HEALTH, STATE BOARD OF: Ch. 17, Acts 1937—Coal is commodity governed by terms of act.

January 19, 1938.

Hon. Verne K. Harvey, M.D.,
Director, Indiana State Board of Health,
Indianapolis, Indiana.

Dear Doctor Harvey:

Receipt is acknowledged of your request for an official opinion dated January 14, 1938, which request is as follows:

> "Enclosed herewith find a letter from G. Don Sullivan, executive secretary of the Indiana Coal Merchants Association, raising a question that has been and will in the future be inquired about, and the answer to which should be familiar to all of the inspectors working out of this division.
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> The question, which you will note from the enclosed letter, is as follows—whether or not coal is considered in the category of trade-marked merchandise within the medium of the Act, which is chapter 17 of the Acts of 1937 and which is known as the Fair Trade Practice Act.

Appended to said request is a letter addressed to Mr. Meek, Chief of the Bureau of Weights and Measures. Omitting the formal parts of the same the letter is as follows:

> "Just recently we have had a number of requests from dealers and coal producers asking for information as to the application of the Fair Trade Practice Act, which is chapter 17 of the Acts of 1937, to coal as a trade marked or branded commondity. This, as you know, is a state complementary law to the Miller-Tydings Act, which was a part of the District of Columbia's Revenue Act for 1937, published Law No. 314.
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> The question which arises is this, whether or not is coal considered in the catagory of trade marked merchandise within the meaning of the Act which is as follows: "The sale or re-sale of a commodity which bears, or the label or container of which, bears the trademark brand or any of the producers or distribu-

tors of which commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others."

The question also arises that if coal as it is merchandised at the present time without any trade mark on the actual merchandise, but yet sold under a definite brand name, which in most cases appears on the order confirmation or bill or lading, and which is advertised under this trade name is not within the meaning of the Act, then what provision could be made for placing it as a branded merchandise?"

Chapter 17 of the Acts of 1937 (Burns' Indiana Statutes Annotated 1933, section 66-301 to 66-309) provides as follows:

66-302 (Acts of 1937, chapter 17, section 2)—"Contracts relating to sale of trade-marked commodities.—Lawful provisions.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Indiana by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Acts 1937, Ch. 17, section 2, p. 53)."

It is my observation that coal is a commodity, as defined in section 66-301, Burns' Indiana Statutes Annotated 1933. A brief analysis of section 66-302 reveals the following: There are two classes of commodities:

(1) That which bears the trade-mark, brand or name of the producer or distributor of such commodity.

(2) That which does not bear the label, but the trade-mark, brand or name of the producer or distributor thereof is found on the label or on the container holding the said commodity.

In the case of coal, the name of the producer or distributor thereof appears on the label or bill of lading, or it appears on the bill that is delivered to the consumer when the coal is delivered. There seems to be little doubt but that the Legislature had in mind such commodities as coal as well as other subjects of commerce in the enactment of chapter 17.

The commodities which are the subject of commerce, whether designated and set apart as above stated under point 1 or point 2, must be such commodities as are in free and open competition with commodities of the same general class produced or distributed by others. The general consensus of opinion is that coal is a subdivision of fuel commodities, that it is found so extensively in the states that it can not belong to a class not produced or distributed by others.

A trade-mark or brand placed on a commodity represents to the owner thereof something of value. It is a business asset to the owner. For illustration: he has by his manner of conducting his business, by the quality of his product, his manner of advertising created a demand for the commodity protected by the particular trade-mark, thereby furnishing the right to the owner to fix a reasonable value thereon. The Fair Trade Practice Act seeks to protect for that individual the value he places upon his particular product. For illustration: the word "Pocahontas" is a trade-mark designating a particular high grade of coal. If the word "Pocahontas" were used in the sale of a commodity the standard of which falls far below that of the recognized "Pocahontas" grade, that use would damage

the business of the man owning the trade-mark "Pocahontas." Therefore, the owner of a commodity which is protected by a trade-mark, brand, etc., does have the right to contract with others for the sale of said commodity and to fix or stipulate the price to be obtained therefor, as the right to fix those prices is the continuing protection to the owner of the valuable right, to wit: the trade-mark.

I conclude that a commodity such as coal is a subject of commerce and that the owner of the trade-mark, brand or name of the producer or distributor of such commodity may contract for the sale thereof, stipulating the prices at which said owner may sell said commodity.

Your attention is called to section 5 of the said Act (66-305, Burns' Indiana Statutes Annotated 1933) wherein exceptions a, b, c and d are designated. Section 66-305 reads as follows:

> "Resales not precluded by contract.—No contract containing any of the provisions enumerated in section 2 (66-302) of this Act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:
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> (a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase said stock at the original invoice price;
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> (b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;
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> (c) When the goods are altered, second-hand, damaged or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;
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> (d) By any officer acting under an order of court. (Acts 1937, chapter 17, section 5, p. 53.)"