

Syllabus

IN THE MATTER OF

TEMPLE ANTHRACITE COAL CO.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914

Docket 1537. Complaint, Oct. 11, 1928—Decision, Mar. 8, 1930

Where a corporation, shortly following its organization,

- (a) Acquired all the outstanding capital stock of a corporation theretofore engaged in commerce in anthracite coal between and among various States, which (1) was one of the largest anthracite coal mining companies, having theretofore acquired physical assets of various other anthracite coal-mining companies and all or a majority of the stock of two other similar companies, and had physical properties, including modern completely equipped collieries, necessary buildings and railroad connections, worth more than twelve and a half million dollars, and an annual output of about 1,250,000 tons of anthracite coal, (2) was, along with said acquired companies, in sound financial condition and free from funded debt, and (3) sold all but a small part of its output through or to a distributor with offices in Philadelphia, Buffalo, Chicago, Baltimore, and New York, and thus to customers in Canada, the District of Columbia, and some 22 eastern, southern, and western States; and
- (b) Acquired 98 per cent of the outstanding capital stock of a corporation theretofore engaged in commerce in anthracite coal between and among various States, which (1) had coal lands with a total recoverable tonnage of 4,700,000 tons, along with improvements and developments not susceptible of duplication for \$1,500,000, ample rail facilities, and a colliery completely and modernly equipped, with breaker capacity of 1,200 tons per day, (2) was in sound financial condition and free from funded debt, and (3) sold its output to or through a distributor with offices in Philadelphia, New York, Boston, and Washington, and thus to customers in Canada, the District of Columbia, and 15 eastern, southern, and western States, included, as to all but one, among those served by said first named distributor, and in competition therewith, through solicitation and filling of orders not only in the same territory and cities, but from and for the same dealers; and
- (c) Selected the officers and directors of the aforesaid various companies and controlled and dominated the management and operation of their properties and finances;

With the result that effect of said acquisition of stock of said two companies and use thereof by voting or granting of proxies or otherwise had been and was to substantially lessen competition in interstate commerce between said companies:

Held, That such acquisition and continued ownership of the stock of said companies, under the conditions and circumstances above set forth, constituted a violation of section 7 of the Clayton Act.

Complaint

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Mr. Edward L. Smith for the Commission.

Mr. John R. Wilson, and Mr. John P. Kelly of Kelly, Balentine, Fitzgerald & Kelly, of Scranton, Pa., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its reason to believe in a violation of section 7 of the Clayton Act by respondent, a Delaware corporation with 60,000 shares of stock of no par value and with principal office and place of business in Scranton, Pa., the Commission charged said respondent with acquisitions of stock in competitors on or about October 11, 1924, namely, all the outstanding stock of the Temple Coal Co., and 98 per cent of that of the East Bear Ridge Colliery Co., Pennsylvania corporations with principal offices and places of business in Scranton, in violation of the provisions of the aforesaid section and act.

Said Temple Coal Co., as alleged, the stock of which was thus acquired (10,000 shares of common, of a par value of \$100, authorized, issued, and outstanding at the time in question), has been and is engaged in the mining and sale of anthracite coal to purchasers in Pennsylvania and various other States, Territories thereof, and the District of Columbia in competition with other concerns and persons similarly engaged, including, prior to the aforesaid stock acquisitions, said East Bear Ridge Colliery Co. Said company, further, owns and for more than five years last past has owned the entire capital stock of the Mt. Lookout Coal Co., and 80 per cent of that of the Lackawanna Coal Co., Ltd., two Pennsylvania corporations likewise similarly engaged in the mining and sale of anthracite coal.

Said East Bear Ridge Colliery Co., as alleged, the stock of which was thus acquired (25,000 shares of common stock of a par value of \$25 each, authorized, issued, and outstanding at the time in question) similarly has been and is engaged in the mining and sale of anthracite coal to purchasers in Pennsylvania and other States, Territories thereof, and the District of Columbia, in competition with other concerns and persons similarly engaged, including, prior to the aforesaid stock acquisitions, said Temple Coal Co.

The effect, as alleged, "of the acquisition by respondent of said capital stocks of Temple Coal Co. and of East Bear Ridge Colliery Co., or the use of such stocks by the voting or granting of proxies

or otherwise, may be and is to substantially lessen competition between said Temple Coal Co. and East Bear Ridge Colliery Co."

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDERS

Pursuant to the provisions of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", the Federal Trade Commission issued and served its complaint upon Temple Anthracite Coal Co., respondent herein, charging it with violating section 7 of said act.

Thereupon the said respondent entered its appearance and filed its answer to the said complaint, and hearings were had before an examiner of the Commission duly appointed, and testimony was offered and received in support of the charges of the complaint and testimony was offered and received in defense of the charges of the complaint, all of which said testimony was reduced to writing and filed in the office of said Commission; and thereafter the proceeding came on for final hearing on the record, briefs and oral arguments and the Commission being fully advised in the premises, now makes this its report and states its findings as to the facts, and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Temple Anthracite Coal Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. It was organized on August 25, 1924, with an authorized capital of 60,000 shares of stock of no par value, all of which shares have been issued. Its registered office is in the city of Dover, in the State of Delaware, and it maintains an office in the city of Scranton, in the State of Pennsylvania.

PAR. 2. Temple Coal Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business in the city of Scranton, in said State of Pennsylvania. Its authorized capital is 10,000 shares of common stock of a par value of \$100 each, all of which is issued and outstanding and all of which was issued and outstanding on October 11, 1924. It is now and ever since its organization has been engaged in the business of mining anthracite coal in the State of Pennsylvania and in the sale of such anthracite

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coal to purchasers located in the State of Pennsylvania and in various other States of the United States, the Territories thereof, and the District of Columbia, and it causes such anthracite coal, when sold by it, to be shipped and transported from its mines in the State of Pennsylvania, to purchasers in the State of Pennsylvania and to purchasers in other States of the United States, the Territories thereof, and the District of Columbia, and there is now and has been at all times hereinafter mentioned, a constant current of trade and commerce in such anthracite coal between and among the various States of the United States, the Territories thereof, and the District of Columbia. It is one of the largest anthracite coal mining companies and prior to 1924 had acquired the physical assets of the following mentioned anthracite coal mining and in the sale thereof, to wit: Northwest Coal Co., Edgerton Coal Co., Sterrick Creek Coal Co., Babylon Coal Co., and Forty Fort Coal Co. In the course and conduct of its business said Temple Coal Co. is in competition with other corporations and with firms and persons engaged in the mining and sale of anthracite coal between and among the various States of the United States, the Territories thereof, and the District of Columbia. Among such competitors, prior to the acquisitions by respondent, Temple Anthracite Coal Co., of the capital stock of said Temple Coal Co. and of East Bear Ridge Colliery Co., as hereinafter set out, was said East Bear Ridge Colliery Co.

Said Temple Coal Co. now owns and for more than six years last past has owned, all of the capital stock of the Mt. Lookout Coal Co., a Pennsylvania corporation, engaged in the mining of anthracite coal in Pennsylvania and in the sale of such coal between and among the various States and Territories of the United States, and the District of Columbia.

Said Temple Coal Co. now owns and for more than six years last past has owned 80 per cent of the capital stock of shares of the Lackawanna Coal Co., Ltd., a limited partnership, organized and existing under the laws of the State of Pennsylvania and engaged in the mining of anthracite coal in Pennsylvania and in the sale of such coal between and among the various States and Territories of the United States and the District of Columbia.

PAR. 3. At the time said respondent, Temple Anthracite Coal Co., acquired all of the capital stock of said Temple Coal Co., as hereinafter described, the said Temple Coal Co. was in sound financial condition, free from mortgage or funded debt, and directly and

through said Mt. Lookout Coal Co. and said Lackawanna Coal Co., Ltd. (both in sound financial condition and free from mortgage or funded debt), operated six collieries in the northern anthracite field of Pennsylvania, and produced about 1,250,000 tons of anthracite coal per year. The said collieries were Northwest, Lackawanna, Sterrick Creek, Mt. Lookout, Forty Fort, and Harry E. All of said collieries were completely equipped with modern machinery and equipment and had all necessary buildings for the operation of the plants.

The said Northwest Colliery is situated in Vandling Borough, Lackawanna County, Pa., about three miles north of Carbondale. At the time of the said stock acquisition by respondent, said Temple Coal Co. at this colliery controlled by ownership and lease 566.25 acres of coal land and had railroad connections with the New York, Ontario & Western and Erie Railroads. The breaker had a capacity of 1,000 tons per day. At this colliery Temple Coal Co. owned 125.26 acres and leased 82.90 acres of surface.

The said Lackawanna Colliery, owned by said Lackawanna Coal Co., Ltd., is situated in Blakely Borough, Lackawanna County, Pa., about six miles north of Scranton. At the time of the aforesaid stock acquisition by respondent, said Lackawanna Coal Co., Ltd., controlled, by ownership and lease, 1,082.65 acres of coal land and this colliery had railroad connections with the D. L. & W. Railroad Co. and Erie Railroad Co. The breaker had a capacity of 1,200 tons per day. And the said Lackawanna Coal Co., Ltd., owned 156.82 acres and leased 166.90 acres of surface.

The said Sterrick Creek Colliery is situated in Winton Borough, Lackawanna County, Pa., about six and one-half miles north of Scranton, controlling by ownership and lease 748.33 acres of coal land and having railroad connections with the Erie Railroad. The breaker had a capacity of about 2,000 tons per day. Said Temple Coal Co., at the aforesaid time, owned 13.67 acres surface at said Sterrick Creek Colliery.

Said Mt. Lookout Colliery, owned by said Mt. Lookout Coal Co., is situated in Exeter Borough, Luzerne County, Pa., being located between Wilkes-Barre and Pittston. At the time respondent acquired all of the capital stock of said Temple Coal Co., as hereinafter set forth, said Mt. Lookout Coal Co. at this colliery controlled, by ownership and lease, 632.80 acres of coal land and had railroad connections with the Lehigh Valley and D. L. & W. Railroads. The breaker had a capacity of 1,500 tons per day. Said Mt. Lookout Coal Co. owned 33.05 acres and leased 99.91 acres of surface.

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The said Harry E. and Forty Fort Collieries are situated in Luzerne County, Pa., between Wilkes-Barre and Pittston, about three miles distant from the aforesaid Mt. Lookout Colliery. Said Temple Coal Co., at the time of the aforesaid stock acquisition by respondent, controlled at these collieries, by ownership and lease, 1,074.30 acres of coal land, and these collieries had railroad connections with the Lehigh Valley Railroad. The capacity of the Forty Fort breaker was 1,000 tons per day, while the Harry E. breaker had a capacity of 1,500 tons per day. These breakers were located within a mile of each other and in October, 1924, Temple Coal Co. contemplated abandoning the Forty Fort breaker and inasmuch as connections underground were then made, said Temple Coal Co., planned to transport the coal underground from Forty Fort to Harry E. for preparation. In connection with these collieries, said Temple Coal Co., owned 44.78 acres and leased 284.22 acres of surface.

In addition to the properties hereinabove described, said Temple Coal Co., at the time of the aforesaid stock acquisition owned thirty-one buildings in the borough of Duryea located about seven miles from Scranton, Pa., and controlled undeveloped territory consisting of 319 acres of coal land and leased 251.25 acres of coal land in the village of Jermyrn, Lackawanna County, Pa., in which territory the amount of unmined coal in August, 1924, was 480,871 tons. In August, 1924, the total coal in place in all of the properties owned, controlled and leased by said Temple Coal Co., said Lackawanna Coal Co., Ltd., and said Mt. Lookout Coal Co., was approximately 66,730,205 tons, of which amount approximately 51,565,409 tons could be mined from the solid and pillars.

The total acreage owned or leased by said Temple Coal Co., said Mt. Lookout Coal Co. and said Lackawanna Coal Co., Ltd., aggregated, in September 1924, 4,213 acres of anthracite coal lands and 1,576 acres of surface land and the value of the physical properties of said companies on September 20, 1924, was in excess of the following figures:

Company	Coal	Property
Temple Coal Co. and Mount Lookout Coal Co.-----	\$7, 620, 451. 00	\$2, 775, 000. 00
Lackawanna Coal Co.-----	1, 572, 299. 00	675, 000. 00
	9, 192, 750. 00	3, 450, 000. 00

All of the aforesaid physical properties owned by Temple Coal Co., Lackawanna Coal Co., and Mt. Lookout Coal Co., are still owned and operated by such companies, excepting for the ordinary depletion of coal from the coal lands due to mining and excepting that in November, 1928, the said Mt. Lookout Colliery ceased operating, at which time said Mt. Lookout Coal Co. surrendered its rights to certain leases of coal lands.

PAR. 4. Continuously since 1914 the coal mined by said Temple Coal Co., said Lackawanna Coal Co., Ltd., and said Mt. Lookout Coal Co., excepting for a small amount sold in the vicinity of the mines, has been sold through Thorne, Neale & Co., Inc., which is engaged in the business of buying and selling anthracite and bituminous coal. Said Thorne, Neale & Co., Inc., maintains offices in Philadelphia, Buffalo, Chicago, Baltimore, and New York, from which offices sales of coal are solicited throughout a large territory traveled by representatives of such offices. The Buffalo office solicits and makes sales in Canada also. Said Thorne, Neale & Co., Inc., secures orders for coal mined by said Temple Coal Co., said Lackawanna Coal Co., Ltd., and said Mt. Lookout Coal Co., which orders are transmitted to said Temple Coal Co. by said Thorne, Neale & Co., Inc. These orders give the name of the consignee, destination, route of shipment, the equipment of the cars containing the coal, the mine from which the coal is to be shipped, the quantities and kinds of coal ordered and the price of the coal, f. o. b. mine. If the price mentioned in the order is satisfactory to said Temple Coal Co., the coal is shipped by said Temple Coal Co. to the customer at the said price, said Thorne, Neal & Co., Inc., paying to said Temple Coal Co. the said selling price of the coal, less a commission of 4 per cent for making such sale. Said Thorne, Neale & Co., Inc., collects from the purchaser the selling price of the coal. In the event that the price on the order given by said Thorne, Neale & Co., Inc., is said Temple Coal Co. for the coal to be shipped is not satisfactory to said Temple Coal Co., the order is not filled. Such has been the method of sale employed by said Temple Coal Co., said Mt. Lookout Coal Co. and said Lackawanna Coal Co., Ltd., with said Thorne, Neale & Co., Inc., at least since 1914.

In addition to shipping coal to customers secured by said Thorne, Neale & Co., Inc., said Temple Coal Co. in the usual course of its business, ships coal directly to said Thorne, Neale & Co., Inc. Typi-

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cal of that nature and places of shipments by said Temple Coal Co. to said Thorne, Neale & Co., Inc., is the following statement of shipments made in 1925 and 1926:

Temple Coal Co. to Thorne, Neale & Co., Inc., agents

	1925	1926
	<i>Tons</i>	<i>Tons</i>
Perth Amboy, N. J.	17,423.09	25,648.01
Edgewater, N. J.	85,901.11	74,578.15
Carlisle, N. Y.	5,680.00	10,711.04
Buffalo, N. Y., for lake shipment.	25,990.00	25,016.08
	135,001.11	135,954.08

When such shipments of coal are made directly by said Temple Coal Co. to said Thorne, Neale & Co., Inc., the coal is billed to said Thorne, Neale & Co., Inc., at a price agreed upon between it and said Temple Coal Co., which price is paid to said Temple Coal Co. by said Thorne, Neale & Co., Inc., irrespective of the price received by said Thorne, Neale & Co., Inc., from the ultimate purchaser.

In 1924, said Temple Coal Co., said Mt. Lookout Coal Co., and said Lackawanna Coal Co., Ltd., on orders furnished by said Thorne, Neale & Co., Inc., shipped 1,075,097.10 gross tons of coal, of which 783,304.06 gross tons were shipped to purchasers located outside of the State of Pennsylvania; in 1925, of 668,138.12 gross tons of coal shipped on orders furnished by said Thorne, Neale & Co., Inc., 485,468.17 gross tons were shipped to purchasers outside of the State of Pennsylvania; while in 1926, of a total of 976,865 gross tons shipped on orders secured by said Thorne, Neale & Co., Inc., 767,887.02 gross tons were shipped to purchasers located outside of the State of Pennsylvania. The customers outside of the State of Pennsylvania to whom the shipments of coal were made in 1924 by said Temple Coal Co. f. o. b. mine, on orders secured by said Thorne, Neale & Co., Inc., were located in various cities in Canada, in the District of Columbia, and in various cities in the State of Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, Virginia, and Wisconsin. These shipments of coal by said Temple Coal Co., said Mt. Lookout Coal Co., said Lackawanna Coal Co., Ltd., in 1924, 1925, and 1926 to purchasers located outside of the State of Pennsylvania on orders secured by said Thorne, Neale & Co., Inc., in those years are typical of the territory to which the said companies shipped coal from their mines, at least since 1914 to the present time.

PAR. 5. Said East Bear Ridge Colliery Co. is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business in said city of Scranton, State of Pennsylvania. Its authorized capital is 25,000 shares of common stock of a par value of \$25 each, all of which is issued and outstanding and all of which was issued and outstanding on October 11, 1924. It is now, and ever since its organization has been, engaged in the business of mining anthracite coal in the State of Pennsylvania and in the sale of such anthracite coal to purchasers located in the State of Pennsylvania, and in various other States of the United States, the Territories thereof, and the District of Columbia, and it causes such anthracite coal, when sold by it, to be shipped and transported from its mines in the State of Pennsylvania to purchasers in the State of Pennsylvania and to purchasers in other States of the United States, the Territories thereof, and the District of Columbia, and there is now and has been at all times hereinafter mentioned, a constant current of trade and commerce in such anthracite coal in and among the various States of the United States, the Territories thereof, and the District of Columbia. In the course and conduct of its business, said East Bear Ridge Colliery Co. is in competition with other corporations and with firms and persons engaged in the mining and sale of anthracite coal between and among the various States of the United States, the Territories thereof, and the District of Columbia. Among such competitors, prior to the acquisition by respondent Temple Anthracite Coal Co. of the capital stock of said Temple Coal Co. and of the said East Bear Ridge Colliery Co., as hereinafter set out, was said Temple Coal Co.

PAR. 6. At the time said respondent, Temple Anthracite Coal Co., acquired all of the capital stock of said East Bear Ridge Colliery Co., as hereinafter described, the said East Bear Ridge Colliery Co. was in sound financial condition, free from mortgage or funded debt and operated a colliery at Mahanoy Plane, in the borough of Gilberton, near Frackville, Pa., in the Schuylkill anthracite field of Pennsylvania, where said East Bear Ridge Colliery Co. leased at the time aforesaid, and still leases, 266 acres of coal lands. The said colliery was completely equipped with modern machinery and equipment and had all necessary buildings for the operation of the plant. Its breaker capacity was 1,200 tons per day.

The said East Bear Ridge Colliery Co., at the time aforesaid, had, and still has, ample rail facilities which are furnished by the Philadelphia & Reading Railroad Co. In September, 1924, the total

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tonnage of coal recoverable from its lands was 4,700,700 tons. The improvements and developments on the property could not have been duplicated in September, 1924, for \$1,500,000. The value of the following items of physical property of said East Bear Ridge Colliery Co. in September, 1924, was conservatively as follows:

Breaker and outside improvements-----	\$566,286.74
Inside improvements and development-----	327,205.68
Total improvements and development-----	893,492.42
Lease on coal in ground at 10 cents per ton-----	470,070.00
Total-----	1,363,562.42

All of the aforesaid physical properties owned by said East Bear Ridge Colliery Co. are still owned and operated by said company, excepting for the ordinary depletion of coal from the coal lands due to mining.

PAR. 7. Continuously since 1914, the coal mined by said East Bear Ridge Colliery Co. has been sold through Madeira, Hill & Co., which is engaged in the business of buying and selling anthracite and bituminous coal. Said Madeira, Hill & Co. maintains offices in Philadelphia, New York, Boston, and Washington, from which offices sales of coal are solicited throughout a large territory traveled by the representatives of such offices. Said Madeira, Hill & Co. secures orders for coal mined by said East Bear Ridge Colliery Co., which orders are transmitted to said East Bear Ridge Colliery Co. by said Madeira, Hill & Co. These orders give the name of the consignee, destination, route of shipment, the equipment of the cars containing the coal, the quantities and kinds of coal ordered and the price of the coal, f. o. b. mine. If the price mentioned in the order is satisfactory to said East Bear Ridge Colliery Co., the coal is shipped by said East Bear Ridge Colliery Co. to the customer at the said price, said Madeira, Hill & Co. paying to said East Bear Ridge Colliery Co. the selling price of the coal, less a commission of 4 per cent for making such sale. Said Madeira, Hill & Co. collects from the purchaser the selling price of the coal. In the event that the price on the order given by said Madeira, Hill & Co. to said East Bear Ridge Colliery Co. for the coal to be shipped is not satisfactory to said East Bear Ridge Colliery Co., the order is not filled. Such has been the method of sale employed by said East Bear Ridge Colliery Co. with said Madeira, Hill & Co. at least since 1914.

In addition to shipping coal to customers secured by said Madeira, Hill & Co., said East Bear Ridge Colliery Co., in the usual course of its business, ships coal directly to said Madeira, Hill & Co. Typical of that nature of shipments is the following statement of shipments made in 1925 and 1926:

East Bear Bridge Colliery Co. to Madeira, Hill & Co.

	1925	1926
	Tons	Tons
Port Reading Piers, N. J.	4,869.18	9,593.15

When such shipments of coal are made directly by said East Bear Ridge Colliery Co. to said Madeira, Hill & Co., the coal is billed to said Madeira, Hill & Co. at a price agreed upon between it and said East Bear Ridge Colliery Co., which price is paid to said East Bear Ridge Colliery Co. by said Madeira, Hill & Co., irrespectively of the price received by said Madeira, Hill & Co. from the ultimate purchaser.

In 1924, said East Bear Ridge Colliery Co. on orders furnished by said Madeira, Hill & Co. shipped 235,620.12 gross tons of coal, of which 85,692.11 gross tons were shipped to purchasers located outside of the State of Pennsylvania; in 1925, of 153,295.09 gross tons of coal shipped on orders furnished by said Madeira, Hill & Co., 52,933.19 gross tons were shipped to purchasers outside of the State of Pennsylvania; while in 1926, of a total of 233,753.13 gross tons shipped on orders secured by said Madeira, Hill & Co. 97,682.09 gross tons were shipped by said East Bear Ridge Colliery Co. to purchasers located outside of the State of Pennsylvania. The customers outside of the State of Pennsylvania to whom the shipments of coal were made in 1924 by said East Bear Ridge Colliery Co. f. o. b. mine on orders secured by Madeira, Hill & Co. were located in various cities in Canada, in the District of Columbia, and in various cities in the States of Connecticut, Delaware, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Maine, New Jersey, New York, Ohio, Rhode Island, Virginia, and West Virginia. These shipments of coal by said East Bear Ridge Colliery Co. in 1924, 1925, and 1926 to purchasers located outside of the State of Pennsylvania on orders secured by said Madeira, Hill & Co. in those years are typical of the territory to which said East Bear Ridge Colliery Co. shipped coal from its mine, at least since 1914 to the present time.

PAR. 8. Said Temple Coal Co., said Mt. Lookout Coal Co., said Lackawanna Coal Co., Ltd., and said East Bear Ridge Colliery Co. sold coal of the same kinds and sizes, and said Thorne, Neale & Co.,

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Inc., and said Madeira, Hill & Co. were in competition in securing orders for coal, orders for coal mined by said Temple Coal Co., said Mt. Lookout Coal Co. and said Lackawanna Coal Co., Ltd., being solicited, obtained and filled through said Thorne, Neale & Co., Inc., in the same territory, in the same cities and, in many instances, from the same dealers from whom orders for coal mined by said East Bear Ridge Colliery Co. were solicited, obtained and filled through said Madeira, Hill & Co.

PAR. 9. On or about October 11, 1924, said respondent Temple Anthracite Coal Co. acquired, directly by purchase, and ever since such acquisition has owned, all of the outstanding capital stock of said Temple Coal Co., a corporation engaged, as hereinbefore described, in commerce in anthracite coal between and among the various States and Territories of the United States, and the District of Columbia.

On or about October 11, 1924, said respondent Temple Anthracite Coal Co. acquired directly by purchase, and ever since such acquisition has owned, 98 per cent of the outstanding capital stock of said East Bear Ridge Colliery Co., a corporation engaged, as hereinbefore described, in commerce in anthracite coal between and among the various States and Territories of the United States, and the District of Columbia. Ever since the said stock acquisitions hereinbefore mentioned in this paragraph, said Temple Coal Co., and said Mt. Lookout Coal Co., and said Lackawanna Coal Co., Ltd., in each of which said Temple Coal Co. has a controlling interest, and said East Bear Ridge Colliery Co. have been dominated by said respondent Temple Anthracite Coal Co., which has chosen the officers and directors of said Temple Coal Co., said Mt. Lookout Coal Co., said Lackawanna Coal Co., Ltd., and said East Bear Ridge Colliery Co., and which has controlled the management and operation of the properties and finances of said Temple Coal Co., said Mt. Lookout Coal Co., said Lackawanna Coal Co., Ltd., and said East Bear Ridge Colliery Co.

PAR. 10. The effect of the acquisition by respondent Temple Anthracite Coal Co. of the said capital stocks of said Temple Coal Co. and of said East Bear Ridge Colliery Co., and the use of such stocks by the voting or granting of proxies, or otherwise, has been and is to substantially lessen competition in interstate commerce between said Temple Coal Co. and said East Bear Ridge Colliery Co.

CONCLUSION

The acquisition and the continued ownership by the respondent, the Temple Anthracite Coal Co., of all of the outstanding capital stock of said Temple Coal Co. and of 98 per cent of the outstanding capital stock of said East Bear Ridge Colliery Co., under the condi-

tions and circumstances described in the foregoing findings constitute a violation of section 7 of the act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission on the complaint of the Commission, the answer of the respondent, the testimony and evidence, briefs and arguments of counsel, and the Commission having made a report in writing in which it stated its findings as to the facts, with its conclusion that the respondent has violated the provisions of section 7 of an act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,"

Now, therefore, it is ordered, That the respondent, Temple Anthracite Coal Co., forthwith cease and desist from violating the provisions of section 7 of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and within 90 days from the day of the date of service upon it of this order divest itself in good faith of all the capital stock of the Temple Coal Co. owned by it and all of its interest in the capital stock of said Temple Coal Co., such divestment of stock to carry with it all of the property and assets of all kinds whatsoever of said Temple Coal Co.; or within 90 days from the day of the date of service upon it of this order divest itself in good faith of all the capital stock of the East Bear Ridge Colliery Co. owned by it and all of its interest in the capital stock of said East Bear Ridge Colliery Co., such divestment of stock to carry with it all of the property and assets of all kinds whatsoever of said East Bear Ridge Colliery Co.

And it is hereby further ordered, That such divestment of the capital stock and interest in the capital stock of said Temple Coal Co. shall not be made directly or indirectly to East Bear Ridge Colliery Co. or to any stockholder, officer, director, employee or agent of, or to anyone otherwise directly or indirectly connected with or under the control of said East Bear Ridge Colliery Co. or to any stockholder, officer, director, employee or agent of, or to anyone directly or indirectly connected with or under the control of respondent, Temple Anthracite Coal Co.

And it is hereby further ordered, That such divestment of the capital stock and interest in the capital stock of said East Bear Ridge Colliery Co. shall not be made directly or indirectly to Lackawanna

Coal Co., Ltd., Mt. Lookout Coal Co., Temple Coal Co. or to any stockholder, officer, director, employee or agent of, or to anyone otherwise directly or indirectly connected with or under the control of any of such companies or to any stockholder, officer, director, employee or agent of, or to anyone directly or indirectly connected with or under the control of respondent, Temple Anthracite Coal Co.

And it is hereby further ordered, That respondent, Temple Anthracite Coal Co., within 4 months from the day of the date of the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which this order has been conformed to.

Dissent by Commissioner Humphrey

I find myself compelled to dissent to the action of the majority in issuing an order to cease and desist in this case.

This case rests entirely upon the proposition that if one corporation acquires the stock of two or more competing corporations it is under any circumstances a violation of the Clayton Act. The complaint is drawn upon this theory. I do not think that it states a cause of action. It is not alleged that the acquisition of the stock referred to by the respondent in any way tended to restrain commerce, tended to create a monopoly, or was or may be injurious to the public.

Under the decision of the United States Supreme Court in the recent case of the International Shoe Co.,¹ an order to cease and desist made by the Federal Trade Commission, based on the statute involved, can not be sustained until it is alleged and proven, and found by the Commission as a fact, that by the acts complained of competition will probably be lessened to "such a degree as will injuriously affect the public". In the instant case the complaint was purposely so drafted as to omit such allegation. The findings of fact follow strictly the complaint.

The Clayton Act especially recognizes the fact that in certain instances it is lawful for one corporation to acquire the stock of two or more competing corporations. What may be lawfully done is presumed to have been done lawfully. By every rule of construction a complaint or findings to be sufficient in law must contain specific facts sufficient to overcome such presumptions of legality. The United States Supreme Court, in the *Gratz case* (253 U. S. 421, 429) held that a complaint to be sufficient in law must allege the facts

¹ 280 U. S. 291.

constituting the unfair method of competition charged in the complaint. The findings to be sufficient to sustain the order must include such facts. The complaint in the instant case clearly omits such allegation of fact, and the findings are limited to the facts charged in the complaint.

It must be kept in mind that the right of one corporation to acquire or hold the capital stock of another corporation is solely a question of State laws. Presumably the right of a corporation to acquire or hold stock of another corporation is recognized by the laws of the State under which the corporations are organized. The power of Congress is derived solely from its power to control interstate commerce for the protection of the public. It can not make the acquiring of the stock of one corporation by another unlawful *per se*. Such acquisition must injuriously affect interstate commerce—and this is the heart of the International Shoe Co. decision.

I can not believe that the mere acquisition by one corporation of the stock of two or more competing corporations is a violation of the law, even if the competition between the competing corporations is thereby eliminated. I think the test is whether such acquisition results in restraining commerce. There may be and undoubtedly are many circumstances under which such acquisition is lawful, in addition to those specifically mentioned in the Clayton Act, because it may be done so that it will not substantially lessen competition but on the contrary may increase it and have a tendency to prevent monopoly.

To illustrate: Suppose that three corporations, A, B, and C, are engaged in commerce within the same territory. A is strong and is gradually driving the two weaker corporations, B and C, out of business, and thereby destroying competition—and unless some action is taken A will soon have a complete monopoly of the market in that vicinity. D, another corporation, acquires the stock of B and C, the two weaker corporations, and thereby becomes a strong competitor of A, increasing competition in that territory and preventing A from having a complete monopoly. Is such acquisition unlawful?

I know that it is argued that Congress has decided that the acquisition of the stock of one corporation by a competing corporation is in itself injurious to the public and a violation of the statute. The answer is that Congress has no authority to legislate unless the act complained of injuriously affects interstate commerce, and whether such acquisition does tend to restrain commerce is a question of fact and not of law, to be determined in each particular instance. A more conclusive answer to this contention is that the Supreme Court of the United States, in the International Shoe Co. case, distinctly

held that Congress had decided quite to the contrary. That case squarely holds that Congress meant that it must be such a suppression of competition as "will be injurious to the public", and this fact must be alleged and proven and found as a fact, or an order by the Commission is improvidently issued.

In the same sentence, it is stated that it is unlawful for one corporation to acquire "the whole or any part" of the stock or share capital of two or more competing corporations engaged in commerce where the effect of such acquisition "may be to substantially lessen competition between such corporations or any of them".

This is a use of words without meaning. To contend that Congress meant what the words say is to attribute to it lack of ordinary understanding. The acquisition of stock under such circumstances must not only lessen such competition substantially but practically wipe it out. If Congress intended that the acquisition by one corporation of the stock of two competing corporations was in itself unlawful, it would have stopped there. It would not have added the meaningless and contradictory phrase "where the effect * * * may be to substantially lessen competition between such corporations or any of them." But what Congress meant by the words "to substantially lessen competition" has been settled by the only power that could settle it. The Supreme Court of the United States has said in the *International Shoe Co.* case that what Congress meant by that phrase was that the acquisition, whatever effect it might have on the competition existing between the corporations whose stock was acquired, must tend to lessen competition in "such a degree as will injuriously affect the public." In other words, as the Supreme Court interprets the statute, Congress meant that the word "or" as used in this section of the Clayton Act, should be changed to "and", so that it would read, "Where the effect of such acquisition may be to substantially lessen competition between such corporations and to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce."

It is a part of the legislative history of section 7 of the Clayton Act that Congress doubted its power to base the provisions of this section on mere lessening of competition, and sought to bring it within the power of Congress under the Interstate Commerce clause of the Constitution by the use of the additional word "substantial", which it left undefined. The Supreme Court of the United States now says that the word "substantial" as used in the statute is as follows: "That is to say, to such a degree as will injuriously affect the public."

I re-state what I said in my dissenting opinion in the International Shoe Co. case,¹ that the vital question in these cases is always, was the public injured by such transaction? The complaint alleges no such injury and the findings of fact show none. Will it be in the interest of the public to issue an order in this case? We have no evidence tending to show that this will be the result.

Memorandum by Commissioner McCulloch

I am in entire accord with the majority in issuing an order against respondent, but I think that respondent should be required to divest itself of the acquired stock of each of the corporations instead of only one of them.

Respondent is a holding corporation and it acquired the stock of two competitive corporations engaged in interstate commerce. The acquisitions occurred on the same day—the two transactions were simultaneous and were each unlawful. The taint of illegality pervaded them both. The statute (Clayton Act, sec. 7, second paragraph) declares to be unlawful the acquisition by any corporation of the “whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock, by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or share capital is so acquired”. Section 11 of the same statute provides that in case of violation the Federal Trade Commission shall issue complaint and after hearing “shall issue an order requiring such person to cease and desist from such violations and divest itself of the stock held”.

In the present case the two acquisitions were simultaneous and each was in violation of the statute, hence the only way to “desist from such violations” is by divestiture of all of the shares of stock unlawfully acquired. Such is the plain letter of the statute and there is no reason to conclude, from the language used, that the lawmakers considered a lesser measure of divestiture sufficient to completely restore competition. In the face of the emphatic language of the statute, we need not search for the spirit of it to reach a conclusion not in accord with the precise terms.

Of course, if the two acquisitions had been wholly separate in point of time the first would not have been unlawful and a divestiture of stock by the second acquisition—the unlawful one—could only be required.

¹ 9 F. T. C. 463.

Complaint

13 F. T. C.

IN THE MATTER OF

L. J. HOUZE CONVEX GLASS CO.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1674. Complaint, Sept. 20, 1929¹—Decision, Mar. 31, 1930

Where a corporation engaged in the manufacture and sale of gear shift balls resembling onyx in appearance, represented the same on the containers of the extension levers to which they pertained, as "Marblex Onyx", the fact being that said balls were made entirely of glass; with the tendency and capacity to mislead and deceive the purchasing public in respect of the composition thereof and induce their purchase in such belief:

Held, That such practice, under the conditions and circumstances set forth, was all to the prejudice of the public and competitors and constituted an unfair method of competition.

Mr. Alfred M. Craven for the Commission.

Christy, Christy & Wharton, of Pittsburgh, Pa., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, a Pennsylvania corporation engaged in the manufacture and sale of lamps and lamp bases and breaks simulating onyx in appearance, and of gear-shift balls for automobiles, and with principal place of business at Point Marion, Pa., with advertising falsely or misleadingly and misbranding or mislabeling, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged as above set forth, describes its said lamps, lamp bases, and breaks in advertisements, leaflets, and on the containers as "Onxglass" and/or "On-X-Glass" and its gear-shift balls as "Marblex Onyx", with tendency and capacity to mislead and deceive the purchasing public into believing said articles to be composed of onyx and into purchasing the same in such belief; all to the injury and prejudice of the public and of respondent's competitors.

¹ Amended.