DUST SITUATION - ILLINOIS

February 14, 1935

SOME LEGISLATIVE AND LEGAL ASPECTS

(A). SPECIAL CONSIDERATIONS AFFECTING THE ILLINOIS SITUATION

In approaching the question of the Company's policy in regard to occupational disease legislation in Illinois which would include asbestosis and silicosis as compensable diseases, it is desirable to point out certain differences between the background of the problem in Illinois as contrasted with that in New Jersey.

A few of these differences are as follows:

(1) - The generally lower quality of the Bench, both Federal and State, in Illinois. The jury hazard is probably equal in all localities but I believe one is justified in holding the opinion that the appellate judges in Illinois are probably on the average less capable professionally than those encountered in states like New Jersey and New York. This does not lose sight of the fact that there are notable exceptions to the rule. This condition adds to the difficulties of trying the cases in Illinois. Decisions on points that have previously been the subject matter of litigation and of so-called judicial determination are in such conflict that it is impossible to predict with the normal degree of certainty what the courts may hold the next time these same points are brought to their attention.

In this connection it should be pointed out that the suits which are pending against us are not suits at common law but for the alleged violation of a statutory duty by the Company. This duty is the one outlined in Section 1 of the Occupational Diseases Act which requires the employer to provide "reasonable and approved devices, means or methods" for the prevention of certain occupational hazards. Although the law has been in effect over twenty years it is still impossible to know or determine what are "reasonable and approved devices, means or methods" and within the past few weeks a trial judge has ruled the law unconstitutional as violative of the "Due Process of Law" clauses of the Federal and State Constitutions. His holding will soon be reviewed by the Illinois Supreme Court.

(2) - The Statute of Limitations on claims under this Statute is two years but only a short while ago the Supreme Court of Illinois ruled that the Statute did not begin to run (in cases of injuries such as silicosis which for many years may be latent in character) until the claimant discovered the existence of the injury or it became reasonably apparent. The practical effect of this is that there is no Statute of Limitations. A somewhat similar holding in Missouri has resulted in one concern having scores of suits

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brought against it by persons who left its employ between twenty and thirty years prior to the commencement of the actions.

(3) - In Illinois as defendants we have no right to examine the plaintiff or to obtain X-rays and must accept at the trial the reports of the plaintiff's own physician and the X-rays submitted for him. The danger and difficulties of this situation are readily apparent particularly in view of the fact that a skillful X-ray technician can so operate the machine as to produce a film disclosing markings which simulate fibrosis where in fact the lung is perfectly normal and healthy.

(4) - The Statute we are alleged to have violated purports to define a standard of care but this standard is so vague that it is impossible to determine what should be done to fulfill it. The Statute refers to "reasonable and approved devices" but there is no procedure set up for "approval" of the devices used and the result is that the jury decides the question in each case.

The foregoing will explain why from the outset we have favored properly drawn occupational disease legislation in Illinois irrespective of any local conditions which might exist at our Waukegan plant. Nothing would be gained at that location by delay such as we hope to gain by delay in New Jersey and we have felt that our chances with the worst type of Industrial Commission were far better than the treatment we could expect from the highest type of jury. Moreover, with a new statute under which to operate we could play an active part in determining the manner in which it should be interpreted both by the Commissions and Courts.

(B). PROPOSED OCCUPATIONAL DISEASE LEGISLATION

The Occupational Diseases Act in Illinois has been on the statute books for more than twenty years. It is of the type which purports to list certain specific occupational disease hazards, namely, those involved in the handling of brass, zinc or lead, in any of its forms. At any rate, the foregoing is the interpretation that was placed upon it until last June. Theretofore anyone reading the Statute was aware of a jumble of words occuring in the body of the Statute which made no sense but the Judge in a case decided last June (Burns vs. Industrial Commission) read into the Statute an additional word which was intended to give meaning to these meaningless words. The effect of his interpretation was to set up a new

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category of occupational diseases, namely, diseases resulting from "any process of manufacture or labor in which poisonous chemicals, minerals or other substances are used or handled by the employees in harmful quantities or under harmful conditions". This category apparently would include the various forms of pneumonoconiosis since it is now the best scientific opinion that the injury from the inhalation of dust is the result of a chemical or toxic reaction rather than a physical reaction. Whether chemical or physical in character, the effect is "poisonous" within the legal definition of a poison as "any substance which, when taken into the living tissue, causes cessation of function". After the Burns case the insurance carriers in Illinois declared a state of alarm since no account had been taken of such hazards in determining the premiums upon occupational disease policies. Some of the defendant employers began to secure the dismissal of new silicosis cases on the grounds that the Industrial Commission, and not the courts, had jurisdiction and the already existing confusion became more confounded.

As a consequence, the insurance companies began to threaten the cancellation of policies and eventual withdrawal from the State unless the situation were clarified or remedied by further judicial decision or by the enactment of new legislation; the employers, while willing to fish for advantages in troubled waters, were practically unanimously in favor of legislation which would specifically cover pneumonoconiosis and at least limit their potential hazard within the range of the more or less predictable. They accordingly decided that the time was ripe for proposing an entirely new Occupational Diseases Act and the Illinois Manufacturers Association appointed an Occupational Diseases Committee to draft legislation for submitting to the 1935 Session of the Illinois Legislature.

This Committee is headed by Mr. O. E. Mount of American Foundries and Mr. Heth, whose firm is representing us in the pending lawsuits, has recently been made a member of the Committee. Considerable work has already been done and a proposed Bill has been drafted. The co-operation of the insurance companies has been enlisted and we have their assurance that the employer's risk under the proposed Bill is an insurable one. A great deal of research and skillful draftsmanship has been expended upon the Bill and it is generally satisfactory. Silicosis and asbestosis are specifically listed and properly defined. Asbestosis is defined to mean "a fibrotic condition of the lungs resulting from the inhalation of asbestos dust sufficient to cause, and causing, disability". I have checked this definition with Dr. Lanza and he considers it satisfactory. (Another occupational disease is listed which may likewise affect us, namely, "dermatoses or affections of the skin resulting from exposure to poisonous and irritating chemicals * * * dust * * * vegetable and animal parasites".)

The proposed Bill contains what might be termed the seven cardinal virtues of a fair and equitable occupational disease act covering pneumonoconiosis. These are the following:

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(1) A listing and defining of the diseases to be covered — the so-called "scheduled" type of Act rather than the "all inclusive".

(2) The liability to compensate for the scheduled diseases is exclusive of all other liability.

(3) Provision is made for determination by medical experts of the existence of the disease and the disability and of the extent of the disability.

(4) A provision requiring a definite amount of exposure to dust as a condition to the right of compensation for pneumonoconiosis.

(5) A Statute of Limitations to safeguard industry against stale claims.

(6) A provision for re-opening settlements with the view of either increasing or decreasing or eliminating an award as developments subsequent to the initial award may indicate are desirable.

(7) A definite maximum limit on liability, both compensatory and medical.

Our member on the Committee of the Manufacturers Association has been instructed to lend the fullest co-operation to the Committee and to other interests who desire the passage of the proposed Bill; also, to inform us if any other members of our organization can be of assistance in any way.

The proposed Bill has not as yet been presented and it is not public property. We have been provided with a copy inasmuch as we have a representative on the Committee but it is solely for the confidential use of our own organization. The Committee is now endeavoring to secure Labor's approval of the proposed Bill, the desire being that it be finally presented to the Legislature as meeting the approval of those primarily interested, namely, employers, employees and insurance companies.

(C) PENDING CASES IN ILLINOIS

Twenty-seven claims have to date been placed in the hands of lawyers by former employees at the Waukegan plant. All of these employees allege injury resulting from our failure to provide safe working conditions.

Twelve suits have been started. Of the remaining fifteen

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twelve will probably be commenced in the near future. I do not know why suits have not been commenced in the case of the other three inasmuch as the claims were originally made more than six months ago. In each of these three cases the claimant is represented by Sol Andrews who is the most notorious member of the occupational disease "ring" in Illinois and it may be that they have been lost in his files which are reputed to contain hundreds of similar cases.

All of the twelve suits were started in State courts. Ten have been transferred to the Federal Court on the ground of diversity of citizenship. In the case of two (Dean Nixon and Vogl) the claimant's attorney reduced his addamnum to $2,999.50 and thereby defeated our motion for transfer to the Federal Court.

Of the twelve claims brought within the past two weeks which have not yet been made the subject of litigation, eight are sponsored by the same attorney who represents Nixon and Vogl and it is, therefore, a fairly safe assumption that they will likewise be kept in the State courts. The other four of this most recent dozen are represented by members of the ring who have heretofore been closely associated with the attorney who has such a decided preference for the State courts and there is the possibility that they likewise share this preferance.

It will be more than a year before the earliest of the cases pending in the Federal Court can be reached. On the other hand, the Nixon and Vogl cases are likely to come up for trial in the State Court before the Summer adjournment.

About a year ago when we first retained Mr. Heth to represent us in these cases he was in the process of settling his one hundredth silicosis case. At that time it was his opinion that settlement was the only solution for the employer; that a lawsuit was hopeless. He cited the fact that there was no case where an employer had won a decision and that verdicts had ranged between $10,000 and $30,000. Against this he cited the fact that the one hundred cases he had settled had averaged about $1,000 each. The developments of the past year have made Mr. Heth much less certain that settlement is the desirable course to pursue. The chief reasons for this change of attitude are (1) the fact that the judges are now fully alive to the racketeering aspects of the situation and to the well-nigh intolerable situation that has been created for employers, and (2) the increasingly chaotic condition of the Statutes involved and the strong likelihood that before very long the courts will declare the Occupational Diseases Act, or at any rate Section 1 thereof, unconstitutional.

If this Act or Section 1 under which all of our cases are

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brought should be declared unconstitutional the result would be that the claimants would then have only an action at common law and in most cases their claims would be barred by the Statute of Limitations.

Mr. Heth adopts what I consider a very reasonable attitude that we should not at this time determine upon a general policy as regards settling or fighting the cases because of the unpredictable character of possible future developments. He is, however, inclined to litigate the Nixon and Vogl cases which will probably come on for trial in the State Courts in the very near future and where the total amount that could be recovered is less than $3,000. He is of the opinion that Section 1 of the Occupational Diseases Act is unconstitutional and he thinks he has a fairly good chance of having it so held. As a matter of fact, a Trial Judge in the case of Boshuizen v. Thompson & Taylor Co. has quite recently held Section 1 to be unconstitutional on the grounds that "it is so vague, indefinite and uncertain that an employer may not reasonably know whether he is engaged in a work or process within its provisions or what illnesses or diseases are peculiar to the work carried on; that he may not reasonably know from the provisions of said Section 1 what the requirements of said Statute are, and that it provides no sufficiently definite standard for knowledge of the requirements, so that he may know when he has complied with the Statute". In view of the fact that a constitutional question is involved, appeal has been taken directly to the Supreme Court without the necessity of an appeal to the intermediate Appellate Court and there is the possibility that a prompt decision on the point may be forthcoming.

Mr. Heth also believes that we might make a very good case for proving that we had used "reasonable and approved devices, means or methods", if a ruling could be obtained that the providing of devices, means or methods as good and efficient as those provided by other industries engaged in like processes of manufacture constituted a fulfillment of the requirements of the Statute. He is inclined to emphasize this aspect of the case which he designates as the "engineering" aspects rather than the medical aspects and if we go to trial would recommend that our greatest efforts be directed along those lines. He feels that the plaintiff could produce little or no evidence to rebut our witnesses whereas in the case of medical testimony we could import expensive expert witnesses by the dozen and the jury would still decide the question of fact involved upon the basis of the testimony of the ignorant or dishonest medical expert ~~produced~~ (of which so many are available in Chicago) produced by the plaintiff.

I agree with Mr. Heth's analysis of the situation and believe the Nixon and Vogl cases should be tried unless, of course, a decree

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of unconstitutionality or some other unforeseen development takes place in the meantime which renders it either unnecessary to try them or impossible to hope for a successful outcome. The effect of a successful outcome would be most beneficial. Even a verdict against us could not involve a judgment in excess of $3,000. Since the employee's half of the amount recovered must bear the full burden of the expenses of the trial, the amount he actually obtained, even in the event of a verdict in his favor, might be so small as to cast a damper upon the hopes of other actual or potential claimants. Nor do I think that a verdict against us would result in our having to pay more to effect settlements of the remaining claims in the event we should decide to do so. It should be borne in mind that in most cases, and I believe in the case of all the claims pending against us, the attorneys representing the plaintiffs are not of a very high professional type. Their interest in their client's welfare may be regarded as negligible. They are not looking for a fight. What they want and in almost every case what they will take, no matter how actual the distress or disability, is a settlement which will assure their obtaining $500 to $1,000 as their share.

In concluding, I wish to refer to the six instances in which we have been able to obtain X-ray films. In each and every one of these six cases the verdict of the best qualified experts in the United States was that there was no evidence of silicosis, asbestosis or any other form of pneumonoconiosis. This I believe is fairly good evidence (if there is any need of such evidence) that the claims being brought against us are not bona fide and that we are victims of the racket. The background and reputation of the attorneys representing our claimants likewise warrant this conclusion.

Two of the plaintiffs in pending cases have died since the commencement of their actions. One of these is a negro named Johnson who is represented by Sol Andrews. We saw his X-ray before his death and it indicated no evidence of pneumonoconiosis. Every expert who examined it did find evidence of heart disease and it was from this that he died. The other death case is that of Luis Perez who died last month of tuberculosis. In this case it looks like we have won a technical victory since apparently he was not legally married to the woman with whom he was living and, being likewise childless, his claim does not survive his death.

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