actually incurred, "phantom freight" is collected.<sup>5</sup> Conversely "freight absorption" is said to occur when any producer sells to a consumer so located that the cost of shipment exceeds the freight from the governing basing point.<sup>6</sup> In neither instance are cost and price directly related. A buyer located near a non-base plant pays more on deliveries therefrom than a consumer who is farther away from the point of actual shipment but nearer the basing point. Generally only railroad freight tariffs are employed in calculating delivered quotations.<sup>7</sup> Use of the system results in varying net returns for the seller,

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2. 2 ENCYC. SOC. SCIENCES (1930) 473. For example if Chicago is the basing point, and the Chicago price is fifty dollars, the delivered price will be the sum of fifty dollars plus freight from Chicago to the purchaser.

3. Assuming that Chicago and Indianapolis are basing points for a commodity with prevailing prices of fifty and forty dollars per unit respectively, then the delivered price for a destination equidistant from both cities would be the Indianapolis figure of forty dollars plus freight. Should, however, the consumer be so located that the freight from Indianapolis is more than ten dollars in excess of that from Chicago, the sale would be based on Chicago since a lower delivered price would be thereby obtained.

4. BURNS, *THE DECLINE OF COMPETITION* (1936) 336.

5. This would occur when a non-base producer basing his sales on a Chicago basing point sold to a consumer situated nearer to his plant than to the basing point; a fictional item, the freight from Chicago would be included in the delivered price.

6. Freight would be absorbed were the consumer located nearer Chicago than to the non-base producer selling on the Chicago base. Freight absorption may also occur on sales by a basing-point producer. Under the fact situation set forth in note 3 *supra* an Indianapolis seller would absorb freight when selling to a purchaser near Chicago.

7. BURNS, *op. cit. supra* note 4, at 370. Railroad rates are stable and published. Their use insures identical transportation charges for all sellers on any given sale. It is customary in the steel industry to allow a seller who sends his own truck to the mill a credit equal to 65 per cent of the rail freight from mill to destination after including in the delivered price the rail freight from the applicable basing point to destination. TNEC REP., *THE BASING POINT PROBLEM*, Monograph 42 (1941) *The Basing Point Method of Quoting Delivered Prices in the Steel Industry*, 31, 73. Introduction of trucking in the cement industry caused producers to take concerted action to discourage use of this mode of transportation. "The primary reason for this activity . . . was the destructive effect of trucking upon the delivered price system." See Matter of the Cement Institute, 37 F.T.C. 37, 191 (1943). Answers to a questionnaire sent to 117 mills in the course of a study sponsored by the Institute and conducted from 1934 to 1937, showed that 85 mills permitted no trucking, 8 imposed penalties in the form of higher prices, and only 7 allowed trucking on the basis of the applicable price f.o.b. mill without any restriction. *Id.* at 198. The existence of differential routes in the Great Lakes and Warrior River areas caused a breakdown of the sugar industry's

accordingly as phantom freight is collected or freight is absorbed, and also results in uniform delivered prices by all firms using the same basing point to any given purchaser, since all delivered figures are similarly calculated.<sup>8</sup>

This pricing device has manifested itself in a variety of industries<sup>9</sup> which have certain similar characteristics. Generally the commodity is standardized with a consequently elastic demand for the output of any one producer,<sup>10</sup> transportation costs are high,<sup>11</sup> and overhead costs important.<sup>12</sup> Also, production is often localized, being limited to a few geographic areas,<sup>13</sup> and

transportation structure in the late 1920's, and caused combined activity by the refiners of the Sugar Institute to maintain artificial freight charges considerably above actual costs in the regions affected. See *United States v. Sugar Institute*, 15 F. Supp. 817, 843-56 (S. D. N. Y. 1934). See *infra* p. 566, at note 43.

8. See Clark, *Basing Point Methods of Price Quoting* (1938) 4 CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE 477, 479. So complete has been the uniformity in the cement and steel industries that the purchasing agencies of the Federal Government have been forced to award contracts by lot because of the submission of identical sealed bids by competing firms. See FEDERAL TRADE COMMISSION, REPORT TO THE PRESIDENT WITH RESPECT TO THE BASING-POINT SYSTEM IN THE IRON AND STEEL INDUSTRY (1934) 5; Matter of the Cement Institute, 37 F.T.C. 87, 175-7 (1943); FEDERAL TRADE COMMISSION, PRICE BASES INQUIRY (1932) 207-18.

9. The Federal Trade Commission reported, on the basis of material collected in 1928, that the five industry groups with the highest percentage of firms quoting basing-point prices were: iron, steel, and their products, except machinery, 26 per cent; stone, clay, and glass products, 18 per cent; food and like products, 12 per cent; chemicals and allied products, 6 per cent; lumber and like products, 5 per cent. See FEDERAL TRADE COMMISSION, PRICE BASES INQUIRY (1932) 13.

The steel industry used a single basing-point system by which all prices were based on Pittsburgh, until 1924, after which the multiple basing-point system now in use was adopted. For a history of the practice in steel, see DAUGHERTY, DE CHAZEAU, STRATTON, THE ECONOMICS OF THE IRON AND STEEL INDUSTRY (1937) 533-44. A description of the multiple basing-point system used in the cement industry is set forth in FEDERAL TRADE COMMISSION, PRICE BASES INQUIRY (1932) 23-26. Basing-point systems have been observed in the sale of asphalt, hollow building tiles, nuts, bolts, range boilers, rivets, and sewer pipe. See FETTER, THE MASQUERADE OF MONOPOLY (1931) 242. Other commodities sold at basing-point prices include cast iron soil pipe, maple flooring, oak flooring, Philippine mahogany, southern pine, plywood, benzol, carbon black, carbon tetrachloride, zinc, copper, and lead. NELSON AND KEIM, TNEC REP., PRICE BEHAVIOUR AND BUSINESS POLICY, Monograph 1 (1940) 282, 310, 320-1, 345. For examples of the use of basing-point systems in food industries, see *Sugar Institute v. United States*, 15 F. Supp. 817, 841-56 (S. D. N. Y. 1934); Matter of Corn Products Refining Co. and Corn Products Sales Co., 34 F.T.C. 850, 859-61 (1942); Matter of United States Maltsters Ass'n, 35 F.T.C. 797, 809 (1942).

10. Clark, *supra* note 8, at 477. For a discussion of elasticity in the steel industry, see TNEC REP., THE BASING POINT PROBLEM, Monograph 42 (1941), *Some Factors in the Pricing of Steel*, 11, 16.

11. Clark, *loc. cit. supra* note 10.

12. See Clark, *supra* note 8 at 478. For a discussion of overhead costs in the steel industry, see DAUGHERTY, DE CHAZEAU, STRATTON, *op. cit. supra* note 9, at 555-7.

13. MILLER, UNFAIR COMPETITION (1941) 176. The refining of sugar cane is confined to the Atlantic seaboard, the coast of the Gulf of Mexico, and San Francisco. See *Sugar Institute v. United States*, 297 U. S. 553, 572 (1936). Sixty-five per cent of the total output of cast iron soil pipe is produced within 75 miles of Birmingham, Alabama. WILCOX, TNEC

frequently accompanied by a scattered demand.<sup>14</sup> Lastly, there exists in these industries a high concentration of volume in the hands of a few large sellers and/or powerful trade organizations,<sup>15</sup> a fact which assumes major significance in any analysis of the monopoly power of which a basing-point system is both a tool and symptom.<sup>16</sup>

## II

Since by this formula prices are often quoted with reference to a point other than that of shipment and bear no necessary relation to actual costs, basing-point pricing appears to be vulnerable under Section 2(a) of the Clayton Act as amended by Section 1 of the Robinson-Patman Act.<sup>17</sup> The amended Section prohibits price discriminations ". . . where the effect of such discriminations may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the

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REP., COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY, Monograph 21 (1940) 157. The production of steel is likewise confined to a few geographic areas of which Pittsburgh is the most important. De Chazeau, *Public Policy and Discriminatory Prices of Steel* (1938) 46 J. POL. ECON., 537, 544. Cement production was originally highly concentrated in the Lehigh Valley, although subsequently diffused. FEDERAL TRADE COMMISSION, PRICE BASES INQUIRY (1932) 31.

14. *Ibid.* Demand for basic products, such as iron and steel, cement, sugar, lumber, and metals is, of course, nationwide.

15. The fifteen members of the Sugar Institute controlled 70 to 80 per cent of the domestic refined sugar sold in the United States. See *Sugar Institute v. United States*, 297 U. S. 553, 572 (1936). Five of the seventy-five members of the Cement Institute produce over one-third of the industry's total capacity, and twenty-six of the members account for three-fourths of the production. See *Matter of the Cement Institute*, 37 F.T.C. 87, 142 (1943). The United States Steel Corporation and Bethlehem Steel Corporation controlled in 1938, 49 per cent of the total ingot capacity, while nine companies controlled all but 13 per cent. AMERICAN IRON AND STEEL INSTITUTE, IRON AND STEEL DIRECTORY OF THE UNITED STATES AND CANADA (1938) 401-2. Ten manufacturers produced all the corn gluten in 1919. FEDERAL TRADE COMMISSION, REPORT ON COMMERCIAL FEEDS (1921) 162. The twenty-four members of the Hardwood Institute produced, in 1938, 60 per cent of the hardwood lumber produced in northern Wisconsin and northern Michigan. See *Matter of the Hardwood Institute*, 34 F.T.C. 661, 663 (1942). Since 1929, nineteen companies have manufactured over 65 per cent of all the malt produced in the United States. See *Matter of United States Maltsters Ass'n*, 35 F.T.C. 797, 800 (1942). The members of the Cast Iron Soil Pipe Association, thirty-five in all, produce over 90 per cent of the total output. WILCOX, *loc. cit. supra* note 13.

16. See *infra*, pp. 571-3.

17. 38 STAT. 730 (1914), 15 U. S. C. § 13 (1940), as amended by 49 STAT. 1526 (1936), 15 U. S. C. § 131 (1940). Proceedings instituted under this statute by the Federal Trade Commission and resulting in orders to cease and desist basing-point pricing are: *Matter of the Corn Products Refining Co. and Corn Products Sales Co.*, 34 F.T.C. 850 (1942), *aff'd*, 324 U. S. 726 (1945); *Matter of A. E. Staley Manufacturing Co. and the Staley Sales Corp.*, 34 F.T.C. 1362 (1942), *aff'd*, 324 U. S. 746 (1945); *Matter of the Cement Institute*, 37 F.T.C. 87 (1943), order based on § 2(a) as amended, and § 5 of Federal Trade Commission Act, 38 STAT. 719 (1914), 15 U.S.C. § 45 (1940), petition for review filed with the Circuit Court of Appeals for the Seventh Circuit (July 26, 1943).

benefit of such discrimination, or with customers of either of them. . . ." Permitted price differentials are those "which make only due allowance for differences in the cost of manufacture, sale, or delivery. . . ." In 1924, in a proceeding under the original Clayton Act, the Federal Trade Commission issued a cease and desist order condemning the single basing-point system used by the United States Steel Corporation and its subsidiaries.<sup>18</sup> Although this "Pittsburgh Plus" decision was the administrative ruling in effect when the Robinson-Patman Act was passed in 1936,<sup>19</sup> a judicial interpretation of the latter statute's applicability to this widely accepted system was only recently forthcoming.

Thus, in *Corn Products Refining Company v. Federal Trade Commission*,<sup>20</sup> a decision handed down last April, the Supreme Court negated any possibility that the basing-point device was impliedly exempt from the provisions of the Robinson-Patman Act. The claim of the company that the legislative history of the Act<sup>21</sup> indicated a congressional intent to sanction all such systems was denied,<sup>22</sup> but the Court, avoiding a blanket condemnation of the system, concluded that the legality of any basing-point system had to be determined by measuring each individual situation against the statute.<sup>23</sup>

Nevertheless, the standards applied in the *Corn Products* case indicate

18. Matter of United States Steel Corporation, 8 F.T.C. 1 (1924). The Commission held the respondents' pricing activities were also "unfair methods of competition" within the meaning of § 5 of the Federal Trade Commission Act. *Id.* at 58.

The Corporation and its subsidiaries were ordered to cease and desist inter alia from quoting or selling their rolled steel products at Pittsburgh Plus prices, or upon any other basing point than that of manufacture or shipment. *Id.* at 59. Without admitting the validity of the order of the jurisdiction of the Commission, the respondents filed an order of compliance. See Mechem, *The "Pittsburgh Plus" Case* (1924) 10 A.B. A. J. 806, 809. On May 18, 1938 a petition for review was filed in the Circuit Court of Appeals for the Third Circuit.

See generally FETTER, *op. cit. supra* note 9, at 145-91; MCLAUGHLIN, *CASES ON THE FEDERAL ANTI-TRUST LAWS* (1930) 253, n. 57; Commons, *The Delivered Price Practice in the Steel Market* (1924) 14 AM. ECON. REV. 505; Kreutzberg, *The Passing of "Pittsburgh Plus"* (1924) 17 AM. BANKERS ASS'N J. 301.

19. See *Corn Products Refining Co. v. Federal Trade Comm.*, 324 U. S. 726, 736 (1945).

20. 324 U. S. 726 (1945) *aff'g* 144 F. (2d) 211 (C. C. A. 7th, 1944).

21. When the Robinson-Patman bill was reported by the House Judiciary Committee, an amendment was also submitted, to be inserted as subsection (5) of Section 2. This proposed addition to the bill read:

"(5) That the word 'price', as used in this section 2, shall be construed to mean the amount received by the vendor . . . after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

H. R. REP. NO. 2287, 74th Cong., 2nd Sess. (1936) 2. The amendment was specifically designed to abolish all basing-point pricing, and to require f.o.b. plant sales. *Id.* at 14. The House, however, voted to strike it out. 80 CONG. REC. 8224 (1936). At the same session of Congress the Wheeler Anti-Basing Point Bill was rejected. 80 CONG. REC. 8102, 8223, 8224 (1936).

22. 324 U. S. at 737. Compare concurring-dissenting opinion of Judge Major in *A. E. Staley Mfg. Co. v. Federal Trade Comm.*, 144 F. (2d) 221, 227-31 (C. C. A. 7th, 1944).

23. 324 U. S. at 737.

how any basing-point system may be attacked under the amended section. Although the company had plants both at Chicago and Kansas City, all delivered prices for glucose were calculated with reference to the Chicago base.<sup>24</sup> The Court, sustaining the Commission's cease and desist order,<sup>25</sup> found that this system was discriminatory ". . . since the prices . . . upon deliveries from Kansas City bear relation to factors other than actual costs. . . ." <sup>26</sup> The opinion thus indicates that price discriminations result whenever phantom freight is collected or freight is absorbed, since, even under a uniform delivered price, the difference between the actual transportation cost and the freight rate from the basing point causes factory net prices to vary according to the destination of the product and "in the amount of this freight differential."<sup>27</sup> Moreover, in most cases the inference of a probable adverse effect on competition—necessary to the establishment of illegality under the statute—can be drawn from the mere fact of a basing-point operation. For the Court sustained <sup>23</sup> the Commission's findings that the result of the system's use was to lessen the ability of low-priced candy manufacturers located at Kansas City and at other points far from Chicago to compete with those near the basing point, and thus to create a favored zone around Chicago.<sup>23</sup>

The companion decision in *Federal Trade Commission v. A. E. Staley Manufacturing Company*<sup>30</sup> makes it apparent that the requirements of the amended section's rebuttal provision are not satisfied merely by proving subsequent adoption of another's basing-point system. Section 2(b) provides that a producer may rebut the Commission's prima facie case by showing "that his lower price . . . was made in good faith to meet an equally low price of a competitor." The Staley Company made an unsuccessful attempt to take advantage of this provision by showing that in basing sales on Chicago, although its only plant was at Decatur, Illinois, it had merely accepted the basing-point formula of its Chicago competitors upon subsequent entry into the glucose industry.<sup>31</sup> The Court pointed out that

24. *Id.* at 730.

25. See *Matter of Corn Products Refining Co. and Corn Products Sales Co.*, 34 F. T. C. 850, 876-8 (1942).

26. 324 U. S. at 732.

27. *Id.* at 733.

28. "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." 324 U. S. at 739.

29. *Id.* at 738-9. The Commission found that purchasers located in Kansas City paid for deliveries from the local plant prices higher than a Chicago consumer would pay on similar deliveries by the following percentages: August 1, 1936, 13 per cent; August 1, 1937, 12 per cent; August 1, 1938, 17 per cent; August 1, 1939, 19 per cent. As a result of these discriminations a number of candy manufacturers relocated in Chicago. See *Matter of Corn Products Refining Co. and Corn Products Sales Co.*, 34 F.T.C. 850, 861, 864 (1942).

30. 324 U. S. 746 (1945), *rev'g* 144 F. (2d) 221 (1944).

31. *Id.* at 751. The Staley Company had begun the manufacture of glucose, or corn syrup, in 1920. At that time two producers were selling the commodity in Chicago at basing-

no proof had been offered that in each instance non-discriminatory prices would be higher than those charged,<sup>32</sup> and that mere slavish adherence to the discriminatory formula of another without any attempt to set up an independent non-discriminatory system is not to act in "good faith" within the statutory meaning.<sup>33</sup>

Although indicative, neither of these cases can be construed as a judicial condemnation of basing-point pricing *per se*. In holding the system not exempt from the provisions of the Robinson-Patman Act, the Court left open the question as to its illegality in future cases.

### III

In the absence of blanket approval or disapproval, the formulation of an affirmative policy requires an analysis of the compatibility of the practice with the ends of antitrust legislation. The principal objective is the securing to the consuming public, essentially by the fostering of price competition, the benefits of a competitive economy, ultimately a maximum supply of goods and services at lowest possible cost.<sup>34</sup>

One of the most salient and, with regard to antitrust policy, one of the most significant effects of a basing-point system is a suppression of price competition. Under basing-point distribution, the consumer, approached

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point prices with Chicago as the single base. To share in the Chicago business the Staley Company met the delivered prices of their rivals, making reductions where necessary. *Id.* at 751. Judge Minton, delivering one of the two majority opinions, had accepted this argument as rebutting the Commission's *prima facie* case on the Company's appeal to the Seventh Circuit. See *A. E. Staley Mfg. Co. v. Federal Trade Comm.*, 144 F. (2d) 221, 225 (C. C. A. 7th, 1944).

32. The Court stated: "The statutory test is whether respondents, by their basing point system, adopted a 'lower price . . . in good faith to meet an equally low price of a competitor.' This test presupposes that the person . . . would, by his normal, non-discriminatory pricing methods, have reached a price so high, that he could reduce it in order to meet the competitor's equally low price. . . . Even though respondents, at many delivery points, enjoyed freight advantages over their competitors, they did not avail of the opportunity to charge lower delivered prices. Instead they maintained their own prices at the level of their competitor's high prices . . . by including phantom freight in their own delivered prices. . . . Moreover, there is no showing that if respondents had charged non-discriminatory prices, they would be higher in all cases than those now prevailing under their basing point system." 324 U. S. at 754-5.

33. ". . . [T]hey have slavishly followed . . . a pricing policy which, in their case, resulted in systematic discriminations. . . ." *Id.* at 755. "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance." *Id.* at 757.

34. For a discussion of the goals of the antitrust legislation, see McAllister, *Price Control by Law in the United States: A Survey* (1937) 4 LAW & CONTEMP. PROB. 273, 283, 285; HODGES, ANTITRUST ACT AND THE SUPREME COURT (1941) 4; Hamilton and Till, *TNEC REP., ANTITRUST IN ACTION*, Monograph 16 (1941) 5; CLARK, *THE FEDERAL TRUST POLICY* (1931) cc. 3, 5; THORNTON, *COMBINATIONS IN RESTRAINT OF TRADE* (1928) cc. 1, 2.

with a united front, has no choice but to accept one of several identical bids. Thus, whatever competitive pressure is felt must influence the setting of the base price at the basing point. But even at this stage competitive incentive is stifled. An isolated producer under a multiple basing-point system by quoting a high base price at his plant does restrict the area for which his is the governing base and in which he can sell without absorbing freight,<sup>35</sup> and he may invite penetration of the local market by distant sellers.<sup>36</sup> But these considerations are offset by the fact that he can exact a large profit from nearby customers with whom in all probability he has had previous dealings and to whom he can offer prompt convenient service. Furthermore, should this producer wish to sell to former customers now in an area governed by another base, his larger profits in the home market permit absorption of freight on a wide scale.<sup>37</sup> Thus, a fundamental principle of basing-point pricing is that a seller is permitted "to maintain a high price to buyers in the vicinity of his mill without restricting his sales to the small territory in which his base price plus freight gives a lower delivered price than that calculated by reference to any other base."<sup>38</sup> For this reason, and also because long-established bases could, by absorbing freight, still share the local market, non-base units may have little short-run incentive to disturb the existing price pattern by the establishment of lower base prices at their plants.<sup>39</sup>

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35. Since a basing point is applicable for a given destination only when the sum of its base price plus freight is lower than the delivered price similarly calculated on any other base, the area governed by a basing point is expanded by a reduction in base price and contracted by an increase. In this area the base seller realizes his greatest profit, at least equal to base price. Selling in a region governed by another basing point involves meeting the delivered price there by absorbing freight and realizing a lower plant net. Thus any increase in base price restricts the market territory in which the highest profit will be realized.

36. Although an invasion by a distant producer nets that producer a smaller profit than could be obtained in his own area, the profit that he does realize will be greatest wherever the delivered price he must meet is greatest. Consequently a rise in base price is apt to attract competition from without the local territory.

37. Sales by freight absorption into another's market may cause reciprocal invasions, either as a retaliatory measure, or as the natural result of loss of local business. Yet because freight absorption allows additional sales without lowering base price, ". . . sellers are not in fact much deterred by this prospect." Clark, *Imperfect Competition Theory and Basing-Point Problems* (1943) 33 AM. ECON. REV. 283, 290.

38. BURNS, *THE DECLINE OF COMPETITION* (1936) 336. "Assuming rivalry of producers under the basing point system, it is held that it reduces the incentive the seller has to reduce the price charged to consumers in order to expand his sales or ward off encroachments by his rivals, and instead puts him in a position in which it is very generally cheaper for him to expand or protect his volume of sales by reaching out farther from his mill, absorbing freight to a greater distance and accepting a lower mill yield on his additional sales without cutting prices to a consumer. . . ." NATIONAL RECOVERY ADMINISTRATION, *REPORT ON THE OPERATION OF THE BASING POINT SYSTEM IN THE IRON AND STEEL INDUSTRY* (1934) 71.

39. The non-base producer who sells to local consumers at a price calculated by adding to the base price full freight from the basing point may make a large profit on local sales, and still be able to sell in other areas by the device of freight absorption. In effect the high

Even where a number of sellers each quote basing-point prices and might competitively establish a base price for the area, or under a single basing-point system for the entire industry, there are two reasons why a seller may not wish to quote a lower price than his rivals. The possibility of increasing sales by freight absorption is always present, and also, if uniform delivered prices are to prevail, a reduced figure will be instantly met, and no appreciable advantage will be gained.<sup>40</sup>

This suppression of direct price competition results in an increase of unnecessary costs. Since all competition at the delivery point must be in salesmanship, greater emphasis must be placed on advertising and other wasteful forms of sales effort.<sup>41</sup> The possibility afforded by the system of obtaining orders in market areas governed by distant basing points, by meeting the prevailing prices there, gives rise to cross-hauling, and to needlessly heavy transportation costs for the industry as a whole.<sup>42</sup> Similarly costly is the use of only railroad tariffs as the measure of freight charges while cheaper routes are available.<sup>43</sup> Also inefficient or obsolete plants, shielded from direct

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prices paid by local customers reimburse him for lesser profits realized when he absorbs freight.

By establishing a base price he might get no more business because existing plants by absorbing freight could enter the territory in which he could sell most cheaply. See BURNS, *op. cit. supra* note 38, at 337-8.

40. Rigidity of price observed in the cement industry may serve as an example of the minimization of incentive to lower base prices. With the exception of the period from August to November, 1929, the twenty-two mills in the Lehigh Valley maintained their prices "on a dead level" from January, 1927, to November, 1930. The same was true of the Hudson Valley mills except for from November, 1929, to November, 1930, they were ten cents higher than prior to August, 1929. A similar condition was evidenced for the Buffington, Indiana, mills except that a ten cent drop during the last year of the period. Letter of submittal by W. E. Humphrey, Chairman of the Federal Trade Commission, to the Congress, reprinted in FEDERAL TRADE COMMISSION, PRICE BASES INQUIRY (1932) XIII, XVI-XVII.

41. See Clark, *Basing Point Methods of Price Quoting* (1938) 4 CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE 477, 483; MILLER, UNFAIR COMPETITION (1941) 184.

42. With regard to cross-hauling in the steel industry, Charles M. Schwab said, in an address before the American Iron and Steel Institute in 1928, "It is manifestly uneconomic for a steel manufacturer in Chicago to ship 100,000 tons of steel to Pittsburgh at a time when a Pittsburgh manufacturer is shipping a like quantity of like material from Pittsburgh to Chicago," and also that ". . . the net result of the cross-hauling of materials has not been to increase the output of the individual producers by any appreciable amount. It has merely served to dissipate a part of their profits in unnecessary transportation." FEDERAL TRADE COMMISSION, REPORT TO THE PRESIDENT WITH RESPECT TO THE BASING-POINT SYSTEM IN THE IRON AND STEEL INDUSTRY (1934) 13, 14.

The Commission has referred to cross-hauling as a "general symptom of failure of competition." TNEC REP., THE BASING POINT PROBLEM, Monograph 42 (1941) *Monopoly and Competition in Steel*, 1, 4. Professor J. M. Clark states, with regard to cross-hauling, "The amount of the resulting waste cannot be exactly measured, but it is very substantial." Clark, *supra*, note 41, at 482.

43. See note 7 *supra*. The seller may, of course, by using water transportation, for example, cut the cost of some units, but the benefit of such a reduction is not passed on to the consumer. See note 50 *infra*.

price competition and able, by freight absorption, to sell in other markets, may gain large profits on local sales and continue in existence much longer than they could under effective price competition.<sup>44</sup>

A further salient effect of the basing-point system is an artificial location of industrial units—not only of the plants using the system but also of consumer-producers. The collection of phantom freight by a non-base plant, most flagrant aspect of the system's inherent geographic discrimination, prevents the nearby consumer from realizing any advantage from location (as expressed in price),<sup>45</sup> and arbitrarily increases costs for the buyer-manufacturer in competition with others situated near a basing point.<sup>45</sup> The

44. The Federal Trade Commission, after an investigation of pricing in the steel industry, reported, "The growing weakness and comparative inefficiency of older plants in locations no longer best suited to the industry is bolstered up when they are ensured a continued outlet into large areas at delivered prices not to be undersold by any present competitors or by newer, better equipped, and more efficient plants." FEDERAL TRADE COMMISSION, *PRACTICES OF THE STEEL INDUSTRY UNDER THE CODE (1934)* 43. See also FEDERAL TRADE COMMISSION, *PRICE BASES INQUIRY (1932)* 142; TNEC REP., *THE BASING POINT PROBLEM*, Monograph 42 (1941) *Monopoly and Competition in Steel*, 1, 4. Uneconomic location may be a factor in inefficiency. See note 48 *infra*.

45. A consumer located at or close to a basing point can purchase from any plant, regardless of whether it is near or far, and he will only be required to pay a freight charge equal to the cost of transporting the commodity from the nearby base. The consumer situated far from the basing point may be able to purchase from a non-base plant close at hand, but he must pay the imaginary freight application. The only benefit he realizes is in promptness of delivery and convenient service.

46. In the Pittsburgh Plus hearing the Federal Trade Commission found that the Chicago fabricator, buying from a Chicago mill, paid \$7.60 per ton more than his Pittsburgh competitor. Similarly a manufacturer in Duluth paid on purchases from a Duluth mill \$13.20 more for steel than a Pittsburgh competitor. "At Milwaukee, a customer backs up his truck to respondents' Milwaukee mill, hauls away the steel himself, but is obliged to pay the imaginary freight charge from Pittsburgh. . . ." See Matter of United States Steel Corporation, 8 F.T.C. 1, 19-20 (1924).

Indeed two competitors, equidistant from a plant, might both purchase from that plant, yet the customer to whose location the applicable freight rate is lower, receives a gratuitous advantage not based on actual transportation costs.

As a result of this discrimination, competition among manufacturers or processors using the product may be greatly lessened. For example, under the Pittsburgh Plus system, a Chicago fabricator had to include in his total cost and consequently in his price, the imaginary freight charge from Pittsburgh to Chicago plus the actual cost of transporting the finished product from Chicago to destination. By contrast the Pittsburgh fabricator had only to pay the Pittsburgh price for steel plus the transportation cost of the finished product from Pittsburgh to destination. Consequently the Chicago steel user was unable to compete east of Chicago with Pittsburgh rivals. Indeed he could compete on an equal footing only in that area where the freight rate from Pittsburgh was the same as the combined rate from Pittsburgh to Chicago and from Chicago to destination. See Matter of United States Steel Corporation, 8 F.T.C. 1, 21-22 (1924).

An analogous situation exists under the present multiple basing-point system in steel with regard to Pacific Coast fabricators who must pay phantom freight ranging from \$10 to \$13 per ton on steel produced locally but priced with reference to eastern bases. See TNEC REP., *THE BASING POINT PROBLEM*, Monograph 42 (1941) *An Analysis of the Basing-Point System of Delivered Prices as Presented by United States Steel Corporation*, 91, 112.

ultimate result of having more centers of production than basing points is frequently the location of processing and fabricating industries, not in relation to economic or geographic efficiency but near the established bases since proximity decreases the price.<sup>47</sup> This increased demand at the basing points may protect uneconomically-located or obsolete base units,<sup>48</sup> while failure of other vendor plants to quote independent prices can create local monopolies in industries using the product. Indeed by agreeing to set base prices only at designated points, the sellers of an important commodity such as steel can determine what areas should be developed industrially.<sup>49</sup> Furthermore, the quotation of only railroad freight rates prevents any advantage from accruing to a consumer-manufacturer situated on a cheaper alternate

47. See generally MILLER, *op. cit. supra* note 41, at 182; BURNS, *op. cit. supra* note 38, at 345-52.

The single basing-point system of the Corn Products Company caused candy manufacturers to move their factories to Chicago. See note 28 *supra*.

With reference to steel, the Federal Trade Commission has stated, "It is not to be disputed that the existing basing-point system tends to give competitive advantages to fabricators who are located at basing points. This in turn gives certain advantages to producers at basing points who become the natural sources of supply for the local fabricators." FEDERAL TRADE COMMISSION, REPORT TO THE PRESIDENT WITH RESPECT TO THE BASING-POINT SYSTEM IN THE IRON AND STEEL INDUSTRY (1934) 25.

48. Costs of production may be lower at non-base plants because of natural advantages or modern equipment, but if the consumers receive no benefit in the form of lower prices, the consequent location of fabricators near the basing point will assure a ready market for the base producer.

For example, the basing-point system in the steel industry has been defended on the grounds that it affords protection to "property investment in a number of older centers such as Pittsburgh and Youngstown, which might otherwise be at a serious disadvantage in competition." Fly, *The Sugar Institute Decisions and the Anti-trust Laws: II* (1936) 46 YALE L. J. 228, 233.

49. "It is evident . . . that the Pittsburgh basing-point system favored the establishment of steel-using industries at Pittsburgh. . . . In so far as the practice was largely maintained by the United States Steel Corporation, the corporation was able to influence the rate of development of steel-using industries in different parts of the country." BURNS, *op. cit. supra* note 38, at 349. With reference to the steel industry under the National Recovery Administration code of fair competition providing for a continuance of the practice, the Federal Trade Commission contended that ". . . the power to select, discontinue, or increase the number of basing points, involves the power of deciding what cities shall be handicapped and what cities shall be built up as centers for the remanufacture and processing of steel products." FEDERAL TRADE COMMISSION, PRACTICES OF THE STEEL INDUSTRY UNDER THE CODE (1934) 20. See also *Matter of United States Steel Corporation*, 8 F.T.C. 1, 25-8 (1924).

Professor Fetter has contended with reference to the steel industry that "the basing-point system arbitrarily changed the industrial map and continues uneconomically to maintain it so, against the rights and interests of whole regions and of many individual citizens." Fetter, *The New Plea for Basing-Point Monopoly* (1937) 45 J. POL. ECON. 577, 601. For a discussion of recently expressed resentment among Pacific Coast industrialists at the arbitrary freight differentials which are retarding the development of local steel and fabricating industries, see FORTUNE, February, 1945, p. 130.

route,<sup>50</sup> and increases the possibility of an industrial map radically different from one that would result from true price competition.<sup>51</sup>

Thus the basing-point system is incompatible with antitrust policy since the suppression of price competition and concomitant wastes and artificial location prevent any realization of the ultimate goal of lower prices for more and better goods. Elimination of the practice should only be forestalled if retention offers some appreciable positive advantage.

In defense of the system, its advocates point to the desirability of allowing a seller to quote prices quickly and conveniently for any point, especially where high transportation costs are an important element in the delivered price, thus increasing the number of bids readily available to a purchaser.<sup>52</sup> Secondly, the combination of a natural geographic concentration of production combined with widespread demand is said to necessitate a formula whereby a seller can compete in any market so as to insure stable operations allowing him to achieve economies of scale.<sup>53</sup> Thirdly, the claim is made that where demand is highly elastic, and overhead costs must be met, this pricing medium is valuable for it provides "a knowledge of the level at which competition must be met . . . at a definite location" and prevents disorganized markets.<sup>54</sup>

These assertions do not seem to vindicate basing-point pricing. The possibility afforded to a seller to compete at any point may give the buyer a wider range of choice, but still between identical bids; it does not secure to him a lower price, and high transportation costs are arbitrarily assigned among consumers.<sup>55</sup> Furthermore it seems circular to assume that this

50. See note 43 *supra*. For a discussion of the effect of the all-rail formula on steel purchases located on waterways and also the effect on the water transport industry, see FEDERAL TRADE COMMISSION, *PRACTICES OF THE STEEL INDUSTRY UNDER THE CODE (1934)* 27-32.

51. ". . . The natural disadvantages of unfavorably located producers are removed by what amounts to a subsidy collected from the buyers. . . ." FEDERAL TRADE COMMISSION, *REPORT TO THE PRESIDENT WITH RESPECT TO THE BASING-POINT SYSTEM IN THE IRON AND STEEL INDUSTRY (1934)* 24.

52. See TNEC REP., *THE BASING POINT PROBLEM*, Monograph 42 (1941) *Some Factors in the Pricing of Steel*, 11, 25; MILLER, *UNFAIR COMPETITION (1941)* 176.

53. According to this line of argument, the geographic concentration of production is caused by natural factors. Producers of steel, for example, must build their plants where the costs of assembling raw materials and of production are lowest. Also technical efficiency necessitates production on a large scale. To operate a plant of optimum size, outlet to the market must be assured. The market for the product may be nationwide, however, and furthermore, fluctuations in local demand may make the penetration of distant areas even more imperative if production is to be maintained. Consequently there arises a need for freight absorption and for a device allowing a producer to compete anywhere on equal terms with the local sellers. See TNEC REP., *THE BASING POINT PROBLEM*, Monograph 42 (1941) *Some Factors in the Pricing of Steel*, 11, 25. See also argument of Representative Citron in defense of basing-point pricing in 80 CONG. REC. 3224 (1936).

54. See TNEC REP., *THE BASING POINT PROBLEM*, Monograph 42 (1941) *Some Factors in the Pricing of Steel*, 11, 25. See also *BUSINESS WEEK*, May 5, 1945, p. 30.

55. A consumer located near a non-base plant, for example, may receive a number of

pricing system is required by a natural maladjustment of production and demand, since such maladjustment may be the result of basing-point pricing and its effect on the location of industrial units.<sup>56</sup> Also, the advantages gained by fostering the reaching into another's market in order to stabilize economic rates of operation may be nugatory since these efforts by rival producers prove mutually offsetting.<sup>57</sup> Finally any theoretical defense based on the necessity of meeting overhead costs when demand elasticity is high has little merit. Elastic demand merely indicates a potentially competitive market, and it is through the impact of price competition on all costs including overhead costs that the mechanical operation of economic forces channels industrial investment so as to serve the consumer most advantageously.<sup>58</sup> Suppressing price competition to allow sellers to cover fixed costs is to subordinate public to private interest.

It must be admitted, however, that abolition of the system would cause temporary hardships to some producers and to processing industries built up in reliance on the present price pattern;<sup>59</sup> but the advantages to be gained thereby far outweigh these considerations. Assuming the absence of collusion to nullify the normal effects of demand elasticity, the substitution of a uniform plant-net price policy would create vigorous price competition. The possibility of absorbing freight being removed, a seller's market area would be limited to that for which his plant price and actual transportation costs combine to give a lower total delivered price than that of any other producer. Sales could be increased and the tributary market territory expanded only by reducing prices uniformly for all purchasers.<sup>60</sup> Natural

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bids from many firms. But all competition between them will be in service and salesmanship. The customer will still have to pay a delivered price equal to a sum of the base price plus freight, although he may eventually decide to buy from the local plant. Similarly, competition from without the area serves only indirectly to lower the base price there. See note 36 *supra*. The system can work efficiently allowing uniform delivered quotations and "competition" at any destination, only if there is a systematic and reciprocal variation in plant nets, reflecting a systematic and reciprocal assignment of freight charges, without regard to actual transportation costs. See Fly, *Sugar Institute Decisions and the Anti-trust Laws: II* (1936) 46 YALE L. J. 228, 233.

56. See p. 567 *supra*.

57. See MILLER, *op. cit. supra* note 52, at 184.

58. See WILCOX, TNEC REP., COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY, Monograph 21 (1940) 13.

59. "Industrial investment in steel mills and in consumer plants has been conditioned by a basing-point system of prices for over thirty-five years. The f.o.b. mill plan would alter arbitrarily the competitive advantage of location over a substantial portion of American business." De Chazeau, *Public Policy and Discriminatory Prices of Steel* (1938) 46 J. POL. ECON. 537, 562.

For those candy manufacturers who relocated at Chicago in reliance on the single-basing-point system used by corn products sellers, there would be obvious repercussions. See note 28, *supra*.

60. Despite the absence of competition by distant sellers within the local territory, an isolated producer would not have a monopoly position, since the extent of his market area would be determined by competition at its boundaries. See Mund, *The "Freight Allowed"*

geographic advantages would find expression in price differentials, wastes would be eliminated, and costs decreased.<sup>61</sup> Sanction of basing-point pricing makes impossible this beneficial state of competition and resulting low prices.

#### IV

Despite the patent desirability of destroying the system, the amended Clayton Act under present judicial interpretation may prove ineffective as a legal weapon. The implications of the *Corn Products* and *Staley* cases are admittedly sweeping,<sup>62</sup> and rigorous enforcement of Section 2(a) may cause industries to make large-scale readjustments, since phantom freight collections on an appreciable scale are clearly illegal and there will have to be a basing point at or near each center of production. Yet it is not entirely clear to what extent freight absorptions will escape the prohibitions of the Act, as a meeting of lower prices in "good faith."<sup>63</sup>

Moreover in a determination of the statute's adequacy the fact that the effective maintenance of a basing-point system is a symptom of monopoly must be considered. Although uniform prices may indicate perfect competition, the identical delivered prices accompanying the use of a basing-point formula do not.<sup>64</sup> They result from coördinated policy and action as to the

*Method of Price Quotation* (1939) 54 Q. J. ECON. 232, 244. Compare TNEC REP., THE BASING POINT PROBLEM, Monograph 42 (1941) *The Basing-Point Method of Quoting Delivered Prices in the Steel Industry*, 31, 81-86.

61. See Mund, *loc. cit. supra* note 60. "With freight absorptions abolished, competition . . . would almost certainly act with more force to lower prices to consumers." NATIONAL RECOVERY ADMINISTRATION, REPORT ON THE OPERATION OF THE BASING POINT SYSTEM IN THE IRON AND STEEL INDUSTRY (1934) 162.

62. For comments on the significance to businessmen of these cases, see Clark, *New Basing Point Problems* (1945) 23 HARV. BUS. REV. 109; NEWSWEEK, May 7, 1945, p. 73; BUSINESS WEEK, May 5, 1945, p. 30.

63. The defense of meeting competition as a rebuttal of the Commission's *prima facie* case is "a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination." *Federal Trade Comm. v. A. E. Staley Manufacturing Co.*, 324 U. S. 746, 753 (1945). The determination of this question of fact is for the Commission. *Id.* at 758.

Thus much will depend on the inferences drawn by the Commission in each instance. Some freight absorption may be legal when a seller's factory price combined with actual freight gives a higher total than a competitor's delivered price at that destination. *Id.* at 757. But the widespread and systematic absorption of freight which allows a seller to maintain a high price to local consumers, and which gives rise to wasteful interpenetration of markets is hardly justifiable. As stated by Representative Utterback, during the enactment of the Robinson-Patman bill, ". . . This procedural provision cannot be construed as a *carte blanche* exemption to violate the bill . . . so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill." 80 CONG. REC. 9418 (1936).

64. The very mechanics of the system serve to suppress competition with respect to price, and cause wastes, artificial location, and a higher price level. These effects are just the opposite from what is to be expected under perfect competition. See pp. 564 *supra*.

That ". . . the thesis that a policy of identical prices according to a formula can be

method of price quoting by sellers controlling the bulk of production. To the extent that by acting in concert these sellers are enabled to impose a discriminatory system on the public and to maintain high prices by restricting the supply in any area to what will be accepted at the prevailing price, they possess and exercise an appreciable degree of monopoly power.<sup>65</sup> Such united action may possibly be achieved by "tacit understanding" or acceptance of a "business custom," or more probably by collusion.<sup>66</sup> Agreements to use the system have been evidenced in several instances, effected by the members of powerful trade associations.<sup>67</sup> Combination and the intimidation of independents<sup>68</sup> is facilitated in basing-point industries by the presence of these trade groups and also by the frequently observed con-

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followed without collusion, agreement, or understanding is misconceived . . .", see Mund, *Monopolistic Competition Theory and Public Price Policy* (1942) 32 AM. ECON. REV. 727, 733. Identical delivered prices which result from systematic price discrimination hardly indicate eompetition, since such discriminations are impossible under free competition. See Viner, *Objective Tests of Competitive Price* (1925) 33 J. POL. ECON. 107, 110. Furthermore the presence of sellers refusing to use their plants as a base for sales in the local area "is seldom or never found in a competitive industry." Fly, *supra* note 55 at 237.

The Federal Trade Commission considered the Pittsburgh Plus system evidence in itself that free competition did not exist. See *Matter of United States Steel Corporation*, 8 F.T.C. 1, 40-1 (1924).

65. "If the market supply is in large measure controlled either by one seller or by a group which acts more or less as one on price, there is present an element of monopoly." Mund, *supra* note 64, at 738. ". . . Monopoly may be said to exist whenever a single seller or a number of sellers acting in unison control enough of the supply . . . to enable them to augment their profit by limiting output and raising price." WILCOX, *TNEC REP., COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY*, Monograph 21 (1941) 10.

66. The pricing of many commodities involves quantity discounts, "extras", and other factors which are taken into account when setting the price. The uniformity of policy with respect to the inclusion of these items necessary to identical prices would be difficult to obtain in all probability without some understanding. The same may be said with regard to the treatment of other-than-rail transportation.

"Where firms agree upon a common basing point, each one, foregoing the competitive advantage inherent in its location, makes its delivery charge so high as to enable every other one, however distant, to sell in territory that would otherwise belong to it alone. Without collusion, no such practice could obtain." WILCOX, *op. cit. supra* note 65, at 146.

67. The collusive use of basing-point systems pursuant to agreements for the maintenance of uniform prices has been condemned as an unfair method of competition within the meaning of § 5 of the Federal Trade Commission Act in the following hearings: *Matter of United States Maltsters Ass'n*, 35 F.T.C. 797 (1942), second petition for review filed with Circuit Court of Appeals for the Seventh Circuit (February 26, 1943); *Matter of the Hardwood Institute*, 34 F.T.C. 661 (1942); *Matter of Pine Hill Lime & Stone Co.*, 33 F.T.C. 427 (1941); *Matter of North Dakota Wholesale Grocers' Ass'n*, 9 F.T.C. 266 (1925).

The multiple basing-point system in the cement industry was also maintained by combination among the members of the Cement Institute. See *Matter of Cement Institute*, 37 F.T.C. 87 (1943). See also *United States v. Sugar Institute*, 15 F. Supp. 817, 851 (1934).

68. Powerful firms in the cement industry have dealt with rebellious producers by putting into effect at their plants punitive base prices, frequently lower than the base prices of the sellers imposing them. See *Matter of the Cement Institute*, 37 F.T.C. 87, 178-87 (1943).

centration of volume in a few producers. Behind a utilization of the system may be the desire to suppress price competition, to collect large profits in the home market, or to share in a harmonious "open competition" plan. The system has obvious value as part of a scheme to protect invested capital at certain locations or to fix the level of prices. Abolition of the device by Robinson-Patman Act enforcement can remove in the particular instance the formula allowing such coordinated action.<sup>69</sup> Nevertheless, however effective a cease and desist order may be in preventing sellers from using the system, the concentration of volume and the existence of trade groups make other forms of future agreements or understandings as to price quite likely, and the imposition of a competitive price structure may indeed stimulate such concerted action.

Where combination in conjunction with producers' associations has made possible the maintenance of a basing-point system, the Clayton Act appears to be an inadequate remedy and dissolution of the organization by Sherman Act<sup>70</sup> proceedings may be necessary to insure a restoration of competition. To date, however, in Sherman Act cases, basing-point systems have been considered only as one of a number of activities allegedly in restraint of trade. For this reason the failure of the Supreme Court to find any "prohibited concert of activity"<sup>71</sup> in *Maple Flooring Manufacturers Association v. United States*<sup>72</sup> and *Cement Manufacturers Protective Association v. United States*<sup>73</sup> offers little guidance in the determination of the legal status of the practice. Furthermore, in the former case, it was carefully pointed out that although the mills quoted delivered prices by adding the freight tariff from the single basing point at Cadillac, Michigan to their base prices, they sold

69. "Although sellers may still 'act as one' . . . the likelihood of such action would be reduced and the problem of coping with any residuum of monopoly would be reduced." Mund, *loc. cit. supra* note 60. See also Fetter, *The New Plea for Basing Point Monopoly* (1937) 45 J. POL. ECON. 577, 591.

70. 26 STAT. 209 (1890), 15 U. S. C. § 1.

71. Chief Justice Stone, who delivered the opinions in the *Maple Flooring* and *Cement* cases, in distinguishing them from the *Corn Products* case, stated, "The only question for decision in those cases was whether there was a concerted price-fixing scheme among competing sellers, accomplished in part by their adoption of a uniform basing-point system; in fact, no prohibited concert of action was found." *Corn Products Refining Co. v. Federal Trade Comm.* 324 U. S. 726, 735 (1945).

For an interesting comment on these cases, see FETTER, *THE MASQUERADE OF MONOPOLY* (1931) 231-42.

72. 268 U. S. 563 (1925). The activities of the Association complained of by the government were: the calculation and distribution to members of the average cost of all dimensions and grades of flooring, the distribution of a booklet containing freight rates from the basing point, the gathering and dissemination of sales statistics, and meetings of members' representatives at which the industry was discussed. *Id.* at 566-7.

73. 268 U. S. 588 (1925). In the *Cement* case the government attacked the use of "specific job contracts," the compilation and distribution of freight rates from the basing points, the exchange of information concerning credits, and the activities of the Association at meetings. *Id.* at 592.

f.o.b. mill on request,<sup>74</sup> and that no substantial uniformity in delivered prices had been evidenced.<sup>75</sup> Such uniformity was found, however, in the *Cement* case, accompanying the use of a multiple basing-point system.<sup>76</sup> Warning that "agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful,"<sup>77</sup> the Court concluded, however, that the identical quotations were the result of competition.<sup>78</sup>

Collusive maintenance of a basing-point system was condemned in *United States v. Sugar Institute*.<sup>79</sup> The defendant refiners in that case concertedly maintained a delivered price system, setting arbitrary transportation charges higher than those dictated by actual costs<sup>80</sup> and refusing to sell f.o.b. refinery.<sup>81</sup> The Court, enjoining the members of the Institute inter alia from collectively "determining transportation charges or freight applications,"<sup>82</sup> stated that, "in thus concertedly fixing a substantial element in the price of sugar without any demonstration or even real consideration of the reasonableness of the charge, . . . defendants acted . . . illegally."<sup>83</sup>

Under this reasoning, any *agreement* to use a basing-point system would be unlawful as an agreement to fix a part of the delivered price since the pre-determined freight rates employed are usually higher than necessary, owing to the collection of phantom freight and the quoting of all-rail tariffs, and consequently "unreasonable." Thus concerted action in maintaining a basing-point system is a type of price-fixing.<sup>84</sup> Even assuming competitively established base prices, uniform delivered figures accompanying the use of

74. 268 U. S. at 571. "But if, as appears probable, the f.o.b. price was computed by first calculating the delivered price based on Cadillac and then deducting the actual freight charge from the point of production to the point of delivery, the buyer gained nothing from the use of the mill price." BURNS, *THE DECLINE OF COMPETITION* (1936) 292. This custom of quoting f.o.b. mill prices by deducting actual freight from the formula-calculated price has been followed by cement sellers in sales to the Federal Government. See *Matter of the Cement Institute*, 37 F.T.C. 87, 167 (1943).

75. *Id.* at 567.

76. 268 U. S. at 593.

77. *Id.* at 604.

78. *Id.* at 605-6.

79. 15 F. Supp. 817 (S. D. N. Y. 1934). On appeal the decree was modified in other respects, and affirmed as modified, 297 U. S. 553 (1935). That part of the lower court's decree regarding the determination of transportation charges was not challenged on appeal.

The petition for dissolution, attacking a variety of activities on the part of the refiners, charged "a comprehensive conspiracy affecting almost all phases of the sale and distribution . . . of domestic refined cane sugar." 15 F. Supp. at 822.

80. 15 F. Supp. at 849-50.

81. *Id.* at 849.

82. The decree also forbade collective action in "selling only on delivered prices . . . or refusing to sell f.o.b. refinery." *Id.* at 908.

83. *Id.* at 903.

84. Concerted price-fixing is illegal *per se*. See *United States v. Trenton Potteries Co.*, 273 U. S. 392, 397-8 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 220-4 (1940). "Any combination which tampers with price structures is engaged in an unlawful activity." 310 U. S. at 221.

the system would be impossible without identical, automatically-fixed transportation charges. Therefore, if agreements for uniform price maintenance are prohibited,<sup>85</sup> an understanding to adopt a formula which leads to artificially identical delivered prices should be similarly condemned.

Furthermore, since all freight-absorbing sales involve the acceptance of prices set by rivals, once identical freight charges are established, only a collusive setting of base figures is needed to give producers complete control over the price level. Thus, in practice, an agreement to use a basing-point system is a constant menace to competition and the resultant best interest of the consuming public.

Whether or not dissolution is required in a given case, the interests of the consuming public can be protected and a desirable industrial decentralization achieved only if the eradication of basing-point pricing is a primary objective of post-war economic policy. To assure the benefits of competition, rigorous enforcement of the Robinson-Patman Act will be necessary, and also close coöperation between the Federal Trade Commission and the Justice Department with a view to the most effective possible use of the Sherman Act.

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85. See p. 574 *supra* at note 77.