Q. Was the establishment of the single distributor in Belgium a device for fighting nonmember competitors in Belgium?

A. The answer to that is no, and in addition to that I might say that the effect of preventing our own agent from cutting prices was an advantage to the outsider. It held an umbrella over him in that market.

Mr. Kayer's reply to Mr. Billings' letter to which he refers in his testimony, was dated April 5, 1938, and is in the record by way of photostatic copy as exhibit 591 A–B, the reference to Belgium reading as follows:

Altho the percentage of outsider business done in Belgium in 1937 declined markedly, no test of the soundness of our experiment with a single agent in a market is furnished by last year's figures. Far more than half of the total sales to Belgium for the year were made in the first half of it when the old system was in operation. In the month's interval between our announcement that our distribution would henceforth be carried on by a single agent and the effective date of the change two agents loaded several of the intermediate customers up with supplies which, in some instances, will carry them thru the year 1938. This operated to reduce the market of our single representative very materially. Experience with the new system is far too young to permit of a categorical statement that it is better or worse than the old one. While that indisposes me to discuss the relative merits of the two systems at this time, I do not want to let you draw false conclusions from a lack of facts.

Mr. Kayser testified that all markets of the world excepting Belgium were open to distributors. Exhibits 555 to 564, distributors' contracts referred to above, each contain a territory provision identical to the section from the Binney & Smith contract (exhibit 20 A–J) above reviewed.

Mr. Allan F. Kitchell, president of Binney & Smith Co., testified that his company is the domestic distributor for Columbian Carbon Co. of whose stock it owns a proportion under 2 percent. He stated that his company's research division is constantly at work solving its customers' technical problems and that such technical information is available for use of the association. Under its distributors' contract, it normally sells Columbian black in export, but on several occasions it has sold other member producer's black upon order of the association. Mr. Kitchell was familiar with the association's policy requiring its members to report sales to nonmembers as expressed in the resolution adopted May 25, 1937, exhibit 102 B discussed in paragraph IV B herein. Certain dealings with Mr. L. C. Herkness of the Chas. Eneu Johnson Co. had taken place several years earlier and Mr. Kitchell agreed that his arrangement with the association would not permit sales for export to Mr. Herkness. His prepared statement on this particular reads as follows: [67]

I would like to state, however, that in years gone by we have often sold Charles Eneu Johnson Co. various quantities of carbon blacks, high-grade materials

[67] T. 925; 1605.

as well as ordinary ink grades. From the best recollection of those in the department here handling such business our sales during that period were limited to high-grade materials which are not under the jurisdiction of Carbon Black Export Corp.

However, we might well have accepted an order for ordinary black from them since that would only have been of a nature for domestic shipment and packed in the regular domestic bags. If such an order had been accepted we would have expected them to use it in their own manufacture here and that it would not have been exported. If we had had any idea that such black was to be moved into the export trade we would not have accepted the order.

Mr. D. H. Robinot of New York City, testified that he has been an exporter of steel and some chemicals since 1932. About a year before passage of the Lend-Lease Act, he attempted to purchase carbon black for export and made written inquiry of manufacturers Imperial, Cabot, Huber, and Columbian. They replied that they had local agents for the particular countries he inquired about or referred him to Carbon Black Export, Inc. The latter told him they had coverage in France. He reported a telephone conversation with United's New York City agent as follows:

I told them that the Carbon Black Export, Inc., being in the same game as mine naturally wouldn't be able to pay me the full amount of commissions that the manufacturer generally allows an agent. I asked him, "What do you think they will give me?"

He said, "1 percent."

I said, "I don't work on that basis."

He testified further that the Lend-Lease Act passed in the meantime and that only one of the manufacturers, Imperial, offered to sell him carbon black for delivery to Spain, which offer the war forced him to decline. He learned of Phillips' entry into carbon black production from the War Production Board. After less than a year of negotiation with the Phillips company, Mr. Robinot wrote the Secretary of Commerce (exhibit 430) on October 16, 1945. Thereafter on October 30, 1945, he addressed a letter to the Commission's Director of the Export Trade Office (exhibit 431) and on November 1, 1945, to the Phillips company (exhibit 432 A–B). At the latter date, Mr. Robinot had an inquiry from Greece for 20 tons of carbon black, for which, shortly after November 1, 1945, Phillips Petroleum Co. made him a quotation. At the date of his testimony, January 16, 1946, Mr. Robinot had completed arrangements with the Phillips company to sell their product, Philblack, in five small countries at a 5 percent commission. He plans to sell the product to the paint and ink industries in these countries because they have no rubber industry. His knowledge of Philblack is that it "is being made by a different process than ordinary carbon black is made." [68]

[68] T. 869 ; 880.

Mr. W. H. Grote, of Phillips Petroleum Co., testified that he assumed the position of Export manager and established an export office for the company on December 1, 1945. He testified that the home office made all price arrangements and he did not know the relation of C. K. Williams & Co. to Phillips, but he was familiar with the territory assigned to Mr. Robinot, testifying as follows:[60]

Q. In the assignment of territory, to Mr. Robinot, is there any particular reason why you, if you did, restrict the territories to those in which there was no rubber manufacturing potential?

A. I think you must be laboring under a misapprehension.

Q. I may be.

A. Because there is no restriction. On the contrary, I told Mr. Robinot that unless he could sell to the rubber industries in those countries, his volume wouldn't be very big. There is no restriction.

Q. I might have misunderstood him, then.

A. You must have, because we would rather have him sell to the rubber industry than to the ink industry.

Q. Let's just have it so that we may have it by way of contrast—I am not trying to trip you up or him up. What is the nature of your arrangement? Is there any limitation as to destination, as to industry destination?

A. No limitation whatsoever.

Q. There are limitations, though, as to countries?

A. Well, I wouldn't say limitations.

Q. Certain ones have been specified?

A. He was interested in certain countries which I granted to him.

Q. Is there a so-called rubber potential in those countries which he was assigned?

A. Yes, all those countries have rubber-manufacturing establishments.

Mr. Robinot's letters to the Phillips company relative to his request for an agency are not in the record, although two of Phillips' replies appear as exhibits 444 A–B and 445. Exhibit 444 A–B, from Phillips to Mr. Robinot, dated October 29, 1945, contains a paragraph reading as follows:

As we advised you some time ago we are withholding all commitments on export sales and shipments until we have established our export office in New York. Present indications are that this office will be inaugurated shortly after the first of December, and no final arrangements will be made except through the director of export sales.

If you are in position to have carbon black crated we will be happy to complete this order for any domestic point you might designate, and the price will be in accordance with our current price schedules, and no discounts will be allowed for agency fees. At the present time it is impossible for us to crate it as we do not have the equipment or manpower available to handle this work. We also wish to mention in this respect that we give no assurance that we will continue to accept orders as all later requests for foreign shipments must go through our export office as soon as it is in full operation.

We wired you today as follows: "Relet impossible to quote at this time on 20 tons of Philblack for Mediterranean area." We did not receive your letter

[60] T. 892; 894.

in time to wire you Saturday as requested, and sincerely hope that receiving it today has not caused you any undue inconvenience. We are also returning the correspondence you forwarded on your request to C. K. Williams & Co., and we wish to thank you for forwarding this to us. We have passed this on to our main office for their further information.

Their letter to Robinot dated October 19, 1945, refers to the Williams company as follows (exhibit 445):

Our relations with C. K. Williams & Co. were established some little time ago, and we can make no exceptions in regard to selling our product to others where its ultimate use is in the coloring, or ink field. We regret that this is necessary but we are sure that you appreciate that agreements cannot be violated. We would suggest that you contact C. K. Williams and see if they are not interested in selling you.

Mr. Frank Andrews, sales manager of the Philblack Division of Phillips Petroleum Co., testified that he never discussed carbon black prices with Carbon Black Export, Inc., officers but assumed Phillips' prices were "close to them." He was familiar with the quotation made to Mr. D. H. Robinot and after testifying that the quotation was made on an f. a. s. basis because the company wanted to avoid paying insurance and freight as entailed in the c. i. f. basis, his testimony continues:[70]

Q. Do you intend to have such a person, say, as Robinot competing as to price in such a market as Greece, say, with another person to whom you sell such as Robinot?

A. I wouldn't plan to.

Q. How would you avoid that?

A. I would set up territories in which agents were given definte territory in which to sell.

Q. In other words, you would avoid competition among, we will call them "agents" abroad by limiting and restricting the territory which they serve so that they would not overlap?

A. Yes.

Q. How would that work out? You have no control over the product when it is shipped f. a. s., do you, Mr. Andrews?

A. We would probably enter into some kind of contractual arrangement with our agents.

Q. In other words, do you have such an arrangement with Mr. Robinot?

A. We have no contracts at the present time.

Q. But you do anticipate in a general way to enter into contracts whereby the independent exporter through whom you operate shall restrict his activities to certain fields?

A. That's right.

Q. The purpose of that is to avoid price competition between those men abroad?

A. No, to make it possible for each dealer to operate.

Mr. Louis A. De Smet testified that he operates as an individual trader under the name De Smet & Co. from his home at 6417 Wayne Avenue, Chicago, Ill. He is engaged in exporting Gilsonite and

[70] T. 1168–1169.

Bentonite. The main business was, prior to his father's death in 1938, the export of carbon black. The witness joined his father in 1923, though his father had operated since 1917 under the name George W. De Smet. Sales of carbon black were principally of the rubber black type and were made direct to consumers and in some instances to agents who resold to consumers. "In all cases we purchased and we sold the carbon black on our own account," he testified. His records disclosed dollar volume of export sales of carbon black for the years 1929–35 as follows: 1929—$123,454; 1930—$65,147; 1931—$66,236; 1932—$69,306; 1933—$45,312; 1934—$114,175; and 1935—$157,887. The 1935 exports went to France, England, Japan, Poland, Germany, and Holland. Supplies of black had been purchased from Cabot, United, Keystone, Palmer, and Wishnick-Tumpeer. Keystone, after joining the association, on October 3, 1936, wrote him that all their export business would thereafter be handled through the association (exhibit 454). Thereafter, until 1945, he canvassed the industry but could not procure supplies. Contained in the record are a total of 37 items of correspondence relating principally to efforts of the witness and his father to affiliate with the association. These are identified in the record as exhibits 287–91 A–B, 421–3, 454–9, and 604–22. Representative of these are the following:

Exhibit 613, dated May 24, 1934, George W. De Smet to association:

We acknowledge receipt of your telegram of the 18th inst, and your letter of the 19th, confirming this telegram.

Since then we have received your letter of the 21st inst, in which you enclose the copy of the resale price schedule for various states in Europe for which we thank you but we are sorry that you did not send us a copy of the schedule for France. We have always done a fairly good business in France and would like to receive the schedule.

Please let us know when you expect your Mr. Kayser in New York. In his last letter your Mr. Kayser advised us that on his return from Europe he would be able to give us a definite answer in reference to securing a full agency from your company.

Exhibit 617 (also in record as exhibit 455) dated July 12, 1934, association to De Smet:

On June 5th I advised you that I would later again refer to your inquiry regarding agency arrangements.

At a recent meeting of the directors of the Corporation, I brought the matter up in connection with a discussion of our general representation. As a result of that discussion, I must now write you that the directors asked me to express to you their regret that, because of many problems not yet completely solved within our present distributing organization, they feel it necessary to take the position that they cannot make any other arrangements for the balance of this year.

I should like to have you understand that, although the matter is as I have now explained it, I should be very pleased to receive a call from you on the occasion of one of your visits in New York, to discuss the question of export in general and any means we can develop of cooperating together along other lines.

Exhibit 622, dated January 27, 1936, association to George W. De Smet:

> Since my letter to you in July 1934 our distribution in export has been so organized as to be thoroughly adequate for our needs. Consequently I am compelled to reply to your courteous letter of January 21st last that we are unable to grant you an agency. Nor are we able to release any of our producing members from their contracts to sell us exclusively all of their black which goes into export. I can advise you, however, that our agents in the various markets are permitted to sell black to jobbers at our regular schedule prices without discount or commission allowance.

Continuing his testimony, Mr. De Smet said that in certain years the bulk of his export sales of carbon black were made to Michelin Tire Co. of France through a Paris agent named J. Bugnet who later transferred his agency to Mr. W. Van Lede. At times Mr. Van Lede, as De Smet's agent, sold Michelin, sometimes De Smet sold Michelin direct, reserving a commission for Van Lede and "at other times it was sold to Mr. Van Lede at a net price, and he sold it to them at a higher price." 1927 sales to Michelin exceeded 2½ million pounds. Since 1936, he has had offers from Mr. Van Lede on behalf of Michelin and others. One such inquiry, in 1938, was substantial. In connection with this inquiry, Mr. De Smet testified that Texas-Elf Carbon Co., an affiliate of the Cabot company, and the Imperial Oil & Gas Products Co., refused to sell him, the latter's letter of November 5, 1938, reading as follows (exhibit 457):

> We have your letter of November 3 in which you inform us that the 700,000 lbs. order was offered to you by your French agent and that the material would go to France and Belgium.
>
> Our arrangements in France and Belgium are such that at the present time we could hardly offer this in these markets. We therefore feel that we cannot quote on this business.

He testified that his company had purchased carbon black from Canada Carbon Black Co. at one time but that it advised him that they could not supply him. This was by letters, photostatic copies in the record as exhibits 458 and 459, dated January 28 and February 1, 1938. Exhibit 458 reads as follows: "We regret very much that we are not in a position to offer you any black at this time either for England or the Continent."

In May 1945 the witness was offered a proposition by Mr. R. L. Wishnick to act as his subagent in France at a commission of 5 percent. This he refused because "it was an entirely different way of handling it than I had done it before." He continued, "If I was to handle it for this company I would have to pay that 5 percent commission to an agent there to handle the business. Now, the only way that could be worked would have been to do away with the agent in France, and for me to go there myself and handle the business there myself."

Mr. Wishnick suggested that De Smet see Mr. Kayser. Mr. De Smet testified that in October or November 1945, he conversed with Mr. Kayser who told him that under the present set-up of Carbon Black Export, Inc., "it was impossible for them to appoint another agent," but that Mr. De Smet's application would be taken under advisement and if something could be done he would be notified. Nothing had materialized to the date of the testimony (February 4, 1946). He testified that Mr. Kayser had informed him of Columbian's acquisition of Keystone Carbon Co. and closing of that plant because of inferior quality of the product. To this, he said he told Mr. Kayser that he thought the quality of Keystone's product was excellent and that in the years when he handled it he had never had a complaint from an agent or customer.

Mr. De Smet testified that his company had sold carbon black under three brand names: "Stygian," "Jetta," and "Croak." Producers, including Keystone, had cooperated when questions of quality arose, but it was "never a question that made or broke a sale." The Stygian brand was sold to Michelin in competition with brands of other American suppliers and was well known throughout England and Europe, and it had a "marked brand preference," he added. He never had credit difficulties with his suppliers, and in selling he netted 10 percent profit after agent's commission, purchase cost, and other expenses. The only competition encountered was that of other American producers and he could not recall an instance of bad faith rejection to create a distress sale. He testified that since 1935, he has not been able to procure supplies of carbon black because Carbon Black Export, Inc., controls the export of carbon black to foreign countries; that it was his regular business which was terminated at quite a financial loss; and that the members of the association were nice people to do business with and men of their word but that nobody could break in "and those who were not in on it before were definitely out." [71]

Upon the suggestion of respondents' counsel made to the investigating attorney, Mr. De Smet gave the following additional testimony: Since 1938, sales of envelopes and domestic and export sales of Gilsonite has been his means of livelihood. From 1925 to 1938, witness and his father were importers and sellers of crude rubber, mushrooms, and canned fish. From 1925 to 1927, his father was president of De Smet Quartz Tile Co., Wauconda, Ill., which either went bankrupt or made a settlement with creditors. Witness has no knowledge of whether the Colored Cement Co. controlled by his father was able to pay its debts and judgments obtained against it. The importing of

[71] T. 1308; 1336.

mushrooms was discontinued because of a tariff which added $5 to the cost of a case. He knew the following carbon black manufacturers who were not members of the association between 1933 and 1938: Crescent Carbon Co., Canada Carbon Co., Imperial Oil & Gas Products Co., Keystone Carbon Co., C. E. Johnson Co., Magnolia Carbon Co., General Atlas Carbon Co., and Thermatonic Carbon Co. He had done business with all but the four last named. From 1933 to 1938, witness was Imperial's exclusive agent in France. He knew William Priem, Magdeburg, Germany, was Imperial's German Agent and that they had an exclusive agent in England whose name he could not recall. Witness testified that he would expect a manufacturer who had a foreign agent to protect such agent and not compete with him. Witness believed the association had a right in the sale of its own brands to expect an applicant for an agency to wait until a vacancy arose but that it had no right to exclude an agent possessing his own brand. Witness agreed that he would not expect Ford Motor Co. to sell him cars for resale in Chicago in competition with an appointed Ford agency. Witness was not familiar with producers' practice of selling their brands through specially selected distributors. If such producer received an order for one of the trade-marked brands, witness would expect the producer to fill the order through his agent located at the place of origin of the order. In their dealings with Imperial, witness testified their territory was limited to France, Belgium, Holland, Spain, and the Scandanavian countries, and when they found they could sell Keystone's product in an unlimited territory "we changed from Imperial to Keystone." At the date of testimony (February 4, 1946), Mr. De Smet recalled Imperial and Canada as nonmembers of the association. The De Smets never maintained a laboratory for giving technical service on carbon black problems but relied on their producer-suppliers. Their agents Van Lede in Paris and Alfred Smith, Ltd., Manchester, England, are large outfits and have technical staffs. The De Smets, likewise, never called for the technical services of any independent laboratories. He concluded by expressing his desire to get back into the business with his brands which are still known.[72]

Mr. R. I. Wishnick testified that he had dealings with De Smet but had no recollection of a discussion of those dealings in any association directors' meeting, particularly the meeting of November 1, 1933, exhibit 83 A–B. (The minutes make no reference to De Smet or Wishnick.)

Mr. Oscar Nelson of United Carbon Co. was favorable to grant of an agency to the elder De Smet as evidenced by the following correspond-

[72] T. 1342; 1363.

ence. Exhibit 288 A–B, dated November 7, 1933, photostat copy of letter from Mr. Nelson to Mr. Kayser reading as follows:

Chance & Hunt, Ltd., have sent us the following copy of letter from Kurt Rasmus & Company of Hamburg:

"We have learned by accident that a certain firm: Messrs. De Smet & Co. of Chicago have sent a sample packet of Carbon Black to a German firm. This packet was sent through Paris and not direct to the Hamburg firm.

"Do you know of Messrs. De Smet & Co., of Chicago being sellers of black?"

With the following transmitting letter:

"We enclose translation of a letter from Rasmus dated the 16th and we are sorry to note the signs of activity by De Smet in the German market.

"We sincerely hope that this outsider will not prove such a thorn in the side in the German market as he has done in France."

The De Smet matter was discussed at the last meeting of Carbon Black Export, Inc., and it was revealed that one of the members of the Corporation was selling De Smet, namely, Wishnick. The above does not complain of any price cutting, but in my conversation with Mr. De Smet I made it plain that the country the Export Corporation would consider for him was delivery to France, and if you in future decide to make sale of any Black to De Smet I would suggest that he be restricted to the territory in which he has been so active and not allowed to enter any new market. He has some connections in France which he has maintained for a number of years, but I do not know of any activities he has had in Germany.

On January 21, 1936, the elder De Smet addressed letters of like tenor to the association and to Mr. Nelson (exhibits 421 and 422), the former containing a paragraph reading as follows:

We are now approaching again to see if in case you cannot grant us an agency if you could permit some of your members to sell us some black so that we could supply same to our agents who are handling our other products and are also anxious to offer their customers carbon black. Our agents are selling our products to the rubber, paint, and ink trades and would also like to be able to offer them carbon black. It is understood that any sales they make would be at the prices of the Carbon Black Export, Inc.

Mr. Nelson's reply to Mr. George W. De Smet, dated January 23, 1936, reads as follows:

I have your letter of the 21st enclosing copy of letter you have written to Carbon Black Export, Inc., relative to securing some black or securing an agency. I appreciate your writing me in this instance and I would like to see something worked out for you.

Mr. Nelson testified, by means of prepared statement, in relation to these exhibits, as follows: [73]

I refer now to exhibit 288–A and B, which is a letter from me to Kayser dated November 7, 1933, with which I transmitted to him two letters regarding the activities of De Smet & Co. of Chicago; one of said letters being from Rasmus & Co., Hamburg, to Chance & Hunt, and the other being a letter from Chance & Hunt to me transmitting the Rasmus letter, or a translation thereof. I had known De Smet for many years prior to the formation of Carbexport and had

[73] T. 631; 715–717.

done some business with him. Our relations were always friendly. I had known of his business connections in France. At this period in the business of Carbexport the association was having a good deal of trouble educating its foreign agents to carry out its rules and policies.

It occurred to me that De Smet would fit into our picture very nicely in France, since he had connections there over a period of years and I believed that it would be all right for him to take that agency and confine his activities to that country. However, it was only a thought on my part and nothing was ever done that I know of to persuade De Smet to do this. The fact as I understood it is that he preferred to stay outside.

He continued his testimony under questioning, testifying that he had suggested an agency in France for De Smet because he knew that De Smet "used to sell a little black occasionally in France." Mr. Nelson had no recollection of any directors' meeting at which Mr. Wishnick's sales to De Smet were discussed. He recalled knowing the elder De Smet, saying "He had had a lot of financial trouble and was rather hard up. He was a nice old gentleman and I tried to help him if I could."

Mr. Kayser identified Mr. George W. De Smet as one of the firms referred to in the memorandum reporting his 1935 European trip, exhibit 193 A–T. He knew De Smet was not a producer of carbon black and he was never "what I would consider a distributor or exporter of carbon black"; that "De Smet purchased carbon black wherever he could and he sold it wherever he could."

By way of a prepared statement, Mr. Kayser testified as follows:[74]

Exhibits 604–622, inclusive, represent all the correspondence with De Smet & Co. outside that already in the record as evidence I can find in Carbexport files. My recollection is that Carbexport declined to give De Smet & Co. the distributorship it sought because it was the concensus that the said firm was not an exporter in the essential sense that applied to the distributors whom Carbexport employed.

The said firm had been a trader in carbon black. It had never been equipped with a technical staff, as were all Carbexport's distributors, to do independent research in the uses and applications of carbon black and to help consumers abroad in the problems of compounding rubber or pigments.

It was also felt that De Smet & Co. acted largely as shopper in the United States for concerns abroad, principally French concerns, who were seeking price concessions. It will be noted in exhibit 291 A that De Smet is reported to have stated in his inquiry to Texas-Elf Carbon Co. that he had been offered an order for compressed carbon black of 700,000 pounds monthly.

He had never been a producer of carbon black nor an agent of any producer.

My reaction, as expressed in 291 B, was that De Smet was being used by a foreign buyer as a shopper. My suspicion expressed in my pencil note on exhibit 291 A and my stated belief in 291 B is advisedly pointed at Michelin, France.

In pre-Carbexport days Michelin was most active in the use of tactics against which American exporters of carbon black could produce no defense, even when joined in the earlier Carbon Black Export Association.

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[74] T. 1731; 1779.

During the early years of Carbexport's operation Michelin attempted several times to undermine the stability and orderliness of Carbexport operation. This was without success, although the efforts contributed in so small measure to the consideration that was given in 1937 (see exhibit 102 C) to the advisability of consolidating distribution in France in the hands of a single agent.

The offer of an order which De Smet announced to Texas-Elf looked to me like another such attempt by Michelin. I regarded it as either an attempt by Michelin to jar out of Carbexport a forward price announcement which we were not yet ready to make or even as an attempt to break the export price.

The use by me of the words "shopper" and "to shop" does not imply that either Carbexport or I hold shopping for the lowest price or being a shopper for a foreign buyer to be either odious or not legitimate. The use of these terms is meant to bring out that it would be senseless on the part of Carbexport to come to the assistance of anyone whose free activities resulted in nullifying the very benefits which the Webb Act permitted us to enjoy.

* * * * * * *

Mr. De Smet states that 5 percent is the usual commission paid to a subagent. It may have been his own usual commission to subagents but in the case of subagents in Carbexport's organization the commission for subagents has been 3 percent. There are many instances where an agent, which is what Mr. Wishnick offered to make Mr. De Smet, sells through a subagent and allows him only 3 percent. Mr. De Smet undoubtedly preferred to work under conditions where he could have kept the full 5 percent, which is the maximum a Carbexport distributor may allow an agent, but, considering the many examples (R. 72) in Carbexport's organization of agents successfully and profitably selling in countries outside their own through subagents who receive only 3 percent, there can be no other reason for Mr. De Smet's refusal of Mr. Wishnick's proposition other than his own preference or his unwillingness to seek subagents who would represent him for 3 percent.

Mr. De Smet quotes me at line 11–13 of page 1329 as stating that it was impossible for Carbexport to appoint another agent. Not for the purpose of impugning Mr. De Smet's veracity but in order to get the record straight I wish to bring out that Mr. De Smet could not have recollected what he terms my explanation of "the present set-up of Carbon Black Export, Inc." Under that "set-up" Carbexport can only appoint general distributors. The right to appoint agents is reserved to the general distributors, with Carbexport's approval. When Mr. Wishnick, acting on behalf of Witco Chemical Co. a distributor for Carbexport, offered Mr. De Smet a vacant agency he did so with Carbexport's approval.

Under questioning, Mr. Kayser later testified that his refusal to consider Mr. De Smet an exporter in the essential sense that applied to the association's distributors was due to De Smet's lack of a technical staff and "no personal ability to solve purchaser's compounding problems." He added that it was not a question of De Smet having to start at the top but "If Mr. De Smet had ever presented himself as wanting a subagency or perhaps even an agency from a distributor, we would not have objected if the distributor wanted to employ him." He further testified that the association was in existence for only 2 years of the period 1929 to 1935 for which De Smet offered dollar volume statistics, but that if the statistics had recorded the price per pound at which sales were made it would have demonstrated that De Smet's

sales resulted from under-cutting his competitors and not because of the Stygian brand name of his product.[75] He concluded that the point of his comment on De Smet was—

> not that Mr. De Smet was not within his rights to buy at any price and resell at any price he chose to. Those rights were absolutely his. The point of the said comment is that Mr. De Smet doubtless lost supplies of carbon black for export because the nonmembers of Carbexport found that they could themselves sell all the black they wished to put into the export markets at higher prices than if they furnished Mr. De Smet a portion of such total quantity for export by him.

Mr. Kayser expressed a similar attitude with respect to the agency application of Mr. D. H. Robinot, above set out, testifying: "I hope that he succeeds in becoming a large and profit-making exporter. * * * But he has got to start able in the sense in which I have repeatedly described it here in the record"—principally with a technical organization. Contained in the record are exhibits 661 A–B to 664 A–B, photostatic copies of Mr. Robinot's correspondence with the French Board of Import Control, dated August 10 and November 5, 1945, in which Mr. Robinot wrote that he would shortly be charged by "a very substantial firm in the United States with its foreign sales." Late that fall (1945) Mr. Le Person, head of the Carbon Black Section of the French Import Control Board visited the United States as an advisor to the French Purchasing Commission. On one of his numerous visits to the association's offices, he inquired about Mr. Robinot, who was not known to the association's office personnel. The telephone switchboard operator traced the only Robinot address Mr. Le Person had, "Office and Warehouse, 323–27 West Sixteenth Street, New York City." The operator made telephone contact with that address, was told that Mr. Robinot was out, and that he had no organization or individual who might speak for him, he simply having desk space at that address.[76]

F. *Exclusive Contracts With Distributors*

The fifth specification in the bill of particulars reads as follows:

> 5. Contracts with all "distributors" and "agents," some of whom are American exporters, which require and cause them to deal only in carbon black sold to them by Carbexport and not to deal in any other carbon black, including the carbon black of other American manufacturers and exporters.

The distributors' contract referred to in the preceding section (exhibits 19 A–I and 20 A–J), contains the following agreement:

> SECOND: Purchaser shall not during the subsistence of this agreement purchase any carbon black for resale in the territory from any person, firm, or cor-

[75] T. 1861; 1949.
[76] T. 1778; 1943.

poration other than Vendor, or as principal or agent sell or distribute any carbon black in the territory except carbon black purchased from the Vendor; but nothing in this agreement contained shall restrict or limit the right of the Purchaser to purchase carbon black or to act as agent for any person, firm, or corporation in the sale of carbon black, provided that all such black shall be sold only to customers for consumption in the United States, Canada, or Mexico, and not for export to any other country (or under circumstances in which Purchaser shall have reason to believe the same is intended for export).

Mr. Reid L. Carr, who drafted the contracts, was questioned about the purpose of the exclusive clause above quoted, and testified as follows: [77]

A. I would say that it was deemed very unwise that a distributor for Carbexport should be in a position where it could take black from nonmember producers and sell it at a lower price than the carbon black which it handled for the association. It could not. It did not seem practicable to have an arrangement whereby the same distributor or agent could handle the identical material at two different prices.

Q. It was a control device you thought essential?

A. To the proper functioning——

Q. Of Carbexport?

A. Yes.

Q. Would you say the same thing is true with reference to the power which the corporation exerts in the distributors' contracts to fix the minimum prices and the most favorable terms and conditions of sale?

A. I should say those powers would be essential to the functioning of the Export association. Otherwise, we would have a return to the chaotic conditions that prevailed before the association was formed and which it was one of the chief purposes of the association to remedy.

Q. Now, in drafting these amendments, not only as to the sales contract, but distributors' contract, and in general setting up the organization, were you guided or governed by other forms or organizations, perhaps operating in other fields?

A. I should say generally, yes.

Q. Well, I would like to have you enlarge upon that, if you care to or will.

A. Well, I had understood that in the debates of Congress with reference to the adoption of the Webb Act, there was matter indicating a recognition that exclusive contracts were permissible under the Webb Act, and I had also understood that it was the long-conducted practice of the Federal Trade Commission to accept for filing contracts containing such terms, and in fact while the Federal Trade Commission did make some specific criticisms of our sales agreement and required us to change certain features of it, that particular feature with reference to exclusiveness was not challenged by the Commission and so I assumed that it was in accord with their departmental practice.

In section IV B, footnote 16 and 19 above, reference will be recalled to exhibits 40 and 41 A, identical letters mailed to producer-members and to association distributors, on the question of sales of carbon black to nonmembers. Exhibit 40 was addressed to Binney & Smith, distributors. Mr. Kayser's testimony relative thereto included the state-

[77] T. 139.

ment that "This was a warning that that was contrary to the contract. That letter was probably circulated to everybody in the organization or connected with the organization in any way." At the June 6, 1946, hearing, Mr. Kayser testified as follows: [78]

The notices involved in these exhibits, 40, 41 (a) and (b) referred to on page 188, were to remind producers and their domestic selling agents, the latter in many cases also Carbexport distributors, of the last sentence of the THIRD CLAUSE of the producers' SALES AGREEMENTS which requires that all reasonable precautions be taken by the producers to prevent carbon black sold by them in the United States, Canada, and Mexico from being exported except through Carbexport. Crescent Carbon Co. and Canada Carbon Black Co. were apparently buying carbon black from Carbexport members for resale within the United States, Canada, and Mexico.

Mr. Oscar Nelson's testimony on these exhibits included the statement that "It is my judgment that if Carbexport as the selling agent for the producers does not have authority that makes its agency exclusive, the Export association cannot succeed."

Mr. A. F. Kitchell, an officer of Binney & Smith, was questioned about that distributor's sale of 82,000 pounds of black to the C. E. Johnson Co. between May 1933 and June 1936, as follows: [79]

Q. And you don't recall whether he represented it was for export or whether it was or not?

A. Of course there was no call for him to declare the use of the material because of the fact that it was high grade black and under no restrictions whatsoever.

Q. You do not want this to appear in the record as an exception to the policy of Carbon Black Export or yourself with reference to your mutual arrangement to be solely a distributor for Carbon Black Export and not to sell for export in any other way?

A. We would certainly want to uphold that obligation in every other way.

Mr. Thomas D. Cabot testified as follows in reference to the exclusive provision of the contract: [80]

Nor is it to the interest of a principal to permit his agent to distribute the product of others. Unless the association can grant an exclusive agency for some brand or territory and can require that agent to handle only his line of goods of a given kind or type, I consider that any agency or distributor arrangement would be practically impossible and that it would be necessary for the association to deal directly with consumers through salaried employees. This would be a revolutionary and costly change in the export field and would undoubtedly provoke competition from new producing enterprises in foreign countries.

Contained in the record is the photostatic copy of a letter dated July 21, 1938, from Mr. Kayser to Mr. Godfrey L. Cabot, with notation that

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[78] T. 1695.
[79] T. 1619.
[80] T. 1083–1084.

a copy thereof was sent to all the association directors. It is identified as exhibit 42 A–B, and reads as follows:

The progressive realization of reports current during the last three years about proposed carbon black production outside the United States intrigues our distributors' agents more and more. Lately we have had a number of appeals for modification of the provision in our distributors' contracts obliging our representatives to sell Carbexport black exclusively. The Roumanian producer is looking for export markets and is making agency offers which interest some of our agents.

The precedent regarding the "exclusive" contract provision established by the decision of Carbexport's directors in October 1935 to allow German agents to handle German, Czecho, and Hungarian production in Germany together with ours makes us uncertain how to answer the aforesaid appeals. Our policy with respect of the "exclusive" provision needs clear definition. If our directors will express their views in reply to this letter, the guidance we will be able to draw from the consensus of opinion will make it necessary to call a meeting for the purpose of such definition.

The principal argument advanced in support of allowing our agents to handle a competitive black together with ours is that less damage will be done if the former is in friendly hands. That argument appears to assume that the agent will, in loyalty and friendship, take care that we lose little or no business to the competitor regardless of how he, the agent, may see his own interests.

We consider the assumption dangerous in our type of distributing organization. Our agents, tho "under the same flag," are first of all competitors with each other. It would be too much to expect that those handling a cheaper black together with ours would refrain from using the former as a competitive weapon. Carbexport would be the injured innocent bystander. Furthermore, such dual representation would interfere with the effective carrying out of protective measures against the outside producer we might decide upon because of the divided loyalty under which the "polygamous" agents would find themselves. Eventually each would be forced back into a single loyalty. If Carbexport should be the divorcee it will have simply furnished the cushion on which the agent rested while establishing himself against us. What is more, the competing producer has had the benefit of all the information in our possession and has been saved many of the obstacles to establishing himself. Not the least of the latter would be his agent's lack of sufficient supplies to attract the business of the larger customers.

In October 1935 we opposed the relaxation of the obligation to represent us exclusively, even tho the situation in favor of which this was done appeared unimportant. The time will come when it will be wise to arrive at some understanding with foreign producers of carbon black, but the proper approach to that time is not over a route which gives our competitor a control over our salesmen. We reaffirm that objection now and recommend that we be authorized to enforce the exclusive representation requirement in our distributors contracts literally and without exception.

The record contains no testimony concerning this subject and but one reply, Mr. Oscar Nelson's, reading, under date August 8, 1938 (exhibit 43): "I have your letter of July 21 and am in accord with your recommendation that the exclusive contract provision of the distributors' contracts should be enforced."

Exhibit 98 A–C in the record is the photostatic copy of minutes of a directors' meeting held on October 24, 1935, referred to in section

IV–C above. These record the adoption of a resolution authorizing renewal of all distributors' contracts for the calendar year 1936, but contain nothing resembling the subject matter of exhibit 42 A–B.

Reference was made in the preceding section to exhibits 555 to 564, the association's distributors' contracts extant as of the date of their introduction in evidence at the June 5, 1946, hearing, and to the fact of their extension in January 1941 subject to termination "by either party by at least 10 days' written or telegraphic notice to the other."

The exhibits consist of copies of distributors' contracts with the following concerns:

Exhibit 555, Godfrey I. Cabot, Inc., Boston, Mass.
Exhibit 556, African Metals Corp., New York, N. Y.
Exhibit 557, J. M. Huber, Inc., New York, N. Y.
Exhibit 558, United Oil & Natural Gas Products Corp. Ltd., Manchester, England.
Exhibit 559, William Somerville's Sons Rubber Co., Ltd., London, England.
Exhibit 560, Chas. Eneu Johnson & Co., Philadelphia, Pa.
Exhibit 561, Wishnick-Tumpeer, Inc., New York, N. Y.
Exhibit 562, Binney & Smith Co., New York, N. Y.
Exhibit 563, Chance & Hunt, London, England.
Exhibit 564, R. W. Greeff & Co., Inc., New York, N. Y.

G. *Control of Resale Prices and Terms*

The sixth specification in the bill of particulars reads as follows:

6. Contracts with "distributors" and "agents," some of whom are American exporters, which (a) fix the price, terms, and conditions of sale of carbon black manufactured by its stockholders and others which it sells to such "distributors" for resale to "agents" or consumers in export trade; (b) fix the minimum price and most favorable terms and conditions of such resale of such carbon black by "distributors" to "agents;" and (c) fix the minimum price and most favorable terms and conditions of resale of such carbon black by all such "distributors" and "agents" to consumers located abroad.

Mr. Kayser gave the following testimony describing the association's export price policy. The base price is the price which the association pays to producers. This is fixed by the directors at a rate "to give more net to the producer than he received from other sales." This enables producers to pay the association a "charge-back" to cover the association's deficit from operations—it never operating at a profit. The association settles with the producers on the basis of f. a. s. Gulf port, meaning the price agreed to be paid to producers plus the cost of freight to Gulf port. The association then computes a c. i. f. price by adding to the base f. a. s. price, crating, insurance, freight, and 8 percent for selling costs. The c. i. f. price thus determined is

the price or cost to the distributor and is the minimum price at which the distributor may resell. Mr. Kayser explained it thus:

Well, they buy at a c. i. f. price. Now, they may sell at a c. i. f. price and do in large quantities, which is a minimum of that price which we have sold them, or it may be more. Our control is only over the minimum price that may be charged. They may sell, and frequently do, also delivered at the customer's door. In the event they sell delivered at the customer's door, the additions to the price, covering the additional cost, and so on, are also determined by the Carbon Black Export, Inc. In other words, the distributor may not sell at less than the price determined in the schedules.

He has observed that some dealers in South America have made "surprisingly more than our minimum schedule." The distributor for his services receives a discount of 8 percent.[81] Mr. Carr explained use of the term "discount" rather than "commission" in referring to the distributor's compensation, as follows:[82]

We were advised that under the provisions of British law an American manufacturer who employs an agent for the sale in the United Kingdom of goods manufactured in the United States would become liable to pay British income tax on the entire profit resulting from the sale of those goods, representing the difference between the cost of manufacture and expenses of sale, and the selling price. For that reason it was necessary, unless the member companies were to be subjected to extremely heavy tax liabilities, to draw the distributors' contracts in the form of sales, c. i. f., and instead of allowing the distributors an 8 percent selling commission, to put that distributor's compensation in the form of a discount.

I might add that this feature of the distributor's agreement was submitted to British counsel in London for approval and was approved as forming such a contract, would not subject the original producers of the black to the British income tax liability.

Mr. Kayser identified exhibit 24 A–L, consisting of price lists as follows:

For Norway, Sweden, Finland, and Denmark, November 30, 1934, exhibit 24 A–B.

For Norway, Sweden, Finland, and Denmark, June 3, 1935, exhibit 24 C.

For Holland, Sweden, Finland, and Denmark, February 1, 1938, exhibit 24 D–F.

For Finland and Sweden, March 7, 1940, exhibit 24 G–I.

For Sweden, July 16, 1941, exhibit 24 J–L.

Packaging is described in the lists as "uncompressed in 150-pound cases, quarter-compressed in 187½-pound cases, half compressed in 225 cases, fully compressed in 312½-pound cases, and fully compressed and dustless in 50-pound bags." Mr. Kayser testified that in course of time carbon black was shipped in paper packages, a latex type of

[81] T. 101; 115.
[82] T. 141–142.

bag, 50-pound size, or in overslips containing two or four small bags 2 feet in length and 6 inches in width and height. Price on the lists are specified in United States currency and are applicable to 100-kilo and 100-pound units. A factor not appearing on the price lists but implicit in the prices themselves is that of ocean freights. In order to make a uniform price announcement to some 170 distributors located all around the world, it was found impractical to quote prices and exact freight rate to the numerous destination points involved. A system of average freight rates weighted by tonnage to certain areas of the world was devised. Mr. Kayser described it as follows:

> We will assume that on the continent of Europe, or that the freight rates to the continent of Europe were within the range of 10 cents a cubic foot to 20 cents a cubic foot. From records we had in our possession, we knew approximately what each one of the countries whose freight rates fell into that zone, took in volume, so we weighted each one of these freights by tonnage that it covered, and divided by the total tonnage and arrived at an average weighted freight factor.
>
> Now, it so happened that areas in Europe and areas in North Africa, and perhaps areas in South America, that their freight rates fell within that 10- to 20-cent range, so that the price to a dock in South America in that range would be the same price as to France, for instance. Then the rest of the world was divided or fell into a range, say from 20 to 30 cents, so that the freight factors we used or we devised was by dividing the world into two zones and that cannot be marked by a line through the globe or anything like that, or a straight line. The location of any market in a zone depended upon the range of its freight rates.

Additional price schedules, similar in form to the foregoing, for Austria, Hungary, and Switzerland, dated February 1, 1938, and for British Malaya, same date, appear in the record as exhibits 575 and 576.

Mr. Kayser testified that exhibits 22, 23 A–D, and 586 A–G, represent the "complete statement of the basic selling policy." Exhibit 586 A–G consists of four such statements, two of which duplicate exhibits 22 and 23, which are briefly described as follows: Exhibit 586 A, dated November 30, 1934, is entitled "Basic Selling Policy" and consists of 11 sections lettered (A) to (L). (A) "No price decline guarantees shall be given on any sales." (B) All contracts to be in writing and "requirement" contracts not permitted. (C) Long-term contract to contain privilege by seller to prorate deliveries. (D) Contract to grant seller cancellation option in event of governmental interference with payment or delivery. (E) No firm offers—all prices subject to change without notice. (F) All annual contracts to be terminated within the calendar year. (G) 1935 contracts to specify termination date. (H) All prices will be based upon shipment from Gulf ports. (J) Actual consular fees paid chargeable to buyer. (K) Moisture guarantee to be 2½ percent at shipment from plant. (L) Sales price in effect in country of consumption shall apply as minimum

regardless of point of shipment. Exhibit 586 B–C, dated July 1, 1937, exhibit 586 D–E, dated February 1, 1938, and exhibit 586 F–G, dated March 7, 1940, are entitled "Standard Conditions and Terms of Sale." These are similar in substance to exhibit 586 A, except that the 1937 issue added 3 new sections and the 1938 and 1940 added an additional 2 sections, containing all told 17 lettered A to Q. The 1938 and 1940 additions concerned ocean freights and war-risk insurance. The three sections added to the 1937 issue, and repeated in the last two are: (F) Maximum payment terms, 30 days from date of delivery; (G) 1 percent cash discount allowed for cash payment against documents in New York; and (H) "The prices in Carbon Black Export, Inc.'s price schedules are net prices for resale by distributors, agents, and subagents. No discount, other than that authorized in the previous regulation (G), may be allowed customers for prompt payment." The price decline clause (A) was slightly modified to read "No price decline guarantee (Fall Clause) shall be given on any sales."

Mr. Kayser described a basis of control over distributors and agents consisting of a system of reports as follows: [83]

> The reports covered two types of transactions. The first type of transaction was that one which required the direct shipment of the goods from the United States to the consumer.
>
> The second type of transactions were the contract sales as well as spot sales for less than 50 cases or equivalent lots, I believe. What was required in either report, whether I have covered the matter completely or not, was the name of the customer and his address, the quantity involved, the price at which it was sold, the terms allowed, the full description of the types of packages required, and details of that kind.
>
> * * * * * * *
>
> That was the basis of the control. In the event there was any question about adherence to the numerous regulations we made from time to time with regard to the rate of exchange, for instance, at which the dollar price was allowed to be converted to the price of the market in which the goods were being delivered, we would require the original contracts or copies thereof for examination.
>
> These records not only furnished the basis for our control, but also furnished the information from which we drew up statistics, statistical reports as to the relative position of distributors in any given market, and total sales in the market, and so on.
>
> Another method of control was to issue these basic selling policies which represented the major items of the code of conduct, and to issue amendments either by letter in special cases or by new issues of the basic selling policy keeping agents and distributors informed of what was required everywhere.
>
> Now getting to the question of discipline. There have been a few cases where the distributor or agent has had to be what you term as "disciplined." I think I probably used that term myself.

Mr. Kayser pointed to exhibit 27 A as illustrating association procedure in checking deviation from sales policy. This exhibit, dated

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[83] T. 174–177.

June 23, 1933, is the photostat of a telegram to the Cabot company, which he termed "an admonition to please behave." It reads as follows:

PLEASE CABLE YOUR ITALIAN AGENT NOT TO QUOTE AEROPLANO MILAN ITALY SPHERON LESS THAN FAS BASIS THREE SEVENTY FIVE STOP AMOUNT INVOLVED IS TWENTY CASES STOP THIS BY REQUEST.

Exhibits 29 A–i to 30 consist of 11 photostats of correspondence passing between the association and Binney & Smith, distributor, between January 18 and August 31, 1937, relative to an infraction by the latter's Belgian agent, Peter Freres. Mr. Kayser referred to this group as a "detailed account of how we proceed in matters of that kind." The correspondence indicates that the agent made two deliveries to a customer on a purported single c. i. f. invoice. The distributor eventually agreed with the penalty imposed, a 2-month suspension of the agent, which is set out in exhibit 29–D as follows:

We have decided to suspend the privilege of Peter Freres to sell for you in Belgium for 2 months. Please cable them this information, advising them that the suspension goes into effect immediately on receipt of your cable, and that they are barred from making any forward or spot sales during the 2 months' period beginning with such receipt, whether it be for delivery by direct shipment or ex warehouse.

Mr. Kayser cited as an illustration of protection given distributors against arbitrary deduction of discounts by customers, the case of Semperit, appearing in exhibit 31 A, photostat of a letter dated February 6, 1937, association to Binney & Smith, and reading as follows:

During the past year the firm of Semperit, with branches in Austria, Poland, and Czechoslovakia, has on various occasions paid each of its suppliers in advance of 30 days from steamer arrival and has arbitrarily deducted a discount. Protests by distributors and their agents at this unprivileged practice have not consistently succeeded in recovering the discounts taken.

In consequence of Semperit's arbitrary position in this regard we find it necessary to require that no further sales be made by any distributor or agent to this customer unless there is a prior definite understanding that invoice amounts are net under all circumstances except when cash is paid by the buyer in New York against delivery of documents. The exception carries the privilege of deducting 1 percent discount. Any variation to the foregoing requirement shall mean no sale. This notice is being sent to all distributors. Please promptly instruct your agent accordingly.

Mr. Kayser testified that on two occasions fines have been imposed on distributors, once in the case of Cabot and once against Binney & Smith. The latter is evidenced by photostat of the association's letter of February 9, 1937, to that distributor, reading as follows (exhibit 32 A):

From the time when Carbon Black Export, Inc., made the regulation that a customer must make cash payment in New York against presentation of docu-

ments in order to enjoy the 1% discount privilege and up to November 13th, 1936, your company has admittedly allowed the discount to Goodrich Rubber Company and Goodyear Tire & Rubber Company on more generous terms. The infraction is subject to penalty under the Distributors Contract between your company and Carbon Black Export, Inc.

Of the penalties provided by the contract the one most justly fitting the character of the offense is unavailable. Therefore it has been agreed with you that a cash fine shall satisfy the requirements in this one case.

Consequently I herewith impose a fine on your company of $1,500.00 and request that you make arrangements for its prompt remittance to Carbon Black Export, Inc. I must advise you further that a recurrence of this violation of regulations will call for prescription of one of the more severe penalties under the contract.

Exhibit 33 A–B, photostat of letter from the association to Binney & Smith dated April 14, 1937, lists sales to four subagents, and refers to the report Forms II A as follows:

We require, as you know, the name of the ultimate consumer of all black under our jurisdiction and the listing of a sub-agent's name by an agent, on its Form II A to us, does not meet our regulations. Further, although your sub-agent may buy, with or without your permission, a supply of black from another distributor, the responsibility of the agent involved is still binding to the extent of furnishing as usual information on Forms II A, concerning the ultimate disposal of such material.

The association's control over distributor's advertising is evidenced by exhibit 35, photostat of a letter from the association to Columbian, dated January 8, 1938, in which is quoted the opinion of counsel reading as follows:

(2) The Distributor may advertise in his own name and at his own expnese, but he certainly has no right to advertise himself as agent for any Producer, since that would be a misrepresentation of fact and a repudiation of the obligations assumed by paragraph Second of the Distributor's Agreement. There is nothing to prevent him from advertising (1) brands which he has the right to use, or (2) high-grade blacks. In the latter case, it would seem that he would also have the right to use the Producer's name, provided it is so used as to be confined exclusively to such high-grade blacks.

Referring to exhibit 45 B, photostat of a letter from the association to Cabot, dated July 16, 1937, and stating that a disclosed consumer must be quoted the minimum price but that "a jobber wishing to purchase for resale purposes must be quoted the highest price regardless of quantity," Mr. Kayser testified as follows: [84]

Q. In other words, then, a jobber in the United States desiring to purchase carbon black from a distributor and that being his only source, he couldn't buy it directly from the Carbon Export Co?

A. That is correct.

Q. He would have to pay what?

A. The highest schedule price.

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[84] T. 192.

Q. For export?
A. For export.
Q. No matter what quantity was involved?
A. That is correct.

It will be recalled that in section IV–E above, with reference to exhibits 49 to 55, Mr. Kayser testified that it was the association's policy to refer all inquiries for carbon black to distributors. He also testified that from 1933 to 1940 there was a substantial increase in the number of inquiries from miscellaneous persons, firms, and corporations for carbon black for export.

Exhibits 46 A–C are photostats of correspondence between the association and distributor Cabot, dated in early February 1938, concerning Cabot's plea that a Boston exporter-customer be allowed freight on a 50-pound shipment to South America. The association computed the amount of freight and permitted its allowance, writing "considering the small quantity of black involved in the present instance, we are willing to make an exception."

The omission of the so-called "Fall Clause" from long-term contacts, was the subject of Mr. Kayser's letter of March 12, 1938, to Mr. Van Valkenburgh of Dunlop Rubber Co., Ltd., Buffalo, N. Y. The latter states that the explanation is made because the association's distributors are unable to make a full explanation. The pertinent portions of the letter, being the first five paragraphs, read as follows (exhibit 70 B):

Please pardon the delay in replying to your letter of March 7th. It is due to the fact that I have been out of the office continually since your communication reached me.

The absence of the so-called Fall Clause from the contracts which are offered carbon black buyers in the export markets is not the result of an attitude taken by our distributors and agents on their own initiative. Under our arrangements with them our representatives are obliged to refuse it.

Unfortunately I cannot agree with your opinion that there is no reason for us to refuse the Fall Clause in foreign contracts. Our industry had an illustration of the sad state of affairs it can bring about in the free-for-all period which existed prior to 1934. You will recall that period as the unhappy time for the producer when the said stipulation played such a large part in wrecking prices abroad, as well as the time when the export consumer was without protest obtaining his carbon black at a materially lower price than that at which the American consumer could acquire it. When Carbexport was formed by those who were suffering the consequences of the wreck, one of its first actions was to bar the further use of the sales condition which so thoroughly implemented it.

In my opinion the conditions now prevailing in the American market prove the action of Carbexport with respect of this insidious contract stipulation to have been most sound. If I have observed those conditions correctly, the Fall Clause in domestic contracts has contributed its full share to the debacle.

With the best of will I am unable to understand why Mr. McDowell, at Fort Dunlop, should feel greatly disturbed over being unable to obtain any price

protection clause in his carbon black contracts. He cannot be fearful that we completely reject the principle of price protection to the customer. On each of the two occasions in our history when we have reduced sales prices, namely effective December 1st, 1934 and February 1st, 1938, we have specifically stated the reductions to be applicable to all balances on customers' contracts which had not been shipped from the American seaboard prior to those dates.

Mr. Kayser testified that distributors chose their own agents and, except in one or two inconsequential instances, the association had nothing to do with their approval. In referring to exhibit 73 A to 73–Z–35, a 59-page list of distributor's agents and subagents, he testified that on account of wartime conditions, it would be impossible to determine which of these are authorized to do business in the United States.

Mr. Norman L. Smith, president of Binney & Smith, on a visit to his firm's customers in France, wrote Mr. Kayser on May 25, 1935 (exhibit 588 A–B) that he had encountered pressure to sell below the association's price list and to allow a 1-percent discount for 30-day payments, concluding his letter with the suggestions:

1. For the Export corporation to discharge all distributors' agents in France and simply appoint one agent for all the corporation.

2. To pay every agent a fixed commission, but of course by that I do not mean the same amount to each agent.

Mr. Kayser's reply to the foregoing is in the record as photostat exhibit 179, dated June 11, 1935, and reads, in part, as follows:

I am not certain that it is yet the proper time to propose discharging present agents and establishing a single one responsible directly to Carbexport. I doubt it. The overthrow of the Codes by the Supreme Court decision leaves only the sketchiest instruments for controlling the domestic situation. I imagine that producers will want to take a fair look at the ultimate effect on the industry before further concentrating control in Carbexport hands.

There is nothing further in the record as to any action about agents in France. Mr. Kayser testified that Mr. Smith's reference to the codes meant the N. R. A. and that his own phrase "sketchiest of controls" meant the Trade Practice procedure of the Federal Trade Commission for dealing in the United States with "unfair practices similar to those in France about which Mr. Smith complains." [85]

Mr. A. F. Kitchell, of Binney & Smith, gave testimony concerning contract procedure covering their domestic business which permitted upward adjustment of prices every 3 months, and as to fall clauses as follows: [86]

A. I mean that 100 percent of our contracts never carried the fall clause. When markets were weak or the customer thought that prices might go down, they were very apt to insist upon a fall clause and we felt obliged to put it in.

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[85] T. 1711.
[86] T. 1628–1630.

On the other hand due to our general policies which have grown up over the years, we have had a mutual understanding with practically all of our accounts that if conditions change materially during a period of any contract and the customer was faced with the position where the contract named a price and he could get a better offering, and we know darn well he could, we never fell back upon the legal rights in the contract but tried to do what we thought was the fair thing, looking toward his protection and our protection later on.

Q. You say these fall clauses were not universal. I would guess, and correct me if I am wrong, in connection with this sort of thing that probably it was the big customer who was always successful in getting the fall clause to operate.

A. He may have led the way, sir, but in our position within our own organization, we have never tried to draw the line between the big man and the little man. We felt that each was entitled to a fair deal.

Q. I have another question here and I think probably you have covered it, but I will ask you this: What was the purpose of these clauses, namely, the escalator and fall clauses?

* * * * * * *

A. And in the purpose of these clauses, which I give, it is easy to get one kind when the market is weak and going down and it is easy to get another kind when it is the reverse. But we have tried not to play the thing unfairly one way or the other, but to get a good average—fair experience with our trade that would in turn protect us in the long run.

Q. You were successful, were you not, in eliminating the fall clause from export trade, were you not?

A. I don't have anything to do with that.

When the association commenced operating in May 1933, it required distributors to file with it the details surrounding all contracts running for the calendar year in question. Exhibits 297 and 623 are photostat copies of such requests, which Mr. Kayser testified formed the basis of the association's control of export transactions. Exhibit 297 is dated October 17, 1933, notes a price advance, and requests data on all contracts entered into immediately before and after the price increase. Exhibit 623, dated July 24, 1933, requests filing of five specific contracts with firms named Lorilleux, Goodyear (England), Neumaticos Goodyear, Goodyear (Australia), and B. F. Goodrich, the request being prefaced as follows:

> Because of the number of important requirements contracts and option contracts which appear in the lists given on Forms 1 and 2, on the statistics we called for immediately after May 24, we find it necessary to require the filing of all such contracts by all companies.

The Forms 1 and 2 are the report forms described above by Mr. Kayser. Photostat copies of the report forms appear in the record as exhibits 584 and 585. Exhibit 584 is known as "Form II," is for the use of distributors, and calls for information on contract, customer, amount, price, terms, place of delivery, packaging, and name of agent. It carries a notation that the form be filed "immediately after contracts are obtained." Exhibit 585 known as "Form II A," is designed for the use of agents and calls for information on delivery date, cus-

tomer, quantity, spot or contract sale, price, packaging, type of black, terms, and name of subagent. It carries a notation "Listings on this form mailed monthly, not later than the 10th of the month following."

At the June 6, 1946, hearing, Mr. Kayser read into the record a prepared statement summarizing the association's pricing policy as follows:[87]

Distributors paid Carbexport the c. i. f. prices thus devised less 8 percent discount (their commission) on the f. a. s. base factor, regardless of quantity. The commissions which distributors paid out of their own allowance to their agents were, of course, less and were made uniform depending on the type arrangement in effect.

D. PRICES AT WHICH CARBEXPORT'S CONTRACT DISTRIBUTORS RESOLD TO THEIR CUSTOMERS ABROAD

All prices under this title were set by schedules issued by Carbexport. The schedule resale prices governed sales by distributors and/or agents to customers.

While schedule-making policy has tended toward uniform programing, complete uniformity has never been achieved. The aspects of uniformity to which scheduling successfully clung were the following:

(1) *A division of the export world into two zones according to the value of the freight factor in c. i. f. price structure*

One zone, termed "low zone," comprised essentially markets to which ocean freight rates from Houston, Tex. ranged between 10 and 25 cents per cubic foot. The other zone, termed "high zone," comprised essentially those to which the ocean freight rates ranged over 25 cents. The original freight factor used in making c. i. f. prices to destinations in the first zone, for instance, was the calculated average of all the separate rates to destinations within the 10–25 cents range weighted by the estimated tonnage moving to each. The factor arrived at was 15 cents per cubic foot. The like original factor arrived at for the second zone was 32 cents per cubic foot.

The low and high zone factors were checked several times between 1933, when Carbexport began to operate, and the outbreak of war in September 1939. The first recheck showed that failure to take into account that the largest markets were uniformly those with the lowest freight rates within a range and that any disproportionate increase in volume in those markets would create an unintended increment for the manufacturer in over-all net return from exports. Such an increase in volume was in process at the time of that recheck. The freight factors were not changed, however. A compensating reduction in the uniform c. i. f. prices for each zone was made instead. From that action the policy developed of leaving the original factor unchanged and of compensating for increments and decrements respectively by reductions or increases in c. i. f. prices.

The effect of this procedure was to make the c. i. f. price to every market within a zone uniform and to make only two different basic c. i. f. prices in the world. The fact that it was at times necessary to modify the uniform c. i. f. price for some particular market in a zone for some special reason, such as compensation for the high cost of providing exchange due to regulations by the government of that market, did not alter the effect generally.

[87] T. 1678; 1682.

(2) *A minimum number of resale price schedule patterns*

The most detailed pattern—the one employed in markets where the use of carbon black was extensive and varied as to type, size, and number of customers—recognized the need for quantity differentials because of the extra costs attaching to handling many orders for small quantities. This pattern set the prices for every type of sale from c. i. f. to delivery from an inland warehouse. The least detailed schedules were for the simpler markets where quantity differentials were unnecessary. They set the c. i. f. prices only; they indicated by regulations the procedure for adding charges for extra costs where necessary. A sample of each of these two patterns is attached (Australia 1938, as exhibit 575, a–d, and British Malaya 1938 as exhibit 576). Between these extremes there were a few intermediate patterns which represented such modifications of the most detailed one as the characteristics of the markets covered thereby dictated.

Resale prices fixed by Carbexport were minimum prices. Since, however, practically every market was served by from two to all of Carbexport's contract distributors (a distributor's territory was world-wide) and their agents (an agent's territory was local), these minimum prices were, with exceptions occurring in isolated spots, the actual prices of resale. Since Carbexport collected from its contract distributors no more than the lowest prices of a schedule regardless of quantity of a schedule for which a price was made (which is the c. i. f. price described under subsection B above), all schedule increments over said lowest scheduled c. i. f. prices went to distributors and/or their agents to reimburse them for the extra service costs involved in small quantity sales and deliveries and in deliveries beyond c. i. f. The amount of the increments allowed from time to time was arrived at through examination of the showings made by groups of agents resident in the markets where increments were granted.

The inauguration, in 1937, by the Cabot company of a system of bulk delivery of carbon black to domestic users at an economy variously estimated from an eighth to a quarter of a cent per pound, precipitated a price war in the domestic market, in the course of which, following November 1, 1937, the price of carbon black fell from 4 to 2¼ cents per pound. This resulted in demands for a reduction in the export price. On January 14, 1938, Mr. Kitchell of Binney & Smith wrote Mr. Kayser as follows (exhibit 306):

I have discussed with you on the telephone some of the situations which have arisen in connection with our relations with important consumers abroad.

Speaking solely as a distributor, I feel that the matter of good-will is of sufficient importance to every producer member of the corporation to consider the situation very promptly, and to give immediate indication to the trade of their intention to make some change in the schedule of prices.

Fortunately, it does not seem necessary to go to any drastic limits, as I believe that a reduction of ½ to ¾ cent per pound in the export schedules would rebound to the benefit of the corporation, and be worthwhile for the future. I hope, accordingly, that your members will consider these matters promptly, and release their intentions without loss of time. In doing so I recommend that the announcement be cabled as soon as possible to the effect that the new price schedules will be effective until further notice on shipments clearing the port on and after February 1, 1938.

Mr. Kitchell, questioned about this letter, testified as follows: [88]

Q. Why did you emphasize "solely"? You say "Speaking solely as a distributor."

A. Mr. Smith had taken it up with me for the reason that he was concerned on account of the pressure brought by certain foreign buyers for a lower price in the export market, knowing that he was on the firing line with direct responsibility——

Q. (Interposing.) To stockholders?

A. No; direct responsibility of taking care of those customers, they looked to him.

Q. Oh, I see.

A. He naturally felt the pressure more than anybody else, and I could sympathize with him as a seller of the effect.

Q. Was it also the pressure from buyers that had a dual capacity? I mean the larger rubber companies who had plants both here and abroad?

A. That was a combination of both.

Q. Yes.

A. However, looking at it from the standpoint of the carbon black itself I could not wholeheartedly recommend a lowering of the export price, because I saw no reason for it.

Q. I think it is in exhibit 305, which—just preceding 306, where there is a memorandum from Mr. Kayser setting forth certain aspects of the relationship between those prices. Wasn't one of them, as I read it, that there was a likelihood of what we might call an arbitrage taking place between those large customers—that is, buying the rubber in this market and sending it to their foreign plants if that margin was too wide?

A. I heard that suggestion. I never knew of its being carried out.

Q. You did not have that fear on your own account of that kind of arbitrage between those two markets?

A. The difficulties in so doing are rather great. The products that we furnish to customers in domestic markets are in either bulk hopper cars or in bag form; neither of that can be exported. If they are going to export it they have got to take and put it in containers of some kind, ship it to the seaboard at considerable expense, which, I gather, in most cases would more than offset any difference in prices.

Q. There would be another limitation on arbitrage of that sort insofar as the carbon black export rules would have prohibited it if they knew—that is, from selling for export in this market; isn't that correct?

A. That is right.

Mr. Norman L. Smith, of Binney & Smith, wrote Mr. Kayser on January 16, 1938, the first three paragraphs of his letter reading as follows (exhibit 307 A):

I have been asking myself what the carbon black producers would do if the present price situation was reversed, that is to say, if the price to the domestic manufacturer was 1¾ cents per pound more than the price to the foreign manufacturer. The large consumers here would certainly resent having to pay more than their affiliates abroad, and I am wondering if the producers would be deaf to their appeals to be placed on a parity with their foreign competitors. Would the producers not be afraid of incurring the domestic manufacturers'

[88] T. 941.

displeasure and fearful lest they might take some steps to protect themselves?

Should we therefore allow geographical locations to penalize certain customers? Is it good policy, simply because we have the legal machinery to maintain the present differential between the export and domestic price to do so? I do not believe the Export corporation was created with this idea in view, but rather to maintain a stabilized market. The Export corporation, like any other supplier, exists on the goodwill of its customers. It is of course a fact that irresponsible competition has reduced the price for the domestic market far below a reasonable basis, and naturally I do not advocate an equal reduction for export, but some consideration should be shown to the foreign buyer. The corporation has proven its power to maintain prices—now it should display its magnanimity.

Further, we have to remember that a great many concerns who resent the maintenance of the present export prices are branches or affiliates of some of the largest consumers in this country, and the parent companies here I understand are greatly resenting the fact that their branches have to pay so large a premium.

Mr. Kitchell testified further in respect to the foregoing exhibit, as follows:

A. * * * That there was no reason in the world for lowering the export price as such. The domestic price here was purely an abnormal situation, brought about by this competitive fight. Those conditions did not apply in any way in the export trade. No bulk black was shipped abroad. There was no question of a differential. The price in the export field was on a normal basis. Just because we were fighting here—I think Mr. Smith will agree with me—we saw no real reason to wreck the export price at all.

Mr. Reid L. Carr was questioned on this exhibit as follows:[89]

Q. Do you agree with Mr. Normal Lee Smith's statement in 307 A and B, that Carbexport was created to maintain a stabilized market?

A. Well, I would say that the stabilization of export markets was certainly one of its main objectives. But I would not say that it was created for the purpose of stabilizing the domestic market and I don't understand that that is what the letter means.

Mr. Billings of the Cabot company, on January 21, 1938, forwarded to Mr. Kayser a letter of Dunlop Rubber Co., Birmingham, England, to Cabot's agents, Hughes & Hughes, London, England, dated January 10, 1938, which reads as follows (exhibit 309 B):

Now that the domestic price of gas carbon black is 2½ cents per pound in bulk f. o. b. plant, we consider a reduction in the export price to use is overdue and we wish you to advise your principals that the position created by the wide differential now existing in the domestic and export prices is unjustifiable.

We want you to press very strongly for an immediate adjustment to the basis of the domestic price, after allowing for any increases in inland and ocean freights. Failing this it is our intention to take immediate steps to protect our interests in this market.

Yours faithfully,

(Signed) J. McDowell,
Chief Purchasing Agent.

[89] T. 552.

Mr. Kayser, as president of the association, in the face of this pressure, prepared an agenda for the December 10, 1937, meeting, photostat exhibit 305 A–D, the relevant portions of which read as follows:

This is the first time in its history that Carbexport has to consider price policy in face of a declining domestic market. The unanimity of opinion on export price policy which has been natural during the period of unchanged price in the domestic market will no longer exist. The principal division of opinion will arise over the question of whether or not export prices should automatically follow the course of domestic prices.

The main reasons which will be offered in support of the contention that they should do so will be that a differential between the two in excess of the sum of calculable and estimable transportation costs from the U. S. will (1) invite an increased movement of nonmember black into the exports markets, will (2) encourage international customers and merchants to buy in the domestic market and ship abroad against us, and will (3) induce large foreign buyers to encourage to the utmost a greater production of carbon black outside the U. S.

It is the management's opinion that at this time these reasons are not operative and that, therefore, they do not offer sufficient grounds for a change in Carbexport's present schedules. The outsiders, with the exception of Magnolia Petroleum Co., have been moving approximately 90% of their production into export right along. The total quantity which they could shift from the domestic into the export market in the next three months would not be more than one and one-half million pounds. International buyers and merchants are not likely to go to the trouble and expense of equipping themselves to take black in domestic bags at U. S. seaports, package them and arrange transportation until domestic prices and transportation costs are stabilized. Neither of these factors is stable now and both of them are likely to continue in a state of confusion for the next two or three months. As for the third reason, its force is only likely to exert itself if an excessive differential is maintained continually after the factors which make up the price are stable.

In addition to the foregoing negative argument, there are, in the estimation of the management, the following positive reasons for not changing export prices at this time merely because domestic prices have changed. They are:

(1) That Carbexport was formed, in part, for the purpose of making the export and domestic markets independent of each other, as is the situation in the case of all important articles in international commerce. If this were not so it would follow that whenever the Export Corporation might find it necessary to lower prices to meet competition in one or more foreign countries, the domestic price would have to decline immediately and in like amount even tho there were no competitive pressure on it.

(2) That Carbexport is a Corporation in which its stockholders have important investments. It is reasonable of any investor to expect his Corporation to make money for him as long as it can do so competitively. In addition to having invested thus, Carbexport's stockholders pay it a fee for moving their black at a profit. If the profit were given up except under competitive pressure Carbexport's members would have reason to be skeptical of the advisability of contributing a neat sum monthly to the maintenance of an institution which fails to provide the market stability which will assure the profit.

(3) That Carbexport should act when it can in such a way as to prove that its policy is not dependent on what happens in the domestic market, lest members come to feel that they are entitled to exercise their right to freedom of action in

the domestic market as a means of dominating and affecting the export market to the disadvantage of the Corporation.

The President presented his recommendation as to export prices of carbon to continue present c. i. f. prices to customers in effect on all sailings from U. S. ports up to and including, say, March 31st, 1938, unless otherwise instructed before that date.

The directors met on December 10, 1937. Photostat copy of the minutes, exhibit 103 A–B, discloses the following action taken on prices:

It was moved and seconded that the President be authorized and instructed forthwith to announce to the trade that present c. i. f. prices will be reduced one cent per pound for the period from April 1st, 1938, to July 1st, 1938. This motion was lost.

The President presented his recommendation as to export prices of carbon black for the first quarter of 1938.

Upon motion duly made, seconded and carried, the following resolution was adopted:

"*Resolved*, That the President be and he hereby is instructed and empowered to continue the present c. i. f. prices for sales made for shipment from U. S. ports up to and including March 31st, 1938."

Thereafter, on January 22, 1938, Mr. Kayser addressed a letter to all members reading as follows (exhibit 310 A–B):

When on last December 10th the Corporation announced unchanged forward export prices for the first quarter of 1938 a number of factors bearing on price determination were seriously unsettled. An important one of these, namely ocean freights, has lately been put in order and at a lower level than seemed probable in December. It does not seem too hazardous to estimate the status of another, namely domestic rail freights, for the next several months.

Observation of the activities in export of nonmembers of the Corporation indicates strongly that at least one of them is quoting in some important markets from 7% to 11% lower than our schedules. The differential between the domestic and export base prices has increased ¾¢ since our December 10th announcement. Its size is now such as to give restive large customers strong inducement to consider long term arrangements with our competitors.

In the circumstance I consider it advisable to reduce both our purchase and sales schedules for the balance of the previously announced selling period, and therefore recommend the following:

(1) That our c. i. f. prices be reduced 75¢ per 100 lbs. for sales made for shipment from U. S. ports from February 1st, 1938, to and including March 31st, 1938.

(2) That our f. a. s. Gulf ports prices for settlement with producers on all sailings on and after February 1st, 1938, and until further notice be reduced 75¢ per 100 lbs.

The by-laws of the Corporation provide that export prices may be changed without a meeting of stockholders by the written consent of the holders of a majority of the total number of shares outstanding. I herewith request your consent to price changes as above recommended and would appreciate a reply by return mail.

All members appear to have concurred in the price decrease, two of them in writing. United, by letter dated January 31, 1938 (exhibit

311–C), and Cabot, by telegram dated January 24, 1938. Member Panhandle dissented, its letter dated January 25, 1938 (exhibit 313), reading as follows:

Your letter dated January 22 addressed to Mr. Wishnick received in his absence.

We wish to advise that we see no reason for reducing the export price at this time, and cannot agree that the present domestic price has any bearing whatsoever on what the export price should be, and we definitely vote "no" against making a lower price at this time.

Some foreign buyers were not satisfied with the reduction. Mr. Gundry of Binney & Smith's London, England, office, in a letter to Mr. Kayser dated March 3, 1938, wrote as follows (exhibit 319 C–D):

You will remember that you tried to prove that the reduction of 0.75 cent per pound in the export price of Carbon Black resulted in a net reduction of the price to the producers of one and a quarter cents per pound.

* * * * * * *

As I understand it, the price of Carbon Black in the United States has been reduced since the 1st November last by one and three-quarter cents per pound, and I believe that the present price is two and a quarter cents per pound. The price c. i. f. U. K. for the 50-pound bag packing which, after all, is the most important, is 5.21 cents per pound. At current rates I calculated that freight and insurance costs 0.76 cents per pound, which brings us to a f. a. s. figure of 4.45 cents per pound.

Mr. Kayser's answer to Mr. Gundry's argument is contained in his letter dated March 19, 1938, to the Cabot company, reading as follows (exhibit 320):

In support of my argument that during the period January 1, 1934, to November 1, 1937, the net price received by our producers from sales in export were reduced approximately ½ cent because of benefits passed on to buyers, whereas during the same period there was no reduction in the net price received from domestic buyers for like reason, I submit the following:

Our export prices prior to Dec. 1, 1934	7.90	7.53	7.28	6.43	6.43
Our export prices thereafter through period	7.43	7.15	6.97	6.21	6.21
Actual price reduction	.47	.38	.31	.22	.22
Increased freight absorbed	.38	.30	.25	.18	.16
Total diminishment of net price received	.85	.68	.56	.40	.38

Mr. Kayser testified, by means of a prepared statement, that exhibits 306 and 309 (Binney & Smith and Dunlop letters) "are typical of the pressures the few buyers who purchase more than 60 percent of the carbon black consumed are able to bring on American producers" through distributors. There were many such appeals by letter and by telephone in the period between December 10, 1937, and January 27, 1939. His statement further reads:[90]

I have only two other comments to make on Carbexport's export prices. Each statement is made explicitly.

[90] T. 1744.

The first is that Carbexport has never used price competitively against nonmembers. The export prices of nonmembers have been lower than Carbexport's prices, regularly and continuously. Carbexport's prices have never been lowered even to the point of equality to meet competition.

The second categorical statement I have to make is that the export price of carbon black has no effect on the volume of carbon black exported. The reason is wrapped in two facts. Carbon black has a very low density, and a very small quantity by weight serves its purpose in about 85 percent of its use in a manner all out of proportion to its weight. It is economically impractical to store appreciable quantities of it, both because of the amount of space required and because the stock has to be warehoused, the latter because carbon black absorbs moisture in the air like a sponge absorbs water. The cost of that kind of storage space, assuming its availability, is all out of proportion to the savings that can be effected by buying against the narrow range of price increase possible in such a low-priced commodity. The heavy movement of carbon black into export in 1939 had nothing to do with the price. It was due to the fact that expectant belligerents and countries which could look forward to being cut off from supplies of carbon black with the outbreak of war began feverishly stockpiling finished rubber goods, such as tires.

It has been an exceedingly difficult problem for the United Kingdom to stockpile even sufficient carbon black during the war to prevent the shortage which as little as a 2 or 3 months interruption of ocean transport would create.

I call attention to exhibits 310 a–b, 311 a–b–c, and 312 to bring out that only the association of carbon black exporters as permitted by the Webb-Pomerene Act made it possible to effectively limit the extent of the yielding to pressure and made it possible to retreat from a previously taken position in such good order as to prevent the damaging chaos into which pressures in pre-Carbexport days had thrown exporters' interests. The orderly retreat to a line which could be held served nonmember interests to the same degree as it served member interests.

Under questioning, Mr. Kayser explained the phrase "orderly retreat" appearing in his letter of January 22, 1938 (exhibit 310 A–B), as follows: [91]

A. The orderly retreat, and I now quote from my statement, "To a line which could be held," served to hold a stable umbrella over the nonmembers and made it unnecessary for them to lower prices to an unprofitable basis.

Q. Now we are talking about export prices now?

A. That is what I am talking about, export prices.

Q. I thought your orderly retreat was so that you would have a defense against those outsiders who wanted to reflect the domestic situation in the export market?

A. You did think so?

Q. Is that erroneous?

A. I don't recall any such purpose, and I don't know any such stated purpose—or I haven't noticed any such stated purpose in these exhibits.

Q. Well, I wanted to just call your attention that I had that inference in mind so that you could make any statement that you wanted to. I had this in mind, that nonmember producers would find with the discontent that was apparent in the foreign market—because of your maintenance of the higher price because of the calamity in the domestic market—would find that export market attractive and they would say we will go under Carbexport's prices because they are apparently not willing to reflect that situation in the export market. I just wanted to warn you that I had that in back of my mind.

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[91] T. 1874.

A. I don't mind helping clarify this situation to the extent that I could, but it seems to me that you have a misconception of the carbon black industry's problems. I don't mean to say as an industry, but as the individual members.

In 1938 there were still such outsiders as Crescent Carbon Co. and Crown Carbon Co., just to take a couple of examples. Both of these companies, if my recollection is correct, were sellers in the domestic market as well as in the export market.

Now, you simply cannot—because for the moment it looks like a more attractive move—desert customers who are depending on you here, because you will never get them back, or if you do get them back it will be over a long pull. Mr. Herkness, I think, testified that he picked a market and stayed in that market for a good many years. He did not have the same problem. It would apparently not have come back into the domestic market if the reverse had been true.

Mr. Kayser testified that his letter to the Cabot company, dated March 19, 1938 (exhibit 320), was an explanation to distributors for use with their customers of the manner in which the association had absorbed freight increases. Questioned whether he knew "any instance when export prices influenced or affected the domestic competitive price," he replied as follows: [92]

A. The only thing I can answer is that I do not know an instance where export prices were made with the idea of affecting it. Now the word "affect" has a broad a meaning as reasonable in my estimation but if there is any idea to determine intent through that question, I will categorically say there was never a price made that was even thought as being parallel or related to the domestic price in that sense.

A tabulation of the association's export price changes for the period from May 25, 1933, to June 5, 1940, 21 in all, with reference, by exhibit number, to the directors' meeting at which authorized, is in the record as exhibit 665. Corollary to this tabulation is the following tabulation appearing at page 1739 of the transcript, which, after showing deduction of the association deficit charged back to members, gives the members' average net return per pound.

Year	Average gross price f. a. s. received per pound (cents)	Average deficit per pound charged back (cents)	Average net price f. a. s. received per pounds (cents)
1935	5.48	0.41	5.07
1936	5.40	.46	4.94
1937	5.37	.50	4.87
1938	4.41	.31	4.10
1939	4.36	.27	4.09
1940	4.42	.31	4.11
1941	4.56	.33	4.23

Exhibit 679, contained in the record is a photostatic copy of a price chart submitted to the OPA in May 1942 in support of the association's application for an export price premium. This chart depicts tonnage and price information from January 1, 1939, to February 28,

[92] T. 1896.

1942. Tabulations are made of gross price per pound received by the producer, and tabulations of deductions for association deficit, and cost between plant and Gulf port leaving a final tabulation of net return per pound to the producer. This, in comparison with a tabulation of "f. o. b. plant price of domestic black," establishes the fact of a differential in favor of export black. On this exhibit the average differential commences with 1.022 cents, and decreases as follows: 0.833, 0.683, 0.367, 0.360, 0.110, 0.232 and for the last period, January and February, 1942, 0.129 cent.

Mr. Kayser explained the decrease to two reasons, first that the export black price "moved in a different pattern than the domestic price," and second, due to a great decline in volume of exports over which the association had control between 1939 and 1942, the cost per pound increased, thus reducing the net to the producer.

It appears from exhibit 680 B, copy of a filing made with the OPA on May 6, 1946, to establish an export premium for furnace black, that filings of price information were made by the association on March 31, 1945, and April 7, 1945. This exhibit discloses use of a premium of 0.8060 cent per pound on black in bags and 0.8726 cent per pound on black in 300-pound cases. Exhibit 683, copy of an OPA letter dated May 17, 1946, heretofore quoted, indicates that the premiums appearing in exhibit 680 B, are those which were established for channel black, in view of the statement in the letter:

> Inasmuch as your new items are merely variations of carbon black upon which a premium is allowable this office has no objection to your applying to these new items those premiums which have been approved for your other types of carbon black.

The J. M. Huber, Inc., by its vice president, R. H. Eagles, on November 14, 1939, wrote identical letters to Pennsylvania Rubber Co., Jeannette, Pa., and Dunlop Tire & Rubber Co. (Mr. H. F. Van Valkenburgh), Buffalo, N. Y., the first two paragraphs of which read as follows (exhibit 487–488):

> About this time of year the air begins to fill with rumors that the price of carbon black will go up or down. This is just a line to let you know that I have heard no rumors worth mentioning as yet with regard to 1940 prices, and to the best of my knowledge contracts are not yet being offered by anyone.
>
> As you may know, our Export corporation extended current prices without change through the first quarter of 1940, but your guess is as good as mine whether this is any indicator, because the Export corporation has always functioned entirely independently of domestic conditions.

V. RESULTS OF OPERATIONS

The record contains evidence and statistical information which, though not directly connected with the seven specifications of the bill

of particulars, throws additional light on the operations of Carbon Black Export, Inc.

Mr. Hans B. Huber, president of the three Huber companies, testified that his company commenced export operations in 1923, did considerable export business in the late 1920's, and against a production ratio of 10 percent had 15 to 16 percent of total export trade when the present association was organized. Prior to formation of the association, export prices were lower than domestic prices and since then they have "been as good or better." The new group has eliminated the old evils of excessive discounts and bad credits. His company built plants in this country for five or more domestic producers and in the late 1920's negotiated for such constructions abroad for Amtorg (Russia), Sonemetan (Romania), and Comodora Rivadavia (Argentine), and is currently interested in such projects in Venezuela and Iran because of the availability of gas in those countries. By way of a prepared statement, he added the following: [93]

Carbexport has operated from 1933 to procure for the American producers a fair price for their product and has more or less effectively defeated the unfair attempts of foreign purchases to secure an American product at distress prices and frequently at less than domestic prices.

Nonmembers of Carbexport have benefited by the stabilizing influence of Carbexport even when they sold under the established prices. Foreign consumers of carbon black, both for rubber and ink products, have been put on a more fairly competitive basis with American producers for such products in foreign markets where the finished products have been sold competitively, because Carbexport has operated to keep the carbon black export price at least as high as the domestic price. Transportation rates for carbon black have been kept down by the activities of Carbexport whose weight was felt at the shipping conferences since it represented a volume of traffic having a real value to steamship lines. Carbexport has operated to permit small business to participate in export trade—a field not usually accessible to any but the larger producers in an industry. The participation of J. M. Huber Corp. to the extent of about 10 percent of the United States exports of carbon black and our enthusiastic interest in that participation are proof of this point.

The postwar period will be a trying time for the American carbon black industry. When crude rubber again becomes available, it is probable that it will replace a considerable quantity of the synthetic rubber now in use and crude requires much less carbon black. American production has been greatly expanded during the war through private as well as Government financing. Although figures are not available, it may be assumed that Russian production has also greatly expanded and that as soon as Russia can put its house in order it will make every effort to utilize its vast reserves of natural gas to satisfy its own large demand for carbon black and to capture some of the foreign carbon black market. Russia will have an added incentive in order to provide foreign exchange quickly for its rehabilitation requirements. It is known that Canada has been contemplating carbon black production. Projects for production in Venezuela and Mexico are under consideration. The large gas resources of the Middle East will undoubtedly be exploited for this purpose before long.

[93] T. 162; 750.

These conditions mean a greatly increased supply of carbon black and a much more competitive international market. But the expansion of production is not the only threat for we hear constantly of the probabilities of foreign combinations or cartels dominating the postwar markets and we have ample evidence of the tendencies of this sort in the prewar period. If American industry is to maintain its position in postwar international trade, it must be able to organize itself for the purpose and to present a unified front to the strong competitive and potentially competitive export organizations of foreign countries. Under these circumstances, it is evident that American interests will not be served and the American carbon black industry cannot hope to enjoy the position and prosperity in world markets which it has a right to, unless it is permitted to continue its present export organization and to operate with reasonable freedom in the complex and severely competitive foreign field.

Mr. Oscar Nelson, of the United company, by way of prepared statement, submitted the following information: [94]

It is my opinion that in the postwar period the channel black industry in the United States is likely to meet serious competition in the export market from carbon black manufactured elsewhere. Before the war there was carbon black production in Formosa and in Russia and plans were under way for such production in Rumania. Russia, especially, may well become an important competitor after the war, as the industry there has had some twelve years of growth. More particularly, I anticipate competition in the export market from companies operating in Venezuela, Colombia, Brazil, Arabia, the islands of the Persian Gulf, and Iran. In all these localities there are large quantities of natural gas now going to waste with no local industrial market. Most of these fields are reasonably close to seaports, thus permitting ocean transportation, whereas most of the carbon black industry in the United States has a long and expensive rail haul to seaboard. Since the shortage of carbon black became acute, particularly in the last few months, there have been discussions in governmental circles of the advisability of building channel plants in these foreign countries (M. S. p. 17). Thus the attention of the oil companies, both American and British and Dutch, has been focused on this situation. With very cheap labor costs in these foreign areas and no market value for the gas going to waste, it is evident that the export market can only be retained by American companies through the exercise of superior service and marketing practices. Carbexport is the only agency large enough and strong enough to do this.

Mr. Thomas D. Cabot, of the Cabot company, submitted a prepared statement reading, in part, as follows: [95]

The effect of the formation of Carbon Black Export, Inc., has been to stabilize export prices at levels which have changed less frequently and have averaged somewhat higher in net return to the producer than domestic prices. This has benefited both member and nonmember producers. Unquestionably, nonmember producers have benefited the most because being free to cut the Carbexport prices they have increased their share of the profitable export business.

As a director of Carbon Black Export, Inc., I have consistently voted for the maintenance of export prices which were a little, but not much higher than the domestic prices prevailing from time to time, believing that the maintenance of too high a price would encourage foreign competition. I think the best evidence of effectiveness of Carbon Black Export, Inc., in benefiting American producers

[94] T. 643.
[95] T. 1082; 1098.

is the small amount of growth in foreign production. The gas reserves of the United States are usually estimated at slightly over 100 trillion cubic feet, whereas there is considerably more than 100 trillion cubic feet estimated in the known gas fields outside of the United States. Nevertheless, according to the best available estimates I have of foreign production, something over 98 percent of all carbon black made from natural gas is produced in this country.

After making reference to Russian, German, Rumanian, and Japanese production of carbon black, and the tremendous reserves in Iran, he was questioned as follows:

Q. Well, now, Mr. Cabot, connect what you have been saying, if you will, please, concerning this competition and potential competition and potential postwar competition with the continued existence of Carbon Black Export, Inc.

A. It is my opinion that by having a central agency for the sale of carbon black, the American manufacturers can be more alert to the potentialities of foreign competition and more alert in meeting potential competition before it gets developed and takes away the markets now supplied by American manufacturers.

* * * * * * *

Q. If a policy is pursued of eliminating industries with a so-called war potential do you believe that the carbon black would be one of the industries that wouldn't be permitted, say in Germany and in Japan?

A. I don't know the meaning of the world "war potential." If you mean that the aggressive nations must have carbon black in order to pursue a military policy, my answer is "Yes," they must have carbon black in order to fight a good land war. And if we permit potential aggressor nations to build up a large carbon black producing capacity, they are more dangerous antagonists than if they haven't that industry already built up and must build it up after war is declared.

Q. As a matter of fact, your illustration of the destruction and rebuilding and destruction of the plant in Russia as between the Germans and the Russians is illustrative of the importance that they apparently attached to a plant of that sort?

A. Yes, that is true. I might say with respect to Japan that Japan probably accumulated about 15 million pounds of carbon black in storage before it attacked us at Pearl Harbor.

* * * * * * *

Q. Well, now, let's shift to the other type of buying that I believe you suggested yourself, the cooperative buying or governmental buying through purchasing missions in this country. To what extent do you believe that that growing practice calls for continuation of Carbon Black Export?

A. I think it doesn't need demonstration that collective bargaining is an advantage. The buying countries have now adopted collective buying as a technique. They have appointed government purchasing commissions to buy the whole requirements of some consuming country.

Were we to be denied the right to collective bargaining, we would have to bargain individually, and the collective buyers would deal with individual sellers and play one off against the other, and thus get a lower price than if he had to deal with a collective bargaining seller—with a cooperative seller such as Carbon Black Export, Inc.

Q. Thus, for example, if France decides to purchase the entire requirements of French consumers of carbon black as a unit, you want to be in a position to sell them their requirements as a unit?

A. That is right.

Mr. Kayser testified to the fact that German manufacture of carbon black which, in 1937, he estimated at 3,500 tons annually, grew to a 6,000-ton rate by 1939 (exhibit 681 A–F). Statistics of exports compiled by the Department of Commerce (exhibits 153–157) showed exports to Germany between 1935 and 1939 ranging 8,175 to 12,000 tons, which, he testified, indicated that the Germans were building up for war. Germany represented one of the association's three or four major markets. After stating that Russia has 22 available gas fields, his testimony continues: [96]

> The record is also full of references to Iran, Saudi Arabia, Venezuela, and other spots in the world that have abundant gas supplies; up to this date, as far as I know, no carbon black plants have been built.
>
> However, with the peculiar relationship of those countries to each other—the inability of certain countries to obtain the dollars with which to buy American goods—well, there is an urgency, there is a pressure on them to produce commodities of their own to replace those that they cannot buy.
>
> It is not at all unlikely that a number of these areas will go into the carbon black business or will, at least, find it attractive.
>
> I know that during the war period, my own Government thought seriously of helping some of them go into the carbon black business, with good American money and good American plants.
>
> The thing I want to get into the record is the seriousness of it, as a concern to the carbon black manufacturers, the potentiality of competition. It is more difficult for the individual operator in the industry to meet competition than if he is a member of a group. They can do it in a big way.
>
> One of the big ways that I brought out is this idea of bulk shipping in export, which requires installations abroad that an individual operator would hesitate to make because of the expense, relative to its position in the trade.

In 1935, the German Import Control Board undertook to place all German imports on a barter basis. Mr. Kayser made a study of this question as well as the related question of blocked marks, submitting a 13-page report to his distributors, exhibit 64 A–N, dated April 18, 1935. On May 25, 1935, he wrote Binney & Smith as follows, in part (exhibit 65):

> We advise our distributors that there is nothing in the regulations or in the attitude of Carbexport to prevent any of them from entering into barter transactions on their own account, and at their own risk. However, since the technique of barter, as that type of trade progresses, may lead over paths of such variety as to greatly increase the probability of digression from Corporation price schedules and regulations, it is necessary to effective maintenance of prices and trade rules that the Corporation have full knowledge of all barter trades made.

He testified that the association never imported commodities into the United States and that he knew of no distributor of the association engaging in barter.

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[96] T. 1990; 1999.

Mr. Reid L. Carr, at the June 19, 1945, hearing read into the record a statement from which the following quotations are made: [97]

The effect of the war upon normal export trade has been threefold: (1) Exports to enemy and enemy-occupied countries have been completely cut off, (2) lack of shipping has reduced exports to neutral countries to a mere trickle, (3) lend-lease shipments have replaced normal exports to our Allies.

The effect is graphically shown by the following export statistics as to channel black:

	Export	*Lend-lease*
1939	153, 800, 000	----------
1940	121, 100, 000	----------
1941	69, 400, 000	23, 535, 000
1942	13, 900, 000	37, 344, 000
1943	10, 700, 000	36, 021, 000
1944	10, 700, 000	70, 317, 000

Lend-lease sales are made at the domestic price plus cost of export packing. In connection with such sales Carbon Black Export has rendered a material service and saving to the Government, by casing black at the pier for foreign shipment at a cost materially lower than the same service could have been performed by the several producers at their respective plants.

Since January 1, 1945, the British Raw Materials Commission has taken over the purchase of all black for the United Kingdom, but lend-lease shipments to Russia, India, New Zealand, and Australia will presumably continue until the expiration of the Lend-Lease Act. Shipments to France are entirely made to the United States Army Ordnance.

* * * * * * *

When the Export corporation was organized, the production of black by the furnace process or by thermal decomposition was small, and the black was very different in quality and uses from channel black. Consequently it was not a competitor of channel black in the export trade.

During the war, the furnace process has undergone great development, and furnace blacks of the HMF and FT types are now produced which in synthetic rubber tires approach channel black in reinforcing quality and excel it in cool running properties. These blacks are being constantly improved and will undoubtedly prove serious rivals of channel black for many purposes in the postwar period, particularly in synthetic rubber compounds. The production of HMF and FT furnace blacks is now at the rate of 20 million pounds per annum, and will exceed 275 million pounds by the end of 1945.

The new problems confronting the industry in the postwar period from a volume standpoint are indicated by the following comparative figures:

Production (pounds)

	1941 (the peak prewar year)	*Postwar capacity*
Channel	487, 967, 000	[1] 675, 000, 000
HMF furnace	0	275, 000, 000
Other furnace (including Thermal)	106, 098, 000	450, 000, 000
Total	594, 065, 000	1, 400, 000, 000

[1] Including 177,000,000 from D. P. C. plants.

* * * * * * *

[97] T. 389; 397.

Another condition which the industry must face is the virtual certainty that various foreign nations will unify their purchasing power under a governmental agency, as the British have already done by means of their Raw Materials Commission. It is rumored that France will soon establish a similar national purchasing agency. Russia also has its Amtorg. Individual producers or exporters would be at a hopeless disadvantage in bargaining separately with such foreign agencies, which would have power to promise or deny to a producer the business of an entire nation. It is not difficult to foresee what would happen to export prices in such an unequal contest. Only a strong organization representing the collective judgment of the industry, functioning under Governmental supervision, can assure a profitable export market for American carbon black.

* * * * * * *

Another uncertainty that beclouds the export market at the present time is the availability in the various countries of natural and synthetic rubber. It is estimated that from 2 to 4 years will elapse after the termination of the war against Japan before a normal supply of natural rubber will be available in the world markets. Synthetic rubber requires on the average approximately 50 percent more carbon black per pound that natural rubber, and also a different proportion between channel and furnace blacks. Thus the volumes and types of black that will be required by the export market in the immediate postwar years are extremely problematical.

Supplementing the testimony about potential foreign production referred to above, is exhibit 577 A–F, photostat copy of a report on Romanian carbon black production, submitted to the Association on February 19, 1939, by Ralph E. Davis, Inc., engineers, Pittsburgh, Pa. Mr. Kayser testified that the association paid part of the cost of this report. Mr. Billings of the Cabot company had made a survey in Romania in 1938 in which year the association commenced to receive reports from its agents of Romanian black shipments to the Continental Gummiwerke, Pirelli, Semperit, and Beta companies, its customers in Germany, Italy, and Czechoslovakia, respectively. The Davis report (exhibit 577 A–F) states that a pilot plant operated by a government-controlled corporation, "Sonemetan," using a process patented in Poland, can manufacture 10 pounds of furnace black per thousand cubic feet of gas, or about the equivalent of American methods. The report estimates Romanian gas potential at 5 trillion cubic feet.

Evidence in the record on the reaction of customers to the price of carbon black appears in the questioning of Mr. A. D. Moss, director of purchases for B. F. Goodrich Co.[98]

Q. Having in mind the statement that you have made that the existing export association has proved more effective, especially in price, do you have any objection to doing business in the export market through the Webb-Pomerene Export Association which the Carbon Black Export is?

A. I might say that I don't like to pay twice as much in the export market as I pay in the domestic market, but other than that I have no objections to

[98] T. 1189–1190.

doing business with them; it is the same personnel we contact in one case as the other.

Q. Let's dwell on that price differential a minute. Why do you, if you have, pay, say, twice as much in the foreign market as you have in the domestic market?

A. We haven't found a way to negotiate at all effectively with respect to export prices. They are fixed in a central point and all of the major companies apparently are in the export corporation, and that's about all there is to it.

Mr. D. B. Max, Binney & Smith's London agent, wrote Mr. Kayser, on November 29, 1937, as follows (exhibit 304):

It has occurred to the writer that possibly the Export corporation should consider filing a brief with the Department of State, to be used in conjunction with the Reciprocity Treaty under consideration between the United States and England.

It does not seem logical to the writer that such a high rate of duty should be charged on carbon black in England, in view of the fact that that material must be imported from the United States. You are no doubt familiar with the fact that within certain limits the consumption of carbon black is adversely affected by the high delivered cost at any plant; in other words, there is a tendency to increase the dosage of carbon black in any formula when carbon black is cheap in comparison with other materials going into the formulation of rubber goods, ink, etc.

Will you please be good enough to give this matter your prompt attention, because a brief if filed must be received in Washington within the next few weeks.

Mr. Kayser testified as follows on this matter: [99]

Exhibit 304 is a letter from Mr. D. B. Max of Binney & Smith Co., one of our distributors, to me suggesting the filing of a brief with the State Department in connection with a Reciprocity Treaty between the United States and England. Among other things Mr. Max says: "You are familiar with the fact that within certain limits the consumption of carbon blacks is adversely affected by the high delivered cost at any plant; in other words, there is a tendency to increase the dosage of carbon black in any formula when carbon black is cheap in comparison with other materials going into the formulation of rubber goods, ink, etc." I was not familiar with "the fact," nor do I believe it to be a fact—certainly not in the compounding of rubber goods, which represents 85 percent of the use of carbon black, because the cost of the total carbon black used in any rubber compound is such a minuscule item in the cost of the rubber product. I am equally sure that it is not a fact in ink manufacture, where the printing inks consume perhaps half of the balance of carbon black sold.

The association's statistical service to its members and distributors included annual summaries of export sales which carried some information about the volume of outsiders' export business. These are described as follows: Exhibits 110 A–D consist of statistical records of actual annual export shipments and destinations by the association's eight distributors in the period 1935–39, and designated as "Reference 105." Exhibits 111 A–I depict sales (as distinguished

[99] T. 1741.

from calendar year shipments) by the distributors during the period 1934–41, and designated "Reference 100." Exhibits 142–146, are designated "Reference 102," are titled "Comparative analysis of shipments by Carbon Black Export, Inc., and by outsiders * * *," and give shipment totals of both groups by destination for the years 1936 to 1940 (first 6 months). Exhibits 148–151, designated "Reference 103," depict comparisons of outsiders' and members' shipments for the years 1935–36, 1936–37, 1937–38, and 1938–39. Exhibits 152 to 157, designated "Reference 101–9," depict the shipments recorded in exhibits 142–146 as contrasted to Department of Commerce statistics for the comparable years under the title "Reconciliation of actual shipments by Carbexport and Outsiders * * * with total exports announced by United States Department of Commerce." Exhibit 147 is the photostat copy of a letter from Mr. Kayser to all distributors, dated February 5, 1941, and reading as follows:

> Reference No. 102, one of our regular annual statistical reports, is herewith enclosed. It is a comparative analysis of Exports by Carbexport and by outsiders to all markets for the year 1939 and for the first six months of 1940. The first half of 1940 is covered in place of the whole year because the shorter period is the only one for which we consider our information as reliable as formerly.
>
> While this statistical report does not have the usual value, it demonstrates that outsiders are able to dispose of their portion of export black under the difficult conditions today. It is possible that they have been doing even better, percentagewise, since July 1, 1940, than their performance for the first half-year indicates. To be on the safe side on that point whenever we are making a study of the export markets in which outsider performance must be taken into consideration, we allow them a 12% percentage for safety's sake.

Mr. Kayser testified that forwarders employed to handle goods at various ports furnished the data about outsiders' shipments without charge. This information is available from port newspapers, shipping journals, and ship manifests which are public records and is accessible to any outsider if he desires it.

Mr. Kayser made reference to exhibits 641–647 being photostats of correspondence occuring between August 17 and December 9, 1938, relative to standard shipping containers. These indicate the establishment by the association of a standard 1.95 cubic foot capacity for latex and paper bags which had been used as containers since 1934. In 1937, he testified, the French steamship lines sought to bar these containers but that he fought this proposal, his testimony reading as follows:[1]

> Carbexport resisted this move, because this type of packing meant a saving to buyers abroad of about 30 cents per 100 pounds. Through its unique ability to survey and develop the handling experience with respect of so large a volume at the world's principal ports of both embarkation and discharge, Carbexport was able to prove that the fault lay less in the packages themselves than in

[1] T. 1726–1728; 1754.

careless stowage and handling by the ships of the complaining lines and to defeat this move. While the Conference Lines found it necessary to withdraw on the question of barring these packages, they undertook to offset the set-back by imposing a special and higher rate on bag shipments than on shipments in wood cases. It took negotiations over an extended period to defeat that move. The outcome of this controversy was that Carbexport saved to foreign buyers, whether they purchased from members or non-members of Carbexport, all the economies they had enjoyed through the use of shipment of carbon black to them in bags.

Along these lines, he described action taken on ocean freights as follows:

A steamship conference is a combination of steamship lines whose vessels ply competitively between the same port or ports in certain areas that are close to each other. Under the Shipping Act of 1916 such lines are given the right to combine and agree on rates, types of cargo, uniform contracts with shippers, etc. There are many steamship conferences. For instance, the Gulf-Mediterranean Conference, the Gulf-United Kingdom Conference, the Gulf-French Atlantic Hamburg Range Freight Conference, etc. A copy of a typical conference contract, attached as exhibit 625, is offered as an example and lists the steamship lines which were members of the two last-named conferences in 1934. Clauses 1 and 7 of this contract should be particularly noted as indicating the type conditions the Shipping Act permitted steamship lines in combination to make.

When the individual shippers made their individual arrangements for ocean rates, etc., with conference lines few had enough cargo to demand close attention to their interests of conference rate-making bodies. Nor were they individually able to insist effectively on equal treatment in times of tight or scarce space.

In the late fall of 1933 Carbexport let it be known to the conferences that the bulk of export carbon black would thereafter be shipped by it and that thereafter it, and not its members, would negotiate shipping contracts. The Gulf-United Kingdom Conference and Gulf-French Atlantic Hamburg Range Freight Conference had previously decided on a freight rate increase of 4 cents per cubic foot of ship space for carbon black cargo, and to limit the application of the rate to shipments made in the first three months of 1934, as revealed by exhibit 626 A and B, herewith submitted. When the conferences learned of the handling of so large a volume of exports by Carbexport they acknowledged the trading power thus represented by lowering their demand for increased rates to 3 cents. On the other hand they thought to save themselves the opportunity to raise at an early date by limiting the lower rate to January shipments. Exhibits 627 to and including 639 are copies of correspondence which show the course and length of negotiations through which Carbexport, as a combination of interests allowed by the Webb-Pomerene Act, saved buyers of carbon black abroad 1 cent per cubic foot for at least 6 months in its first negotiation with the conference lines. This saving was subsequently extended for the full year of 1934.

Until the outbreak of war in Europe, when steamship conferences dissolved as a matter of necessity, all ocean rates applying to carbon black were always carefully and thoroughly negotiated, with consequent benefits to buyers in the export markets.

The exhibits referred to, 625–640, are photostats of the correspondence and contracts with "Members of the Gulf-United Kingdom Con-

ference and Gulf-French Atlantic Hamburg Range Freight Conference." Under the paragraphs referred to by Mr. Kayser, the first requires exporter to ship all his exports by the conference line, and the seventh provides for increase in freight rate to prevailing schedule in case of shipper's violation of paragraph one. Exhibit 625 is the contract for the year 1934, and exhibit 640 covers the year 1939. Mr. Kayser expressed his belief that rates thus established were available to nonmembers of the association.

Mr. Kayser gave the following testimony describing the latest development in the shipment of black:

In brief, this project contemplates moving black in bulk by covered hopper cars—instead of in small packages as has always been customary—from producing plant to seaboard, to be unloaded there into barge storage or into stationary silos similar to grain elevators. The next step contemplates loading from storage by air-lift or otherwise into a canvas bag tailored to line a lower hold of a ship for overseas transportation in bulk. Overseas the ship would be unloaded by air-lift or otherwise into stationary waterfront storage, from which it could be transported to consumers in bulk in covered hopper cars—or at which it could be packaged for customers unable to take in bulk. The saving in export transportation and handling costs were and are still expected to be of such magnitude as to keep American carbon black competitive, at least in the large export markets, with any foreseen foreign production. The savings in bulk handling from inland American carbon black plants to Gulf ports were carefully investigated and reported on by me. They were found to be considerable. A crude experimental job of handling from hopper car into ship's hold, of transport from Corpus Christi, Tex., to Boston and of unloading there from ship to hopper cars on barges alongside was actually carried out. Pictures of this operation are attached as exhibits 583 B through J. The outbreak of war made it necessary to abandon further experiment and the study of the foreign end of the scheme until a later date, which has of course not yet arrived.

The matter of packaging black for export played an important part during the war as the following further testimony of Mr. Kayser shows:

By the fall of 1939 the bulk of carbon black was being exported in paper and asphalt-impregnated jute bags, packed at the manufacturing plants of Carbexport members. With the outbreak of war in Europe at that time steamship agencies transporting to the United Kingdom and some other countries refused to take bag shipments and required packing of the bags in wooden cases.

By the spring of 1940 Carbexport members, particularly those supplying the largest quantities of carbon black for export, began to find the packing in wood at their plants a burden on their operations and a strain on their facilities. Carbexport then experimented with taking delivery at Houston, Tex., its principal shipping port, in the domestic paper bag and doing the packing itself. This experiment proved not only that handling in that fashion was practical but also that it produced a considerable saving in the cost of delivery of wood-packed black f. a. s. the port. By late summer 1940 the packing operation at Houston was operating continuously. Photographs of this operation, namely exhibits 648 a through g, as well as photographs of another operation established at Savannah, Ga., in 1941, namely exhibits 649 a through h, are attached.

The existence of the packing operation at Houston, Tex., and the experience gained from it, turned out to the advantage of our Government when, in the summer of 1941, it began to purchase carbon black for export shipment via lend-lease.

Lend-lease exports

In the summer of 1941 the Procurement Division of the Treasury Department began making purchases of carbon black for lend-lease export to Great Britain. In subsequent years it added Australia, New Zealand, India, French North Africa, and Russia as countries to which it would supply carbon black under lend-lease.

Every inquiry Treasury Procurement has issued for carbon black to be supplied to the above-named countries has carried the name of the country to be supplied and has carried a notation that the material was to be packaged for export. Every quotation Carbexport has submitted in reply to the said inquiries and every purchase made by Treasury has been on an f. a. s. or "within reach of ship's tackle" basis.

In July 1941 I personally applied to Mr. Freeman, then Chief of Contract and Purchase Branch, for an opportunity to bid on Treasury's requirements of carbon black for lend-lease shipment. At a conference, attended also by a Treasury official named Mr. Landick, Mr. Freeman stated that he had been advised that a Webb-Pomerene association had the privilege of fixing its export prices and that Treasury was unwilling to buy on a fixed price base. In reply to my inquiry, Mr. Freeman stated that Treasury felt its duty to be to buy at domestic prices.

I pointed out to Mr. Freeman (1) that carbon black could only be exported in packages, (2) that British War Transport would not accept the only type of package used on at least 90 percent of domestic package business, namely carbon black in paper bags, unless they were covered with wood cases, and (3) that the manufacturer would naturally have to add the cost of packaging in wood to his domestic price for carbon black in paper bags in order to quote on what Treasury would need. I furthermore stated that I felt certain that every member of Carbon Black Export, Inc., would be willing to renounce the right to a controlled export price which his contract with Carbexport gave him, as far as carbon black to be furnished the United States Government for lend-lease export was concerned, in order that the Treasury might not be denied the same advantages from Carbexport's ability to do a turnkey job which they themselves enjoyed in direct export. Mr. Freeman wanted to know what those advantages might be. The advantages I explained to him were in the main:

(1) A saving of freight cost on at least 18 pounds of wood for every 100 pounds of carbon black;

(2) The saving accruing from a lower wage rate for labor at seaboard than at inland factory locations;

(3) The probability that such savings could be made on Treasury requirements of carbon black which were outside Carbexport's control for export, such as high-grade channel blacks, furnace blacks and thermal blacks, as well as on those that were. There appeared no good reason why the producers of such "outside" blacks, whether they were members of Carbexport or not, should refuse to sell them to Carbexport in their domestic paper bags at their domestic prices in order to assure their delivery to Treasury Procurement for lend-lease export at the cheapest cost possible;

(4) The savings accruing from the purchase of case shooks in a volume large enough to take care of the total quantity of an order as against purchase thereof

by individual shippers to cover whatever share of the said total which might be awarded to them;

(5) An expert knowledge of equivalents of grades which would be called for but which it might be impossible to obtain in time to make shipping schedules;

(6) A complete job, at cost, of assembly and delivery to shipside from more than thirty carbon black plants located principally in Texas, Louisiana, New Mexico, and Oklahoma but also as far away as California and Washington, thus freeing the Treasury personnel, except those which would in any case have to keep records, for the many other difficult tasks which were the responsibility of Treasury Procurement.

On the basis of the statements above recited, Mr. Freeman agreed that Treasury Procurement would entertain Carbexport's bids.

All members of Carbexport did renounce those rights, as I believed they would. All members offered to sell such carbon black as Carbexport might buy from them for delivery to Treasury Procurement at their domestic prices. All nonmember producers of carbon black in the country, with the exception of one, likewise undertook to sell to Carbexport at their domestic prices such carbon black as Carbexport might offer to buy from them for lend-lease export.

Mr. H. L. Titus, who succeeded Mr. Kayser as president, at the last hearing, August 20, 1946, testified with respect to the OPA export price differential referred to in exhibit 680 A–B, that such differential (0.8060 and 0.8726 cent per pound on bag and case containers) "reflected what had been the custom of the trade in 1942—Carbon Black Export, Inc., in 1942 exported probably 85 percent of all carbon black that left the United States." He outlined a program authorized by the directors in a meeting held May 29, 1946, to facilitate movement of the association's exports to the United Kingdom in the face of currency exchange problems. The plan, worked out by agreement with the Guaranty Trust Co. of New York City, consists simply of an understanding that British purchaser transmit with his order an authenticated import permit. The seller (association), upon filing this permit with shipping documents at the bank, is paid in American dollars, and the buyer, upon receipt of the shipment pays the London branch of the bank in pounds sterling.

Mr. Titus characterized this program as follows: [2]

I do not claim that this problem could only have been solved by a Webb Act association. I do think, however, that a great many American exporters cannot afford to maintain a staff, trained and competent, to meet such situations, while it is a fundamental purpose of a Webb Act association to provide exactly that service and skill to its members.

This investigation was closed at the conclusion of the last hearing held on August 20, 1946. Thereafter, on October 20, 1948, it was reopened for the purpose of adding to the record a stipulation bearing the same date and signed by attorneys for all parties containing relevant information bringing the file up to date. The stipulation is

[2] T. 2008; 2020.

a 21-page document accompanied by 9 photostatic exhibits and the whole is included in the exhibit file numbered 1–9 and identified as exhibit No. 686 A to Z–4. Contained therein is the following information supplementary to facts now in the record:

The mode of purchasing gas on a royalty contract basis described in section IV–A herein has been discontinued in favor of a cash-per-unit-of-gas basis.

The royalty contracts with Phillips Petroleum Co. were discontinued by respondents Cabot (on the part of its subsidiary Texas-Elf Carbon Co.), Panhandle, Columbian, and United in the period between April 1, 1945, and July 16, 1947.

Respondent Panhandle Carbon Co., Inc., had its name changed to Witco Carbon Co., by corporate amendment on July 31, 1948.

The admission to membership in the association by manufacturers Imperial Oil & Gas Products Co. and Continental Carbon Co., referred to in section IV–C herein, actually was consummated on the dates August 26, 1946, and September 3, 1946, respectively.

The old association, Carbon Black Export Association, Inc., referred to in section III–B herein, was formally dissolved on December 1, 1933.

The governmental control on export of channel carbon black, referred to in section III–A herein limiting such exports to 9,000,000 pounds per month, has been twice modified. First, the original order (exhibit 686 Z–2) known as Priorities Decision No. 100, was in effect rescinded by removal of channel carbon black from the so-called "restricted" list under the terms of Current Export Bulletin No. 404 issued by the Office of International Trade of the United States Department of Commerce on May 27, 1947 (exhibit 686 Z–3). Subsequently, and effective at the date of the stipulation, channel carbon black exports are subject to the terms of the aforenamed Department's Current Export Bulletin No. 434, which requires a special license for export shipments valued in excess of $100 to Europe and adjacent territory known as the "R" countries (exhibit 686 Z–4).

Supplementary to the evidence reported in section V relative to the British and French Purchasing Missions and the association's cooperation with that effort through the Lend-Lease Administration, the stipulation recites that from early 1946 similar purchasing missions operated in this country for Belgium, Norway, Denmark, Italy, Australia, New Zealand, India, British Colonies, Union of South Africa, and Portugal. These missions, upon the termination of the Lend-Lease Administration, have not completely disbanded, but continue to function for their respective governments in the administration of import controls necessitated by monetary and trade balance considerations. Private trading for a short interval operated in trade with

Czechoslovakia and Yugoslavia but recent information discloses the existence and operation of state corporations known, respectively in the two countries as "Kotva" and "Hempro" for the handling of all imports. Sales of carbon black to Japan are made to an agency called "Boeki Cho" subject to approval of the Occupation Authority. Export sales to Germany may be made direct to consumers upon approval of the Joint Export Import Agency.

Membership affiliation by the Continental and Imperial companies in August and September 1946, left but one competing nonmember of channel carbon black, the Crown Carbon Co., a company organized by Mr. R. I. Wishnick, an executive officer of association members Continental and Witco (ex-Panhandle). Two new competitors are currently preparing for production: The Sid Richardson Carbon Co., which took over a Defense Plant Corporation plant at Odessa, Tex., in early 1948, with an estimated annual production capacity of 60,000,000 pounds. Witco Hydrocarbon Co., another interest of Mr. R. I. Wishnick, is completing construction of a plant with an estimated annual production capacity of 11,000,000 pounds.

Further supplementing section III–A of this report, there has been no addition to the four nonmember producers of furnace carbon black there named—the Crown, Phillips, Thermatonic, and Jefferson Lake companies. This type of carbon black is viewed by the association as a potentially serious competitor of its product, the stipulation referring to exhibit 686 W, a specimen of Phillips Petroleum Co. advertising representing its product as "proving daily that it gives lower heat build up—long flexible life and high tensile strength and gives tires strong resistance to cuts, cracks, and abrasion."

Facts set forth in the stipulation corroborate the testimony of association officers contained in section V herein relative to the imminence of competition from carbon black production in Germany, Romania, Russia, and Venezuela, but with no tangible evidence of specific development. However, the production of carbon black in Russia can be assumed to be substantial when measured by the amounts necessarily incorporated in tires and other rubber products produced and used in Russia and neighboring countries under its aegis. Carbon black production in the Middle East has apparently passed from the potential to the planning stage, the stipulation referring to exhibit 686 X, which discloses that the British House of Commons has designated the "Interdepartmental Committee on the Production of Carbon Black" to discuss with the Anglo-Iranian Oil Co., "regarding the erection of a plant in Persia for the manufacture of carbon black suitable for tire production." This exhibit, together with exhibits 686 Y–Z and 686 Z–1, all of them copies of articles from the trade periodical "India Rubber Journal," point up the fact spurring British action to be the

spending (in 1946 alone) of five and a quarter million dollars for carbon black in the face of a scarcity of dollars. The latter two exhibits refer to two seemingly advanced developments: A project by the United Chemical Co. Ltd., to construct a plant in England for manufacture of carbon black under the Phillips Petroleum Co. process with annual production of 50,000,000 pounds. This plant would use as raw material liquid hydrocarbons instead of gas. The second project contemplates erection of a plant in Wales, using coal as the raw material. The formidable nature of this competition is emphasized by the fact that the association's exports to the United Kingdom in 1947 amounted to 80,000,000 pounds, or approximately 40 percent of its total exports. This information has alerted the association to the danger of losing its place in this market unless it can be maintained by providing superior quality standards and services.

The stipulation also recites facts relating to the divestiture of commingling interests in four plants between the Phillips Petroleum Co. and four of the association members, Cabot, Columbian, United, and Panhandle (now Witco). Phillips and Cabot still jointly own the Texas-Elf Carbon Co. plant. However, Phillips has no say in the management, having granted to Cabot all right and power to vote its stock, name officers and directors who are not Phillips officers or employees and to operate this plant entirely independent of Phillips (exhibit 686 H). Included as exhibit 686 V is a report of the disposal by the War Assets Administration of surplus carbon black producing plants. These matters are hereinafter referred to in consideration of the domestic angle of the investigation, this report being here concluded as to the export matters embodied in the first seven specifications of the bill of particulars.

VI. CONTRACTS AFFECTING DOMESTIC COMMERCE

A. *Restriction of Production*

Paragraph 1 of section B of the bill of particulars consists of the following specification:

1. Contracts with manufacturers of carbon black which limit and restrict their production and sale of carbon black within the United States.

The evidence procured in the investigation under this specification consists of the overtures to restrict production of carbon black which were made to nonmember producers Chas. Eneu Johnson & Co., and the Continental Carbon Co. in the years 1933 and 1936, respectively. The nonmembers in each case denied any agreement and actually increased their production. The evidence on these episodes is reported hereinabove under the first specification of the bill of particulars referring to exclusive dealing with nonmember producers. The first

incident is reported at pages 40 to 52 hereof, titled "Herkness Negotiations," and the second at pages 62–78 under the heading "Continental Quota."

Two years later, in the midst of the bulk price differential war hereafter referred to, there passed the following correspondence, which is included herein because relevant to this general subject. However, no evidence was adduced showing that the export association was involved in the matters hereafter detailed in this section of the report.

Exhibit 337 A–B. Photostat of letter dated February 18, 1938, from Godfrey L. Cabot to Oscar Nelson of United. After comment about excess stocks of carbon black due to over-production at the rate of 16,000,000 pounds per month, the fifth and sixth paragraphs of the letter suggest curtailment of production, in the following language:

> With regard to the United Carbon Company, are they not in a rather strong position relative to certain other producers and would it not be possible in case of curtailment by the United Carbon Company to have a gentlemen's agreement with those with whom you are most closely in touch that they should curtail in the same ratio as the United Carbon Company.
>
> Of course, I recognize that any such agreement wouldn't be binding at law and ought not to be put into writing, because otherwise it might be embarrassing, due to the inquisitorial policy of the present Administration, although I believe it is perfectly legal and defensible in any criminal proceedings in case any attempt is made to penalize it, and for the reason that I think it would be clear to any competent judge and unprejudiced jury that such an arrangement, under present conditions, would be primarily and essentially a conservation action and not an action in restraint of trade, for, of course, there would be no penalty attached to its breach and it very distinctly would tend to diminish the proportion of natural gas that was sold at a price below 1½¢ a thousand.

Mr. Reid Carr of Columbian, questioned with respect to the curtailment suggestions contained in the foregoing exhibit, testified that no one had approached him on that subject and that "no one made any such agreement" (Tr. 560).

Mr. Oscar Nelson, to whom the letter was directed, testified that curtailment was never practiced by any common consent because, excepting Huber, none of the producers own their own gas wells, so that curtailment would require dealing with gasoline refinery owners of gas wells, and in addition conflict with state laws prohibiting gas to be blown into the air. He did not believe there was any over-production at that time (Tr. 637). He further testified that he did not undertake to carry out Mr. Cabot's suggestion (Tr. 701).

Exhibit 324 A is the photostat of a letter dated April 10, 1939, from Mr. C. E. Kayser to Mr. Oscar Nelson, in which the last three paragraphs read as follows:

> The Royalty Owners Association for the Texas Panhandle held a well attended meeting in Amarillo on March 8th. Ernest Thompson, Railroad Commissioner,

and Senator C. C. Small were present. Much of the meeting was taken up in blaming the carbon black manufacturers for the low returns Royalty Owners receive on natural gas produced from their properties. The Amarillo News-Globe on the 9th reports on Senator Small's contribution to the meeting as follows:

"The Senator (Small) also took a rather significant fling at the carbon black companies, who he said were in a big way responsible for the low returns on gas royalty being paid for gas processed for carbon black, by holding the price to such a low level. He intimated clearly that a law shutting off carbon black manufacture might be a real remedy until such time that it became scarce enough to command a reasonable price."

Mr. Oscar Nelson's testimony on this subject reads as follows (Tr. 634–635):

Quite generally the gas companies received 30 percent of the gross carbon-black sales as payment for the residue gas delivered to the carbon companies. After all the expenses of transportation and treatment of the gas in gasoline plants and the burning of the same in the carbon plants, the one-eighth of the net proceeds remaining was a very small sum indeed; probably less than 1 mill per thousand cubic feet. The landowners were much discontented with this situation, particularly after the price of carbon black had fallen to 2¼ cents per pound f. o. b. plant. This discontent was reflected by concerted action taken by an association of royalty owners which comprised the landowners from whose farms the gas was taken and, in some instances, smaller oil and gas companies who produced the gas and sold it to the distributing company, and other landowners throughout Texas. Demands were made upon their representatives in the Texas Legislature for legislation adverse to the carbon industry. Another form of their activity was their appeal or demand for an increase in the price paid them for their gas. I felt at the time that if the market price of carbon black did not improve so that these Texas landowners would derive a better return from their interest in the natural gas, we would have legislation in Texas certainly restricting and perhaps abolishing the manufacture of carbon black in that State.

B. *Preventing Diversion of Domestic Sales Into Export*

Paragraph 2 of section B of the bill of particulars consists of the following specification:

2. Contracts with its stockholders, other manufacturers of carbon black and other owners which require and cause them to use care that domestic sales made by them are not for export and to take precautions to prevent the export of carbon black sold by them for use or consumption within the United States.

The investigation produced no evidence of such contracts with nonmembers or other owners of carbon black, except one contract with a nonmember on February 9, 1937; said nonmember is now a member. (See p. 77 of this report.) There was, however, such agreement to prevent diversion among the members of the association. That evidence is reported hereinabove at pages 23 to 42, under the heading "Exclusive Contracts With Stockholders." Reference is directed to

page 24 hereof, setting out the provisions of the Association's "Members Sales Agreement" (exhibits 12 and 16) in which—

> The producer further agrees throughout the term of this agreement to use reasonable care that exports made by the producer to Canada or Mexico are intended for use and consumption in those countries and shall not be diverted to other foreign countries, and also that carbon black sold by the producer in the United States shall be exported only through the corporation.

And further, at page 25:

> All the obligations of this agreement on the part of the producer are undertaken on behalf of the producer and of any and all subsidiary or controlled corporations in which the producer may now or hereafter directly or indirectly own or control 50 percent or more of the stock.

Correspondence concerning this provision, represented by exhibits 41 A and 185 A, and testimony thereon, is reported at pages 26 and 32 hereof. The testimony of officers of association members (Oscar Nelson, Tr. 627; Hans Huber, Tr. 752; and Thomas D. Cabot, Tr. 1083) was to the effect that such restriction was essential to preservation of the cooperative effort.

Evidence of possible restraint of domestic trade by the association touched upon some other points, including the following:

1. National Gas Products Association

In section IV–B hereof, titled "Exclusive Contracts With Stockholders," at pages 23 to 42, inclusive, is contained a report of the activities of the National Gas Products Association, known as the "domestic trade association" for the carbon black industry (Tr. 240). There is summarized the testimony of its president, Hans Huber, its secretary, C. E. Kayser, and Mr. Reid L. Carr, officer of a member, with reference to exhibits 124–41 (statistical charts); 120, 177, 178, and 185 (joint office expense); and 180 (membership list). Contained in the file as exhibit 500 is a copy of this group's articles of association. It is a voluntary association organized December 28, 1920, under New York law with stated purposes to extend markets for natural gas products; legitimately oppose unreasonable legislation; support conservation; maintain a credit information exchange; compile trade information concerning depletion, pipelines, and production problems; and to take concerted action in the matter of freight rates, classifications, and container requirements. As of the date of testimony, all but two of its members, Crown Carbon Co. and Continental Carbon Co., were also members of the Export association (Tr. 614).

Excepting for an engineering study, the investigation developed no further correspondence of this association nor any minutes of its proceedings.

2. Bulk differential price war and the Cabot price differential

At page 126 hereof, in the consideration of export prices, mention was made of "The inauguration, in 1937, by the Cabot company of a system of bulk delivery of carbon black to domestic users at an economy variously estimated from an eighth to a quarter of a cent per pound, precipitated a price war in the domestic market, in the course of which, following November 1, 1937, the price of carbon black fell from 5 to 2¼ cents per pound." This subject was rather extensively investigated, but inasmuch as the evidence fails to disclose that the association participated in, or was a party to, any dealings or arrangements which may have been made in this connection, the material is not germane to this report and hence is not included.

3. Commingling of interest

The Phillips Petroleum Co. is a large supplier of gas used in the manufacture of carbon black. Mr. F. E. Rice, its vice president, testified (at Transcript 1467–1473) that he had been with the company over 27 years and was familiar with the practices surrounding gas supplies to carbon black plants, giving the following additional facts. Oil or gas leases with landowners provide for a royalty of one-eighth of the proceeds from sale of gas or oil. His company pays the landowner royalty for the amount of natural gasoline which they extract, and if it utilizes the butanes and propanes (which are referred to as "heavier fractions") it pays a higher price. The gas which remains is called residue gas, which may be used for fuel and light or for carbon black production. A royalty of one-eighth of the proceeds of such sales must be paid the landowner. Residue gas from which the heavier fractions have been extracted furnishes a decreased production of carbon black. He testified further that Phillips company in 1944 sold 232 million cubic feet or 25 percent of the 910 million cubic feet of gas consumed by the carbon black industry; in addition it furnished 66½ million cubic feet to plants in which it held a half interest, making the total of gas furnished to the industry by Phillips, 33 percent. Total production of carbon black in 1944 was 431,721,000 pounds; its 30 percent royalty share of this amounted to 28,850,000 pounds, or 7 percent of the total; its share of production in half-owned plants was 27,500,000 pounds, or 6.6 percent, making its proportion of total carbon black production in 1944, 13.6 percent. These proportions had not varied substantially during the 10 or 12 years preceding 1944. Most of the major oil companies, including Skelly, Shell, Magnolia, Shamrock, Gulf, and Cities Service furnish gas to the carbon black industry.

Phillips sold gas to producers Cabot, Columbian

Phillips would receive 30 percent of the value of the black made from the gas when sold, and in one case, namely, the Cabot contract, it was provided that payment for the gas would be based upon 30 percent of the average price obtained for carbon black during the month in which the gas was consumed. These contracts were terminated between April 1, 1945, and July 16, 1947, and all of its gas sales are now on a cost per thousand cubic feet basis (exhibit 686 B–F). The Phillips company has never engaged in the sale of channel black but has become a competitor in the manufacture and sale of carbon black made from oil by a furnace process, which it claims to be superior to channel gas black. (See exhibit 686 O–P.)

In addition to the foregoing, the Phillips Petroeum Co. owned interests in carbon black producing companies as follows: Texas-Elf Carbon Co., Phillips, 50 percent; Godfrey L. Cabot, Inc., 50 percent (Tr. 1107). On September 19, 1947, Phillips gave up its voting rights so that Texas-Elf production and management is in the hands of Godfrey L. Cabot, Inc. (exhibit 686–G).

Panhandle Carbon Co., Phillips, 50 percent; R. I. Wishnick interests, 50 percent (Tr. 306). On September 8, 1947, Phillips sold its interest to Mr. R. I. Wishnick (exhibit 686 H).

Columbian-Phillips Co., Phillips, 50 percent; Columbian Carbon Co., 50 percent (Tr. 534). In July 1947, Phillips sold its interest to Columbian Carbon Co. (exhibit 686 H).

CONCLUSIONS

In General

Carbon black is the commercial name for the soot of gas. Though its exact chemical formula is not known, it is comprised of carbon, hydrogen, oxygen, and other elements, with the carbon content ranging from 84 to 96 percent. It is soluble only in molten iron and has no competitor in conferring tensile strength and abrasion resistance to rubber. Intense color is its marked characteristic and since 1870 it has been used as an important ingredient in paint, ink, varnish, stove polish, and carbon paper. These uses accounted for its annual production volume range from one million pounds in 1887 to 25 million pounds in 1914. Discovery of its adaptability to rubber with the advent of the automobile since the turn of the century has resulted in raising its annual production to 700 million pounds in 1944, of which 90 percent is utilized in the rubber industry.

Natural gas, from which carbon black is manufactured, has become an important fuel commodity for domestic use. When it contains sulphur and other chemicals, it is referred to as "sour gas," and is not desirable for domestic use but its usefulness for manufacture of carbon black is not impaired. Concurrent with increased use and deple-

tion of older natural gas fields, the industry has moved from West Virginia and Pennsylvania to Louisiana, Texas, Oklahoma, and New Mexico, where it is now located.

Carbon black was manufactured in the early seventies by a process involving impingement of natural gas flame upon soapstone plates. After some years, there was developed an improved process consisting of 24-foot circular iron plates revolving over such flame. A further improvement took place in 1900 with invention of the channel method, in which channel iron beams of 6- to 8-inch widths are moved back and forth over gas burners. This method, with improvements, and possessing simple construction and ease of maintenance, was the manufacturing process in use during the major portion of the time period covering this investigation. The product is referred to as "channel black." The extremely dusty character of the product has constituted a problem in its packaging for marketing. During the past 20 years, a process has come into general use of moulding it into small, grain-size pellets. This has permitted use of smaller containers, which, in general, are 50-pound paper and latex bags and 300-pound wooden cases.

Some time before the late war, the Cottrell or "retort" method was invented. This process consists of burning gas in a retort with an inadequate supply of air to create a smudge, from which the carbon black is chemically extracted. A variation of this process is called the "Thermatonic Method." Under this process, as high as 18 percent of the weight of gas burned is recovered as carbon black, against a 3-percent proportion in the channel methods. The resultant product is called "furnace black," and is classified as Semi Reinforcing (S. R. F.) and High Modulus (H. M. F.).

There is a difference in the composition and quality of furnace black so that for use in natural rubber it did not seriously compete with channel black. Furnace black experienced a great development during the war, however, it being found equal to channel black in reinforcing quality and superior in heat resisting properties in the manufacture of synthetic rubber. A 50-percent larger proportion of furnace black is required in synthetic rubber manufacture. The result, at the date of closing of this investigation, places channel black in the position of supplying less than half of carbon black requirements, as indicated by the following statistics:

Production (pounds)

	1941 (the peak prewar year)	*Postwar capacity*
Channel	487, 967, 000	[1] 675, 000, 000
HMF furnace	0	275, 000, 000
Other furnace (including Thermal)	109, 098, 000	450, 000, 000
Total	594, 065, 000	1, 400, 000, 000

[1] Including 177,000,000 from D. P. C. plants

The record discloses the following eight manufacturers of furnace black in the United States at this time, the first four named being members of the association here under consideration: United Carbon Co., Columbian Carbon Co., Godfrey L. Cabot, Inc., J. M. Huber Corp., Phillips Petroleum Co., Thermatonic Carbon Co., Jefferson Lake Sulphur Co., and Crown Carbon Co.

Statistics compiled by the Bureau of Mines record total domestic and export sales of carbon black, in pounds, for the years 1925 to 1941, the period since 1933 appearing as follows:

Year	Domestic	Export	Total
1933	222, 182, 000	152, 286, 000	374, 468, 000
1934	191, 992, 000	120, 620, 000	312, 612, 000
1935	245, 351, 000	142, 185, 000	387, 536, 000
1936	313, 018, 000	154, 718, 000	467, 736, 000
1937	305, 362, 000	184, 253, 000	489, 615, 000
1938	243, 474, 000	167, 968, 000	411, 442, 000
1939	356, 705, 000	203, 828, 000	560, 533, 000
1940	352, 156, 000	177, 618, 000	529, 774, 000
1941	[1] 532, 009, 000	[2] 112, 735, 000	644, 744, 000

[1] Exports for October to December 1941 included under "Domestic" to avoid disclosing export figures.
[2] Figures cover January to September, inclusive.

Members of the association supplied 85 percent of the exports recorded. The same Bureau's statistics of stocks on hand for the 1933 to 1941 period are:

Stocks

1933	155, 969, 000	1938	166, 159, 000
1934	171, 799, 000	1939	130, 792, 000
1935	136, 086, 000	1940	169, 587, 000
1936	79, 582, 000	1941	118, 847, 000
1937	100, 497, 000		

During the war period, exports to enemy countries stopped entirely, and lack of shipping space greatly reduced exports to neutral countries with the result that the preponderant portion of exports was made under lend-lease and not by the association here under consideration, as revealed by the following statistics:

	Export	*Lend-lease*
1939	153, 800, 000	----------
1940	121, 100, 000	----------
1941	69, 400, 000	23, 535, 000
1942	13, 900, 000	37, 344, 000
1943	10, 700, 000	36, 021, 000
1944	10, 700, 000	70, 317, 000

The association, however, assisted the lend-lease Administration by performing the packaging, crating, and loading requirements of all lend-lease shipments.

On November 21, 1929, three carbon black manufacturers, Godfrey L. Cabot, Inc., United Carbon Co., and J. M. Huber, Inc., and three distributors of the product: The Palmer Gas Products Corp., Binney

& Smith Co., and H. W. Greeff & Co., Inc., organized a corporation under Delaware law to engage solely in export trade, known as "Carbon Black Export Association, Inc." It filed requisite statements with the Commission under the Webb-Pomerene law, and went out of existence after filing annual reports at January dates of the years 1931, 1932, and 1933. This was not a so-called full-functioning association, each member selling carbon black in export trade on its own account at prices determined from time to time by the association. It was testified that the membership found this type of association impractical and it was formally dissolved on December 1, 1933.

Mr. Carl E. Kayser, who had been employed for more than 20 years in the gas and oil business in the Southwest, made a survey of this association's operations and demise, for the use of several carbon black manufacturers. He reported that the failure of the association was due to two factors, first, it was comprised of diversified interests (manufacturers and distributors); and, second, it operated as a purely advisory body and had no enforcement authority with which to regulate dealings with foreign purchasers. He testified that the practices of foreign purchasers, some 10 or 12 of whom accounted for 80 percent of all carbon black exported, consisted of insistence on liberal credit terms, bad faith rejection of merchandise, demand for excessive discounts, and a price decline clause in contracts which enabled purchasers, upon the allegation of a lower offer, to procure more favorable terms.

On May 16, 1933, there was organized by the respondents herein a new association, under Delaware law, bearing the name "Carbon Black Export, Inc." Its shares of stock were owned wholly by manufacturers, the first stockholders being the following: United Carbon Co.; Columbian Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber of La., Inc.; Century Carbon Co.; Panhandle Carbon Co.; Texas Carbon Industries, Inc.; and the Palmer Carbon Co., the first three named being by far the larger producers. This association, under its charter, was vested with full power to deal in carbon black in export trade on its own account or for the account of others. The stockholders entered into contracts to sell carbon black in export exclusively through the association. Each member's stock participation was based upon a proportion of export business allotted to him as his so-called quota. At the time of the organization of the corporation, a quota was assigned to and agreed to by each stockholder. The amount of the individual quotas was determined by negotiation among the prospective members and the negotiations were difficult. Agreement was finally reached when the stockholders decided to divide themselves into two groups; the three larger stockholders to

reach an agreement among themselves as to individual quotas which would total 75 percent of the corporation's requirements and the remaining stockholders to reach an agreement among themselves as to individual quotas which would total 25 percent of the corporation's requirements. Since that time there have been a number of changes in the quotas—upon the entrance of new members, upon the building of new plant capacity of individual members and by virtue of the discontinuation of production of some of the plants of some of the members.

The contracts implementing the foregoing exclusive agency arrangement specifically designate the commodity as carbon black made by "the impingement of a flame upon a metallic surface," indicating channel black as distinguished from furnace black. Four members of the association, Cabot, Columbian, United, and Huber, respondents herein, also manufacture furnace black. This is not sold for export through the association on any exclusive contract or quota plan, but rather upon a straight sales agency at a commission of 0.15 cent per pound payable to the association as agent. There are four manufacturers of furnace black who are not members of the association, to wit: Phillips Petroleum Co., Thermatonic Carbon Co., Jefferson Lake Sulphur Co., and Crown Carbon Co. The association has been authorized to make similar agency contracts with these manufacturers, but at date of this investigation's conclusion none had offered such agency nor had any of them requested membership in the association. There is no testimony or evidence in the record supporting specifications in the bill of particulars with reference to furnace black, which became a commodity of export trade in 1946.

I. THE ASSOCIATION-PHILLIPS PETROLEUM CO. CONTRACT

The Phillips Petroleum Co., in the course of its business of extracting gasoline from natural gas, following such extraction, becomes the possessor of large stocks of residue gas, which it sells for domestic use and for carbon black manufacture. During the period 1933 to 1944, it supplied one-third of the natural gas used in manufacture of channel black. Except for a small amount supplied to plants in which it owns a half interest, the major portion of this supply consisted of gas sold on a 30 percent royalty basis. This gas was originally sold at an agreed price per thousand cubic feet basis, but the 30 percent royalty provision became common following 1928, because, so it was testified, of the advantage to gas purchasers in not having to pay for the gas until the carbon black made from the gas was sold. Under royalty contracts, the purchaser stores and sells the manufactured carbon black, agreeing to sell the royalty black in amounts proportional to

his own black, and deducting up to 5 percent commission for selling expense. The royalty black is referred to in these contracts as "seller's carbon black," "seller's stock," "seller's share," and "seller's share of the production." Under the contracts, the purchaser may insure stored stocks of the production and bill the gas seller for his pro rata (30 percent) part of the insurance cost, or the seller may "carry its own risk as to its share of the said production." The 30 percent royalty was described as a "device for determining the price" of the gas. There is no contract requirement for segregation of the royalty black nor any evidence that segregation was ever made. The selling price against which the royalty is computed has been the price received on domestic sales of black, and in periods of high export price, on both the domestic and export price, the gas seller seeking to procure the highest return for the gas sold. All manufacturer respondents herein, excepting Cabot and Huber, purchase natural gas from the Phillips Petroleum Co. on a royalty basis. Phillips did not market the royalty black, but agreed on May 2, 1933, not to export any such royalty black during the 5-year period from January 1, 1934. This period was subsequently extended to December 31, 1945. Its officers construed this agreement as not applicable to royalty black involved in gas contracts with carbon black manufacturers not members of the association, which black was sold in export by such manufacturers. The investigation disclosed no evidence that the Phillips Petroleum Co. had ever sold or offered to sell channel carbon black or in any way held itself out as a dealer or prospective seller of such commodity. It cannot be said to have been independently engaged in the production, manufacture, or selling for consumption or for resale within the United States of channel carbon black, and there is no evidence of offers to sell or sales of such commodity in export trade. Under the royalty contracts with the manufacturer respondents, it may be said to have had an equitable interest in royalty black in which the right of possession, storage and sale, was specifically contracted to the purchaser of the gas. The contingency of possession of and trafficking in royalty carbon black in commerce on the part of Phillips Petroleum Co. never arose nor is it to be anticipated in any of the contracts in evidence.

It is concluded from this evidence that the contracts in question, as they were carried out by the respective parties, amounted to a sale of natural gas by Phillips to the carbon black producer and payment of the purchase price therefor by the latter in cash, the amount of such purchase price in dollars being computed as stipulated in the contract, i. e., on the basis of the average price received by the manufacturer for the black sold by him, originally in the domestic market and later in the domestic and foreign market both. In other words, the 30 percent Phillips' share and the prices agreed upon for such share were

the measure of the amount of money to be paid as the purchase price for the gas. This being the case, Phillips' share of the black itself was actually handled by the manufacturer and Phillips was not engaged in trading therein. The agreements themselves were between individual member-producers and Phillips and not between the association and Phillips. Regardless of Phillips' assurance in 1933 that it would export no black, the evidence indicates that it would not have exported any anyway, because it was not then a producer of any kind of black. It does not appear therefore that there is anything in the situation disclosed that could or did restrain the export trade of independent competitors or effect any of the other restraints excepted in the provisos of section 2 of the Webb-Pomerene law.

II. DEALINGS WITH NONMEMBER PRODUCERS

The association, under the terms of the contract with its members, was authorized to purchase not more than 10 percent of its annual export requirements from nonmembers. Two officers testified that the purpose of this provision was to invite participation in the association's advantages. Such purchases commenced in 1934, aggregating 0.291 percent of that year's requirements, and 0.75, 2.276, 7.527, 4.529, and 4.989 percent for the years 1936 to 1940, respectively, thereafter. These purchases were made from the following nonmembers: Charles Eneu Johnson & Co., Inc.; Magnolia Petroleum Co.; and Continental Carbon Co.

On June 7, 1933, at one of the first directors' meetings following its organization, one of the directors was authorized to negotiate with the "Herkness Carbon Co.," meaning Charles Eneu Johnson & Co., Inc., for an agreement whereby: (1) The Johnson company would purchase all its gas requirements from United Carbon Co.; (2) would adhere to the export price schedule of the association; and (3) would sell to the association such surplus of export carbon black which it did not succeed in selling at the "schedule of prices fixed" by the association. One purpose of this program was expressed by the association's president to insure certainty that Herkness "would not increase his output in the State of Louisiana." These objectives never became the substance of a formal agreement. The Johnson company purchased gas from United Carbon Co. for about 3 years "free from conditions," according to Mr. Herkness, and then changed its source of supply because of a more favorable price quotation. Association officers explained the attempt to control the Johnson company's gas supply to a provision of the NRA Code for the industry directing relation of production to current deliveries.

Charles Eneu Johnson & Co., Inc., became a member of the association on June 18, 1936, almost 3 years to the day from inception of the negotiations. This company had been in the ink business since 1804, consuming since 1924 about a million pounds of carbon black annually. It commenced manufacture of carbon black in 1926, at about 1 million pounds per year, attaining a production of 5 million pounds before 1933. Shortly before 1933, it began selling carbon black in export, and in the domestic trade in 1940. It was given a quota of 3.88 percent of the association's exports, equivalent to 4½ million pounds, all of it sold in export trade. This amount, along with the million pounds used for ink manufacture, was in excess of the firm's entire production. Mr. Herkness, its principal officer, testified that prior to 1933 he had been selling in export below the association's prices but "was negotiating with the thought of maintaining Carbexport prices." He also testified that he found the export market profitable enabling his firm to purchase carbon black beyond their own production capacity for sale in export trade. He admitted that he did "undertake to go along in an effort to maintain Carbexport's prices" and that in 1934, at his request, the association purchased 600,000 pounds of carbon black from the Johnson company.

The record discloses that on at least two occasions Magnolia Petroleum Co., operating four carbon black plants in Texas, sold carbon black to the association for export. The first of these, occurring on July 9, 1936, involved 700,000 pounds of carbon black which had not met the quality requirements of a domestic user. The second sale involved 250,000 pounds and took place on October 1, 1937. In the course of these transactions, the Magnolia company rejected the association's invitation to membership, writing that "the export market has never been attractive to us because of the methods employed at times by customers to secure reduction in price." On another occasion, in response to an inquiry by the Magnolia company about a certain foreign agent, the association's president replied: "When you seriously want to take a flier in exporting carbon black directly, I have in mind recommending that you tie up with Priem to get a taste of what difficulties and costs there are connected with selling this commodity outside of our fair land."

The Continental Carbon Co., successor in early 1937 to the Witco Carbon Co., on February 9, 1937, entered into an agreement with the association to sell to the latter 5 million pounds of carbon black during the calendar year 1937. The price to be paid was specified as the "same as paid by Carbon Black Export, Inc., to its member producers, less 10 percent commission." This contract was renewed for the year 1938, the quantity being increased to 7 million pounds and the exclusive agency feature delineated as follows: "During the term of this agree-

ment Continental shall not directly or indirectly sell or deliver any carbon black for export except through Carbexport." The contract was renewed for the year 1939, the quantity specified at 7 million pounds or a figure representing 5.58 percent of the association's export requirements. This quantity goal was not attained during 1939 so that the association at the close of the year purchased 1,744,308½ pounds for $74,133.11 to be stored by Continental subject to the association's call. The contract was renewed annually through 1943 and then continued in effect by mutual assent. On May 29, 1946, Continental Carbon Co. became a member of the association, subscribing for 589 shares, and being assigned a quota of 7.190 percent of the group's total export requirements.

The renewal for the year 1940 contained a clause granting each party the right of cancellation of the contract upon 60 days' written notice to the other. Mr. R. I. Wishnick, president of the Continental company, testified that the company was increasing its production and that his officers considered a cancellation clause advisable "so we could renew negotiations for increased quotas." The association's president, in turn, testified that the association preferred the cancellation clause because "if Mr. Wishnick chose to increase his capacity and come back for an additional quota, that we should prefer to have him sell his own carbon black." He had, however, at the time the extension clause was negotiated, written to one of the association members that "Wishnick * * * had the clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if present outside capacity were increased a pound." The record discloses that the Continental Carbon Co. did in fact increase its production during the period involved, as shown by these statistics:

	Pounds
1937	23,800,000
1938	29,551,590
1939	32,116,798
1940	32,476,625

The association's president testified that there were two ways to bring the Continental Carbon Co. into the Carbexport picture, one by stockholder membership, and the other by way of an exclusive agency contract. He admitted that under the latter plan the Continental company enjoyed all the advantages of membership without the necessity of making a stockholder's investment. Mr. Wishnick testified that operations under a quota contract placed him "in substantially the same position as a producer member stockholder" excepting that Continental was not required to make an investment in the association.

The Canada Carbon Co., Ltd., of Toronto, Canada, referred to as the sales agent of Crescent Carbon Co., Point Pleasant, W. Va., by

letter dated March 14, 1934, acknowledged to the association receipt of the latter's export price lists on March 9, 1934. The letter went on to state that their interest in export trade was small and confined to the product of the Crescent Carbon Co. but that "we will follow these (the export price schedules) very closely." In March of the following year, 1935, the association's president sought to interest the Canada company in membership on a 2½ percent quota, but nothing came of the negotiations. The association, from time to time, on its own initiative, and sometimes at their request, furnished both companies with price lists and conference shipping rate information. Respondent United Carbon Co. purchased the plant and equipment of Crescent Carbon Co. on April 1, 1944, following its damage by fire in January 1944.

Exchange of export price information was the subject matter of some 20 letters passing between the association and the Imperial Oil & Gas Products Co. of Pittsburgh, Pa., during the years 1937 to 1940. One letter of Imperial's dated August 4, 1938, in reply to the association's query about a low price quotation in Brazil, reads: "Our prices for Brazil are practically the same as Carbon Black Export's and we feel sure that such sales as the one you refer to will not be made in the future." In November of 1938, Imperial again wrote the association as follows:

> We feel that our price policy in the export trade at the present time is very little different from yours and that we have given you little, if any, trouble recently in foreign markets. It is our intention to cooperate with you as well as possible on all export business, and as regards the subject of this letter we might mention that, if any price cutting is to be done, it is not our desire to do it in Brazil.
>
> It is difficult for us to determine what business you are referring to in your complaint regarding our prices in Brazil and we can therefore hardly explain the situation to you any better than we have done above. If you are able to give us more definite information with regard to the alleged price cutting, together with names of customers, perhaps something could be done to rectify any violations of our price policy by our agent in Brazil.

The association's president testified that during the wartime shipping stringency the association assisted Imperial as well as other outsiders in procuring shipping space. He added that he negotiated with Imperial "a number of times" to procure their membership in the association but did not have any agreement with them for adherence to the association's export prices. Imperial Oil & Gas Products Co. became a member of the association on May 29, 1946, receiving a 1 percent quota of the association's export requirements.

The Keystone Carbon Co. of Louisiana entered into a contract with the association on April 17, 1936, making the latter its exclusive sales agent for the sale of 3½ million pounds of carbon black annually

during a term running from January 1, 1937, to December 31, 1945. The contract contained an option granting Keystone the right before October 1, 1936, to subscribe to 216 shares of the association's stock and to sign a member's sales agreement on the basis of a 3 percent quota, or portion of the association's annual export requirements. Keystone exercised the option and on December 14, 1936, its assets and association membership were acquired by respondent Columbian Carbon Co.

The association's maintenance of a price policy for its products was a legitimate objective, but extension of this policy to nonmember competitors by way of procuring "intention to cooperate," and assurances "to follow association prices closely," was not in conformity with the principle of the Export Trade Act. Likewise, membership invitation overtures to prospective new stockholders which resulted in trial operations extending from 3 to 9 years, resulting in enjoyment of "all the advantages of membership without the necessity of making an investment," conferred on such nonmembers benefits which were lawfully attainable only by compliance with the Export Trade Act.

It is concluded that while the association's maintenance of a price policy for its products was a legitimate objective and that membership invitations may be extended by the association to prospective new stockholders, the association may not, however, extend its price maintenance policy to nonmember competitors by way of procuring from them agreements to cooperate with assurances to follow the association's prices and it may not make membership overtures to prospective new stockholders conditioned upon trial operations. Likewise the association may not make agreements with nonmembers whereby they stipulate that they will follow or adhere to the export prices of the association; nor may the association grant any export quota to any nonmember. It is also concluded that the association may not impose or attempt to impose any restrictions upon the volume of exports of nonmembers, or upon their volume of production, or upon the source or quantity of their supply of raw materials, i. e., gas.

III. CONTROL OF DISTRIBUTION

The basic agreement among the members of Carbexport bound each one to confine its exports of black to foreign countries to those made through the Association, except in the cases of Mexico and Canada. As to the latter the producer agreed to use reasonable care to see that exports made to those countries were for use and consumption therein and to prevent their diversion to other foreign countries. Each member agreed that the association should act as its exclusive agent for

the sale of all its export carbon black and that it would export only through Carbexport.

This agreement obviously enabled the association to control the channels of distribution for all the export carbon black originating with the stockholder-members. The volume of each member's exports was determined by his quota as fixed under the quota arrangement agreed upon. The agreement on quotas was said to have been arrived at by negotiation and compromise.

At the time of Carbexport's formation its members represented about 85 percent of this country's carbon black exports. There have always been nonmember producers, but the association membership has always represented the bulk of the production and most of the exports.

Administrative action involving questions raised by Carbexport's set-up and operations under these arrangements has been based upon a determination of factual situations as they relate to the imposition of restraints upon bona fide American exporters who procure and resell the commodity, as distinguished from agents or brokers working on a commission. Evidence was taken as to the effect of conduct of Carbexport in relation to such American exporters.

The association performs its selling function through ten distributors, three of them English firms and the remainder from this country. These in turn operate through more than 170 agents and subagents in all export markets, excepting Canada, Mexico, and Belgium, the latter of which is reserved to one distributor. Sales in the export market are made to seven large foreign rubber products manufacturers (accounting for 60 to 70 percent of sales volume) and to some 4,000 small customers engaged in the rubber, ink, and paint industries. This distribution organization operates under contracts requiring handling of the association's product on exclusive terms, at its suggested prices and a uniform basic selling policy which calls for detailed monthly reports of all sales. Distributors may advertise their own brand names. The association refers all purchase inquiries to its distributors. Most of the distributors have been in business in excess of 25 years. The principal requirements in the selection of distributors have been their financial responsibility, their willingness to adhere to suggested prices, and their technical skill and facilities. These have been found requisite in coping with certain practices traceable to large foreign buyers: Commission splitting, liberal credit terms, unwarranted rejection of shipments, and black-market operations.

The association has operated on a nonprofit basis, from time to time being required to call for pro rata assessments from its stockholders. From the date of its organization, its prices for carbon black have been higher than those prevailing in the domestic market. Its application

for an export price premium from the Office of Price Administration in 1942 disclosed a range of 0.232 to 1.022 cents per pound differential in the export price over the domestic price of carbon black. The investigation disclosed no evidence of price changes in the export market in any relation to domestic price changes.

It was the association's practice to approve assignment of distributor's contracts and the appointment of agents. Careful investigation was made of the dealings with two applicants for agency to sell its carbon black in export trade. The first of these, an individual located in New York, N. Y., was engaged as an exporter of steel and chemicals since 1932. He sought to purchase carbon black for export from three of the respondent manufacturers and one nonmember manufacturer, sometime following the year 1940. He made no direct application to the association because he was told it would offer him only a 1-percent commission. Following our entry into the war, he was offered carbon black for shipment to Spain by one nonmember manufacturer, but was forced to reject the offer because of war-time conditions. Thereafter, in late 1945, he was given an exclusive agency by the Phillips Petroleum Co. to sell its furnace black in five Mediterranean countries at a 5-percent commission. These countries have paint, ink, and rubber manufacturing industries as potential consumers of furnace carbon black.

The other request for an export sales agency was that of Louis A. De Smet who operates as an individual trader from his residence in Chicago, Ill., in the domestic and export sale of Gilsonite, Bentonite, and stationery envelopes under the firm name of "De Smet & Company." From 1917 until his death in 1938, this applicant's father, George W. De Smet, engaged in export and import business as a sole trader under the name "George W. De Smet." The applicant became associated with his father in 1923 and during the period before his father's death in 1938, their main business was the export of carbon black, which "we purchased and we sold * * * on our own account." During the period 1929 to 1935, their dollar volume of sales ranged from $45,312 to $157,887. The 1935 export sales were made to customers in France, England, Japan, Poland, Germany, and Holland. In some years, their principal customer was the Michelin Tire Co. of France, to whom sales were made through a Paris agent. Some sales were made direct, in which event the agent was compensated, and at other times sales were made to the agent on a net basis, he in turn reselling to Michelin. They sold their carbon black under three brand names, "Stygian," "Jetta," and "Croak," the first name having a "marked brand preference" and being frequently sold to Michelin in competition with other brands.

Mr. De Smet knew the following carbon black manufacturers who were not members of the association: Crescent Carbon Co.; Canada Carbon Co.; Imperial Oil and Gas Products Co.; Keystone Carbon Co.; C. E. Johnson Co.; Magnolia Carbon Co.; General Atlas Carbon Co.; and Thermatonic Carbon Co. The firm had done business with the first four named and in the period 1933–38, it acted as Imperial's exclusive agent in France. Under this agency, the firm was permitted to do business also in Belgium, Holland, and Spain. Imperial, they knew, had exclusive agents in Germany and England. Upon learning that they could sell for Keystone Carbon Co. in an unlimited territory, they gave up their agency for the Imperial company. The Keystone company, on October 3, 1936, notified the firm that all their export business would be handled through the association and denied the firm any further supplies. Thereafter, the firm "canvassed the industry until 1945" but could not procure supplies. The firm, at one time or another, had purchased carbon black from the following members of the association: Cabot, United, and Keystone, and members Palmer and Wishnick-Tumpeer of the first export association. The firm never maintained a technical laboratory, but their agents, Van Lede in Paris and Alfred Smith, Ltd., in London, were so equipped.

In 1936, the senior De Smet wrote the association and one of its members requesting "if you cannot grant us an agency." In 1938, the firm received an inquiry from Michelin Tire Co. for 700,000 pounds of carbon black and sought to procure supplies for this order from respondent Cabot's subsidiary Texas-Elf Carbon Co. and from the Imperial Oil & Gas Products Co., but were not given a quotation. In May 1945, the firm was offered a proposition by Mr. R. I. Wishnick of the Panhandle Carbon Co., to act as its subagent in France at a commission of 5 percent. This was refused because it was an "entire different way of handling" and would leave no profit after paying a 5 percent commission to a French agent. (Mr. De Smet testified that on sales of carbon black he had netted 10 percent above expenses.)

The association's president testified that the De Smet firm was denied a distributorship by the association because of a consensus of opinion that the firm "was not an exporter in the essential sense that applied to the distributors whom Carbexport employed." He listed as further objections that firm's failure to maintain a technical staff and the known fact that it acted as a shopper for foreign concerns, principally French, seeking price concessions. This officer testified that many subagents operate on a 3 percent commission and that the De Smet firm could have contracted with such subagents.

The firm was engaged as importers of mushrooms, canned fish, and crude rubber from 1925 to 1938, the business declining following the Tariff Act of 1930. The senior De Smet was also engaged in the fol-

lowing domestic activities in the period following 1925; De Smet Quartz Tile Co. and the "Colored Cement Co." both of which ventures were not financially successful. It would appear from the activities of the De Smet firm that they served as buying agents dealing in a number of widely disparate commodities, of which carbon black was one side line. These activities cannot be said to identify them as American exporters buying and reselling on their own account. In fact, from the evidence it is difficult to discover just what selling services De Smet was prepared to or did render to American producers, either Association members or independents.

The investigation of operations under the association's contracts with its members and its control over the distribution of its members' product disclosed no evidence that the trade of bona fide American exporters, buying and reselling in export trade, was restrained. In the cases developed by the testimony, the weight of the evidence indicates that the applicants involved were seeking to represent the association either as agents or brokers or that they were in fact acting or seeking to act as purchasing agents for foreign buyers. The association was not obligated to employ sales agents in this country to sell its black in foreign countries in which it already had agents rendering sales services or to quote to agents in this country for foreign buyers who were being serviced by its foreign agents; neither was it obligated to designate distributors who lacked the technical skill or facilities required of those whom it did appoint for this service.

The above conclusion to the effect that the facts disclosed by this nvestigation fall short of establishing that Carbexport has illegally 'estrained the trade of American intermediaries is drawn from the 'ecord herein, and does not constitute a ruling or determination of he question of the validity of practices or contractual arrangements imilar to those used by Carbexport, which, under other factual situaions or circumstances, might contravene the law. As hereinabove ;ated, Carbexport represented about 85 percent of the carbon black xports from the United States, but the record discloses that there ere always independent producers to whom intermediaries could ırn for a supply to fill foreign orders. In addition, the record indi-tes that two nonmember producers have recently entered the export ld in a substantial way which materially changes the competitive ıation from that which existed when the testimony was taken. The :ord as a whole does not disclose any of the effects prohibited by e provisos of the Webb Act in this connection and therefore does t afford a basis for any recommendation to the Association rela-e thereto. However, this determination is provisional, and the mmission retains jurisdiction to take appropriate action should

judicial authority with final jurisdiction hereafter hold that exclusive dealing contracts or arrangements, such as have been shown to be present here, are illegal per se.

IV. RELATION TO DOMESTIC TRADE ASSOCIATION

The National Gas Products Association is known as the domestic trade association for the carbon black industry. It is a voluntary association organized December 28, 1930. Its membership as of June 4, 1946, consisted of the following: Cabot Carbon Co.; Columbian Carbon Co.; Coltex Corp.; Columbian-Phillips Co.; Continental Carbon Co.; J. J. Huber Corp.; Crown Carbon Co.; Imperial Oil & Gas Products Co.; Panhandle Carbon Co.; United Carbon Co.; Kosmos Carbon Co.; Eastern Carbon Co.; and Chas. Eneu Johnson Co.

As of that date, the Crown, Continental, and Imperial companies were not members of the respondent association herein. The charter purposes of the domestic association are to extend markets for natural gas products; legitimately oppose unreasonable legislation; support conservation; maintain a credit information exchange; compile trade information concerning depletion, pipelines, and production problems; and to take concerted action in the matter of freight rates, classifications, an container requirements. Monthly statistics of production, shipments, and stocks are compiled and circulated among members. In the summer of 1933, during the preparation of codes under the National Recovery Administration, Mr. C. E. Kayser, then president of the respondent association, was retained as assistant secretary-treasurer of the domestic group. Both associations were housed in the same office. The domestic group was concerned with administration of the NRA Code until May 28, 1935. Until the date of this investigation's conclusion, the group was active in standardization problems, rail freight rates, industry investigations for the War Production Board, and in the operation of a car pool under the Office of Defense Transportation. These activities made severe demands on the office personnel of the respondent association creating problems of allocating personnel time and telephone expense and cost of supplies and equipment. In December 1943 the value of these services was agreed by both associations to be $100 per month. Mr. Kayser testified that the domestic association's board of governors for some time felt, as did he himself, "that it seemed inconsistent" that a domestic association and an export association should be housed together. Accordingly, on December 19, 1945, Mr. Kayser resigned from his position as assistant secretary-treasurer, and the statistical work was removed to another office. The described activities of the domestic group are concerned so closely with the domestic trade which the ex[illegible] by statute enjoined not to restrain, that it would

appear to be bad policy to house, officer, or administer the two types of association with the same personnel under one roof.

It is concluded that the facts justify a recommendation that the respondent association conduct its office activities with personnel who have no official affiliation or employment with domestic trade groups, and that it should not permit itself to be jointly housed with such groups.

V. GENERAL SUMMARY

The major portion of the entire world production of carbon black is produced in the United States, although the exact percentage of this proportion is unknown. There was, prior to the war, some production in Russia, Romania, Germany, and Japanese-held Formosa, but this was not of great volume.

There was no evidence of any agreements between Carbon Black Export, Inc., or its stockholders and any foreign producers of carbon black.

The record contains information indicating the imminence of considerable competition from production potential located propitiously near seaboard in the following gas and oil areas: Russian, Romania, Iran, Iraq, Venezuela, Colombia, Mexico, Canada, and Formosa. The record was brought up to date by a stipulation between counsel dated October 20, 1948.

It appears that the British Government has commenced a program for carbon black production in Iran, in association with the Anglo-Iranian Oil Co., as well as two similar projects in England itself, one of which is expected to utilize Welch coal as a raw material and the other to manufacture furnace carbon black by the Phillips Petroleum Co. process from imported liquid hydrocarbons. The British program apparently stems from a scarcity of dollar exchange in the face of annual carbon black requirements in excess of 5 million dollars. This represents 40 percent of the association's export market. The association is thus confronted with the prospect of the first sizable competition from foreign production.

At the date of the stipulation herein, the activities of six new producers indicated that competition to Carbexport may soon assume considerable proportions. The output of the Sid Richardson plant at Odessa is estimated at 60 million pounds annually, all of which is a potential source for shipment abroad. It is known that the Phillips company in December 1945 had set up an export office to take care of shipments abroad and in that time had licensed one distributor to sell its black in five foreign countries. Phillips is also carrying on trade journal advertising extolling the merits of its product in order to assist its distributors and agents in the marketing of Philblack abroad.

It represents that its carbon black is superior in quality to other types of black heretofore used in tire manufacture.

During World War II 10 nations established in Washington missions or agencies for the purpose of presenting their requirements to the United States Government who did the actual purchasing. Immediately upon the termination of the war, lend-lease came to an end and these agencies immediately began direct procurement. One by one of these listed agencies have abandoned direct procurements so that American sellers are now selling directly to consumers in these 10 nations. However, such purchasing agencies continue to exist in Washington mainly in an advisory capacity for furthering the economic interests of their countries in home buying and for dealing with the Economic Cooperation Administration. It is to be noted that the record indicates that the stockholders of Carbexport are firmly convinced, as a result of their experience in export trade, that an association such as Carbon Black Export, Inc., is the best, if not the only, practicable means of dealing with such foreign nationals' groups, and meeting them on equal terms.

The United States, through the Office of International Trade of the Department of Commerce, maintained a quantity restriction on carbon black exports during the period April 1, 1946, to May 27, 1947. Such exports, since January 28, 1948, are subject to license requirements only in the case of shipments to Europe and adjacent territory.

RECOMMENDATIONS FOR THE READJUSTMENT OF THE BUSINESS OF CARBON BLACK EXPORT, INC.

To: Carbon Black Export, Inc., an export trade association, its officers, directors and stockholders:

The Federal Trade Commission, having had reason to believe that Carbon Black Export, Inc., an association engaged in export trade (as "association" and "export trade" are defined in the act of Congress known as the Export Trade Act, approved April 10, 1918), and certain of its agreements and acts were in restraint of trade within the United States or in restraint of export trade of domestic competitors of said association or that they substantially lessened competition within the United States and otherwise restrained trade therein, summoned said association, its officers, directors, and stockholders, to appear before it on the 30th day of November 1944, as provided by section 5 of said Export Trade Act. Said association having duly appeared before the Commission pursuant to such summons, and a formal investigation into the alleged violations of law having been made, in the course of which testimony and evidence was taken and incorporated into the record, and the Commission having examined

the record and made a report thereon, and concluded therefrom that certain agreements made and acts done by such association have been in violation of law;

Now, therefore, pursuant to the provisions of said Export Trade Act and by virtue of the authority conferred upon it by said act, the Federal Trade Commission hereby makes to said Carbon Black Export, Inc., its officers, directors, and stockholders, the following recommendations for the readjustment of said association's business:

1. That Carbon Black Export, Inc., in the future refrain from adhering to, maintaining, or entering into any understanding, agreement, or arrangement with American producers of carbon black who are not regularly admitted and recognized members of said association, including producers whose membership in the association is in process of solicitation, where said producers agree to sell only at fixed prices and terms, or in apportioned quantities.

2. That Carbon Black Export, Inc., cease and desist in the future from discussing, negotiating concerning, or seeking an agreement upon any plan, arrangement, scheme, understanding or agreement whereby the production of any American producer or potential producer of carbon black is affected, deterred, forestalled, limited or prevented, or where the purpose or intent is to accomplish any of said results.

3. That Carbon Black Export, Inc., conduct its office activities on a basis wherein it shall not permit itself to be quartered in joint offices with any domestic trade association or statistical and advisory group; and further, that it manage and retain office personnel which shall have no affiliation by way of employment, membership or honorarium with any domestic trade association or statistical and advisory group.

It is ordered by the Commission that Carbon Black Export, Inc., file with the Commission within 30 days hereof a report stating whether it has elected to comply with the above recommendations, and if so, the manner in which it has so complied.

DECISIONS OF THE COURTS

IN CASES INSTITUTED AGAINST OR BY THE COMMISSION

BOND CROWN & CORK CO. v. FEDERAL TRADE COMMISSION. CROWN MFRS. ASS'N OF AMERICA ET AL. v. SAME. ARMSTRONG CORK CO. ET AL. v. SAME [1]

Nos. 5813, 5814, 5817—F. T. C. Docket 4602

(Circuit Court of Appeals, Fourth Circuit. August 22, 1949)

EVIDENCE—CONCERT OF ACTION—IF NO DIRECT EVIDENCE, AND CONSPIRACY DENIED

Direct evidence to establish a conspiracy to restrain trade and destroy competition is not required nor is the Federal Trade Commission required to accept the denial of those charged with conspiracy merely because there is not direct evidence to establish it, since essential combination or conspiracy may be found in force of dealings or other circumstances as well as in any exchange of words.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUPPORTED BY EVIDENCE—INFERENCES OR CONCLUSIONS

Where the evidence is sufficient to support the findings of the Federal Trade Commission finding that petitioners have been parties to a conspiracy and combination in restraint of trade constituting unfair method of competion, it is for the Commission and not the courts to say what conclusions are to be drawn from the evidence.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUPPORTED BY EVIDENCE—THAT DIFFERENT CONCLUSION REACHED BY TRIAL EXAMINER

On petitions to set aside an order of the Federal Trade Commission finding that petitioners were parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition, that the trial examiner reached a conclusion different from that of the Commission did not affect the conclusiveness of the findings of the Commission supported by the evidence, since it is the Commission and not the trial examiner that is charged with ultimate responsibility for the finding of facts, and it is the Commission's findings and orders that the Court of Appeals is authorized to review.

[1] Reported in 176 F. (2d) 974. For case before Commission see 45 F. T. C. 89.

METHODS, ACTS AND PRACTICES—CONCERT OF ACTION—RESTRAINT OF TRADE—ESTABLISHMENT OF—FREIGHT EQUALIZATION

On petitions to set aside an order of the Federal Trade Commission finding that petitioners were parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition through a practice of freight equalization, such practice could be considered along with other facts as tending to establish a conspiracy and combination in restraint of trade, which was the only charge of the complaint.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—CONCERT OF ACTION—RESTRAINT OF TRADE—IF FREIGHT EQUALIZATION AND NO PRICE CHANGE IN 10 YEARS, AND NO PRICE COMPETITION IN 85 PERCENT CONTROLLED INDUSTRY

Evidence sustained order of the Federal Trade Commission that petitioners were parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition and ordering them to desist therefrom, where petitioners were manufacturers of crown bottle caps and through a practice of equalizing the freight on shipments in an industry in which they controlled 85 percent of the business, there had been no price change in 10 years and no price competition whatever.

CEASE AND DESIST ORDERS—SCOPE—CONCERT OF ACTION—FREIGHT EQUALIZATION—IF INDEPENDENT USE NOT BARRED THEREBY

Paragraph of order of the Federal Trade Commission finding that petitioners were parties to a combination in restraint of trade constituting unfair method of competition, which related to practice of freight equalization would not be stricken on the ground that it would interfere with the independent use or the practice of equalization by petitioners individually, where prohibitions of the paragraph applied only to acts done in carrying out the combination or conspiracy.

CEASE AND DESIST ORDERS—SCOPE—CONCERT OF ACTION—RESTRAINT OF TRADE—IF PRODUCT (AMONG OTHERS) INCLUDED WITHOUT SUPPORTING EVIDENCE

An order of the Federal Trade Commission that petitioners were parties to a combination in restraint of trade constituting unfair method of competition would be modified to eliminate its application to cork discs where petitioners were manufacturers of crown bottle caps and manufactured the discs which they used so that the inclusion of the latter commodity in the order was of no practical significance.

(The syllabus, with substituted captions, is taken from 176 F. (2d) 974)

On petitions to review and set aside an order of the Commission, order affirmed and enforced as modified.

[976] *Mr. Roger A. Clapp*, Baltimore, Md. (*Mr. Albert E. Donaldson* and *Hershey, Donaldson, Williams & Stanley*, Baltimore, Md., on the brief), for petitioners in No. 5814.

Mr. H. Bartow Farr, New York City (*Wilkie, Owen, Farr, Gallagher & Walton*, New York City, *Mr. Helmer R. Johnson*, New York

City, and *Semmes, Bowen & Semmes*, Baltimore, Md., on the brief), for petitioner in No. 5813.

Mr. Frank B. Ingersoll, Pittsburgh, Pa. (*Mr. Rex Rowland*, New Castle, Pa., and *Smith, Buchanan & Ingersoll*, Pittsburgh, Pa., on the brief), for petitioners in No. 5817.

Mr. Donovan R. Divet, Special Attorney, Federal Trade Commission, Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, *Mr. Walter B. Wooden*, Associate General Counsel, and *Mr. James W. Cassedy*, Associate General Counsel, Federal Trade Commission, Washington, D. C., on the brief), for respondent.

Before PARKER, *Chief Judge*, and SOPER and DOBIE, *Circuit Judges*.

PARKER, *Circuit Judge:*

These are petitions to review and set aside an order of the Federal Trade Commission finding that the petitioners have been parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition in violation of section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. sec. 45) and commanding them to cease and desist from carrying out any "planned common course of action" with respect to certain acts and practices found to be involved in the conspiracy. The petitioners are corporations engaged in manufacturing crown bottle caps, a trade association of these manufacturers and certain individuals holding affice either in the corporations or the association. The commission in its brief filed in this court consents that its order be vacated as to the individual petitioners, and no further attention need be given to them. The manufacturing corporations and the association ask that the order be vacated because not based on sufficient findings and because the findings are not supported by substantial evidence.

The case was heard before a trial examiner, who filed a report recommending that the commission find that there had been no conspiracy in restraint of trade or unfair trade practice in violation of the Trade Commission Act and that it dismiss the petition. Exceptions were filed to this report, and the commission made a complete finding of facts covering every aspect of the case and reached the conclusion that a combination and conspiracy in restraint of trade did exist and that a cease and desist order should issue. The findings of the commission are that the manufacturing petitioners control 85% of the business in question, that there is no price competition of any sort among them, but that absolute uniformity of prices and discounts has prevailed since 1938; that, through their association they considered uniform pricing techniques and a uniform contract in the year 1928, and that, although this uniform contract was not adopted, its provisions have been followed by petitioners; that through the

association petitioners have worked out a standardization of product so that even in the matter of decoration the product of all petitioners is precisely the same; that in connection with patent licensing agreements the petitioner Crown Cork & Seal Company, which was the largest manufacturer of crown bottle caps, furnished lists of its prices to all the other petitioners for a period of many years and ceased only a short while before the institution of this proceeding; that such license agreements provided that the licensees should not sell at prices lower than those of Crown Cork & Seal; and that all of the manufacturing petitioners follow the uniform practice of equalizing the freight on shipments, with the result that the cost of goods plus freight is the same at any given point anywhere in the United States, no matter from which of petitioners the purchase is made. Upon these facts the commission found the existence of the conspiracy charged in the following language (13th finding): "The commission is of the opinion that in the circumstances shown to exist an understanding or agreement under which the respondents acted and still act in concert may be inferred. The intention [977] of the parties participating in the meeting of respondent association, held on July 24, 1928, for all members of the association to sell their products at one and the same price and under identical terms and conditions is clearly evident from the minutes of that meeting. The subsequent use by all such parties of the general pricing plan then formulated, including the schedules of deductions, additions, and differentials, and the adoption of such plan by all of the other respondent manufacturers, with the resulting uniformity in prices, terms and conditions of sale as among all such manufacturers, indicates just as clearly an intention of all of the parties to continue in effect the original understanding. In the opinion of the commission, there is a direct connection between this understanding and the admitted efforts of the respondents to standardize their products to such an extent that a prospective purchaser would have no choice in the realm of coloring, lettering, and decorations as between the products of any two manufacturers; and the concurrent use by all of the respondent manufacturers of the freight-equalization plan serving to maintain identical delivered prices for all purchasers at any given destination, adds materially to the combination of circumstances showing a deliberate and concerted effort on the part of the respondents to completely remove effective competition as among the sellers of crown bottle caps and discs used in connection therewith. Considering, in addition, the price-fixing provisions of the various license agreements, all of which exceeded the legitimate rights of the licensors to protect themselves in the enjoyment of the fruits of their inventions, the sum of all the other incidents referred to in the foregoing paragraphs, the commission has no diffi-

culty in concluding, and therefore finds, that the respondents have in fact entered into and have engaged in and carried out an understanding, agreement, combination or conspiracy among themselves to restrain and suppress competition in the sale of their products. While the record does not show that each of said respondents has participated in all of the activities relied on to establish said understanding, or agreement, each has acted in concert and cooperation with one or more of the others in doing and carrying out some of the acts and practices herein set forth in furtherance of the understanding or agreement common to them all."

We think there can be no question but that this finding supports the order of the commission and we think it equally clear that it, in turn, is supported by the findings as to evidentiary facts which precede it and by the evidence in the case.

Crown bottle caps are the closures for bottles used by the brewing and bottling industry. They consist of metal shells enclosing cork discs and have long been substantially identical in construction and dimension. The Crown Cork & Seal Company, one of the petitioners, manufactures approximately 50% of those produced in this country and the other petitioners approximately 35%. In 1925 the trade association was organized and most of the petitioners were members of it. One of the first things that it did was to bring about more complete standardization of product in that, by agreement of the manufacturers, the decoration of the caps was made uniform, so that those sold by all manufacturers were identically the same. Another matter discussed at an early meeting of the association was the technique of arriving at prices with a view of having uniformity throughout the industry in the schedules of deductions, additions and differentials from base prices. This was to be incorporated in a standard form of contract; and, while the standard form was never adopted, the evidence is that throughout the industry there is as much uniformity in the deductions, additions and differentials allowed from base prices as if it had been adopted. No form of contract of any sort is used, but sales are made informally by correspondence or oral negotiation; and it appears that no written contract is needed, in view of the uniformity that has been attained throughout the industry with respect to matters which a contract would ordinarily embrace within its terms.

There is no proof of any express agreement to charge uniform base prices; but the evidence shows that since 1928 the pric[978]es of all the manufacturing petitioners have been the same. Prior to 1938, there were but few changes, the same price, with minor variations, was charged by all, and, when changes in prices were made, they were made by all at about the same time. In 1933 Crown Cork & Seal granted licenses under patents which it held to most of the other manu-

facturing petitioners; and in connection with these licenses they agreed not to sell at a less price than that which Crown Cork & Seal established. It is significant that, in connection with these licenses, Crown Cork & Seal furnished a list of its prices to the licensees, who were under agreement not to sell for less. In the case of petitioner Gutman, where mutual licensing followed the adjustment of patent litigation, there was an exchange of prices, although neither party used the patents of the other. Not until 1941, shortly before the institution of the proceeding before the commission, was this furnishing of prices discontinued. Its continuance over so long a period of time furnishes adequate explanation of the uniformity of prices attained. The commission has found that, when it was discontinued, it was no longer necessary to maintain uniformity. Certainly, there have been no changes in prices of bottle caps since that time, notwithstanding the fluctuations in the prices of all other commodities. The question which arises with respect to these patent agreements is not whether a patentee may exact an agreement as to prices from a licensee who uses the patent, but whether such agreements under the circumstances here appearing support the charge of conspiracy to destroy competition and fix prices throughout the industry. See *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364.

The freight equalization practice to which reference has been made goes back at least as far as 1921. That practice is to sell the bottle caps f. o. b. the plant of the manufacturer with an agreement that the purchaser shall be credited with the difference between freight actually paid and that which would have been paid if purchase had been made from the nearest manufacturer. This practice has all the vice of the basing point system in that the purchaser pays the same delivered price, whatever manufacturer he purchases from, and the manufacturer must absorb the freight differential, so that the net selling price which he receives is different for different customers, depending upon their location. The effect of this practice in destroying competition and its importance in establishing the existence of the conspiracy charged is well stated by the commission in its ninth finding, from which we quote as follows: "This uniformity in base prices, together with the concurrent use by all the respondent manufacturers of the freight-equalization plan, inevitably means that a purchaser at any given locality will be required to pay exactly the same delivered price for crown bottle caps regardless of the manufacturer from which he purchases. It is undisputed that since 1938, at least, it has been impossible for any purchaser at any location to obtain crowns from any respondent manufacturer for a less price or on better terms than the prices charged or the terms imposed by any other respondent manufacturer. Even on privately decorated

crowns the extra charges made by all of the respondent manufacturers have been the same. * * * Thus every respondent manufacturer is informed at all times of both the prices and the terms of sale quoted and offered by all of the others. In addition to knowledge of the base prices of all of the other respondent manufacturers, each such respondent manufacturer knows that every other respondent manufacturer uses the plan of equalizing freight with the location of the manufacturer nearest the purchaser. It knows, too, that by the use of this plan each will be able to deliver its products to every purchaser at any given destination for exactly the same delivered price as others using the plan, and thus all users of the plan will be able to present to a prospective purchaser a condition of matched prices in which such purchaser is deprived of any choice on the basis of price. * * * In order to produce such matched prices sellers of crowns must, at numerous destinations, accept net receipts for their products varying in amount according to the freight absorbed **[979]** as a result of the closer proximity to the purchaser of some other seller. Each participant in the use of the plan consciously intends that no attempt be made to exclude any seller of crowns from the natural freight-advantage territory of another, and by the use of the plan invites other sellers to share the available business in his natural market in return for similar treatment for itself in the trade territories of all other participating sellers. The price rigidity existing in the crown bottle cap industry since 1938, and the failure of prices of crown bottle caps to respond in any way to changing conditions of supply and demand are not consistent with the existence of effective competition. The complete standardization of crowns as a result of the admitted efforts made by respondents, and other circumstances showing an overriding desire on the part of the respondents to present to a prospective customer a completely united front insofar as products, prices, and terms of sale are concerned, indicate the total absence of such competition. When, as in this industry, the price of the seller nearest the purchaser is always accepted by other sellers and there is no bargaining on any basis between buyers and sellers, fundamental requirements of a true competitive market are lacking and prices are not the result of market action in the economic sense, but are mere expressions of an artificial and monopolistic price structure.

Innocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the commission. The standardization of products, for

example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere. The practice of freight equalization might be all right if used by the manufacturers individually, but not when used in connection with standardization of product, patent control, price publication and uniformity of discounts and trade practices in such way as to destroy price competition. As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that "The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words". *Fort Howard Paper Co.* v. *Federal Trade Com'n*, 7 Cir. 156 F. (2d) 899, 905 [43 F. T. C. 1087, 4 S. & D. 496]. Where, as here, the evidence is sufficient to support the findings of the commission, it is for that body, and not the courts, to say what conclusions are to be drawn from it. *Federal Trade Com'n* v. *Standard Education Society*, 302 U. S. 112, 117 [25 F. T. C. 1715, 2 S. & D. 429]; *Federal Trade Com'n* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 [18 F. T. C. 669, 2 S. & D. 247].

And the rule just stated is no different, as some of the petitioners seem to think, because the trial examiner reached a conclusion different from that of the commission. *N. L. R. B.* v. *Laister Kauffmann A. Corp.*, 8 Cir. 144 F. (2d) 9, 16–17. It is the commission, not the trial examiner, that is charged with ultimate responsibility for finding the facts; and it is the commission's findings and order that we are authorized to review under the express limitation that "the findings of the commission as to the facts if supported by evidence shall be conclusive". 15 U. S. C. 45 (d). In point is *Beard-Laney Co.* v. *United States*, 73 F. Supp. 27, 33. In that case, it appeared that the order of a hearing division of the Interstate **[980]** Commerce Commission had been reversed on rehearing and it was argued that the usual rules for review of orders of the commission should not be applied for that reason. In answering this contention, the special statutory court of three judges said: "The rules to be applied in reviewing the order of the commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of

the division, which received the approval of the commission, was the final and definitive action of the commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed. *Lang Transp. Co.* v. *United States*, D. C., 75 F. Supp. 915, 925."

There has been a great deal of argument with regard to the practice of freight equalization. It should be noted in this connection, however, that the question in this case is, not whether such practice may be enjoined as constituting of itself an unfair trade practice, but whether it may be considered along with the other facts and circumstances to which we have adverted as tending to establish the conspiracy and combination in restraint of trade, which is the only charge of the complaint. We think that it was properly considered for that purpose. *Federal Trade Com'n* v. *Cement Institute*, 333 U. S. 683 [44 F. T. C. 1460, 4 S. & D. 676]; *Triangle Conduit & Cable Co.* v. *Federal Trade Com'n*, 7 Cir. 168 F. (2d) 175 [44 F. T. C. 1522, 4 S. & D. 741]; *Milk & Ice Cream Can Institute* v. *Federal Trade Com'n*, 152 F. (2d) 478 [42 F. T. C. 867, 4 S. & D. 440]. As was well said by Judge Major of a similar freight equalization plan in the case last cited: "It is argued, perhaps correctly, that such a freight system had long been employed by industry so that members thereof might deliver their product at the same price. In fact, the commission recognizes that this freight equalization plan was used by petitioners prior to the organization of the Institute. Such being the case, the fact still remains that it was employed by petitioners for the purpose of fixing the delivered price of their product and by such use price competition was eliminated or at any rate seriously impaired. On the face of the situation, it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves. * * *"

Whether viewed as an unfair labor practice in itself, or as evidence of the existence of a conspiracy, we see no practical distinction between the freight equalization practice here involved and the multiple basing point system before the Supreme Court in *Federal Trade Commission* v. *Cement Institute*, *supra*, 333 U. S. 684 [44 F. T. C. 1460, 4 S. & D. 676]. Both result in "identity of prices and diversity of net returns." In speaking of the single basing point system, which had been condemned in *Corn Products Co.* v. *Federal Trade Com'n*, 324 U. S. 726 [40 F. T. C. 892, 4 S. & D. 331], and *Federal Trade Com'n* v. *Staley Co.*, 324 U. S. 746 [40 F. T. C. 906, 4 S. & D. 346], the Supreme Court, in the Cement Institute case, pointed out the results that flow from that system, saying: "One is that the 'delivered

prices' of all producers in every locality where deliveries are made are always the same regardless of the producers' different freight costs. Another is that sales made by a non-base mill for delivery at different localities result in net receipts to the seller which vary in amounts equivalent to the 'phantom freight' included in, or the 'freight absorption' taken from the 'delivered price'." The court then pointed out that "the multiple and single systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns. Such differences as there are in matters here pertinent are therefore differences of degree only." The same is true of the freight equalization practice here under consideration.

[981] It is argued that the case here is distinguishable from the Cement Institute case because no "phantom freight" is involved; but there is involved freight absorption, resulting in equal delivered prices by all manufacturers selling in a given locality and unequal net returns to the manufacturers from sales to customers in different localities. So far as the questions before us are concerned, there can be no difference between phantom freight and freight absorption. See 333 U. S. at 725. Another argument is that the case here is distinguishable because there is no prohibition of the purchaser's taking delivery at the point of manufacture and thus eliminating freight altogether; but, so far as appears, no one has ever availed himself of this right, and the distinction does not seem to be one of any practical value. We need not decide, however, whether the freight equalization practice here involved constitutes of itself an unfair trade practice or whether it may be condemned as systematic price discrimination in violation of sec. 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, as was held of the multiple basing point system in the Cement Institute case, as those questions are not before us. The practice unquestionably constitutes evidence to be considered, along with other facts and circumstances, as tending to establish the conspiracy charged; and that was the only purpose for which it was considered by the commission.

We conclude the discussion on the sufficiency of the evidence by adverting again to the indisputable fact that through the business practices followed by petitioners it has resulted that in an industry of which they control 85% there has been no price change in ten years and absolutely no price competition whatever. The product has been so standardized that there is no choice of any sort between the products of different producers, and a purchaser anywhere in the country can purchase at the same price including freight from any producer. It is argued that all this is the result of the free play of economic forces, but the commission did not think so; and this is just the sort of question that Congress intended the commission to decide. As was said by the Supreme Court of a similar argument in the Cement Institute

case: "The commission did not adopt the views of the economists produced by the respondents. It decided that even though competition might tend to drive the price of standardized products to a uniform level, such a tendency alone could not account for the almost perfect identity in prices, discounts, and cement containers which had prevailed for so long a time in the cement industry. The commission held that the uniformity and absence of competition in the industry were the results of understandings or agreements entered into or carried out by concert of the Institute and the other respondents. It may possibly be true, as respondents' economists testified, that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times (for such has been substantially the case here) charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed, namely, that without agreement, prices will vary—that the desire to sell will sometimes be so strong that a seller will be willing to lower his prices and take his chances. We therefore hold that the commission was not compelled to accept the views of respondents' economist-witnesses that active competition was bound to produce uniform cement prices."

Petitioners contend that even though the order of the commission be upheld, the fifth paragraph, which relates to the practice of freight equalization should be stricken therefrom on the ground that it will interfere with the independent use of the practice of freight equalization by petitioners individually. The prohibitions of paragraph 5 have application, however, only to acts done in carrying out a "planned common course of action, understanding, agreement, combination or conspiracy." We dealt with the question here involved in *American Chain & Cable Co.* [982] v. *Federal Trade Com'n*, 4 Cir. 139 F. (2d) 622 [38 F. T. C. 825, 4 S. & D. 99], where petitioner had suggested to the commission, without success, that it clarify a similar order by inserting a declaration that nothing therein was intended to prevent a manufacturer from independently continuing to engage in a given course of action. In affirming the action of the commission, this court, speaking through Judge Soper, after pointing out the history of the present form of the order and the fears of arbitrary action entertained by the petitioner, said: "It does not seem to us that the order needs further clarification. It is of course true that a cease and desist order must be certain and unambiguous in its prohibitive terms because businessmen must operate under it at their peril. * * * But, there can be no doubt that to sustain a charge of violation of the order in this case it must be shown that the prohibited acts have been performed as the result of an agreement or conspiracy, or as the result of a common course of action, that has

been agreed upon or planned between two or more persons. If, as the result of such agreement or plan, the petitioners continue to cooperate in a common course of action which has been found to violate the statute, they make themselves liable to the prescribed penalties; and they have no just cause for complaint if in appraising the evidence in any case the triers of fact seek to determine whether there is any relation or connection between their past illegal acts and the conduct under examination. If such a relation or connection is found it may properly be condemned as a continuance of an unlawful conspiracy. Of course the influence of changed business conditions must be taken into account in reaching a decision; but there is no reason to believe that the Federal Trade Commission will fail in its duty in this respect or that the courts will hesitate to modify or reverse an order that is based on inferences not supported by the evidence."

As we have already indicated, the commission consents that its order be modified so as to eliminate the individual petitioners. We think it should be modified, also, to eliminate its application to cork discs. There is no sufficient evidence of any conspiracy or combination in restraint of trade with respect to cork discs, and no finding sufficient to support the application of the order to dealings therein. The evidence discloses that most of the manufacturers of crown bottle caps manufacture the cork discs which they use; and the inclusion of the latter commodity in the order does not seem to have any practical significance.

The order of the commission will be modified by striking therefrom the names of L. C. McAuliffe, E. J. Costa, Joseph C. Feagley and Benno Cohn and by striking the words "or cork discs" from the main body of the order and from the paragraph numbered one; and, as so modified, the order of the commission will be affirmed and enforced.

Modified and as so modified affirmed and enforced.

ARTRA COSMETICS, INC. v. FEDERAL TRADE COMMISSION [1]

No. 9763—F. T. C. Docket 4930

(Circuit Court of Appeals, Third Circuit. December 1, 1949)

Order dismissing, on stipulation of the parties, petition for review of order of the Commission of May 26, 1948, 44 F. T. C. 883, at 891, requiring respondents, their representatives, etc., in connection with the offer, etc., of their depilatory cosmetic product "Imra," to cease and desist from disseminating, etc., any advertisement which represents, directly or by implication, that said product is safe for use or that its use will not irritate a normal skin.

Mr. Fred A. Klein of New York City, for petitioner.

Mr. James W. Cassedy, Associate General Counsel, of Washington, D. C., for Federal Trade Commission.

STIPULATION AND ORDER DISMISSING PETITION TO REVIEW

It appearing that petitioner has filed with this Court a petition to review and set aside a certain order to cease and desist issued against petitioner by the Federal Trade Commission, respondent herein, on May 26, 1948, in a proceeding designated "In the Matter of ARTRA COSMETICS, INC., a corporation, Federal Trade Commission Docket No. 4930"; that on July 7, 1948, petitioner filed with the Federal Trade Commission a motion to vacate the said order to cease and desist; that on November 8, 1949, the Federal Trade Commission granted the said motion and vacated and set aside the said order to cease and desist; and that the controversy which gave rise to this cause has subsequently become moot;

Now, therefore, subject to the approval of the Court, it is hereby stipulated and agreed by and between counsel for petitioner and counsel for respondent that petitioner's said petition to review filed herein on July 26, 1948, be, and it hereby is, dismissed.

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[789] GOODYEAR TIRE & RUBBER CO., INC. ET AL. v. FEDERAL TRADE COMMISSION [1]

Civ. A. No. 5455–49—F. T. C. File 203–1

(United States District Court, District of Columbia. January 18, 1950)

ADMINISTRATIVE PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—IN GENERAL

Ordinarily, relief by judicial action may not be had until administrative remedies have been exhausted.

ADMINISTRATIVE PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—IF PROCEEDING UNDER CLAYTON ACT BEING CONDUCTED BY COMMISSION UNDER ITS PUBLISHED RULES OF PRACTICE AND PROCEDURE—THAT PROCEDURE ALLEGEDLY NOT IN CONFORMANCE WITH REQUIREMENTS OF ADMINISTRATIVE PROCEDURE ACT AND INCONVENIENCE AND COST INVOLVED IN PLAINTIFF'S PARTICIPATION

Where Federal Trade Commission was conducting proceeding under the Clayton Act in accordance with its published rules of practice and procedure, and proceedings were pending and had not been completed, and party to proceeding claimed it would suffer through inconvenience and cost of participating and alleged that commission was not acting as required by the Administrative Procedure Act, administrative remedy was not exhausted, and no irreparable injury was shown, and hence court had no authority to grant injunctive relief.

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[1] Reported in 88 F. Supp. 789

ADMINISTRATIVE PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—EXHAUSTION OF ADMINISTRATIVE REMEDIES AS PREREQUISITE TO—THAT SOME INJURY THEREBY ENTAILED TO LITIGANT

That some injury might result when a litigant is forced to await entry of a final order by an administrative tribunal before securing judicial review does not entitle litigant to injunctive relief on ground that litigant will suffer irreparable injury if resort to judicial remedy is delayed.

(The syllabus, with substituted captions, is taken from 88 F. Supp. 789)

Cahill, Gordon, Zachry & Reindel, Washington, D. C., by *Mr. Robert G. Zeller*, Washington, D. C., for plaintiff.

Mr. W. T. Kelley, Mr. Joseph S. Wright, Mr. James B. Truly, Mr. Phillip R. Layton, Washington, D. C., *Mr. George Morris Fay*, United States Attorney for District of Columbia, Washington, D. C., for defendants.

MATTHEWS, *District Judge:*

This is an action brought by the Goodyear Tire & Rubber Company against the Federal Trade Commission and its members seeking to restrain defendants in the conduct of a pending administrative proceeding entitled "File 203–1, In the Matter of the Rubber Tire Industry," and having for its purpose the determining of whether there should be fixed and established a quantity limit for replacement rubber tires and tubes. The applicable statute (U. S. C., Title 15, sec. 13) prohibits price discrimination but permits price differentials which make only due allowance for cost differences resulting from differing methods or quantities in which commodities are sold or delivered to purchasers, and provides that the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix quantity limits as to particular commodities where the Commission finds that available purchasers in greater quantities are so few as to render price differentials on account thereof unjustly discriminatory or promotive of monopoly. The Commission published Rules of Practice and Procedure to govern the proceeding. Thereafter the plaintiff, a corporation engaged in the sale of replacement tires and tubes throughout the United States, petitioned the Commission, as an interested party, to amend said Rules for the conduct of the proceeding, contending that these rules will not afford plaintiff the "hearing" required by the cited statute, but only an opportunity to submit [790] "data views and argument." The petition was denied, and plaintiff contends that such denial is a final agency action and subject to judicial review under section 10 of the Administrative Procedure Act.

The Complaint in this Court seeks a judgment (1) declaring that the Federal Trade Commission in fixing quantity limits under U. S.

C., Title 15, sec. 13, is subject to sections 4, 7, and 8 of the Administrative Procedure Act, in the conduct of hearings which the Commission proposes to hold in respect to the rubber tire industry; and (2) enjoining defendants pending trial and perpetually from further proceedings under Rules 2.30 and 7.11 of the Commission's Published Rules of Practice and Procedure. The matter now before this Court is a motion by plaintiff for a preliminary injunction and a motion by defendants to dismiss. For the purposes of these motions and by consent of the parties this action and similar actions brought by the B. F. Goodrich Company, The Firestone Tire and Rubber Company and United States Rubber Company are consolidated.

The time for judicial review of the administrative proceeding in the Federal Trade Commission is not ripe. It is well settled that ordinarily relief by judicial action may not be had until administrative remedies have been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

Of the rule requiring the exhaustion of administrative remedies the Court said in *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752:

"The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and correlatively, of awaiting their final outcome before seeking judicial intervention.

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination."

Plaintiff contends that it will suffer irreparable injury if resort to a judicial remedy is delayed until after the pending administrative proceeding and stresses the inconvenience and cost of participating in said proceeding. Of such a contention the Court said in *Utah Fuel Co.* v. *Nat. Bituminous Coal Commission*, 69 App. D. C. 333, 339:

"That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regret-

table but not controlling factor under such circumstances. Injury may result also from judicial determinations and from direct legislative action. The expense and annoyance of litigation is part of the social burden of living under government."

The motion to dismiss must be sustained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on to be heard upon plaintiff's motion for preliminary injunction and defendants' motion to dismiss, and the Court having considered the pleadings and affidavits, together with memoranda of points and authorities filed by the respective parties, and having heard argument of counsel, the Court makes the following findings of fact and conclusions of law:

[791] FINDINGS OF FACT

1. The Federal Trade Commission, an administrative agency, is now and since October 4, 1949, has been conducting a proceeding entitled File 203–1, In the Matter of the Rubber Tire Industry, to determine whether there should be fixed and established a quantity limit for replacement rubber tires and tubes, under the provisions of Section 2 (a) of the Clayton Act as amended, 15 U. S. C. A. § 13, and in accordance with its published Rules of Practice and Procedure, 16 CFR, Ch. I, Parts 2 and 7, Rules of Practice 2.30, General Procedures 7.11, and such administrative proceedings are now pending and have not been completed.

2. On December 5, 1949, plaintiff, a Delaware corporation engaged in the sale of replacement rubber tires and tubes throughout the United States, petitioned the Commission, as an interested party, to amend its Rules of Practice and Procedure for the conduct of said proceeding, which petition was denied by the Commission on December 7, 1949.

3. Thereafter, on December 29, 1949, plaintiff brought this action against the Federal Trade Commission and its members, seeking a judgment (1) declaring that the proceeding to fix quantity limits was subject to the provisions of Sections 4, 7, and 8 of the Administrative Procedure Act; (2) perpetually enjoining defendants from further proceedings under or pursuant to its published Rules of Practice; and (3) an interlocutory injunction restraining defendants from proceeding further in File 203–1, In the Matter of the Rubber Tire Industry.

4. On January 6, 1950, plaintiff moved for preliminary injunction enjoining defendants from proceeding further in File 203–1, In the

Matter of Rubber Tire Industry, on the ground that such proceeding would result in irreparable injury to plaintiff. Said motion was accompanied by affidavit of counsel and memorandum of points and authorities with respect to the merits, the jurisdiction of the Court and irreparable injury.

5. On January 11, 1950, defendants filed motion to dismiss this action on the ground that the Court did not have jurisdiction, and submitted therewith a memorandum of points and authorities addressed to the jurisdiction of the Court and to the lack of irreparable injury to plaintiff.

6. On January 12, 1950, counsel for plaintiff and defendants were heard on plaintiff's motion for preliminary injunction and defendants' motion to dismiss.

CONCLUSIONS OF LAW

1. This Court lacks jurisdiction to interfere with the conduct of pending administrative proceedings.

2. The Court lacks jurisdiction over the subject matter of this action.

AMERICANA CORPORATION v. FEDERAL TRADE COMMISSION [1]

No. 21109—F. T. C. Docket 5085

(Circuit Court of Appeals, Second Circuit. January 20, 1950)

Order dismissing, on stipulation of parties, and following the Commission's modification of its order, petition to review order of Commission of July 14, 1948, 45 F. T. C. 32, at 46, requiring respondent corporation, its agents, etc., in connection with the offer, etc., of its encyclopedia designated "Americana" or "Encyclopedia Americana" and material supplementary thereto, or any other publication, to cease and desist from representing among other things,—

That said publication is the only national American encyclopedia, is the best known or most authoritative encyclopedia published in the United States or is America's supreme authority, contains more articles than any other encyclopedia, presents more information than any other set of books, is the choice of all Government departments, educational institutions, boards of education, or public libraries as the official reference work;

That it is available only to selected individuals under special conditions; that individuals employed by respondent to sell its publication are anything other than salesmen soliciting prospects to purchase said publication at prices regularly established by respondent; or

That any issue of said publication, prepared through the use of old plates which have been merely revised, with new articles inserted, is a new edition, etc.

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[1] Not reported in Federal Reporter. For case before the Commission see 45 F. T. C. 32.

Mr. J. Raymond Tiffany, of Hoboken, N. J., and *Mr. Benjamin Werne*, of New York City, for petitioner.

Mr. James W. Cassedy, Assistant General Counsel, of Washington, D. C., for Federal Trade Commission.

ORDER DISMISSING PETITION TO REVIEW

It appearing that petitioner has filed with this Court a petition to review and set aside a certain order to cease and desist issued against petitioner by the Federal Trade Commission, respondent herein, on July 28, 1948, in a proceeding designated "In the Matter of AMERICANA CORPORATION, Federal Trade Commission Docket No. 5085"; that on October 22, 1948, petitioner filed with said Commission a motion to review and modify the said order to cease and desist; that on December 8, 1949, the said Commission granted to said motion in part and modified the said order in certain respects; that the controversy giving rise to this cause has consequently become moot; and that the parties hereto have jointly stipulated that the petition filed herein be dismissed:

Now, therefore, it is ordered that the petitioner's said petition to review be, and it hereby is, dismissed.

UNITED STATES v. MORTON SALT CO.; SAME v. INTERNATIONAL SOLT CO.[1]

Nos. 273 and 274—F. T. C. Docket 4319

(United States Supreme Court. February 6, 1950)

FEDERAL TRADE COMMISSION—DUTIES—PREVENTION OF UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS, ETC.

The Federal Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—IF COMMISSION CHARGED WITH RESPONSIBILITY FOR COMPLIANCE REPORTS AND CONTEMPT PROCEEDINGS—WHETHER COMMISSION THEREBY RELIEVED OF RESPONSIBILITY INCIDENT TO DECREE'S ENFORCEMENT.

Court of Appeals decree affirming with modifications a cease and desist order of the Federal Trade Commission, directing that reports showing manner of compliance be filed with commission, and giving commission responsibility to initiate contempt proceedings for violation of decree did

[1] Reported in 338 U. S. 632, 70 S. Ct. 357. Judgments of the District Court for the Northern District of Illinois, Eastern Division, granting defendants' motion for summary judgments and dismissing the complaints are reported in 80 F. Supp. 419, and affirmance by the Court of Appeals for the Seventh Circuit in 174 F. (2d) 703.

not wholly relieve commission of responsibility for enforcement, and contemplated that commission could obtain accurate information from time to time on which to base a responsible conclusion as to whether there was a cause for contempt proceeding.

APPELLATE PROCEDURE AND PROCEEDINGS—JUDICIAL REVIEW—IN GENERAL

The function of judicial review of administrative orders is dispassionate and disinterested adjudication, unmixed with any concern as to success of either prosecution or defense.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—WHETHER COMMISSION APPROPRIATELY CHARGED WITH RESPONSIBILITY FOR COMPLIANCE REPORTS AND CONTEMPT PROCEEDINGS

[358] Decree enforcing cease and desist order of Federal Trade Commission appropriately permitted commission to receive reports of compliance and to institute contempt proceedings in case of violations.

JUDGMENTS—ENFORCEMENT—WHETHER STEPS IN AID OF BY LITIGANT OR DEPARTMENT, USURPATION OF COURT'S POWER

Steps which a litigant or executive department lawfully takes for enforcement of a judgment are a vindication rather than a usurpation of the court's power.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—WHERE ORDER, AS MODIFIED, INCORPORATED IN LATTER—WHETHER COMMISSION'S DUTY TO INFORM ITSELF AND PROTECT COMMERCE, THEREBY AFFECTED

Although cease and desist order of Federal Trade Commission was merged in enforcement decree, the court by its decree neither assumed to itself nor denied to commission that agency's duty to inform itself and protect commerce against continued or renewed unlawful practice.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—IF COMMISSION CHARGED WITH RESPONSIBILITY FOR COMPLIANCE REPORTS AND CONTEMPT PROCEEDINGS—WHETHER COMMISSION'S REQUIREMENT OF SUBSEQUENT REPORTS TO SHOW CONTINUING COMPLIANCE, BARRED BY DECREE'S REQUIREMENT OF INITIAL COMPLIANCE REPORTS

Where decree affirming with modifications a cease and desist order of Federal Trade Commission had directed that reports showing manner of compliance be filed with the commission and the corporations involved had filed such reports, the commission could later require the filing of additional reports to show continuing compliance with decree even though commission did not charge violation either of decree or statute and was allegedly engaged in a mere "fishing expedition" to see if it could uncover evidence of guilt.

ADMINISTRATIVE BODIES—INVESTIGATORY POWERS—AS INCIDENT TO INVESTIGATIVE AND ACCUSATORY DUTIES

An administrative body to which by statute investigative and accusatory duties are delegated may take steps to inform itself as to whether there is probable violation of the law.

COMMISSION PROCEDURE AND PROCEEDINGS—REVIEW AND ADJUDICATION—DECREES—COMPLIANCE—WHETHER COMMISSION DEPRIVED OF RIGHT TO INVESTIGATE CONTINUED

The Federal Trade Commission cannot intrude upon or usurp the court's function of adjudication, and the court's jurisdiction to review cease and desist order is exclusive and its enforcement decree final, but the commission is not deprived by such decree of its right, in the exercise of its own law enforcing powers, to investigate the question of continued compliance with decree.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—IF COMPLIANCE REPORTS REQUIRED BY, FILED—WHETHER REQUIREMENT OF SUBSEQUENT REPORTS BY COMMISSION, SHOWING CONTINUED COMPLIANCE, THEREBY BARRED

Where decree of the Court of Appeals affirming with modifications a cease and desist order of the Federal Trade Commission had directed that reports showing manner of compliance be filed with the commission and the corporations concerned had complied therewith, a subsequent order of the commission requiring additional reports to show continuing compliance with decree did not constitute an interference with the decree or an invasion of the powers of the Court of Appeals.

ADMINISTRATIVE PROCEDURE ACT—IN GENERAL

The Administrative Procedure Act was framed as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices, and it creates safeguards even narrower than the [359] constitutional ones, against arbitrary official encroachment on private rights.

ADMINISTRATIVE PROCEDURE ACT—COMMISSION RULES—REPORTS OF COMPLIANCE—AS PUBLISHED IN FEDERAL REGISTER

Federal Trade Commission rule, as published in Federal Register, setting time limit for filing initial reports of compliance with commission orders and asserting the commission's right to require filing of further compliance reports thereafter, satisfied requirements of Administrative Procedure Act for publication in Federal Register of statements of rules, organization and procedure.

FEDERAL TRADE COMMISSION—POWERS OF—WHETHER FORFEITED BY NONUSER

None of powers granted to the Federal Trade Commission had been forfeited by nonuser.

FEDERAL TRADE COMMISSION ACT—INVESTIGATORY POWERS—WHETHER REPORTS OF COMPLIANCE WITH DECREES ENFORCING CEASE AND DESIST ORDER, INCLUDED

Provision in the Federal Trade Commission Act empowering the commission to conduct investigations and require submission of special reports empowers the commission to require special reports as to manner in which a corporation is complying with a decree enforcing a cease and desist order entered under provision of the act relating to the suppression of unfair practices.

COMMISSION PROCEDURE AND PROCEEDINGS—RULES OF PRACTICE—COMPLIANCE AND SUPPLEMENTAL COMPLIANCE REPORTS—IF ENFORCEMENT DECREE THERETOFORE ENTERED—WHETHER ULTRA VIRES, ETC.

Rule of the Federal Trade Commission announcing the right to require a corporation against which an enforcement decree has been entered to file supplemental reports of compliance is not ultra vires and violative of the Administrative Procedure Act but is authorized by the Federal Trade Commission Act.

INVESTIGATORY POWERS—CORPORATE RIGHTS—IN GENERAL

Corporations are entitled to protection from unlawful demands made in the name of public investigation but they can claim no equality with individuals in the enjoyment of a right to privacy.

INVESTIGATORY POWERS—CORPORATE RIGHTS—IF INQUIRY WITHIN AUTHORITY OF AGENCY, DEMAND NOT TOO INDEFINITE, AND INFORMATION SOUGHT REASONABLY RELEVANT

Governmental investigation into corporate matters may be of such sweeping nature and so unrelated to matter properly under inquiry as to exceed investigatory power, but constitutional safeguards as to searches and seizures and due process are not violated if inquiry is within authority of agency, demand is not too indefinite and information sought is reasonably relevant.

COMMISSION PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—IN GENERAL

Parties who seek judicial aid to avoid compliance with an order of the Federal Trade Commission on the ground that requirements for reports are arbitrarily excessive must have first made reasonable efforts before the Commission itself to obtain reasonable conditions.

COMMISSION PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—COMPLIANCE AND SUPPLEMENTAL COMPLIANCE REPORTS—IF PURPOSE TO SHOW CONTINUING, WHERE DECREE FOR ENFORCEMENT THERETOFORE ENTERED—WHETHER VIOLATION OF FOURTH OR FIFTH AMENDMENTS

Order of the Federal Trade Commission requiring submission of additional reports to show continuing compliance by corporations with decree for enforcement of cease and desist order did not violate the prohibition of Fourth Amendment against unreasonable searches and seizures or transgress "due process of law" clause of the Fifth Amendment.

(The syllabus, with substituted captions, is taken from 70 S. Ct. 357)

On writs of certiorari to The United States Court of Appeals for Seventh Circuit, judgments reversed.

[360] *Mr. Philip Elman*, Washington, D. C., for petitioner.
Mr. L. M. McBride, Chicago, Ill., for Morton Salt Co.
Mr. Frederic R. Sanborn, New York City, for International Salt Co.

Mr. JUSTICE JACKSON delivered the opinion of the Court.

This is a controversy as to the power of the Federal Trade Commission to require corporations to file reports showing how they have

complied with a decree of the Court of Appeals enforcing the Commission's cease and desist order, in addition to those reports required by the decree itself.

Proceedings under § 5 of the Federal Trade Commission Act[1] culminated in a Commission order requiring respondents Morton Salt Company and International Salt Company, together with eighteen other salt producers and a trade association, to cease and desist from stated practices in connection with the pricing, producing and marketing of salt. The Court of Appeals for the Seventh Circuit affirmed the order with modifications and commanded compliance. 134 F. (2d) 354. The decree directed that reports of the manner of compliance be filed with the Commission within ninety days, but it reserved jurisdiction "to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The decree expressly was "without prejudice to the right of the [361] United States, as provided in § 5 (1) of the Federal Trade Commission Act to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree." The reports of compliance were subsequently filed and accepted, and there the matter appears to have rested for a little upwards of four years.

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[1] The Federal Trade Commission was established, under the Federal Trade Commission Act, 38 Stat. 717, as amended 52 Stat. 111, 1028, 15 U. S. C. §§ 41 *et seq.*, to prevent unfair methods of competition and unfair or deceptive acts or practices in interstate commerce by certain persons, partnerships or corporations. Under § 5 (b) of that Act the Commission is empowered and directed, following suitable hearing and determination, to order that those found guilty of such practices cease and desist therefrom; and under §§ 5 (c) and 5 (d) exclusive jurisdiction to affirm, enforce, modify, or set aside such orders is placed in the appropriate Court of Appeals, whose judgment and decree are final except insofar as they may be subject to review here. Civil penalties for violations of cease and desist orders are provided for, § 5 (l), to be recovered in civil actions brought by the United States. Under §§ 6 (a) and 6 (b) of the Act, the Commission is authorized to compile information concerning, and to investigate, the organization, business, conduct, practices, and management of any corporation within its jurisdiction, and to require any such corporation to file "annual or special, or both annual and special, reports or answers in writing to specific questions," concerning such information. For the purposes of the Act, the Commission is empowered, in § 9, to examine and copy documentary evidence of any corporation being investigated or proceeded against, and to require attendance of witnesses and production of all such documentary evidence. The same section also gives District Courts jurisdiction to compel compliance with the subpoena as well as other provisions of the Act or any order of the Commission made in pursuance thereof. And, finally, in § 10, it is provided that, "If any corporation required by this Act to file any annual or special report shall fail to do so within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture . . . shall be recoverable in a civil suit in the name of the United States . . ." The present action was brought to compel the filing of reports ordered by the Commission and for money judgment under § 10 for respondents' default to do so.

On September 2, 1947, the Commission ordered additional and highly particularized reports to show continuing compliance with the decree. This was done without application to the court, was not authorized by any provision of its decree, and is not provided for in § 5 of the statute under which the Commission's original cease and desist order had issued. The new order recited that it was issued on the Commission's own motion pursuant to its published Rule of Practice No. XXVI [2] and the authority granted by subsections (a) and (b) of § 6 of the Trade Commission Act. It ordered these and other parties restrained by the earlier decree to file within thirty days "additional reports showing in detail the manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree." It demanded of each producer a "complete statement" of the "prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944." From the Salt Producers Association it required information as to its activities and services. The Association and some of the producers reported satisfactorily. These two respondents did not. Instead, each informed the Commission in general terms that it had complied with the decree in the manner previously reported, but that it doubted the Commission's jurisdiction to require further reports and declined to supply the particulars demanded. Neither asked any hearing or made objection to the scope of the order.

The Commission next gave respondents notices asserting their default and calling attention to penalties provided in § 10 of the Act. Neither respondent asked any hearing on the notice of default. These suits were then commenced in the name of the United States in District Court under §§ 9 and 10 of the Trade Commission Act, asking mandatory injunctions commanding respondents to report as directed, together with judgment against each for $100 per day while default continued. Respondents answered. Both sides moved for summary judgments. The court found no dispute as to material facts and dismissed the complaints for want of jurisdiction. 80 F. Supp. 419. The Court of Appeals, by divided vote, affirmed. 174 F. (2d) 703. We granted certiorari, 338 U. S. 857, because the case involved issues of some importance to enforcement of the Act and of court decrees under it and under other Acts which provide similar methods to enforce orders of administrative bodies.

The Government's suits and the Commission's order are challenged upon a variety of grounds, not all of which were considered by the

[2] See note 4, *infra*.

Court of Appeals. They include contentions that (1) the order constitutes an interference with the decree and an invasion of the powers of the Court of Appeals; (2) the Commission's Rule XXVI is *ultra vires* and violates the Federal Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001 *et seq.;* (3) the procedure is unauthorized by those sections of the Act on which it is based; (4) it is novel and arbitrary and violates the Fourth and Fifth Amendments to the Constitution. For reasons given, we reject each of these contentions. **[362]**

I. Invasion of Court of Appeals Jurisdiction

The respondents' case and the decision below are rested heavily on this argument that the Commission is invading the province of the judiciary. The Court of Appeals held that the Commission's order of September 2, 1947, represented an unauthorized attempt to enforce that court's decree. It pointed out that the statute had made the court's own jurisdiction of the proceeding "exclusive" and its own decree final. It considered that "every vestige of jurisdiction" over that subject was "firmly and exclusively lodged in [the] Court of Appeals." It noted that it had required filing of only the original compliance reports, and that it had protected its jurisdiction by reserving power to enter further orders necessary to enforce compliance and prevent evasion. It thought that the effect of the Commission's proceedings was to assert "such jurisdiction to reside elsewhere."

It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission.[3] Certainly entry of the court decree did not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility "to initiate conempt proceedings for the violation of this decree." This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not cause for such a proceeding. The decree also required the original report showing the manner and

[3] For example, one of the respondents frankly states: ". . . At no time has this respondent attempted to argue that it was immune to investigation by the Federal Trade Commission simply by virtue of the original case having come within the jurisdiction of the Court of Appeals. This respondent assumes that in some manner or other the Commission can, if it chooses, continue to police the compliance of this respondent by appropriate investigatory procedures. Whether or not the appropriate procedure is (a) by petitioning the Court of Appeals for permission to investigate the respondent with a view to possible contempt or Section 5 (l) proceedings, (b) by an assertion of a right of investigation under Section 9, even though it be an investigation supplemental to a Court of Appeals decree, or (c) by an assertion of an alleged inherent right of investigation under Section 5, is a matter of law not at issue in this case, and it represents an issue as to which this respondent at the moment is completely indifferent. . . ."

form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established.

If the Commission had petitioned the court itself to order additional reports of compliance, it could properly have been required to present some evidence of probable violation to overcome the "presumption of legality," of innocence, and of obedience to the law which respondents here urge. Courts hesitate to alter or supplement their decrees except the need be proved as well as asserted. Evidence the Commission did not have; it had at most a suspicion, or let us say a curiosity as to whether respondents' reported reformation in business methods was an abiding one.

[363] Must the decree, after a single report of compliance, rest upon respondents' honor unless evidence of a violation fortuitously comes to the Commission? May not the Commission, in view of its residual duty of enforcement affirmatively satisfy itself that the decree is being observed? Whether this usurps the courts' own function is, we think, answered by consideration of the fundamental relationship between the courts and administrative bodies.

The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process. Its agencies are provided with staffs to institute proceedings and to follow up decrees and police their obedience. While that process at times is adversary, it also at times is inquisitorial. These agencies are expected to ascertain when and against whom proceedings should be set in motion and to take the lead in following through to effective results. It is expected that this combination of duty and power always will result in earnest and eager action but it is feared that it may sometimes result in harsh and overzealous action.

To protect against mistaken or arbitrary orders, judicial review is provided. Its function is dispassionate and disinterested adjudication, unmixed with any concern as to the success of either prosecution or defense. Courts are not expected to start wheels moving or to follow up judgments. Courts neither have, nor need, sleuths to dig

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up evidence, staffs to analyze reports, or personnel to prepare prosecutions for contempts. Indeed, while some situations force the judge to pass on contempt issues which he himself raises, it is to be regretted whenever a court in any sense must become prosecutor. Those occasions should not be needlessly multiplied by denying investigative and prosecutive powers to other lawful agencies.

The court in this case advisedly left it to the Commission to receive the report of compliance and to institute any contempt proceedings. This was in harmony with our system. When the process of adjudication is complete, all judgments are handed over to the litigant or executive officers, such as the sheriff or marshal, to execute. Steps which the litigant or executive department lawfully takes for their enforcement are a vindication rather than a usurpation of the court's power. In the case before us, it is true that the Commission's cease and desist order was merged in the court's decree; but the court neither assumed to itself nor denied to the Commission that agency's duty to inform itself and protect commerce against continued or renewed unlawful practice.

This case illustrates the difference between the judicial function and the function the Commission is attempting to perform. The respondents argue that since the Commission made no charge of violation either of the decree or the statute, it is engaged in a mere "fishing expedition" to see if it can turn up evidence of guilt. We will assume for the argument that this is so. Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the color[364]ful and nostalgic slogan, "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than

those which underlay many older decisions. Compare *Jones* v. *Securities & Exchange Comm'n*, 298 U. S. 1, with *United States* v. *Morgan*, 307 U. S. 183, 191.

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Of course, the Commission cannot intrude upon or usurp the court's function of adjudication. The decree is always what the court makes it; the court's jurisdiction to review is and remains exclusive, its judgment final. What the Commission has done, however is not to modify but to follow up this decree. It has not asked this report in the name of the court, or in reliance upon judicial powers, but in reliance upon its own law-enforcing powers.

That Congress did not regard it as a judicial function to investigate compliance with court decreees, at least initially, is shown by its action as to other antitrust decrees. Section 6 (c) of the Act under consideration specifically authorizes the Commission, on its own initiative and without leave of court, to investigate compliance with final decrees in cases prosecuted by the Attorney General and not involving the Commission as a party. Congress obviously deemed it a function of the Commission, rather than of the courts, to probe compliance with such decrees, even when it had no part in obtaining them. It surely was not because of fear it would involve collision with the judicial function that Congress omitted express authorization for the Commission to follow up decrees in its own cases. Express grant of power would only seem necessary as to decrees in which the Commission had no other interest.

Whether the Commission has invaded any private right of respondents, we consider under later rubrics. Our only concern under the present heading is whether the Commission's order infringes prerogatives of the court. We hold it does not.