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V
THE SECRETARY OF THE INTERIOR
WASHINGTON

July 10, 1914.

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*Alfred
7/10/14*

My dear Mr. President:

I inclose herewith a memorandum prepared by Mr. Rublee concerning Section 5 of the bill to create a Federal Trade Commission. I have looked over this memorandum, and it seems to contain the answer to most, if not all, of the objections that have been raised to this provision of the bill, and have thought it might be helpful to you.

Faithfully yours,

John C. Rose

The President,
The White House.

Inc.

MEMORANDUM CONCERNING SECTION 5 OF THE BILL TO
CREATE A FEDERAL TRADE COMMISSION.

1.

Section 5 and Its Effect.

The section reads as follows.

Sec. 5. That unfair competition in commerce is hereby declared unlawful.

The Commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any corporation has been or is using any unfair method of competition in commerce, it shall issue and serve upon such corporation a written order, at least thirty days in advance of the time set therein for hearing, directing it to appear before the commission and show cause why an order shall not be issued by the commission restraining and prohibiting it from using such method of competition, and if upon such hearing the commission shall find that the method of competition in question is prohibited by this Act it shall thereupon issue an order restraining and prohibiting

the use of the same. The commission may at any time modify or set aside, in whole or in part, any order issued by it under this Act.

Whenever the commission, after the issuance of such order, shall find that such corporation has not complied therewith, the commission may petition the district court of the United States, within any district where the method in question was used or where such corporation is located or carries on business, praying the court to issue an injunction to enforce such order of the commission; and the court is hereby authorized to issue such injunction.

The section may be analyzed thus.

(a) Congress lays down a general rule of action under which the commission shall proceed, namely that unfair competition in commerce is unlawful.

(b) The commission is empowered and directed to apply this rule to particular situations and circumstances, with a view to making orders in particular cases within the rule laid down by Congress.

(c) The orders of the commission are not final. If not acquiesced in, they can be enforced only by the courts after judicial review of the proceedings before the commis-

sion.

2.

The Evil to be Corrected Through the Action of
the Commission Under Section 5.

The numerous cases which have been decided under the Sherman Act have established beyond doubt that the only effective means of building up and maintaining monopoly, where there is no control of a natural resource, or of transportation, is the use of unfair competition.

Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest.

The object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods. It may be

urged that the Sherman Act sufficiently protects the public in this regard. This is not true for the following reasons.

The Sherman Act applies only to restraint of trade by a combination and to monopolization of commerce. Unfair competition is a means of restraining or of monopolizing trade. But there may be some doubt as to whether the mere use of an unfair method, without more, by a corporation of no conspicuous size, would be held to fall within the scope of the Sherman Act.

At all events, the Department of Justice with its manifold other activities, has not in the past brought suit under the Sherman Act, and probably will not do so, except in cases of great magnitude involving what appear to be very clear violations of the Act. In such suits the Attorney General usually alleges the use of unfair competitive practices in support of his main contention that a monopoly exists which ought to be dissolved. The injunction against the future use of such practices is only an incidental part of the decree. Countless competitors succumb before relief is finally obtained.

The Department of Justice deals with monopoly as an accomplished fact. It did not attack the oil trust or the

tobacco trust until after they had destroyed competition and obtained monopoly of the markets. If a trade commission, armed with the power to prevent unfair competition, had existed when the founders of the tobacco trust began to carry out their calculated policy of exterminating competitors, that astoundingly successful attempt to monopolize could have been frustrated. Instead of merely terminating an illegal condition after harm has been done, the trade commission will prevent not only the infliction of harm, but also the monopoly to which that harm would have led.

The commission by reason of its knowledge of business affairs and the concentrated attention it will give thereto, its facilities for investigation, its rapid, summary procedure, will be able to protect business against unfair competition in much more effective and timely fashion than the Department of Justice can do.

The Department of Justice, on the other hand, will be relieved of a load of burdensome work which it is not well fitted to perform. It will be able to give its main attention to the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition so as to protect small

business men, keep an open field for new enterprise, and prevent the development of trusts.

3.

The Method Provided in Section 5 is the Best Method of Correcting the Evil of Unfair Competition.

One of the great issues in the last presidential campaign was whether the solution of the trust problem was to be found in the regulation of monopoly or in the regulation of competition. The Democratic Party declared itself for the abolition of monopoly and the regulation of competition. The regulation of competition means the prevention of competition that destroys for the purpose of gaining monopoly, and so is harmful to the public, -- the prevention, in short, of unfair competition. The Sherman Act is adequate for the abolition of monopoly. It is, however, but imperfectly adequate for the regulation of competition. The present Congress is charged with the duty of supplying the defect in the law.

Two ways of regulating competition have been proposed. One is the method provided in Section 5 of this bill. The

other is to define, one by one, the various unfair practices, and to make each one a criminal offense.

The objections to the latter method are many and conclusive. Let me state a few of them.

(a) It is impossible to frame a set of definitions which embrace all unfair practices. The best we can do is to define those which we know to be unlawful from the decisions and decrees of the courts under the Sherman Act. The list of these is so formidable that no draftsman has yet ventured to enumerate more than a small fraction of them in any bill introduced in Congress. But if they were all defined and prohibited under severe penalties, it would at once be necessary to begin over again. The number and variety of unfair practices is as unlimited and inexhaustible as the wit of man. Judge Evans of the Iowa Supreme Court has well described them as "modern evil inventions". How can you define the scope of human inventiveness? With each new invention there would arise a public demand for Congress to make a new definition and prohibition. If Congress adopts the method of definition, it will undertake an *endless task.* ~~labor as endless as that of Sisyphus.~~ Compare such a cumbersome, imperfect method with the elastic, comprehensive Sher-

man Act, which, as Chief Justice White has said, by generic designation embraces "every conceivable act which could conceivably come within the spirit or purpose of the prohibition of the law, without regard to the garb in which such acts were clothed." Men have urged in favor of the policy of definition that business men do not understand the law and need to be enlightened. This contention was well founded three years ago, but now that the later decisions and decrees have clarified the law, it is no longer heard. In order to be informed as fully as Congress can inform them, business men have only to read the decrees of the courts in cases which have arisen under the Sherman Act.

(b) It is practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not, depends in a peculiar degree upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

If you make a rigid definition applicable to everybody in the whole United States, you will stop some things which you would choose under some circumstances to encourage, if you could only look

far enough into the unknown; and some things which you would like to stop will slip through the meshes of your definition. The definitions in the Clayton Bill which the House has passed are subject to this criticism.

(c) It would be impossible to frame definitions without using language which would present very difficult problems of construction to the Courts. One has only to read the definitions in the Clayton bill to be convinced of this, or to read the descriptions of unfair methods of competition in the court decrees, and then imagine how complicated the definitions of these same methods would be, if the language of the decrees were altered and qualified so as to have a universal application instead of applying to a particular business. The definitions would give rise to a long series of litigated cases continuing until the new language had all been judicially construed. Instead of being clarified, the law would be obscured.

(d) A definition once enacted can never be adapted so as to meet the requirements of a particular situation. An order of a commission, or a court decree on the other hand, is flexible. Orders of the commission issued under Section 5 may be modified or set aside; and the courts retain jurise

diction of their decrees for the purpose of modification. In the very recent decree dissolving the thread trust it is ordered "that jurisdiction of this cause be and is hereby retained for the purpose of enforcing this decree, and for the purpose of enabling the parties to apply to the court for modification hereof if it be hereafter shown to the satisfaction of the court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inappropriate or inadequate to maintain competitive conditions in interstate or foreign sewing thread trade in the United States, or have become unduly oppressive to the defendants and are no longer necessary to secure or maintain competitive conditions in such interstate and foreign trade." No such discriminative moulding of the law to changing conditions will be possible in case the method of defining unfair practices should be adopted.

4.

Advantages to Business of the Method provided in
Section 5 for Preventing Unfair Competition.

Nobody defends unfair competition. Only the pirates of business who desire monopoly have an interest in its continuance. Everybody else wants to have it stopped. The only question is as to the best way of stopping it, with the least risk to legitimate business operations. My belief is that if a vote could be taken it would be found that American business men are almost unanimously in favor of committing the duty of preventing unfair competition to the Trade Commission under the wise restrictions provided in Section 5 of this bill. The board of directors of the United States Chamber of Commerce at a meeting held in Washington a few days ago took favorable action in regard to Section 5 by authorizing the sending of a special bulletin to the members of the Chamber explaining the section and pointing out its merits.

One has only to consider what would happen in the actual working under Section 5 in order to see why it would be acceptable to all business men except those who wish to monopolize, especially to the small business men who are the victims of unfair competition. Let us suppose that the Commission, in

4 the course of its investigations, finds a corporation using what it regards as an unfair method of competition. The first thing the Commission will do will be to call the matter to the attention of the managers of the corporation. There will then take place a full, informal discussion between the Commission and the managers. The managers will have every opportunity to explain, and persuade the Commission, if they can, that the method of competition is fair; and the Commission, on its part, will present its views. Should neither party convince the other, the Commission will then hold a formal hearing at which the corporation will offer testimony and will be represented by counsel. If at the close of the hearing the Commission abides by its original opinion, it will declare that the method of competition in question is unfair, and will issue an order that the same be discontinued. The corporation will then have the choice either to obey the order or to disregard it. If the order is disregarded no penalty will be incurred. All that the Commission can do will be to present the case to a federal court which will then decide in the regular course whether the order of the Commission is just, and if it ~~is~~ so decides, will enforce the order by proper process. The corporation will thus have three chances to protect itself against arbitrary or unjust action; first, in the informal discussion

with the Commission; secondly, upon the hearing before the Commission; and thirdly in the suit in court. Doubtful cases probably will always go to a court and be judicially adjudicated and determined. The function of the Commission will be to act as an administrative agency to see that the law is applied and enforced. The court in performing its judicial function will have the very important benefit of an investigation such as no court has the facilities for making, and of findings by a commission composed of men whose judgment on a question of business practice, by reason of their comprehensive knowledge and experience of business, will be entitled to great weight. The court will doubtless ascribe to these findings, as the Supreme Court has said in speaking of the Interstate Commerce Commission, "the strength due to the judgments of a tribunal appointed by law and informed by experience." Interstate Commerce Commission v. Union Pacific R. R., 228 U. S. at p. 541. We must not lose sight of another advantage to men in a small way of business. Such men are timid. They fear to incur the hostility of great corporations. They cannot afford the expense of long drawn out legal proceedings carried from one court to another. It will be an inestimable boon to them to have a strong arm of the government come to their rescue and, in the public interest, bear the

expense of the contest.

5.

Objections Raised against Section 5 and
Answers Thereto.

Those who oppose Section 5 have argued (a) that its provisions are unconstitutional, (b) that the term "unfair competition" has no certain legal meaning, (c) that orders of the Commission will not be subject to review by a court, so that business will be exposed to the arbitrary judgments of five "irresponsible" commissioners, (d) that the task imposed upon the Commission is so vast that it cannot be performed and the Commission will break down, (e) that the action of the Commission under this section will be used as a buffer in prosecutions under the Sherman law, and will put business in a strait-jacket. Let us consider these objections in order.

(a)

The constitutionality of the section is assailed on the ground that it involves a delegation of legislative power. This question is no longer open. The Supreme Court has considered the arguments urged against Section 5 in cases that go much further than this bill proposes to go and has rejected them as unsound. The rule of law which the Trade Commission

will administer is the rule declaring unfair competition to be unlawful. In enacting that rule Congress will clearly indicate the result it desires to bring about; and in enforcing the rule, so as to bring about the result pointed out by the statute, the Commission will exercise administrative and not legislative power. This is absolutely established by the decisions. The cases in point have been referred to in the Senate and are to be found in the Congressional Record. They are as follows:

Field v. Clark, 143 U. S. 649.

In re Kollock, 165 U. S. 526.

Butterfield v. Stranahan, 192 U. S. 470.

Union Bridge Co. v. U. S., 204 U. S. 364.

St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 287.

Monongahela Bridge Co. v. U. S., 216 U. S. 177.

U. S. v. Grimaud, 220 U. S. 506.

Interstate Commerce Commission v. Goodrich Transit Co.,
224 U. S. 194

Kansas City Southern Ry. v. U. S., 231 U. S. 423.

In Butterfield v. Stranahan, supra, the rule laid down by Congress made it unlawful to import tea inferior to certain standards. The Secretary of the Treasury was authorized to establish the standards and to enforce the rule. The Court

held that in performing his duties under the act the Secretary of the Treasury exercised executive and not legislative power. The Court said: "Congress legislated on the subject as far as was reasonably necessary, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

In Interstate Commerce Commission v. Goodrich Transit Co., supra, the Court said: "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that Commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by Congress."

The power given by this bill to the Trade Commission to administer the rule against unfair competition is analogous to the power given to the Interstate Commerce Commission to administer the rule laid down in Section 3 of the Act to Regulate Commerce which makes it unlawful to give undue or unreasonable preferences or advantages. It is also precisely analogous to the power conferred on the Interstate Commerce Commission in Section 15 of the Act to Regulate Commerce to compel the discontinuance of unjust or unreasonable or unjustly discriminatory

or unduly preferential or prejudicial classifications, regulations or practices and to prescribe what classification, regulation or practice is just, fair and reasonable to be thereafter followed.

(b)

It is urged that the term "unfair competition" is too vague, that it has no certain meaning in the law. The answer to this objection is that it is not necessary that the meaning should be completely ascertained. There are many terms in the law, such as fraud and negligence, whose meaning is constantly being extended. Certainly "unfair competition" has a better ascertained meaning than the terms "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial classifications, regulations or practices" had when Section 15 of the Act to Regulate Commerce was first enacted. As a matter of fact "unfair competition" is a term which has an unusually definite legal meaning. The courts have no difficulty at all in dealing with this term. In Standard Oil Co. v. United States, 221 U. S. at pp. 42-43, the Court, by Mr. Chief Justice White, said:

"Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed

record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition, espionage, of ~~the~~ business competitors, the operation of bogus independent companies, and payments of rebates on oil, with the like intent."

In State v. Fairmont Creamery Co., 153 Iowa 702, at pp. 709-710, the Court, by Evans, J., said:

"One of the great legislative problems of the day is to protect fair competition in the business world without unduly interfering with the freedom of contract. We may properly presume that the problem is greater in some lines of business than in others. In the purchase of commodities, the methods of business adopted are quite as various as the different commodities. Methods are adopted which are peculiar and limited to dealings in a certain commodity. Evil practices, therefore, may arise in the business methods pertaining to one commodity,

Chapter 210, Laws of 1913, State of New Jersey is entitled: "An Act to prevent unfair competition and unfair trade practices."

which do not obtain at all in relation to other commodities. Practices may obtain which contravene no statute, and which, nevertheless, would be deemed as morally dishonest and detrimental to the public interest. x x x x The temporary maintenance of artificial prices for the sole purpose of destroying a weak competitor and creating a monopoly is one of the modern evil inventions."

Many states have enacted laws prohibiting unfair competition. A typical instance is a Nebraska statute entitled "An Act to prohibit unfair commercial discrimination between different sections, communities, or localities, or unfair competition, and providing penalties therefor." Similar statutes are found in ^{New Jersey,} South Dakota, Minnesota, Iowa and other states. See also State v. Drayton, 82 Neb. 254, State v. Standard Oil Co., 111 Minn. 85, State v. Bridgman & Russell Co., 117 Minn. 186.

In order to get very complete and specific information about unfair competition one has only to turn to the decrees in cases under the Sherman act. There will be found precisely defined numerous examples of unfair competition. Nowhere is it more indispensable to use language having precise meaning than in a decree. Yet in the case of United States v. General Electric Co., in the decree entered by the Circuit Court for the Northern District of Ohio, Eastern Division, at the end of the

eighth clause enjoining the use of a specific unfair method of competition the following language is found: "Provided further that nothing in this decree shall be taken in any respect to enjoin or restrain fair, free and open competition."

In addition there are numerous text books on unfair competition in which the authorities are collected and analyzed. Among such works are Singer on Trade Mark Laws of the World, and Unfair Trade; Paul on The Law of Trade Marks including Trade Names and Unfair Competition; Nims on The Law of Unfair Business Competition; Hopkins on The Law of Trade Marks, Trade Names and Unfair Competition; Hesselstine's Digest of the Law of Trade Marks and Unfair Trade.

(c)

The objection that orders of the Commission are not subject to review by the courts is easily met. The language of the section in its present form would seem to provide for review by the courts. But if it is thought not to do so, it can easily be changed, and since a different construction has been put upon it, it should be amended so as to prevent the possibility of such mistake.

(d)

The objection that the Commission will be overloaded by

the task imposed upon it is not well taken. The Commission alone can initiate a proceeding. It is not bound to act on complaint. It will only act when it deems action desirable in the public interest, and it will not undertake more than it can do.

(e)

In the course of his speech Senator Borah said: "I fear the time may come, if this law is enacted, when it will be used as a buffer in prosecutions under the Sherman law, when defendants, in cases brought under that law, will seek shelter behind the decision of this trade commission as to what constitutes unfair competition.

"The law now contemplates forcing competition, and this law would prohibit unfair competition. I doubt the wisdom of putting business in this straight-jacket."

The Senator does not seem to have noted the inconsistency between his fear that defendants in prosecutions under the Sherman law will seek shelter behind the decisions of the Trade Commission, and his doubt of the wisdom of putting business in this straight-jacket. If the Sherman law will be weakened by conferring upon the Trade Commission the power to prevent unfair competition, how can it be said that the effect will be

to put business in a straight-jacket? His fear and his doubt, however, are equally unfounded. The Commission will have no power to authorize the use of a method of competition as fair, or to give immunity from the Sherman law. The only orders the Commission can issue are orders prohibiting the use of unfair methods of competition. It is not possible to weaken the Sherman law in that way. The idea that business will be put in a straight-jacket implies an equally singular misconception. Unfair competition is the most effective weapon of monopoly. Prevention of unfair competition, instead of putting business in a straight-jacket, will liberate business. Fair, free and open competition is the object which the Sherman Act, no less than the ^{is} bill, seeks to promote. The two laws will be in perfect harmony.
