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United States Department of Justice

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TRADE BARRIERS CREATED BY BUSINESS

CORWIN D. EDWARDS*

The trade barrier legislation which has received so much attention in the last few years has often been discussed as though it were a peculiar infirmity of state governments which has suddenly broken out after lying dormant since the days of the Articles of Confederation. Although the rapid spread of certain kinds of state trade barrier legislation affords an excuse for this view, trade barriers are neither new nor peculiar to state governments. Such laws have been enacted by federal, state, and municipal authorities alike, the restrictions by the federal government being among the oldest and those by municipal authorities the most numerous. Moreover, the discriminatory hindrances to trade which have been given statutory form in such laws are often indistinguishable economically from the barriers to trade established and maintained by private groups for their own advantage. The distinguishing feature of governmental trade barriers is public sanction, not economic effect. The distinguishing feature of state trade barriers is merely the fact that they are now in the public eye.

Trade barrier laws do not grow like weeds in a vacant lot, without planting or tending. They are drafted, proposed, advocated by cajolery, pressure, and inducement, and supported against counter attack. The driving force for their enactment and administration is supplied by groups which find them serviceable. Although it is a truism to say that discriminatory legislation expresses the power of special interests, there is a tendency to regard each law as an isolated political fact rather than as a part of the coordinated strategy of an interest group. To deal with trade barrier laws statute by statute is somewhat like trying to cure the measles spot by spot. Such therapy ignores the power and purpose of those who procured the laws' enactment and who will devise a dozen alternate plans to accomplish the same discriminatory purposes.

Trade barrier laws appear in truer perspective if they are regarded as among the devices, both public and private,

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available to groups which seek favored positions. Such groups may pursue a strategic advantage in many ways—by patents, trademarks, advertising, long-term contracts, integration, mergers, reciprocal buying, commercial bribery, and other private devices of varying repute and effect. If they are large enough they may seek legal favors of assorted kinds from city, state, and national governments, a greater size being usually requisite for a successful appeal to the larger governmental units. The available devices, both political and private, may be used in combination. Indeed, the security of the group tends to increase as it comes to depend less upon any single source of advantage.

The activities of private groups designed to establish and maintain trade barriers may be roughly distinguished from the other activities of such groups by their general purpose and effect. Ordinary competitive behavior of the sort exhaustively analyzed by generations of economists centers upon making, pricing, and selling goods under the pressure of similar activities of competitors which provide incentives to be efficient and to hold profits to a minimum. But such competitive behavior is accompanied by a struggle for positions of advantage which will shelter those who attain them from the ordinary competitive pressures. The object of such a struggle is to place obstacles between one's rivals and certain opportunities to sell which they might otherwise enjoy. It is a struggle toward relative advantage rather than absolute gain—toward the power to restrain the trade of others rather than toward maximum immediate trade for oneself. Once achieved, the advantageous position affords those who hold it a limited monopoly; but the effort to attain such a position may be fiercely competitive. Though economic theorists have begun to describe the varieties of monopolistic competition in the market which may take place among concerns with various degrees and kinds of special advantage, they have said relatively little about the competitive tactics by which such special advantages are established, nor about the trade practices in which such advantages are institutionalized. Hence, though much is known about these tactics and practices, it remains scattered in reports of investigations and records of legal proceedings.1

1 Though the two categories "trade barrier" and "unlawful restraint" overlap, they are not identical. Federally sanctioned trade bar-
In the following summary of privately erected trade barriers no sharp distinction will be made between those which depend partly upon the machinery of public laws and those whose machinery is entirely private. A principal point to be illustrated is the fact that public and private means are used interchangeably to accomplish the same private end.

Among the most ancient and effective forms of interference with trade is the limitation upon the right to engage in a particular type of enterprise. Indeed, the common law of restraint of trade had its origin in a series of cases involving private contracts in which the right to engage in specified trades was surrendered. Today public authority and private control over indispensable facilities may both be used to prevent certain competitors from entering a line of business.

Illustrations of the use of public authority abound in the occupations which are regarded as affected with a public interest to such an extent as to require a public license. Many building codes require, for example, that plumbing be done only by licensed plumbers, the ground for the requirement being the danger that incompetent plumbing installations will involve hazards to public health. The actual administration of the machinery for examining plumbers and granting licenses is frequently placed in the hands of local officials who are or have been licensed plumbers and who are keenly aware of the private interests of the plumbing trade. From time to time there are complaints that tricky examinations designed to limit the number of successful applicants have been used in an effort to protect established plumbers from competition. In some jurisdictions an effort is made to interpret the license requirements in such a way as to protect the master plumbers’ lucrative trade in plumbing equipment from the competition of mail order houses. A Pennsylvania plumbing code, for example, forbids persons who are not registered
plumbers to advertise or display plumbing equipment for sale at retail.\textsuperscript{2}

Other groups engaged in building have also sought the protection of licenses. Electricians are widely licensed on the theory that incompetent electrical work creates a fire hazard. In at least one major city the electrical license is so rigidly interpreted that only a licensed electrician is allowed to plug the cord from a welding machine into an electrical connection, although the operation is no more difficult than the plugging of an electric percolator cord into a wall outlet. One state has gone so far as to require that all tile setting be done by licensed contractors. This statute strengthened the efforts of organized tile contractors to prevent the purchase of unset tile by the consumer and by so-called jobbers who distribute it to small tile setters.

Similar efforts to extend the scope of a licensing requirement and thereby to exclude inconvenient competition are to be found among pharmacies and in the legal profession itself. There have been attempts to prevent the distribution of packaged drugs by concerns which did not employ a registered pharmacist and to define the practice of law so that it includes filling in the blanks upon standard legal forms for the making of a lease or the adjustment of an insurance claim.

More subtle devices to exclude certain types of concern from the market consist in the imposition of requirements as to equipment or performance which can be easily met by some concerns but are prohibitive to others. It is alleged that the campaign of ice cream manufacturers against the use of the counter freezer has included efforts to secure the enactment of sanitary legislation for ice cream manufacture which will require the sterilization of all equipment with live steam and the use of a cement floor which slopes toward a central drain.\textsuperscript{3} Neither requirement is burdensome to a factory, but a soda fountain which could obtain a counter freezer only by installing a sloping cement floor, a central drain, and a steam boiler would be unlikely to make its own ice cream. Similarly, the building ordinances of many cities are so designed as to exclude new types of building material

\textsuperscript{2} Newcastle, Pennsylvania, Plumbing Code, Act of 1937, §2.

and new methods of building construction. In some cases the restrictive features of these ordinances are the accidental result of excessively detailed specifications and infrequent revision. Some of the newest codes, however, contain similar restrictive features which were inserted after pressure from local building trades groups. The Chicago building code, for example, has been so written that it systematically favors the use of lath and plaster rather than plasterboard, insulation board, or hard fibre board; and this result was achieved in spite of the recommendations of a technical committee and in conformity to the recommendations of representatives of local plaster contractors and unions. Builders who erect prefabricated houses are often unable to meet the requirements of a local building code because dealers, contractors, and unions who do not wish to see construction operations shifted from a jobsite to a factory are able to prevent the liberalization of building codes and even to introduce new restrictive features into the codes.

In a few cities the exclusion of concerns from the market is accomplished by burdensome requirements for a report rather than by specifications as to the product. The city of Dayton, Ohio, for example, requires that the seller of plumbing equipment affix a sticker which is to be obtained from the municipality and that he make weekly reports which include the place of installation of each piece of equipment. Ostensibly this legislation is intended to handicap the sale of used plumbing equipment which may not be in sound condition and to make it difficult to sell plumbing equipment stolen from unfinished houses. Sears Roebuck has contended in a suit against the city that the actual effect of the ordinance is to make it difficult to sell plumbing equipment by mail, both because of the difficulty in obtaining and affixing stickers and because a mail order house seldom knows the exact point of installation of the products it sells.\(^4\)

Exclusion of concerns from certain markets may be ac-

\(^4\) In its first form the Dayton sticker ordinance was designed to make unlawful both the purchase and the sale of equipment without stickers and to make the possession of a piece of equipment without a sticker prima facie evidence of violation. After this ordinance was held unconstitutional the city enacted the revised ordinance described above. On November 26th the case of Direct Plumbing Co., et al, v. the City of Dayton, challenging the second ordinance, was pending on appeal before the Supreme Court of Ohio.
complished even more indirectly by a public requirement that sellers use a privately owned grademark which is not readily available. Within the last year the Antitrust Division has found such practices in the sale of Southern pine, Western pine, and Douglas fir lumber. The lumber manufacturing industry had persuaded the Department of Commerce to include in American Lumber Standards, promulgated by the Department, a provision that conformity to such standards should be indicated by the grademark of the lumber trade association covering the particular species. It had also persuaded Federal purchasing authorities to include a requirement for an association grademark in certain Federal lumber specifications. In some parts of the country the use of grademarked lumber is a condition for the approval of loans by the Federal Housing Administration. In the far West regional lumber associations induced a considerable number of local building authorities to require association grademarking in the local building code. As a result of these requirements a lucrative part of the market for lumber was open only to those whose product bore the grademark of a lumber trade association. The grademarking plan adopted by some of the most important regional associations authorized approved employees of member mills to grade and grademark the output of those mills under the supervision of inspectors provided by the association to check the accuracy of the grading. No such right to grade was granted to independent mills. The association’s inspectors were likewise empowered to grade lumber and issue an inspection certificate upon payment of a fee, but the certificate plan was necessarily more costly than mill grading. Moreover, when the certificates were made available to non-members of the association a higher fee was charged, with the effect that the non-member was placed at a disadvantage in competitive bidding upon graded lumber. In one regional association, inspectors promoted the products of members of the association as against independents by means which included maximum publicity for substandard independent lumber and minimum publicity for substandard lumber from association members. Another regional association granted to certain retail lumber yards the right to affix grademarks, and by denying this right to other competing yards limited the number of retailers which could compete for business in grademarked
lumber. To prevent the use of the association grademarks by other grading agencies these marks were registered as trademarks. In some cases strenuous efforts were made to prevent the grademark of an independent lumber association from being recognized as conforming to the requirements set forth in American Lumber Standards. The effect of the entire plan was to reserve for member mills most of the business of the Federal government and of private builders in certain parts of the country.  

Private concerns frequently are able to exclude others from a line of business by virtue of their exclusive control over an indispensable product, process, or facility. The simplest case of this kind is refusal by the holder of a patent to license its use or arbitrary restriction of the number of licensees. Corning Glass Works and General Electric Company, for example, are the only concerns which have the right to make the tubing for neon lights. Only the Dow Chemical Company has obtained an American license for the manufacture of pig magnesium. Often the power conveyed by a patent has been supplemented and extended by a business strategy in which various patents are conceived as weapons to be used together. The glass container industry, for example, has followed a consistent policy of developing patents it does not intend to use in order to "fence in" concerns which might otherwise be able to limit the effect of a patent monopoly by patenting alternative ways to accomplish the same result. In the radio field a patent pool closed to outsiders gave the members of the pool freedom to use all the important technical methods while it exposed newcomers to the necessity of devising unpatented substitute methods at all points simultaneously.

Exclusive ownership or lease of scarce facilities may be as effective as a patent. The position of Western Union

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5 United States v. Western Pine Association, et al, Indictment, Sept. 18, 1940; United States v. West Coast Lumbermen's Association, et al, Indictment, Sept. 25, 1940; United States v. Southern Pine Association, et al, Indictment, Feb. 19, 1940. In the latter case pleas of nolle contendere were entered on Feb. 21, 1940 and Southern Pine Association was fined $10,000 and each of remaining defendants fined $1,000 on same date. Consent decree was entered Feb. 21, 1940.


7 United States v. Radio Corporation of America, Consent Decree, Nov. 21, 1932.
Telegraph Company is partly due to a system of contracts with railroads which gave the company exclusive use of railroad rights of way for the erection of its poles and lines and use of railroad terminals for Western Union offices.\(^8\) The development of new sulphur companies is prevented in spite of the high profits which such companies enjoy because the existing companies own or lease substantially all the workable deposits of brimstone.\(^9\) The Government’s suit against the Aluminum Company alleges that the company has sought to prevent the rise of competition by acquiring all the commercially available bauxite and the most accessible sources of cheap water power.\(^10\) The United Fruit Company’s dominance of the trade in bananas is at least partially due to the fact that it controls the banana railroads and the only telegraph line between Honduras and the United States.\(^11\)

Exclusion from the market need not be based upon legal rights or private monopolies so absolute as those described in the foregoing paragraphs. Any restriction upon the access by rival concerns to credit, raw materials, means of transportation, productive equipment, or labor may sufficiently handicap the independent concern. In some cases the members of an industry may refuse to make available to new concerns certain costly services which they cooperatively maintain or may provide these services in a less efficient way at higher cost. In some cases an organized group may use boycott, threat, or bribe to force suppliers to refuse to serve concerns outside the organization. In some cases the organized group cannot cut off such service but obtains differential treatment which gives it so great an advantage that the independent cannot survive.

The Department of Justice has charged the American Medical Association with attempting to destroy a cooperative plan for the provision of medical service by depriving the cooperative of access to hospitals and of the opportunity to obtain consultation upon difficult cases, and by excluding

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\(^8\) United States v. Western Union Telegraph Company, Petition, Dec. 1, 1937.


\(^10\) United States v. Aluminum Company of America, \textit{et al, Petition, Apr. 23, 1937.}

\(^11\) Kepner and Scothill, \textit{The Banana Empire (1935)} 26, 178, 182; \textit{Fortune (Mar. 1933)} 26ff.
the cooperative's doctors from the association. In a Chicago milk case the Department charged the large milk distributors with refusal to let independents use the bottle exchange and with conspiring with the unions to prevent the delivery of independent milk. A recent indictment of producers of military optical equipment included a charge that the American and German companies had agreed not to supply information or equipment to any competitor. In the Aluminum case witnesses testified that a power company which has officials of the Aluminum Company upon its board of directors lost interest in a large power contract as soon as it became clear that the buyer of the power intended to begin the manufacture of aluminum. In a case against the Association of American Railroads the Department charges that the railroads agreed not to establish combination through rates for shipment by rail and motor carrier similar to the combination rates which are established among railroads and that they thus sought to exclude motor carriers from participation in a large part of the long-haul business. A proceeding against potash manufacturers charged that they had agreed not to sell potash directly to cooperatives, individual farmers, or fertilizer mixers which were not recognized by all manufacturers. Indictments covering tile contractors, electrical contractors, glass contractors, plaster contractors, etc.

tors, lumber dealers, plumbing contractors, hardwood flooring contractors, excavating contractors, and haulage companies charge various conspiracies to deprive independent concerns of union labor and to induce manufacturers and jobbers not to supply materials to such concerns. In most cases the pressure upon manufacturers and jobbers took the form of a threatened boycott and the inducement to union leaders was an offer of a more favorable labor contract.

The exclusion of independent concerns by discriminatory prices may take various forms. A striking early illustration is found in the rebates which the Standard Oil Company obtained from the railroads prior to the enactment of the Interstate Commerce Commission Act. Not only was Standard's product carried more cheaply, but Standard actually received a portion of the transportation charge paid to the railroad by its rivals. More recently, price discrimination in favor of large distributors was thought to involve such a threat to the existence of their smaller rivals that the Congress passed the Robinson-Patman Act as a remedy. This Act greatly reduced overt discriminations in price but did not destroy the opportunity to accomplish a discrimination in fact while keeping prices uniform. Integrated companies which sell a portion of their semi-manufactured products are often in competition with their own customers. In such a case a relatively high price upon the products they sell to their rivals will not impair their own profits but will so reduce the margin available for the final processes of manufacture as to threaten the existence of the rival concern. Government testimony in the aluminum case alleges that the Aluminum Company sought to monopolize the manufacture of duralumin and of fabricated aluminum products by charging a high price for aluminum ingot, which is monopolized,

and a relatively low price for products made from the ingot which were likewise sold by competitors.

Devices like those just described may be effective even when they do not exclude from the market the concerns against which they are directed. So long as they create difficulties for the independent concern, they tend to raise its cost, expose its customers to delays, impair the quality of its service, and restrict the amount of business it can do. Thus the proportion of the total business done by the independent is reduced and he is made more vulnerable to ordinary competition. A private trade barrier, like a public law, may serve its purpose even though it is only partially effective.

Other devices are intended to deprive rivals of access to an adequate system of distribution for their products. Many of these seek to bind distributors to a single producer, either by the producer's direct ownership of distributive channels or by contracts which exclude the products of competitors. Such arrangements afford a ready market for the products of one concern and may force competitors either to find new distributors or to go to the expense of creating their own distributive outlets. Major producers of moving pictures, for example, control affiliated chains of moving picture theatres through which they may be sure of a wide distribution of their product. Until the recent consent decree in the case of United States v. Paramount Pictures, Inc., et al, it was customary to offer a fifty-two weeks' supply of films in a single contract, so that independent theatres wishing to deal with the major companies were required to contract for a block of pictures so large as to leave them without demand for films from other studios. The majors gave preference to their theatres and to certain powerful independent chains by permitting them to show new pictures first and sometimes by supplying them with better films and charging them lower rentals. The independent theatre was at a disadvantage in competing with the controlled theatre and with the independent theatre chain. The independent producer was likewise at a disadvantage in marketing his product.

A similar illustration is found in the contracts of the
National Broadcasting Company. Local independent stations which join a network are forbidden to broadcast programs of another network company and are required to reserve for national broadcasts whatever time is optioned by the National Broadcasting Company. About two-thirds of the optioned time is never used. The local stations are forbidden to accept advertisements from national advertisers at rates below those charged by the network. National Broadcasting Company may assign any local station either to the red network, which is profitable, or to the blue network, which carries a larger proportion of sustaining programs and is relatively unprofitable. The control of optioned time makes it difficult for any company outside the network to obtain the use of desirable local radio time, while the control over advertising rates prevents the locals from finding a by-pass to large clients. The power to transfer stations from one network to another is an effective means of discipline in any controversies between the national and the locals.

Less complicated arrangements for exclusive dealing are relatively frequent. In an antitrust suit the Government charges that the Masonite Corporation has induced its potential competitors to agree that they will neither make hard fibre board nor buy it from any other company, and that in consequence practically all of such board is produced by the Masonite Corporation. The Federal Trade Commission reported recently that manufacturers of agricultural implements require their dealers to agree not to handle competing products. Since such products are sold in sparsely settled communities, many of which will not support more than one dealer, each manufacturer thereby acquires a series of local monopolies. In the distribution of gasoline many producers charge one-half cent less per gallon to filling stations which agree to handle only one product, and thereby compel other producers to build up their own system of filling station outlets. An interesting variation of this type of control

\textsuperscript{26} Federal Communications Commission, Report of the Committee appointed by the Commission to supervise the investigation of chain broadcasting (mimeographed, 1940) 52-72.

\textsuperscript{27} United States v. Masonite Corporation, et al, Complaint, Mar. 11, 1940.

over a market is alleged in an antitrust suit against a Southern newspaper which is charged with having excluded rival papers from its city by binding its advertisers not to purchase space in any other paper.29

Control of distributors is often limited to devices intended to make the distributor handle a product he does not want in order to obtain a product which he does want. Monopoly, reputation, or quality may have established a dominant position for a product while other goods from the same producer are exposed to severe competition. Contracts which prevent the various articles from being handled separately are used to stretch the control of the major product into a control over the minor products also. An example is afforded by the United Shoe Machinery Company's lease contracts, which formerly provided that the leased machines could not be used in conjunction with other machines from rival producers.30 The Pullman Company is charged in an antitrust suit with refusal to operate sleeping cars which it does not build.31 In other antitrust proceedings automobile companies were required to discontinue their insistence that installment purchases of their cars be financed through their own financial subsidiaries.32 Automobile dealers are still required to buy parts and accessories from the companies which produce their cars. Similarly, lease contracts for accounting machinery formerly provided for a higher rental if the lessee did not buy his punch cards from the manufacturer from whom he leased the machine.33 In 1937 the Federal Trade Commission ordered the California Packing Company and the Alaska Packing Company to cease requiring that commodities they purchase be routed through a terminal which they control.34

For the most part, the controls of distribution which have been discussed above were intended to give certain producers an advantage over others. Controls designed to provide an advantage for certain types of distributors are also prevalent. Products may be distributed directly by manufacturers, by mail order houses and chain stores which buy from manufacturers, by cooperatives, or by the traditional channels through wholesalers and retailers. Within each type of distributive channel there are competing sub-types. Wholesalers, for example, may carry stocks and attempt to cover the whole market, may take orders but depend upon direct shipment from the manufacturer, may specialize in serving certain types of customers, or may specialize in sales at auction. Thus there may be a wide variety in the services provided by a wholesale distributor.

In the struggle for survival between different types of distributors there is a constant effort to gain a decisive advantage by boycotts or discriminatory discounts. Such efforts are sometimes of interest only to the distributors, but frequently the interests of producers are likewise involved because the triumph of one type of distributor means also a victory for the producers who can most effectively use this type. One orange growers' cooperative, for example, sells a large part of its output through fruit auctions, whereas another is primarily interested in sales to the wholesale departments of chain stores. The fortunes of the conflict between chain store buyers and independent commissionmen necessarily affect the relative prosperity of these two groups of growers.

Since the price and discount policies of manufacturers often operate as barriers to effective competition by certain types of distributors, it is particularly difficult in the field of distribution to distinguish between the ordinary processes of competition and the effort to build up institutions which give some group a special advantage. This discussion will not attempt to deal with the more intricate problems involved, but will be limited to cases in which the effort to erect trade barriers is peculiarly obvious.

In 1938 the Federal Trade Commission found that window glass manufacturers had divided their customers into quantity buyers and others and were allowing quantity buyers large discounts which gave them a monopoly of whole-
saling service. Status as a quantity buyer was conditioned upon willingness to accept an assigned sales territory. Thus the discount system was used to police the establishment of a closed group of wholesale distributors with allocated shares of the total market. Similarly, the Department of Justice has alleged that manufacturers of optical equipment have agreed to grant wholesale discounts only to certain wholesalers who have been arbitrarily chosen by themselves and that this agreement serves to prevent other wholesalers from doing business. From time to time retail distributors of cement have induced cement manufacturers to grant a dealer's discount only to certain recognized dealers and thus, by agreement, to restrict the number of concerns which may sell cement at retail. Manufacturers of gypsum, plasterboard, and wallboard are bound by the terms of patent licenses to observe uniform systems of distributive discounts available to designated groups of distributors.

Such limitations upon the availability of distributors' discounts are often coupled with refusals to sell to certain types of distributors. In some cases these refusals express the interest of the selling group; in others they are due to effective pressure by organized distributors of other types. In the lumber industry, for example, manufacturing groups have frequently followed an agreed policy of distribution which reserves portions of the lumber market for lumber manufacturers and provides that lumber shall be sold to other portions of the market only by wholesale or retail dealers. Similar division of the market has often prevailed in the cement industry. Jobbers of flat glass have been charged in antitrust cases with conspiracy to persuade glass manufacturers not to sell direct to independent dealers. In the tile industry manufacturers and certain local groups of contractors and tile setters have repeatedly attempted to exclude jobbers and independent contractors from the market both by cutting off their supplies of tile and by preventing

38 See note 5 supra.
39 For example see note 20 supra.
them from hiring union labor. In some localities milk distributing companies and milk drivers' unions have agreed to prevent the sale of milk by retail stores in order to force customers to use door-to-door systems of delivery. In the plumbing industry a systematic effort has been made by master plumbers, unions, and jobbers to prevent manufacturers from selling plumbing equipment direct to the user or through mail order houses as intermediaries. In the mineral wool industry a system of patent licenses covering both product and process is used to require sub-licensees who use the patented process to buy only the patented product and to buy it from concerns which are licensed to produce it.

Although most of the restraints upon distributive channels have been based upon patents, actual or threatened boycotts, or simple collusive plans for distribution, the oil industry illustrates the accomplishment of similar ends through purchases made by the integrated concerns. The major companies have at times established buying pools designed to purchase the entire output of gasoline by independent companies in order that the independent supplies might be placed upon the market at such a rate and through such channels as the majors saw fit.

Many of the restraints upon access to the market are directed not against new or small concerns or concerns of a certain type but against any concern outside a specified area. They amount to privately organized protective tariffs surrounding a particular locality. In this field the resemblance of private purposes achieved by private means to similar purposes achieved by public means is particularly striking. Indeed, it is notorious that the establishment of tariff schedules becomes a battle ground between the special interests favorably and adversely affected; and many of state trade barriers are frankly designed to protect business within the state from outside competitors.

The building industry contains an unusual number of

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40 See note 17 supra.
41 See note 13 supra.
42 See note 22 supra.
44 See for example: United States v. General Petroleum Corporation of California, et al, Indictment, Nov. 14, 1939. Thirty-three defendants pleaded nolo contendere and were fined in July and August, 1940.
restraints designed to protect local business. Two indictments secured in the recent housing investigation by the Antitrust Division charge that local enterprises and unions handling millwork have conspired to prevent the installation of millwork made outside the state.45 Two indictments charge similar conspiracies to prevent the purchase or installation of electrical fixtures from other states.46 One indictment involves a similar charge concerning sheet metal.47 Three indictments charge the existence of similar conspiracies against the use of metal strips, metal rods, and similar building accessories which were bent or shaped in another state rather than on the jobsite.48 One indictment charges an effort to force the use of local marble.49 Two others charge conspiracies to prevent the installation of factory-glazed windows.50 An indictment in Chicago charges a conspiracy by local contractors and the building trades council to require the use of limestone fabricated in Chicago rather than in Indiana, in spite of the fact that the workers in Indiana receive a higher wage than in Chicago.51 A peculiarly significant case is one in Illinois in which it is charged that local dealers, contractors, and labor conspired to prevent the erection of a prefabricated house, first by withholding the services of contractors and workmen and later by physical violence against people brought in to do the work.52 Indictment of this conspiracy was followed by a series of difficulties in securing approval of the house by local building inspectors.

Such efforts to segregate a local market are not confined to the building industry, though they are peculiarly prevalent there. An indictment secured by the Antitrust Division alleges a conspiracy to prevent the sale of wine not locally bottled. Several indictments, as well as various investigations not yet completed involve efforts by local groups of teamsters to require the use of local drivers and unloaders. In a typical case the local union would not permit the union driver who brought the truck to the city line to drive it within the city unless a local driver was also hired to sit beside him on the driver's seat. The truck's crew often is not permitted to unload the truck but instead the owner is forced to employ local men in unloading.

In nearly all of the cases which have been mentioned, the trade barrier was intended to serve one concern or group at another's expense. In some instances, however, trade barriers are established by mutual consent, each concern being willing to surrender or limit its access to other parts of the market in return for a more sheltered position in some portion of the market reserved for itself. The most obvious illustrations of this type of trade barrier are those in which enterprises agree upon an allocation of the available business. Often, however, such agreements are supplemented by measures designed to prevent the rise of new enterprises not bound by the agreement.

The simplest agreements are territorial. German and American makers of military optical instruments entered into a contract dividing the world market and stipulating that if they were asked to bid upon business not assigned to them they would submit a courtesy bid high enough to avoid getting the business. A similar division of world trade outside the United States was maintained before the present war by an agreement between Aluminum, Ltd., of Canada and the European members of an international aluminum cartel; and the government has charged that the Aluminum Company of America participated in this agreement in order to reserve the American market for itself.

54 See note 14 supra.
55 See note 10 supra.
In other cases the agreements assign the amount of business to be done rather than the geographical area to be covered. Until recently, makers of fibre shipping containers were allotted percentages of the total volume of business and each concern received frequent statistical reports to enable it to adjust its sales policy in order to maintain its proportion of the total business. A similar plan has been used to restrict and allocate the production of Kraft paper. Manufacturers of Western pine, Douglas fir, and Southern pine, according to charges in indictments, agreed among themselves to restrict the total quantity of their species of lumber and to apportion shares in the allowable output. Manufacturers of print cloth recently undertook a similar scheme so publicly that a statement of their plan was released to the newspapers. Electric light manufacturers who operate under patents not only are required by license to divide the American market from the world market but are also subject to a prohibitive increase of royalty if their sales exceed a stipulated proportion of the total American sales.

In a considerable number of marketing agreements approved under the Agricultural Marketing Agreements Act, growers and shippers of various fruits and vegetables have undertaken to limit the total shipments and to divide the allowable business according to some agreed formula. It is interesting to note that although the marketing agreement program was intended to permit collective action by farmers who are too numerous and small to bargain effectively as individuals such farmers have typically failed to work out an agreed marketing program; and the act has been used primarily for products which are already partially protected from competition. In some cases this protection is derived from climatic conditions which localize the crop and from private action such as the concentration of acreage in corporate farms controlled by food processors and distributors. In other cases the protection springs from other legislation.

58 See note 5 supra.
such as laws establishing a limited milkshed to serve a metropolitan area.

Some plans for the allocation of business attempt to prevent transfer of customers or to restrict each enterprise to a different type of product which is bought by a different group of customers. Refinishers of textiles at one time assigned each customer to a particular refinishing concern and forbade others to accept their work. In a small Middle Western city local distributors of milk and the organized milk wagon drivers recently decided that to quarantine the competition of a distributor who had reduced prices they would prevent customers from changing distributors unless in their opinion there was a reasonable excuse for the change. Building material manufacturers who secure their supplies of hard fibre board from the Masonite Corporation are bound by contract not to sell such board for any other use than building, and thereby Masonite is given substantially exclusive control of various industrial markets for the product.  

In several cities Federal indictments charge that contractors for glass, electrical work, and marble rotate jobs among themselves, agreeing in advance that each shall be in succession the low bidder. But perhaps no plan to establish exclusive rights to groups of customers is more elaborate or complete than that involved in the Federal indictment of glass container manufacturers. The Government charges that each licensee under patent processes for the manufacture of glass containers is restricted to making a particular type of container purchased by particular kinds of customers and that in consequence a series of product monopolies have been established based upon the refusal to grant additional licenses. One result of this plan is said to have been that fruit jars intended to be used by housewives for canning were sold for twice

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61 See note 27 supra.
62 See note 50 supra.
TRADE BARRIERS CREATED BY BUSINESS

as much as identical jars designed to be used by the canning industry.

The various barriers to trade which have been described on previous pages are often only parts of broader conspiracies to restrain trade. Most efforts to fix prices can be effective only in a limited industrial area or among a limited number of concerns, and therefore a plan to exclude outsiders from the market becomes an indispensable means to the success of the undertaking. But in addition to the trade barriers which are established for their own sake and the trade barriers which define the boundaries of a price fixing conspiracy, there is often an effort to develop trade barriers for disciplinary purposes. Such barriers are used to punish enterprises which will not participate in some general plan desired by the rest of the industry. Often, for example, local groups of contractors in the building trades wish to maintain a bid depository with which they file copies of their bids which become available for inspection by the group. Indictments by the Antitrust Division in the heating, electrical, and tile contracting trades of various cities have charged that union labor was withdrawn from concerns which failed to file their bids with such a depository. Similarly, some large enterprises take systematic advantage of their size by threatening to make localized price reductions among the customers of small concerns unless these small concerns follow policies which are considered satisfactory. The hearings on beryllium before the Temporary National Economic Committee illustrate the fact that such threats may be inherent in a market situation and may be effective even though nothing is actually said. The ease with which a small enterprise may be driven from the market by a large concern's local price cutting may thus establish a barrier to its effective competition for more business and may accom-


63 Hearings before the Temporary National Economic Committee, op. cit. supra note 6, part 5, at 2084-2091.
plish as much as the more tangible barriers already described.

The recent efforts to repeal state trade barriers are significant because they express a public awareness of the need for free trade within the boundaries of the United States and because they seek to deprive those who would restrain trade of certain public endorsements which they have secured through legislation. It is to be hoped that the activities centering upon state governments will be supplemented by similar activities directed at legal trade barriers maintained by other governmental bodies. But the repeal of all restrictive legislation which fails to express the public interest would not in itself solve the trade barrier problem. During nearly fifty years in which the antitrust laws were revered as traditions but were not effectively administered, much of American industry has developed private trade barriers which are effective without the affirmative support of any law. If law-making bodies cannot be used to secure special advantage, the pursuit of advantage by private means will be intensified. In spite of the greatly increased activity of the Antitrust Division during the last three years, the administration of the Sherman Act is still highly selective for lack of men and money. It may be that a systematic enforcement of the antitrust laws will reveal the need to terminate some private trade barriers which are not unlawful and thus will suggest the desirability of further legislation; but the logical first step is full enforcement of the existing law.