

Syllabus.

FEDERAL TRADE COMMISSION

v.

WHOLESALE TOBACCO AND CIGAR DEALERS ASSOCIATION OF PHILADELPHIA, PA., ET AL.

COMPLAINT, FINDINGS AND ORDER IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 886—February 16, 1924.

SYLLABUS.

Where an association composed of tobacco wholesalers, and the officers and members thereof;

- (a) Agreed upon a schedule of fixed prices at which the members should thereafter resell the products dealt in by them to their dealer customers, and, in accordance with a system adopted by them and directed to the maintenance and enforcement of such prices;
- (b) Undertook to maintain and maintained the same;
- (c) Caused the fixing of such prices to appear as the formal action of the association by appropriate resolution;
- (d) Notified all members of such actions;
- (e) Sought by persuasion and intimidation to cause all dealers in the territory concerned to maintain such prices;
- (f) Sought and secured the cooperation of a tobacco manufacturer, the products of which constituted a large portion of those dealt in by them and were so essential to a tobacco dealer that without them his business would be substantially crippled and he would be placed at a competitive disadvantage with others so supplied, in its aforesaid persuasion and intimidation, in the notifying of the trade by circular letters and otherwise that such manufacturer, the notifier, would refuse further to supply price cutters, and in the taking of such action by said manufacturer;
- (g) Caused reports of price cutting to be reported to the aforesaid manufacturer for action as above set forth;

(h) Employed a special agent to spy on members and other dealers in order to ascertain and report instances of price cutting as above described; and Where the aforesaid manufacturer, in pursuance of its general policy to assist groups of its jobbers who had fixed uniform resale prices on its products, by refusing shipments of its goods to price cutters,

- (i) Assisted the aforesaid association and members in making effective their plan of resale price maintenance, as above set forth;

With the tendency and capacity to constrain all wholesalers doing business in the territory concerned uniformly to sell their products to their dealer customers at the prices fixed as above described and to hinder and suppress all competition in the wholesaling of such products in said territory and likewise to hinder and restrict competition between retailers therein; and with a tendency thereby to unduly hinder and obstruct the free and natural flow of commerce:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition,

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Mr. Edward L. Smith and *Mr. E. B. Haas* for the Commission.

Mr. Joseph H. Taulane of Philadelphia, Pa., for respondent Wholesale Tobacco & Cigar Dealers Association of Philadelphia, and the officers, directors, and members thereof.

Mr. John Walsh and *Mr. L. A. Spiess* of Washington, D. C., and *Mr. Junius Parker* of New York City, for respondent American Tobacco Company.

Mr. H. H. Shelton of Washington, D. C., and *Mr. Charles Caldwell* of New York City, for respondent P. Lorillard Company.

COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its Officers, Directors, Members and the various individuals, partnerships and corporations named in the caption hereof,¹ hereinafter referred to as Respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, is a voluntary unincorporated association organized in the Year 1920 by and composed of various individuals, partnerships and corporations engaged in the business of selling at wholesale to wholesale and retail dealers cigars, cigarettes and other tobacco products in the State of Pennsylvania and in neighboring States, in some instances doing a retail business in said commodities in addition to said wholesale business, said Association is hereinafter called the Association. Respondents, Nelson F. Eberbach, Harvey D. Narrigan, James Murphy, Herman Krull and Paul L. Brogan were the original officers of the Association, holding the respective official positions set out in the caption hereof.¹ They and their successors have continuously been and are now such officers administering the affairs of the Association. Arthur Slipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman were the original Directors of the Association and together constituted the original Board of Directors. They and their successors have continuously been and still are the Directors and Board of Directors of the Association, controlling and directing its affairs.

¹ See recital on p. 262 et seq.

Group I.

The following-named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling one or more of the aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their respective places of business in said city of Philadelphia to said purchasers at various points in various States of the United States:

Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company;

Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey;

Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company;

Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company;

Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull;

William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons;

T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company;

Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

M. Blumenthal;

John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons;

Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company;

Victor Fermani;

Bennett Holland;

B. Hochman;

M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania;

Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers;

E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

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Group II.

The following-named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers wholly within the State of Pennsylvania:

Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers;

Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania;

Anna E. Bechtold, an individual doing business under the trade name of James S. Bechtold;

Frank Blatt;

Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style of Shipton & Payne Company;

H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead;

Fred G. H. Woerner, an individual doing business under the trade name of Fred G. H. Woerner & Sons;

Group III.

The following-named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in selling one or more of aforesaid tobacco products at wholesale to wholesale and retail dealers in several States of the United States. They cause said products when so sold to be transported from their several places of business in said city of Camden to said purchasers at points in various States of the United States:

F. Hartmann & Son, a corporation organized under the laws of the State of New Jersey;

John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

All the foregoing respondents whose names are set out in Groups I, II, and III above were at all times hereinafter mentioned and still are Members of the Association and are hereinafter collectively referred to as the Members. In the absence of the acts and things done by them as more particularly hereinafter set out, they were and are naturally and normally in unrestricted competition with each other and with other dealers in aforesaid territory.

Respondent, American Tobacco Company is a corporation organized under the laws of the State of New Jersey, with its prin-

principal office in the city of Jersey City in said State and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Respondent, P. Lorillard Company is a corporation organized under the laws of the State of New Jersey, with its principal office in the city of Jersey City, in said State and with factories in several of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigars, cigarettes, and other tobacco products and the sale thereof to wholesale and retail dealers throughout the United States. It causes its products when so sold to be transported from the point of manufacture to said purchasers at points in other States of the United States. Amongst said purchasers are all the respondents set out in Groups I, II, and III above.

Said manufacturers at all times hereinafter mentioned were and still are in competition with each other and with other individuals, partnerships and corporations similarly engaged in the manufacture and/or sale of tobacco products in interstate commerce except in so far as the same has been limited, prevented or suppressed by the acts and things done by them and the other respondents herein as more particularly hereinafter set out.

PAR. 2. At the time of the organization of the association, the prices at which said manufacturers sold their products were fixed as follows: Said manufacturers severally supplied the members with a schedule of prices denominated "list prices" which were the prices severally suggested by said manufacturers at which their products should be resold by the members to the retail trade. The prices at which said products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid to said manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including respondent dealers set out in Groups I, II, and III above, then were and still are dependent upon respondent manufacturers for their supply of a large portion of the products in which they deal. The extent of this dependence is such that when any such dealer is unable to secure the products of respondent manufacturers or either of them

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his business is substantially crippled, and he is placed at a competitive disadvantage with dealers supplied with said products. In the year 1920 the association and its members acting through the association and cooperating and conspiring with it, and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the products dealt in by the members, including the products of respondent manufacturers, and having thus fixed said uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the members and by all other wholesale dealers in the trade who did business within the territory served by the members. Respondent manufacturers cooperated and conspired with the association and its members and participated in said price maintenance system as is more particularly hereinafter set out. In the course of aforesaid cooperative enforcement of said system, the members, and the association through its officers and directors, did, amongst others, and still do, the following acts and things:

(a) Undertook among themselves to maintain said resale prices, and did maintain same;

(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to notify all members of said action;

(d) Sought by persuasion and intimidation to cause all dealers in the territory above referred to including those members of the association who discontinued the maintenance of said resale prices in violation of their aforesaid undertakings so to do, to maintain said resale prices;

(e) Sought and secured the cooperation of respondent manufacturers in such persuasion and intimidation, which each said manufacturer rendered by notifying the trade in aforesaid territory, by circular letters and otherwise, "that the notifier would refuse to furnish further supplies of his products to any wholesale dealer who failed to resell such products at the prices fixed in aforesaid schedule, or implying the same in veiled language;

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to respondent manufacturers requesting

the assistance and cooperation of respondent manufacturers in the enforcement of said system by having said manufacturers refuse to further supply said offending dealers with any of their products;

(g) As a result of reporting said names to the respondent manufacturers and requesting their cooperation, as set out in specification (f) hereof, secured the cooperation and assistance of said manufacturers in that behalf and each said manufacturer upon receiving such information proceeded to investigate said instances of price cutting, and upon finding that the offending dealer was cutting prices, and refusing and failing to maintain aforesaid resale prices, refused to furnish said offending dealer with further supplies of its, the manufacturer's products, until the offender gave such promises and assurances of maintaining said resale prices in the future as were satisfactory to said manufacturers and the association in that regard;

(h) Employed special agents to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were or was failing to maintain said resale prices, and upon discovering that a member or a dealer was so doing, to report the name of such offender to the association. Upon receiving such report, sought and secured the cooperation of the manufacturers with regard to said offenders in like manner and with like results as set out in specifications (f) and (g).

PAR. 3. The aforesaid acts and things done by respondents and each of them had and still have the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out, and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Respondents' said practices thus tended and still tend to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

PAR. 4. The above acts and things done by respondents and by each of them constitute unfair methods of competition in commerce, within the intent and meaning of section 5 of an act of Congress, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, defining its powers and duties and for other purposes," the Federal Trade Commission issued and served a complaint upon the respondents, the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, its Officers, directors and members as follows: Nelson F. Eberbach, President, Harvey D. Narrigan and James Murphy, Vice Presidents, Herman J. Krull, Treasurer, Paul L. Brogan, Secretary, respectively, Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, its directors, and the following members: Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation, Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company, Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style F. Kuhn & Brother, Peter J. Murphy and John Murphy, partners doing business under the name and style Peter J. Murphy Company, Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull, Baum & Neely, Incorporated, a corporation, William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons, T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company, F. Hartmann & Son, a corporation, Yahn & McDonnell Company, a corporation, M. Blumenthal, John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons, Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company, Victor Fermani, Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold, Frank Blatt, Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company, H. S. Moorhead, an individual doing business under the trade name Duncan & Moorhead, Bennett Hollard, P. Hochman, M. J. Dalton Company, a corporation, Brucker & Boghien, Incorporated, a corporation, Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons, S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers, E. Cohen and William Cohen, partners

doing business under the name and style E. Cohen & Sons, John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, American Tobacco Company, a corporation, and P. Lorillard Company, a corporation, charging them and each of them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondents John Wagner and Joseph W. Wagner, trading as John Wagner & Sons, filed their joint answer denying the use of the methods of competition charged in the complaint; respondent M. J. Dalton Company filed its answer averring that for at least four months prior to the service of said complaint the Wholesale Tobacco & Cigar Dealers Association of Philadelphia had been practically abandoned and that from that time to the filing of said answer there had been no associated action, agreement, resolution, or understanding between said Association and the officers and among members thereof, or any of them in connection with the business of buying and selling cigars, cigarettes and other tobacco products; excepting Yahn & McDonnell Company, Baum & Neely, Inc., John Murphy and James Murphy, partners doing business under the name and style of Murphy Brothers (none of whom filed answers), all the other respondent members, officers and directors of the Wholesale Tobacco & Cigar Dealers Association of Philadelphia and the said Wholesale Tobacco & Cigar Dealers Association of Philadelphia, filed their joint answer averring that for at least four months prior to the filing of the complaint the Wholesale Tobacco & Cigar Dealers Association of Philadelphia had been practically abandoned and that since that time to the filing of said joint answer there had been no associated action, agreement, resolution, or understanding between said Association and the officers and members thereof, or among the members thereof, or any of them in connection with the business of buying and selling cigars, cigarettes and other tobacco products, respondents American Tobacco Company and P. Lorillard Company filed their separate answers denying the use of the methods of competition charged in the complaint.

Thereupon hearings were had and evidence was thereupon introduced in support of the allegations of said complaint and on behalf of the respondents before George McCorkle, Esq., an examiner of the Federal Trade Commission theretofore duly appointed and thereupon this proceeding came on for final hearing and the Commission having heard argument of counsel and having duly considered the record (the testimony having been reduced to writing and filed in the office of said Commission) and being now fully advised in the premises, makes this its findings as to the facts and

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conclusion (except that the proceeding having been dismissed as to the P. Lorillard Company, the Federal Trade Commission does not make any findings as to the facts as against P. Lorillard Company):

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent, Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, was a voluntary, unincorporated Association organized in the year 1920 and existing until at least June 9, 1922. It was composed of various individuals, partnerships and corporations engaged in the business of selling tobacco and tobacco products at wholesale to wholesale and retail dealers in the State of Pennsylvania and in the neighboring States, and, in some instances, doing a retail business in said commodities in addition to said wholesale business. Said association will be hereinafter referred to as the association.

The original officers of the association elected on September 2, 1920, were the following respondents: Nelson F. Eberbach, President, Harvey D. Narrigan, Vice President, James Murphy, Vice President, Herman J. Krull, Treasurer, Paul L. Brogan, Secretary, and Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd, and M. Hochman, Directors. Such respondents remained and continued as such officers of the association from September 2, 1920, until at least January 6, 1922, except that respondent William Fink, on June 6, 1921, was elected Second Vice President in place of respondent James Murphy, and said respondent William Fink continued as such Vice President from June 6, 1921, until at least January 6, 1922.

At a meeting of the association held September 2, 1920, the following committees were appointed, viz.,

Executive Committee: Respondents H. Stewart Moorhead, chairman, Frank Kuhn, John Murphy, Philadelphia, Philip Godeski, and William Cohen;

Finance Committee: Respondents M. Hochman, chairman, L. Fink, and James Bechtold;

Membership Committee: Respondents Arthur Shipton, chairman, F. Hartmann, and Myer Blumenthal.

These respondents continued as members, respectively, of the executive committee, finance committee and membership committee until at least January 6, 1922.

The membership of the association comprised all of the wholesale tobacco and cigarette dealers in Philadelphia and Camden, N. J., except Charles Seider and Fringes Sons.

The following named respondents with their several principal places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers in the several States of the United States. They caused said products when so sold to be transported from their respective places of business in the said city of Philadelphia to purchasers thereof in the various States of the United States:

(a) Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style of A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation organized under the laws of the State of New Jersey; Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company; Peter J. Murphy and John Murphy, partners doing business under the name and style Peter F. Murphy Company; Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull; William D. Shepherd and John G. Shepherd, partners doing business under the name and style of S. Shepherd's Sons; T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company; Yahn & McDonnell Company, Incorporated, a corporation organized under the laws of the State of Pennsylvania; M. Blumenthal; John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons; Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company; Victor Fermani; Bennett Hollard; P. Hochman; M. J. Dalton Company, a corporation organized under the laws of the State of Pennsylvania; Brucker & Boghien, Incorporated, a corporation organized under the laws of the State of Pennsylvania; S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers; E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons.

The following named respondents with their several places of business in the city of Philadelphia, State of Pennsylvania, were at all times hereinafter mentioned and still are engaged in the business of selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers wholly within the state of Pennsylvania:

(b) Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style of F. Kuhn & Brothers; Baum & Neely, Incorporated, a corporation organized under the laws of the State of Pennsylvania; Anna E. Bechtold, an individual doing

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business under the trade name James S. Bechtold; Frank Blatt; Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company; H. S. Moorhead, an individual doing business under the trade name of Duncan & Moorhead; Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons.

The following named respondents with their several principal places of business in the city of Camden, State of New Jersey, were at all times hereinafter mentioned and still are engaged in the business of selling cigarettes and other tobacco products at wholesale to wholesale and retail dealers in the several States of the United States, particularly in Camden, N. J., and Philadelphia, Pennsylvania. They caused, and at all times hereinafter mentioned caused, such cigarettes and tobacco products, when so sold by them, to be transported from their respective places of business in the city of Camden, N. J., to purchasers in various states of the United States, particularly in the states of New Jersey and Pennsylvania:

(c) F. Hartmann & Son, a corporation organized under the laws of the state of New Jersey; John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers.

All of the foregoing respondents whose names are set out in subparagraphs (a), (b) and (c) were at all times during the existence of the association, members thereof and are hereinafter collectively referred to as the members, excepting that respondents John Murphy and James Murphy, trading as Murphy Brothers, were expelled from the Association in April, 1921, and John Wagner and Joseph W. Wagner, partners trading as John Wagner & Sons, Yahn & McDonnell Company and Baum & Neely, Inc., withdrew from the Association some time after June, 1921. During the period of the existence of the Association the members were naturally and normally in unrestricted competition with each other and with other dealers in the territory in which they sold, excepting insofar as such competition was limited, prevented and suppressed by the acts and things done by them as more particularly hereinafter set out.

Respondent, American Tobacco Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office in Jersey City in said state and with factories in several states of the United States. It was at all times hereinafter mentioned and still is engaged in the manufacture of cigarettes and other tobacco products and in the sale thereof to wholesale dealers throughout the United States. It caused, during the period hereinafter mentioned, and still causes, its products,

when so sold, to be transported from the point of manufacture to purchasers at points in other states of the United States. Among said purchasers were all of the respondents named in subparagraphs (a), (b) and (c). The said American Tobacco Company was at all times hereinafter mentioned and still is in competition with individuals, partnerships and other corporations similarly engaged in the manufacture and sale of tobacco products in interstate commerce.

PAR. 2. During the period of the existence of the association the prices at which the respondent American Tobacco Company sold its products were fixed as follows: It supplied each of the members with a schedule of prices, denominated List Prices, which were the prices suggested by said American Tobacco Company at which its products should be re-sold by the members to other wholesalers and to the retail trade. The prices at which such products were sold to the members were fixed by certain uniform discounts off said list in each instance, whereby the members paid the manufacturers for said products said list prices minus said discounts. Wholesale and retail dealers in tobacco products throughout the United States, including the members, were, during the existence of the association, and still are, dependent upon the American Tobacco Company for their supply of the American Tobacco Company's products, which constitute a large portion of the tobacco products dealt in by such wholesale and retail dealers. The extent of this dependence is such that when any dealer is unable to secure the products of the American Tobacco Company, his business is substantially crippled and he is placed at a competitive disadvantage with dealers supplied with said products.

On September 16, 1920, the association and its members, acting through the association and cooperating with it and with each other, agreed upon a schedule of fixed prices at which the members should thereafter resell to their dealer-customers the tobacco products dealt in by the members, including the products of the American Tobacco Company and, having thus fixed such uniform resale prices, adopted a system for the maintenance and enforcement of said resale prices by the Members and by all of the wholesale dealers in the trade who did business in the territory served by the members. In the course of said cooperative enforcement of said system the members and the association, through its officers and directors, did, among other things, during the period from September 16, 1920, until the end of 1921, the following acts and things:

(a) Undertook among themselves to maintain said resale prices and did maintain same;

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(b) Caused the fixation of said resale prices to appear as the formal action of the association by an appropriate resolution in that behalf;

(c) Caused the association to notify all members of said acts;

(d) Sought by persuasion and intimidation to cause all dealers who sold in the general selling territory of the members, including those members who discontinued the maintenance of said resale prices in violation of their aforesaid undertaking so to do, to maintain said resale prices;

(e) Sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation, which said American Tobacco Company rendered by notifying its trade in the territory of the members, by circular letters and otherwise that the notifier would refuse to furnish further supplies of its products to any wholesale dealer who failed to resell such products at the prices fixed in the aforesaid letter, or implying the same in veiled language;

(f) Caused reports of the names of said dealers who failed to maintain said resale prices to be reported by the members and their salesmen, either directly to the association, or through the respective members in each instance to the association, and upon receiving such reports, in turn, reported the names of such offending dealers to the American Tobacco Company, requesting its assistance in the enforcement of said system by having said American Tobacco Company refuse to further supply said offending dealers with any of its products;

(g) As a result of reporting said names to the American Tobacco Company and requesting its cooperation as set out in specification (f) hereof, secured the cooperation and assistance of the American Tobacco Company in that behalf and said American Tobacco Company, upon receiving such information, proceeded to investigate said instances of price-cutting and upon finding that the offending dealer was cutting prices and refusing and failing to maintain the said resale prices, refused to furnish said offending dealer with further supplies of its products;

(h) Employed a special agent to spy upon the members and other dealers in the aforesaid territory in order to ascertain if any of them were failing to maintain said resale prices, and upon discovering that a member or dealer was so doing, to report the name of such offender to the Association, which, upon receiving such reports, sought and secured the cooperation of the American Tobacco Company with regard to such offenders in like manner and with like results as set out in specifications (f) and (g).

PAR. 3. During the period aforesaid in which the association adopted and maintained uniform resale prices for said American Tobacco Company's products in the manner and by the means set out in paragraph 2 hereof, it was the general policy of said American Tobacco Company to assist groups of its jobbers who would fix or who had fixed by cooperation among themselves uniform resale prices on its products, by refusing shipments of its goods to such of its jobbers who had resold or who would re-sell at prices lower than those fixed by such jobbers by cooperation among one another. Such was the policy of said American Tobacco Company with respect to respondent association and its members. The representatives of said American Tobacco Company in the territory in which the members resold its products were instructed by their superiors to carry out such policy in Philadelphia and vicinity and because of such instructions such representatives carried out such policy.

Said American Tobacco Company knew of the price agreements made by the association and its members as described in paragraph 2 hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph 2 hereof.

Charles Seider, one of said American Tobacco Company's distributors in Philadelphia and a competitor of the members, having declined an invitation of the president and treasurer of the respondent association to join its membership, was urged by the division manager of the American Tobacco Company in charge of its Philadelphia territory, to join the association. Said division manager requested said Seider to join the association and not to sell at prices below those fixed by it and its members, but to comply with the uniform prices put into effect by the members and by the association as described in paragraph 2 hereof. Said Seider refused to join the association, or to abide by its prices, and the said American Tobacco Company, after investigating a complaint made to it by the association and its members that the said Seider was reselling its products at prices less than those fixed by the association and its members, discontinued selling to said Seider in the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the association and its members to maintain the price agreements as described in paragraph 2 hereof. After said Seider, following the suggestion made to him by the said division manager that if he joined respondent association, it would help him get the shipments that had been withheld from him by said American Tobacco Company, applied to the vice president of the respondent association for membership therein, the said American Tobacco Company reinstated him

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as one of its customers and forwarded to him shipments that had been withheld in the period from April 20, 1921, to August 13, 1921.

Respondents John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, were expelled from the association in April, 1921, because they were accused by said association of reselling at prices less than those fixed by the association. The American Tobacco Company, after investigating complaints made to it by the association that said Murphy Brothers were reselling its products at prices less than those fixed by the association and its members, discontinued selling said Murphy Brothers in the period from August 29, 1921, to October 4, 1921, for the purpose of assisting the association and its members in maintaining the prices which had been fixed as set out in paragraph 2 hereof.

For the purpose of assisting the association and its members in maintaining the prices fixed by them as set out in paragraph 2 hereof, the American Tobacco Company in 1921, because of complaints made to it by the association and its members that respondents Fermani and Blumenthal were reselling its products at prices less than those fixed by the association and its members, withheld shipments of its products to said Fermani and Blumenthal while it was investigating the prices at which Fermani and Blumenthal were reselling its products.

PAR. 4. The aforesaid acts and things done by said respondents and each of them had the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer-customers at the prices fixed by the association and its members as hereinbefore set out and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the association and further to hinder and restrict competition between all retail dealers in said territory. Said respondents' practices thus tended to unduly hinder and obstruct the free and natural flow of commerce in the channels of interstate commerce.

CONCLUSION.

The practices of said respondents under the conditions and circumstances described in the foregoing findings are unfair methods of competition in interstate commerce and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties and for other purposes."

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the Complaint of the Commission, the answers of respondents, the testimony and evidence and the argument of counsel, and the Commission having made its findings as to the facts and having reached its conclusion that the respondents hereinafter named have violated the provisions of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties and for other purposes,"

Now, therefore, it is ordered, That the Wholesale Tobacco & Cigar Dealers Association of Philadelphia, Pennsylvania, and its Officers, Directors and Members as follows: Nelson F. Eberbach, President, Harvey D. Narrigan and James Murphy, Vice Presidents, Herman J. Krull, Treasurer, Paul L. Brogan, Secretary, respectively, Arthur Shipton, Frank Kuhn, William Cohen, Bennett Hollard, Frank Blatt, H. Stewart Moorhead, Philip Godeski, William D. Shepherd and Morris Hochman, its directors, and the following members: Nelson F. Eberbach, John S. Eberbach and Joseph H. Eberbach, partners doing business under the name and style A. B. Cunningham & Company; Dusel, Goodloe & Company, Incorporated, a corporation, Philip Godeski and Sidney G. Godeski, partners doing business under the name and style Franklin Tobacco Company, Frank Kuhn, George Kuhn and John Kuhn, partners doing business under the name and style F. Kuhn & Brother, Peter J. Murphy and John Murphy, partners doing business under the name and style Peter J. Murphy Company, Charles A. Krull and Herman Krull, partners doing business under the name and style Charles A. Krull, Baum & Neely, Incorporated, a corporation, William F. Shepherd and John G. Shepherd, partners doing business under the name and style S. Shepherd's Sons, T. H. Hart and A. I. Mitchell, partners doing business under the name and style T. H. Hart & Company, F. Hartmann & Son, a corporation, Yahn & McDonnell Company, a corporation, M. Blumenthal, John Wagner and Joseph W. Wagner, partners doing business under the name and style of John Wagner & Sons, Harvey D. Narrigan, an individual doing business under the trade name H. D. Narrigan & Company, Victor Fermani, Anna E. Bechtold, an individual doing business under the trade name James S. Bechtold, Frank Blatt, Arthur Shipton and Thomas F. Cooper, partners doing business under the name and style Shipton & Payne Company, H. S. Moorhead, an individual doing business under the trade name Duncan & Moor-

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head, Bennett Hollard, P. Hochman, M. J. Dalton Company, a corporation, Brucker & Boghien, Incorporated, a corporation, Fred G. H. Woerner, an individual doing business under the trade name Fred G. H. Woerner & Sons, S. T. Banham and A. L. Banham, partners doing business under the name and style S. T. Banham & Brothers, E. Cohen and William Cohen, partners doing business under the name and style E. Cohen & Sons, John Murphy and James Murphy, partners doing business under the name and style Murphy Brothers, cease and desist from fixing, enforcing and maintaining and from enforcing and maintaining, by combination, agreement, or understanding among themselves, or with or among any of them, or with any other wholesaler of cigarettes or other tobacco products, resale prices for cigarettes or other tobacco products dealt in by such respondents, or any of them, or by any other wholesaler of cigarettes or other tobacco products;

And it is further ordered, That The American Tobacco Company cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the resale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company.

It is further ordered, That all of said respondents and each of them shall file with the Federal Trade Commission, within sixty (60) days from the date of the service upon them of this order, a report in writing stating the manner and form in which this order has been conformed to.

ORDER OF DISMISSAL AS TO P. LORILLARD COMPANY.

This proceeding having come on for hearing before the Federal Trade Commission upon the complaint of the Commission, the answers of the respondents and the testimony and evidence, and the Commission being fully advised in the premises,

It is ordered, That the complaint herein be and the same is hereby dismissed as against respondent P. Lorillard Company.

Dissent by Commissioner Van Fleet.

I dissent in this case as to the order against the American Tobacco Company. The charge is that said company conspired with the Wholesale Dealers Association to maintain prices. The association was interested in maintaining the price that its members might

obtain more for their goods. The object of the American Company was not the same as the Association. The American Company sold its goods upon a ten per cent discount to the members of the association and its price was in no wise affected by the cutting of dealers. Of course this did not necessarily prevent the American Company from conspiring with the association but it is a fact to be considered whether there was such conspiracy. If dealers were cutting prices and demoralizing the trade which at the time charged had proceeded to the extent of ruin if continued the American Company had a legal right to refuse to continue business dealings with such concerns. It is evident that a concern can not stay in business if it sells at no profit as the evidence shows was the case here. The mere fact that the acts of the American Company were contemporaneous with those of the association is not determinative.

Of course conspiracy is often incapable of direct proof, but when resort is had to circumstantial evidence as in this case the proof should rise above the dignity of mere suspicion. Some of the evidence relied upon to sustain the order hardly ever rises to that dignity. Without summarizing the evidence to my mind it appears that the truth is that the American Company had nothing to do with the organization of nor conduct of the association and I know of no proof to the contrary. Also I believe its acts were taken independently of the association and no real proof to the contrary appears. The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which the American Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against the American Company.

Complaint.

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