

Syllabus

IN THE MATTER OF
UNITED FENCE MANUFACTURERS ASSOCIATION, ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3305. Complaint, Jan. 18, 1938—Decision, July 13, 1938

Where an unincorporated association, and the eight member producers thereof, engaged in manufacture and sale of snow fence, carriage charges of which, largely sold in carload lots constituted a substantial element of the average product costs of such members, in competition with one another in sale and delivery of their said products but for acts and practices set forth, and sellers of from 90 percent to 95 percent of snow fence products purchased in 14 States in the northeastern part of the United States—

- (a) Entered into and maintained an agreement, understanding or conspiracy among themselves unduly to hinder, lessen, frustrate, and restrain or suppress competition in price in course of their commerce, and to maintain higher initial and resale prices than would otherwise prevail, within area of said States; and, with intent and effect of making such agreement, etc., more effective—
- (1) Combined or conspired and continued to combine or conspire, to follow and mutually maintain therein a system of delivered prices for quotation and sale of snow fence to customers living within said States, under which each producer member made same delivered prices at location of every such customer from whom such member accepted business, irrespective of carriage charges, either for carload or less than carload lots, necessary for delivery to respective destinations;
- (2) Entered into agreements to file, and filed with association's executive secretary, delivered price lists, discounts and terms of said members, to be maintained pending filing of revised delivered price list and for not less than 10 days thereafter, and concertedly adopted and filed, for both carload and less than carload quantities, lists of identical delivered prices and identical discounts and terms of sale for snow fence products of each standard type, and made it their practice to cause such respective revised price lists to be filed for their products shortly following member's filing thereof, and, notwithstanding formal and pretended exception from said price filing rule of governmental purchasers, pursued same price policy as respects both public and private buyers, to the end that public and governmental purchasing bodies were deprived of the benefits of competition in price among said members and among their vendees in buying said products;
- (3) Maintained said filed delivered prices without direct or indirect concession to any buyer, and abstained from shipments on consignment, and brought instances of suspected member price cutting to attention of said executive secretary, who undertook to negotiate matter with such member and thereby eliminate further price concessions, and variously agreed that any member charged with violation of their said price undertaking would

submit to investigation and examination, under oath, by association board of trustees, and, in advance, to be bound by such corrective steps as board might ordain;

- (4) Agreed that "distributors" and "dealers" should have discounts from aforesaid filed delivered prices of 20 percent and 10 percent, respectively, and concertedly defined what traders should be classified as "distributors" and what as "dealers," and filed with association lists of customers of respective members and issued, through association, to members, list of distributors exclusively entitled to standard distributor's discount;
- (5) Took concerted steps to maintain resale prices made by distributors at list price, less 10 percent, and to maintain dealers' resale prices to public at list, without concession in either case, and effective throughout said States, and requested and urged distributors and dealers to report instances of price cutting in distribution of said products with name of vendor and vendee, prices and terms offered or charged, and producer's name, and obtained, at times, such reports and brought persuasion, constraint and coercion to bear upon vendees of said product, to end that they should maintain said required resale prices;
- (6) Entered into and maintained an understanding that said various agreeing members would not sell to price cutting distributors or dealers, or to those who made better than authorized terms and conditions, and, at times, threatened to cut off supplies of such products from such price cutting vendees and concertedly refused to continue to sell thereto; and
- (7) At times, apportioned among several of their number, and without consent or knowledge of purchaser, large awards to one producer, following proposals and submission of bids, and thereby lessened competitive initiative of such members and advantages to purchaser of competitive bids, and effected, likewise, the passing off upon purchaser of a make of snow fence other than that made by particular member in whose favor award was made;

With result that competition in delivered prices between said various members for business of any private or public buyer located in said States was absent; sales and deliveries were, in numerous instances, made by members to customers far distant from plant of particular member vendor and susceptible of being served more economically and at lower prices from some nearer plant; no effort was made by any member to obtain the more profitable orders located at or near his own plant through reducing, to slightest extent, his delivered price to hold or gain such actual or prospective business; variations in cost of products at respective plants, due to varying material and labor costs and varying local conditions of supply and demand, were nullified, as price influence or check, and there was maintained throughout said States artificial price level little related to and not governed by truly competitive conditions, and under which, in large measure, the more efficient, better financed and equipped, and better located producers in large measure waived their competitive advantage by adhering to such identical pricing system and weakened thereby incentive to efficiency and economy; advantages which would normally accrue to buyers located near plants under conditions of true price competition were destroyed, and buying public, on average, paid prices for said products enhanced both by freedom from competition and by excessive carriage factor; channels of distribution were crystalized in favor of certain wholesalers and retailers, favored and given exclusive trade recognition as noted; resale prices of such customer distributors and dealers and

higher trade and cash discounts and terms were maintained through cooperation of such members, etc., and through concert of action; such outlets as distributors and dealers competent to obtain volume business through price competition were waived and eliminated; benefit of price competition in snow fence products, both among producer members and among their distributors and dealers, was lost to buying public, obliged to pay artificially enhanced and maintained prices for said products; and acts and practices in question tended to and nearly did give such members monopoly in products in question in aforesaid states; and

- (b) Discriminated necessarily and substantially in said system of delivered prices, in that said system, under which each member's true price was delivered price less carriage charge, was not one of uniform true prices made by any given member, but system under which one made as many different prices to customers as there were delivery destinations having varying carriage charges from his plant, with varying effects hereinabove noted, and under which, among other things, while buyers might purchase from greater number of producers than would normally quote or sell them under conditions of true price competition, conditions under which purchasers bought were monopolistic and not competitive;

With result that public interest was substantially, adversely, and unreasonably affected by such agreement, practices and activities, economic tendency of which was to lend encouragement to similar impairment of competition in other industries, with increasingly severe effect upon consumers' buying power, opportunities for independence in business, need for Government regulation in public interest, and on fluctuations of national prosperity, as extent of competition was reduced; to the prejudice of the public; and

With further result that said system of price discrimination, as thus adopted and maintained, constituted a vehicle through which said members, etc., as thus joined, obtained elimination of price competition and effected monopoly or near monopoly in their industry, in such States, and with effect that said acts not only might substantially lessen competition and tend to create a monopoly in said line of commerce, but actually and substantially did so lessen same and tended directly and powerfully to create monopoly as aforesaid:

Held, That such agreement, understanding, or conspiracy and practices thereunder, and said acts of discrimination in price, respectively, were all to the prejudice of the public and constituted unfair methods of competition in violation of Section 5, and unlawful discrimination in price within intent and meaning of Section 2 of Clayton Act, as amended by Robinson-Patman Act.

Mr. Eugene W. Burr for the Commission.

Fox, Rothschild, O'Brien & Frankel, of Philadelphia, Pa., for respondents, with whom also appeared *Mr. Clarence T. Spier*, of Omaha, Nebr., for Nebraska Bridge Supply and Lumber Co. and Lloyd DeKater.

COMPLAINT

Pursuant to the provisions 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, and

commonly known as the Federal Trade Commission Act, the Commission having reason to believe that the respondents named herein have violated the said Act of Congress and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues this its complaint stating its charges in such respect in count 1 hereof.

Also pursuant to the provisions of Section 2 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," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission having reason to believe that the respondents named herein have violated the said act, as so amended, the Commission issues this its complaint stating its charges in such respect in count 2 hereof.

Count 1

PARAGRAPH 1. (a) Respondent, The United Fence Manufacturers Association, hereinafter referred to as the "association," is an unincorporated body having as members eight respondent corporations, individuals, and copartnerships, manufacturers of snow fence, described in subparagraphs (b) to (i), inclusive of this paragraph 1, and sometimes referred to herein as "producer-members." The association was organized in 1936 and has its headquarters at the offices of the respondent copartnership H. R. Lindabury & Sons, of Burlington, N. J. It operates through its respondent officers and trustees.

(b) Respondent, Mattson Wire & Manufacturing Co., is an Illinois corporation, having its principal place of business at Joliet, Ill., and plants at Menominee, Mich., West Albany, N. Y., and at points farther west.

(c) Respondent, Nebraska Bridge Supply & Lumber Co., is a Nebraska corporation, having its principal place of business at Nineteenth Street and Farnum Avenue, Omaha, Nebr. It has plants at Troy, N. Y., East Corinth, Maine, and at points in the Middle West and West.

(d) Respondent, Rowe Manufacturing Co., is an Illinois corporation, having its principal place of business at Galesburg, Ill. It has plants at Portland, Maine, Candia, N. H., and Horseheads, N. Y.

(e) Respondents, Glenn A. Lindabury, Martin Lindabury, and Edgar Lindabury, are copartners doing business under the style of New Jersey Fence Co. They have their principal place of business and a plant at Burlington, N. J., and another plant at Cohoes, N. Y.

(f) Respondents, J. M. Denning and J. Wayne Denning, are co-partners doing business under the style of Illinois Wire & Manufacturing Co. They have their principal place of business at Market and Pleasant Streets, Joliet, Ill., and plants at Buffalo, N. Y., Cumberland Mills, Maine, and several points in the Middle West.

(g) Respondent, Margaret C. Larsen, is a producer doing business under the style of Buffalo Industrial Co., and has her principal place of business at 604 Jackson Building, Buffalo, N. Y., and a plant also at Buffalo.

(h) Respondent, Leon L. Hutchinson, is a producer doing business under the style of L. L. Hutchinson, with his principal place of business and plant at Pavilion, N. Y.

(i) Respondent, Stewart W. Adams, is a producer doing business under the style of S. W. Adams and having his principal place of business and plant at Oxford, Chenango County, N. Y.

(j) Respondents, Harry I. Mattson, J. M. Denning, and S. Page Scholey, are respectively chairman, vice chairman, and executive secretary of the association.

(k) Respondents, Harry I. Mattson, J. M. Denning, Glenn A. Lindabury, Lloyd DeKater, Alvin V. Rowe, Carl F. Larsen, Leon L. Hutchinson, and Stewart W. Adams, are trustees of the association.

PAR. 2. Snow fence is largely sold in carload lots, 8,000 feet constituting a minimum carload. The carriage charges, on both carload and less than carload lots comprise a substantial element of the average costs of producer-members' snow fence products, sold, as described in paragraph 5 hereof, delivered at customers' locations. Far the greatest part of said snow fence products are sold in standard dimensions and specifications. The fence most in demand is 4 feet in height, with pickets 4 feet by 1½ inches by ½ inch.

PAR. 3. Each producer-member in the regular and ordinary course of his business, in the sale and delivery of snow fence products, causes the same to be shipped from the point of production thereof in one State to customers in other States of the United States. There is competition among producer-members except insofar as it has been hindered, lessened, restricted, frustrated, restrained, or suppressed as alleged in paragraphs 4 to 5, inclusive, hereof. Respondent association and its said officers and trustees are not, in their said official capacities, engaged in commerce, but are engaged in aiding producer-members in carrying out the methods of competition and practices alleged in this count, with the effects set forth in paragraphs 7 and 8 hereof.

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PAR. 4. Respondents have entered into and now maintain an agreement, understanding, or conspiracy among themselves unduly to hinder, lessen, restrict, frustrate, restrain, or suppress competition in price among producer-members in the course of their commerce within, and to maintain higher initial and resale prices than would otherwise prevail within, the area of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and Ohio. In the area of said 14 States, the producer-members sell from 90 percent to 95 percent of the snow fence products purchased therein.

PAR. 5. For the purpose and with the effect of making the agreement, understanding, or conspiracy, alleged in paragraph 4 hereof, the more effective, respondents have combined or conspired, and continue to combine or conspire to follow and mutually to maintain a system of delivered prices for quotations and sales of snow fence to customers who live within the said 14 States. Under the said system of delivered prices, each producer-member makes the same prices delivered at the location of every customer within the said 14 States, from whom said producer-member accepts business, defraying without additional cost to any such customer, whatever carriage charges, either for carload or for less than carload lots, are necessary for delivery to all such respective destinations.

PAR. 6. For the purpose and with the effect of making the agreement, understanding, or conspiracy, alleged in paragraph 4 hereof, more effective, respondents have combined or conspired, and continue to combine or conspire, to follow in addition to the delivered pricing system, alleged in paragraph 5, numerous other practices, several of which were employed by respondents, other than the association and its agents, prior to the formation of the association. Among these practices, the following are, but by no means exclusively, alleged, to wit:

(a) Each producer-member has formally agreed to file, and in practice has actually filed, with respondent executive secretary his delivered price list, discounts, and terms of sale, the same to be maintained for all sales except where bids are requested by any government or subdivision thereof, until such producer-member shall file with said executive secretary, a revised delivered price list not less than 10 days before the same shall become effective. Delivered price changes are not generally made effective by all producer-members on the same day, but, to the extent and for the period that the said agreement, understanding or conspiracy has been effective, producer-members cause their revised lists of delivered prices to be filed for their respec-

tive standard snow fence products for delivery in the said 14 States, soon after a revised price list has been filed by a fellow producer-member, in order to maintain the price identity set out in subparagraph (b) next herein set forth.

(b) Producer-members concertedly adopt and file, for both carload and less than carload quantities, lists of delivered prices which are in fact actually identical for snow fence products of each standard type, and identical discounts and terms of sale.

(c) Notwithstanding the exception formally made in favor of governmental purchasers, as set forth in subparagraph (a) of this paragraph 6, respondents have in practice pursued the same price policy as respects public, as well as private, buyers to the end that public and governmental purchasing bodies have been deprived of the benefits of competition in price, among producer-members and among their vendees, in the purchasing of snow fence products.

(d) Producer-members maintain the said filed delivered prices without direct or indirect concession to any buyer.

(e) They abstain from making shipments upon consignment.

(f) They bring instances of price cutting, if deemed to have been indulged in by a producer-member, to the attention of respondent executive secretary, who thereupon undertakes to negotiate the matter with the producer-member charged with price cutting and thus to eliminate further price concessions.

(g) Each producer-member has agreed that, if at any time he shall be charged with a violation of any of respondents' undertakings as to prices averred in paragraphs 5 and 6, among others, he will submit to an investigation and to an examination under oath, conducted by the respondent board of trustees; and he has also consented in advance to be bound by such corrective steps as the board may ordain.

(h) Producer-members have agreed that "distributors" and "dealers" shall have respective discounts, from the aforesaid filed delivered prices, of 20 percent and 10 percent.

(i) The definitions of what traders shall belong to the class of "distributors" and of what traders shall belong to the class of "dealers" have been concertedly made by respondents.

(j) Producer-members file their respective lists of customers with the association.

(k) The association issues to producer-members a list of distributors who only shall be entitled to the standard distributors' discount.

(l) Respondents have taken concerted steps to maintain the resale prices, made by distributors, at list price less 10 percent, and to maintain the resale prices, of dealers to the public, at list price; each

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class of said resale price to be without concession and to operate throughout the said 14 States.

(*m*) Respondents request and urge distributors and dealers to report instances of price cutting in the distribution of snow fence products with the name of vendor and vendee, the prices and terms offered or charged, and the name of the producer. And respondents have at times succeeded in obtaining such reports.

(*n*) Respondents bring persuasion, constraint, and coercion to bear upon the vendees of snow fence to the end that the vendees shall maintain the said resale prices required by respondents.

(*o*) Producer-members have entered into and maintain an understanding that they will not sell to distributors or dealers who quote and charge prices below the prices required by respondents, or to those who make better terms and conditions than are authorized by respondents.

(*p*) Respondents have at various times threatened to cut off the supplies of snow fence products from vendees who make lower prices or better terms and conditions of sale than those authorized by respondents and have actually at times concertedly refused to continue to sell to such vendees.

(*q*) Producer-members have at times apportioned among several of themselves large orders awarded to one producer, as the result of proposals and submission of bids, without the consent or knowledge of the purchaser. They have thus lessened the competitive initiative of producer-members and the advantages to the purchaser of competition, through the issuance of proposals for bids. They have thus also effectuated the passing off upon the purchaser of a make of snow fence other than that made by the producer-member in whose favor the award was made.

PAR. 7. The effects of the said agreement, understanding or conspiracy, the said system of delivered prices and the said other practices employed, all as in paragraphs 4, 5, and 6 of this count set forth, during times when they have been operative, are hereby alleged, but not to the exclusion of other effects, to be as follows, namely:

(*a*) There is no competition in delivered prices, between producer-members, for the business of any private or public buyer located in the above-named 14 States. All producer-members make delivered prices, identical as respects the customers of each of them, and identical also as respects all producer-members.

(*b*) In numerous instances producer-members thus sell and deliver their products long distances from their plants to customers located

much nearer the plant of one or more other producer-members and susceptible of being, more economically and at lower prices, served from the said other plants.

(c) Each producer-member obtains his highest net return when he sells to customers located at or near the point where his own plant is also located and from which the delivery charge is accordingly at a minimum; but he does not reduce his delivered price in the slightest to hold or to gain this his most profitable actual or prospective business. Instead of doing so, he refrains from any acts of price competition and makes no effort, so far as price is concerned, to bid for such most profitable business. In return for refraining so to do he reciprocally gains the privilege of quoting and selling to customers in the high net return areas of other producer-members. Each producer-member well knows that, so long as other producer-members adhere to the said concerted delivered pricing system, he will nowhere encounter competition in price.

(d) The costs of producing snow fence vary somewhat due to the differing costs, at respective plants, of the lumber, wire, and other materials and differing labor costs. By the said pricing system such variations in cost are nullified as an influence or check upon prices. Prices are made by producer-members with no regard to individual costs or to varying local conditions of supply or demand. Said prices are made in terms of the said pricing system and are applied throughout the said 14 States. Such producer-members maintain an artificial price level little related to and not governed by truly competitive conditions.

(e) Under the said pricing system, producers more efficient, and better financed and equipped, and better located, as respects supplies, markets and transportation, in large measure waive their competitive advantages, in the said respects, among others, by adhering to the said identical delivered pricing system. Thus their incentive toward efficiency and economy is weakened. Any saving that might be effected cannot, under the system, be reflected in price concessions, or in holding of business in high net return areas, or in the obtaining of increased volume of business. The same delivered prices are adhered to by all producer-members alike.

(f) Under conditions of true price competition, consumers located at or near points of production normally tend to buy from a local plant. If the local prices advance unduly, the competition of the nearest competitor at once becomes more active and restores a more reasonable price. But under respondents' said pricing system the advantages which would normally accrue to buyers located near

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snow fence plants are destroyed. Each producer-member charges the same delivered price as every other. All buyers pay the same averaged carriage factor irrespective of location or actual carriage costs, a price factor substantially higher than would prevail under normal competitive conditions. Buyers can choose to purchase from among a greater number of producers than would normally quote or sell under true price competition, but the conditions under which they buy are monopolistic, not competitive.

(g) Thus the buying public, as an average, pays prices for snow fence which are enhanced both by freedom from competition and also by an excessive carriage factor.

(h) The channels of distribution of snow fence have been crystallized in favor of certain wholesalers and retailers, who are regarded as meeting the views and definitions of respondents and who, irrespective of the rights of others freely to enter trade and compete for success therein, are given exclusive trade recognition through respondents' said agreement, understanding or conspiracy.

(i) The resale prices of distributors and dealers, customers of producer-members, have been maintained by concert of action among respondents and, in some cases, by concert of action among certain distributors and dealers at the instance and with the cooperation of respondents.

(j) Distributors and dealers in snow fence have been compelled to adhere to sales prices concertedly forced upon them by respondents.

(k) Other important means of price competition, susceptible of being employed in the business, including higher trade and cash discounts and better terms, than those made by competitors, and the gaining as outlets of distributors and dealers sufficiently competent to gain volume of business through competition in price, are waived and, while respondents' said combination is in effect, are eliminated.

(l) Thus the buying public, while respondents have pursued the acts and things set forth in paragraphs 4, 5, and 6 hereof, have lost the benefit of price competition in snow fence products among producer-members, and among their distributors and dealers. The public has been obliged to pay artificially enhanced and maintained prices for said products.

(m) Since producer-members control 90 percent to 95 percent of the snow fence products sold in the aforesaid 14 States, the tendency of the acts and things averred in paragraphs 4, 5, and 6, is to give, and said acts and things have nearly availed to give, producer-members a monopoly in said products in the said 14 States.

PAR. 8. (a) The public interest has been substantially, adversely and unreasonably affected by the agreement, understanding, or con-

spiracy of respondents and the practices and activities in paragraphs 4, 5, and 6 averred. Thereby respondents have hindered, lessened, restricted, frustrated, and restrained, and still hinder, lessen, restrict, frustrate, and restrain the interstate commerce of producer-members in the 14 States with a direct and substantial tendency to suppress such commerce. Such concerted action exercises a power which individual action could not exercise or possess, and the necessary tendency and the direct and substantial effect of the combination are injury to the public.

(b) The Federal Trade Commission alleges moreover, that the public interest directly involved herein and set out more particularly in paragraph 7 and the preceding subparagraphs of this paragraph 8, is a part of the larger public interest, within the meaning of the Federal Trade Commission Act, in the maintenance of the natural regulatory forces of free competition in industry generally. The economic tendency of the respondents' said agreement, understanding, or conspiracy upon the public interest, as thus broadly stated, is to lend encouragement to similar impairment of competition in other industries, the effect of which upon the buying power of consumers, the opportunities for independence in business, the necessity that the Government undertake by regulation to protect the public interest, and the fluctuations of national prosperity, must increase in severity as the extent of competition is reduced. The leaving to private industry of monopolistic special privileges and franchises is at the expense of the purchasing power of the masses of the country and results inevitably in reducing the opportunity freely to enter industry and commerce.

PAR. 9. The agreement, understanding, or conspiracy, and the practices in this count set forth are all to the prejudice of the public. They constitute unfair methods of competition in the snow fence industry in interstate commerce, within the effect and meaning of the aforesaid Federal Trade Commission Act.

Count 2

PARAGRAPHS 1 TO 5, INCLUSIVE. As paragraphs 1 to 5, inclusive, of count 2 of this complaint, the Commission hereby incorporates paragraphs 1 to 5, inclusive, of count 1 hereof to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this count.

PAR. 6. (a) Under the pricing system described in paragraph 5 hereof the said delivered prices quoted and charged by each producer-member are in excess of the net or true prices received for snow fence except where the buyer is located in the same city as that of the

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producer-member making the sale. Delivered prices to all buyers not located in the same city include not only the price of the fence but the price of transportation and delivery. In order to ascertain the net or true price received the actual carriage charges incurred by the producer-member must be deducted from the delivered price which he receives.

(b) Each producer-member receives his highest price from buyers located in the city or town where his plant is also located. As the distances from his plant and the corresponding amounts of the freight charges increase, the net or true prices received by the producer-member diminish. The lowest price received, by any producer-member, is that from the customer to whose location the carriage charge is the highest, but from whom, nevertheless, such producer-member accepts business.

(c) Respondent's uniform delivered price system is not a system of uniform true prices made by any given producer-member. It is a system under which each producer-member makes as many different prices to his customers as there are destinations, at which he delivers his products for sale, having different carriage charges from the location of his plant.

(d) The said system of delivered prices is a system wherein the regular, constant and substantial discrimination in prices is inherent and inescapable so long as the said system be employed.

PAR. 7. The discriminations described in paragraph 6 of this count are not indulged in merely for convenience nor through custom. Producer-members have no immediate purpose or wish to obtain higher net prices or greater profits from customers who are their neighbors or residents of the same community or locality, wherein they themselves live, than from other customers. They obtain such higher prices and profits from local buyers but through no motive of ill-will towards them as individuals. They discriminate in price in their sales against buyers in their respective home territories with the purpose to destroy competition in price in interstate commerce on the part of each producer-member, which grants the discrimination, with all other producer-members.

PAR. 8. It is through the said system of discrimination in price, adopted and maintained as in paragraphs 5, 6, and 7 set forth, that respondents have put into operation and maintained their agreement, understanding, or conspiracy alleged in paragraph 4. Among the effects of the said price discrimination, thus systematically pursued, are the following:

(a) There is no competition among the producer-members since the delivered prices by them quoted and charged for the business of

any private or public buyer located in the above-named 14 States are precisely identical as respects the customers of each of them and identical also as respects all producer-members making or quoting such delivered prices.

(b) Each producer-member obtains his highest price when he sells to customers located at or near the point where his own plant is also located and from which the delivery charge is accordingly at a minimum; but he does not reduce his delivered price in the slightest in order to hold or to gain this his most profitable, actual or prospective business. Instead he refrains from any act of price competition and makes no effort, so far as price is concerned, to bid for such most profitable business. In return for refraining from so doing he reciprocally gains the privilege of quoting and selling to customers in the high net return areas of other producer-members. Each well knows that so long as other members adhere to the same system of discrimination in price through employing the same concerted delivered price system, he will nowhere encounter competition in the price.

(c) The cost of producing snow fence varies somewhat in different localities due to the varying costs at respective plants of the lumber, wire and other materials and varying labor costs. By the same system of discriminatory prices such variations in cost are nullified as an influence and check upon prices. Prices are made by producer-members with no regard to individual costs or to varying local conditions of supply and demand. Said prices are made in terms of the said delivered price system and are applied throughout the said 14 States not as identical prices but as identical delivered prices. Thus producer-members maintain an artificial level of prices little related to and not covered by truly competitive conditions.

(d) Under the said system of discriminatory prices, producers more efficient and better financed and equipped and better located, as respects supplies, markets and transportation, in large measure waive their competitive advantages, in the said respects, among others, by adhering to the said system of discriminatory prices. Thus, their incentive towards efficiency and economy is weakened through the identical character of the delivered prices made by them under the system. Any savings, that might be effected cannot, under the system be reflected in price concessions, nor in the holding of business in high net return areas, nor in the obtaining of increased volume of business. The same delivered prices are adhered to by all producer-members alike.

(e) Under conditions of true price competition, consumers located at or near points of production normally tend to buy from a local

plant. If its prices advance unduly, the competition of the nearest competitor having similar costs of production and distribution, becomes more active and restores a reasonable price. But under respondents' said pricing system the advantages which would normally accrue to buyers located near snow fence plants are destroyed. Each producer-member charges the same delivered price as every other. All buyers pay the same average carriage price factor irrespective of location or actual carriage cost, a factor substantially higher than would prevail under normal competitive conditions. Buyers may therefore purchase from a greater number of producers than would normally quote or sell under true conditions of price competition, but the conditions under which they buy are monopolistic not competitive.

(f) Thus the buying public has lost the benefit of price competition in snow fence products among producer-members and has been obliged to pay artificially enhanced and maintained prices for said products.

(g) Since producer-members control 90 percent to 95 percent of the snow fence products sold in the aforesaid 14 States, the tendency of the acts and things averred in paragraphs 4 to 7 inclusive hereof is, through the said system of price discrimination, to give producer-members a monopoly in said products in said States.

The effects set forth in this paragraph 8 are not exclusively alleged. They are set forth as showing some of the effects of the said system of price discrimination upon competition in price in the said industry. The said system of price discrimination, as adopted and maintained by respondents is a vehicle through which they obtain the elimination of price competition and have effectuated a monopoly or near-monopoly in their said industry in the said 14 States.

PAR. 9. Respondents' agreement, understanding, or conspiracy to practice price discrimination and the acts of price discrimination, as alleged in paragraphs 4 to 7 inclusive, are performed in the actual course of interstate commerce in the sale of like grades and qualities of snow fence. These acts not only may substantially lessen competition or tend to create a monopoly in said line of commerce; they have availed actually and substantially to lessen competition therein and they tend directly and powerfully to create a monopoly in said products in the said 14 States of the northeastern section of the country, in favor of producer-members who grant the benefits of such discrimination in price to those customers who are favored by the system. The said acts of discrimination in price constitute unlawful discrimination in price within the intent and meaning of Section 2

of the aforesaid Clayton Act as amended by the aforesaid Robinson-Patman Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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," commonly known as the Federal Trade Commission Act, and pursuant further to Section 2 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," commonly known as the Clayton Act, as amended by the Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Federal Trade Commission on January 18, 1938, issued its complaint against the United Fence Manufacturers Association, an unincorporated association, and other respondents named above, and caused the said complaint to be served upon respondents in manner provided by law. Therein it was charged that respondents had been and were using unfair methods of competition in interstate commerce and had been and were engaging in discrimination in price in such commerce, in violation of the above-described statutes.

Respondents entered their appearance and filed their joint answer to the said complaint. Subsequently, upon reconsideration they applied to the Commission for leave to withdraw their said answer and in lieu thereof to file a substitute answer under Rule VII of the Rules of Practice of the Commission. Leave was granted and respondents filed an answer consisting of a statement that respondents admitted all the material allegations of the complaint to be true. Respondents waived all intervening procedure.

Accordingly, this proceeding came on for decision and the Commission, being fully advised in the premises, upon consideration thereof, makes this its report, stating its findings as to the facts and its conclusions, in manner following, to wit:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent the United Fence Manufacturers Association, hereinafter referred to as the "Association," is an unincorporated body having as members eight respondent corporations, individuals and copartnerships, manufacturers of snow fence, described in subparagraphs (b) to (i), inclusive of this paragraph 1, and sometimes referred to herein as "producer-members." The As-

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sociation was organized in 1936 and has its headquarters at the offices of the respondent copartnership H. R. Lindabury & Sons, of Burlington, N. J. It operates through its respondent officers and trustees.

(b) Respondent Mattson Wire & Manufacturing Co. is an Illinois corporation, having its principal place of business at Joliet, Ill., and plants at Menominee, Mich., West Albany, N. Y., and at points farther west.

(c) Respondent Nebraska Bridge Supply & Lumber Co., is a Nebraska corporation, having its principal place of business at Nineteenth Street and Farnum Avenue, Omaha, Nebr. It has plants at Troy, N. Y., East Corinth, Maine, and points in the Middle West and West.

(d) Respondent Rowe Manufacturing Co. is an Illinois corporation, having its principal place of business at Galesburg, Ill. It has plants at Portland, Maine, Candia, N. H., and Horseheads, N. Y.

(e) Respondents Glenn A. Lindabury, Martin Lindabury, and Edgar Lindabury are copartners doing business under the styles of New Jersey Fence Co. and H. R. Lindabury & Sons. They have their principal place of business and a plant at Burlington, N. J., and another plant at Cohoes, N. Y.

(f) Respondents J. M. Denning and J. Wayne Denning are copartners doing business under the style of Illinois Wire & Manufacturing Co. They have their principal place of business at Market and Pleasant Streets, Joliet, Ill., and plants at Buffalo, N. Y., Cumberland Mills, Maine, and several points in the Middle West.

(g) Respondent Margaret C. Larsen is a producer doing business under the style of Buffalo Industrial Co. and has her principal place of business at 604 Jackson Building, Buffalo, N. Y., and a plant also at Buffalo.

(h) Respondent Leon L. Hutchinson is a producer doing business under the style of L. L. Hutchinson, with his principal place of business and plant at Pavilion, N. Y.

(i) Respondent Stewart W. Adams is a producer doing business under the style of S. W. Adams and having his principal place of business and plant at Oxford, Chenango County, N. Y.

(j) Respondents Harry I. Mattson, J. M. Denning, and S. Page Scholey are respectively chairman, vice chairman, and executive secretary of the Association.

(k) Respondents Harry I. Mattson, J. M. Denning, Glenn A. Lindabury, Lloyd DeKater, Alvin V. Rowe, Carl F. Larsen, Leon L. Hutchinson, and Stewart W. Adams are trustees of the Association.

PAR. 2. Snow fence is largely sold in carload lots, 8,000 feet constituting a minimum carload. The carriage charges, on both carload and less-than-carload lots comprise a substantial element of the average costs of producer-members' snow fence products, sold, as described in paragraph 5 hereof, delivered at customers' locations. Far the greater part of said snow fence products are sold in standard dimensions and specifications. The fence most in demand is 4 feet in height, with pickets 4 feet by $1\frac{1}{2}$ inches by $\frac{1}{2}$ inch.

PAR. 3. Each producer-member in the regular and ordinary course of his business, in the sale and delivery of snow fence products, causes the same to be shipped from the point of production thereof in one State to customers in other States of the United States. There is competition among producer-members except insofar as it has been hindered, lessened, restricted, frustrated, restrained, or suppressed as found in paragraphs 4 to 7, inclusive, hereof. Respondent Association and its said officers and trustees are not, in their said official capacities, engaged in commerce, but are engaged in aiding producer-members in carrying out the methods of competition and practice described in these findings, with the effects found in paragraphs 7 and 10 hereof of discrimination in price.

PAR. 4. Respondents have entered into and now maintain an agreement, understanding, or conspiracy among themselves unduly to hinder, lessen, restrict, frustrate, restrain, or suppress competition in price among producer-members in the course of their commerce within, and to maintain higher initial and resale prices than would otherwise prevail within, the area of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and Ohio. In the area of said 14 States, the producer-members sell from 90 to 95 percent of the snow fence products purchased therein.

PAR. 5. For the purpose and with the effect of making the agreement, understanding, or conspiracy, found in paragraph 4 hereof, the more effective, respondents have combined or conspired, and continue to combine or conspire to follow and mutually to maintain a system of delivered prices for quotations and sales of snow fence to customers who live within the said 14 States. Under the said system of delivered prices, each producer-member makes the same prices delivered at the location of every customer within the said 14 States, from whom said producer-member accepts business, defraying without additional cost to any such customer, whatever carriage charges, either for carload or for less-than-carload lots, are necessary for delivery to all such respective destinations.

PAR. 6. For the purpose and with the effect of making the agreement, understanding, or conspiracy, alleged in paragraph 4 hereof, more effective, respondents have combined or conspired, and continue to combine or conspire, to follow, in addition to the delivered pricing system alleged in paragraph 5, numerous other practices, several of which were employed by respondents, other than the Association and its agents, prior to the formation of the Association. Among these practices, are the following, to wit:

(a) Each producer-member has formally agreed to file, and in practice has actually filed, with respondent executive secretary his delivered price list, discounts and terms of sale, the same to be maintained for all sales except where bids are requested by any Government or subdivision thereof, until such producer-member shall file with said executive secretary, a revised delivered price list not less than 10 days before the same shall become effective. Delivered price changes are not generally made effective by all producer-members on the same day, but, to the extent and for the period that the said agreement, understanding or conspiracy has been effective, producer-members cause their revised lists of delivered prices to be filed for their respective standard snow fence products for delivery in the said 14 States, soon after a revised price list has been filed by a fellow producer-member, in order to maintain the price identity set out in subparagraph (b) next herein set forth.

(b) Producer-members concertedly adopt and file, for both carload and less-than-carload quantities, lists of delivered prices which are in fact actually identical for snow fence products of each standard type, and identical discounts and terms of sale.

(c) Notwithstanding the exception formally made in favor of Governmental purchasers, as set forth in subparagraph (a) of this paragraph 6, respondents have in practice pursued the same price policy as respects public, as well as private, buyers to the end that public and governmental purchasing bodies have been deprived of the benefits of competition in price, among producer-members and among their vendees, in the purchasing of snow fence products.

(d) Producer-members maintain the said filed delivered prices without direct or indirect concession to any buyer.

(e) They abstain from making shipments upon consignment.

(f) They bring instances of price cutting, if deemed to have been indulged in by a producer-member, to the attention of respondent executive secretary, who thereupon undertakes to negotiate the matter with the producer-member charged with price cutting and thus to eliminate further price concessions.

(g) Each producer-member has agreed that, if at any time he shall be charged with a violation of any of respondents' undertakings as to prices averred in paragraphs 5 and 6, among others, he will submit to an investigation and to an examination under oath, conducted by the respondent board of trustees; and he has also consented in advance to be bound by such corrective steps as the board may ordain.

(h) Producer-members have agreed that "distributors" and "dealers" shall have respective discounts, from the aforesaid filed delivered prices of 20 and 10 percent.

(i) The definitions of what traders shall belong to the class of "distributors" and of what traders shall belong to the class of "dealers" have been concertedly made by respondents.

(j) Producer-members file their respective lists of customers with the Association.

(k) The Association issues to producer-members a list of distributors who only shall be entitled to the standard distributors' discount.

(l) Respondents have taken concerted steps to maintain the resale prices, made by distributors, at list price less 10 percent, and to maintain the resale prices, of dealers to the public, at list price; each class of said resale price to be without concession and to operate throughout the said 14 States.

(m) Respondents request and urge distributors and dealers to report instances of price cutting in the distribution of snow fence products with the name of vendor and vendee, the prices and terms offered or charged, and the name of the producer. And respondents have at times succeeded in obtaining such reports.

(n) Respondents bring persuasion, constraint, and coercion to bear upon the vendees of snow fence to the end that the vendees shall maintain the said resale prices required by respondents.

(o) Producer-members have entered into and maintain an understanding that they will not sell to distributors or dealers who quote and charge prices below the prices required by respondents, or to those who make better terms and conditions than are authorized by respondents.

(p) Respondents have at various times threatened to cut off the supplies of snow fence products from vendees who make lower prices or better terms and conditions of sale than those authorized by respondents and have actually at times concertedly refused to continue to sell to such vendees.

(q) Producer-members have at times apportioned among several of themselves large orders awarded to one producer, as the result of proposals and submission of bids, without the consent or knowledge

of the purchaser. They have thus lessened the competitive initiative of producer-members and the advantages to the purchaser of competition, through the issuance of proposals for bids. They have thus also effectuated the passing off upon the purchaser of a make of snow fence other than that made by the producer-member in whose favor the award was made.

PAR. 7. Among the effects of the said agreement, understanding, or conspiracy, the said system of delivered prices and the said other practices employed, all as in paragraphs 4, 5, and 6 hereof found, during times when they have been operative, are the following, to wit:

(a) There is no competition in delivered prices, between producer-members, for the business of any private or public buyer located in the above-named 14 States. All producer-members make delivered prices, identical as respects the customers of each of them, and identical also as respects all producer-members.

(b) In numerous instances producer-members thus sell and deliver their products long distances from their plants to customers located much nearer the plant of one or more other producer-members and susceptible of being, more economically and at lower prices, served from the said other plants.

(c) Each producer-member obtains his highest net return when he sells to customers located at or near the point where his own plant is also located and from which the delivery charge is accordingly at a minimum; but he does not reduce his delivered price in the slightest to hold or to gain this his most profitable actual or prospective business. Instead of doing so, he refrains from any acts of price competition and makes no effort, so far as price is concerned, to bid for such most profitable business. In return for refraining so to do he reciprocally gains the privilege of quoting and selling to customers in the high net return areas of other producer-members. Each producer-member well knows that, so long as other producer-members adhere to the said concerted delivered pricing system, he will nowhere encounter competition in price.

(d) The costs of producing snow fence vary somewhat due to the differing costs, at respective plants, of the lumber, wire, and other materials and differing labor costs. By the said pricing system such variations in cost are nullified as an influence or check upon prices. Prices are made by producer-members with no regard to individual costs or to varying local conditions of supply or demand. Said prices are made in terms of the said pricing system and are applied throughout the said 14 States. Such producer-members maintain an artificial price level little related to and not governed by truly competitive conditions.

(e) Under the said pricing system, producers more efficient, and better financed and equipped, and better located, as respects supplies, markets, and transportation, in large measure waive their competitive advantages, in the said respects, among others, by adhering to the said identical delivered pricing system. Thus their incentive toward efficiency and economy is weakened. Any saving that might be effected cannot, under the system, be reflected in price concessions, or in the holding of business in high net return areas, or in the obtaining of increased volume of business. The same delivered prices are adhered to by all producer-members alike.

(f) Under conditions of true price competition, consumers located at or near points of production normally tend to buy from a local plant. If the local prices advance unduly, the competition of the nearest competitor at once becomes more active and restores a more reasonable price. But under respondents' said pricing system the advantages which would normally accrue to buyers located near snow fence plants are destroyed. Each producer-member charges the same delivered price as every other. All buyers pay the same averaged carriage factor irrespective of location or actual carriage costs, a price factor substantially higher than would prevail under normal competitive conditions. Buyers can choose to purchase from among a greater number of producers than would normally quote or sell under true price competition, but the conditions under which they buy are monopolistic, not competitive.

(g) Thus the buying public, as an average, pays prices for snow fence which are enhanced both by freedom from competition and also by an excessive carriage factor.

(h) The channels of distribution of snow fence have been crystallized in favor of certain wholesalers and retailers, who are regarded as meeting the views and definitions of respondents and who, irrespective of the rights of others freely to enter trade and compete for success therein, are given exclusive trade recognition through respondents' said agreement, understanding or conspiracy.

(i) The resale prices of distributors and dealers, customers of producer-members, have been maintained by concert of action among respondents and, in some cases, by concert of action among certain distributors and dealers at the instance of and with the cooperation of respondents.

(j) Distributors and dealers in snow fence have been compelled to adhere to sales prices concertedly forced upon them by respondents.

(k) Other important means of price competition, susceptible of being employed in the business, including higher trade and cash discounts and better terms, than those made by competitors, and the

gaining as outlets of distributors and dealers sufficiently competent to obtain volume of business through competition in price, are waived, and while respondents' said combination is in effect, are eliminated.

(*l*) Thus the buying public, while respondents have pursued the acts and things found in paragraphs 4, 5, and 6 hereof, have lost the benefit of price competition in snow fence products both among producer-members, and among their distributors and dealers. The public has been obliged to pay artificially enhanced and maintained prices for said products.

(*m*) Since producer-members control 90 percent to 95 percent of the snow fence products sold in the aforesaid 14 States, the tendency of the acts and things found in paragraphs 4, 5, and 6, is to give, and said acts and things have nearly availed in giving, producer-members a monopoly in said products in the said 14 States.

PAR. 8. (*a*) Under the pricing system described in paragraph 5 hereof the said delivered prices quoted and charged by each producer-member are in excess of the net or true prices received for snow fence except where the buyer is located in the same city as that of the producer-member making the sale. Delivered prices to all buyers not located in the same city include not only the price of the fence but the price of its transportation and delivery. In order to ascertain the net or true price received the actual carriage charges incurred by the producer-member must be deducted from the delivered price which he receives.

(*b*) Each producer-member receives his highest price from buyers located in the city or town where his plant is also located. As the distances from his plant and the corresponding amounts of the freight charges increase, the net or true prices received by the producer-member diminish. The lowest price received, by any producer-member, is that from the customer to whose location the carriage charge is the highest, but from whom, nevertheless, such producer-member accepts business.

(*c*) Respondents' uniform delivered price system is not a system of uniform true prices made by any given producer-member. It is a system under which each producer-member makes as many different prices to his customers as there are destinations, at which he delivers his products for sale, having different carriage charges from the location of his plant.

(*d*) The said system of delivered prices is a system wherein the regular, constant, and substantial discrimination in prices is inherent and inescapable so long as the said system be employed.

PAR. 9. The discriminations described in paragraph 8 hereof are not indulged in merely for convenience nor through custom. Pro-

ducer-members have no immediate purpose or wish to obtain higher net prices or greater profits from customers who are their neighbors or residents of the same community or locality, wherein they themselves live, than from other customers. They obtain such higher prices and profits from local buyers but through no motive of ill-will towards them as individuals. They discriminate in price in their sales against buyers in their respective home territories with the purpose to destroy competition in price in interstate commerce on the part of each producer-member, which grants the discrimination, with all other producer-members.

PAR. 10. It is through the said system of discrimination in price, adopted and maintained as in paragraphs 5, 8, and 9 hereof found, that respondents have put into operation and maintained their agreement, understanding or conspiracy alleged in paragraph 4. Among the effects of the said price discrimination, thus systematically pursued, are the following:

(a) There is no price competition among the producer-members since the delivered prices by them quoted and charged for the business of any private or public buyer located in the above-named 14 States are precisely identical as respects the customers of each of them and are identical also as respects all producer-members making or quoting such delivered prices.

(b) Each producer-member obtains his highest price when he sells to customers located at or near the point where his own plant is also located and from which the delivery charge is accordingly at a minimum; but he does not reduce his delivered price in the slightest in order to hold or to gain this his most profitable, actual or prospective business. Instead he refrains from any act of price competition and makes no effort, so far as price is concerned, to bid for such most profitable business. In return for refraining from so doing he reciprocally gains the privilege of quoting and selling to customers in the high net return areas of other producer-members. Each well knows that so long as other members adhere to the same system of discrimination in price through employing the same concerted delivered price system, he will nowhere encounter competition in price.

(c) The cost of producing snow fence varies somewhat in different localities due to the varying costs at respective plants of the lumber, wire, and other materials and varying labor costs. By the same system of discriminatory prices such variations in cost are nullified as an influence and check upon prices. Prices are made by producer-members with no regard to individual costs or to varying local con-

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ditions of supply and demand. Said prices are made in terms of the said delivered price system and are applied throughout the said 14 States not as identical prices but as identical delivered prices. Thus producer-members maintain an artificial level of prices little related to and not covered by truly competitive conditions.

(d) Under the said system of discriminatory prices, producers more efficient and better financed and equipped and better located, as respects supplies, markets, and transportation, in large measure waive their competitive advantages, in the said respects, among others, by adhering to the said system of discriminatory prices. Thus, their incentive towards efficiency and economy is weakened through the identical character of the delivered prices made by them under the system. Any savings that might be effected cannot, under the system, be reflected in price concessions, nor in the holding of business in high net return areas, nor in the obtaining of increased volume of business. The same delivered prices are adhered to by all producer-members alike.

(e) Under conditions of true price competition, consumers located at or near points of production normally tend to buy from a local plant. If its prices advance unduly, the competition of the nearest competitor having similar costs of production and distribution, becomes more active and restores a reasonable price. But under respondents' said pricing system the advantages which would normally accrue to buyers located near snow fence plants are destroyed. Each producer-member charges the same delivered price as every other. All buyers pay the same average carriage price factor irrespective of location or actual carriage cost, a factor substantially higher than would prevail under normal competitive conditions. Buyers may therefore purchase from a greater number of producers than would normally quote or sell under conditions of true price competition, but the conditions under which they buy are monopolistic, not competitive.

(f) Thus the buying public has lost the benefit of price competition in snow fence products among producer-members and has been obliged to pay artificially enhanced and maintained prices for said products.

(g) Since producer-members control 90 to 95 percent of the snow fence products sold in the aforesaid 14 States, the tendency of the acts and things found in paragraphs 4 to 7 inclusive hereof is, through the said system of price discrimination, to give producer-members a monopoly in said products in said States.

CONCLUSIONS

The Federal Trade Commission has reached herein the following conclusions, to wit:

(a) The public interest has been substantially, adversely, and unreasonably affected by the agreement, understanding, or conspiracy of respondents and the practices and activities found in paragraphs 4, 5, and 6 of the Findings as to the Facts herein. Thereby respondents have hindered, lessened, restricted, frustrated, and restrained, and still hinder, lessen, restrict, frustrate, and restrain the interstate commerce of producer-members in 14 States with a direct and substantial tendency to suppress such commerce. Such concerted action exercises a power which individual action could not exercise or possess, and the necessary tendency and the direct and substantial effect of the combination are injury to the public.

(b) The public interest directly involved herein is a part of the larger public interest, within the meaning of the Federal Trade Commission Act, in the maintenance of the natural regulatory forces of free competition in industry generally. The economic tendency of the respondents' agreement, understanding, or conspiracy upon the public interest, as thus broadly stated, is to lend encouragement to similar impairment of competition in other industries, the effect of which upon the buying power of consumers, the opportunities for independence in business, the necessity that the Government undertake by regulation to protect the public interest, and the fluctuations of national prosperity, must increase in severity as the extent of competition is reduced. The leaving to private industry of monopolistic special privileges and franchises is at the expense of the purchasing power of the masses of the country and results inevitably in reducing the opportunity freely to enter industry and commerce.

(c) The agreement, understanding, or conspiracy of respondents and their practices thereunder, are all to the prejudice of the public, and constitute unfair methods of competition in the snow fence industry in interstate commerce, within the effect and meaning of the Federal Trade Commission Act.

(d) The respondents' system of price discrimination, as adopted and maintained by them is a vehicle through which they obtain the elimination of price competition and have effectuated a monopoly or near-monopoly in their said industry in the said 14 States.

(e) Respondents' agreement, understanding, or conspiracy to practice price discrimination and the acts of price discrimination, as found, are performed in the actual course of interstate commerce in

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the sale of like grades and qualities of snow fence. These acts not only may substantially lessen competition and may tend to create a monopoly in said line of commerce; they have availed actually and substantially to lessen competition therein and they tend directly and powerfully to create a monopoly in said products, in 14 States of the northeastern section of the country, in favor of producer-members who grant the benefits of such discrimination in price to those customers who are favored by the system.

(f) The said acts of discrimination in price constitute unlawful discrimination in price within the intent and meaning of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER TO CEASE AND DESIST

This proceeding having been considered by the Federal Trade Commission upon the complaint of the Commission and the substituted answer of the respondents, and the Commission having made its findings as to the fact and its conclusions that respondent, United Fence Manufacturers Association, an unincorporated association, and other respondents above named have violated 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, and that respondents have also violated Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended by an Act of Congress approved June 19, 1936.

It is now ordered, That respondent United Fence Manufacturers Association and its respondent members, corporations, partnerships, and individuals, and its respondent officers and trustees and its other agents, shall cease and desist from continuing, making, carrying into effect, maintaining, or renewing any agreement, understanding, or conspiracy to use, in interstate commerce, any system or practice of quoting and selling at delivered prices which are identical either at the same destinations or throughout a given zone or area.

It is further ordered, That said respondents shall cease and desist from promoting or facilitating discrimination in prices realized f. o. b. point of shipment through any agreement, understanding, or conspiracy among any two or more of them which results in respondents variously located quoting and selling in interstate commerce at delivered prices that are identical at any given destination.

It is further ordered, That respondent members shall cease and desist from any agreement, understanding, or conspiracy whereby in the course of such commerce they discriminate in prices realized from

their respective customers f. o. b. point of shipment where the effect of such discrimination by members variously located is to make delivered prices identical at any given destination and to substantially lessen competition among respondent members or tend to create a monopoly in snow fence products in their favor.

It is further ordered, That respondents shall cease and desist from continuing, making, carrying into effect, maintaining, or renewing any agreement, understanding, or conspiracy, to use any methods for the substantial lessening or suppression of price competition in snow fence products, in interstate commerce, including the following methods, to wit:

(a) The filing with respondents' executive secretary, or any other agent, of the respective delivered price lists, discounts, or terms of sale of respective respondents with the understanding that the same are to be maintained, for all sales of snow fence products made by each said respondent so filing, either indefinitely or for a given period, or until a new filing shall be made;

(b) The refraining from making direct or indirect concessions in prices, discounts, or terms and conditions of sale to any buyer, private or public;

(c) The abstaining from making shipments upon consignment;

(d) The bringing of instances of price cutting to the knowledge of respondent officers; and the undertaking of negotiations looking toward the elimination of price competition or price concessions by any respondent or respondents;

(e) The having, maintaining, continuing, or exercising of any agreement or understanding that respondents, or any of them, will submit to an investigation or examination, under oath or otherwise, conducted by any other respondent or respondents, or their agents, with respect to any prices or concessions which any respondent member may have made in the quotation or sale of snow fence products;

(f) The making of identical distributors' or dealers' discounts or both;

(g) The defining of which traders shall be recognized as belonging to the class of distributors, or of which traders shall be recognized as belonging to the class of dealers;

(h) The issuing, acceptance, or using of a list of such distributors as shall be deemed to be exclusively entitled to distributors' discounts;

(i) The taking of steps to maintain resale prices at respective list prices, less respective discounts, or to maintain the discounts therefrom;

(j) The securing from distributors or dealers, or both, of reports of instances of price cutting in the distribution of snow fence products;

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(k) The cutting off, or threatening to cut off, supplies of snow fence products from such distributors or dealers as make lower or better resale prices, terms, or conditions of sale than those authorized, prescribed, or suggested by respondents; and

(l) The bidding of a price, or the refraining from bidding, in response to any offer to buy, with an understanding that the business shall be apportioned among two or more respondents after the contract to buy shall have been made.

Provided, however, (1) That any understanding, agreement, or conspiracy as to any matter or thing, from which respondents are collectively prohibited by the above provisions of this order, shall, if undertaken on the part of any number of respondents, more than one and less than all, be as fully within the prohibitions hereof as though all respondents participated therein; and

(2) That any matter or thing from which respondents are collectively prohibited by the above provisions of this order shall not be deemed to be within the prohibitions hereof if done by any respondent individually and wholly apart from any understanding, agreement, or conspiracy with others; but nothing herein contained shall be deemed to have sanctioned any discrimination in price practiced by any respondent individually.

It is further ordered, That the respondents shall, within 60 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

ELBEE CHOCOLATE COMPANY, INC.

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

Docket 1864. Complaint, Sept. 24, 1936¹—Decision, July 14, 1938

Where a corporation engaged in manufacture of candy, sold and distributed nationally and resold in practically all stores where candy is offered for sale and sold to public including penny candy stores, school stores and neighborhood stores, and selling break-and-take assortments composed of a number of penny pieces of chocolate-covered candy of uniform size and shape, together with number of larger pieces or bars of candy and box of candy, to be given as prizes to chance purchasers of a minority of said pieces, enclosed concealed centers of which were colored, with purchaser of last of said pieces entitled to box without further charge, and other assortments employing substantially same method or sales plan—

Sold said assortments to jobbers, so packed and assembled that they could be displayed for sale and distribution to purchasing public without alteration or rearrangement by said jobbers' retailer vendees by lot or chance, and with knowledge and intent that they should thus be resold, in violation of public policy and in competition with many manufacturers who do not make and sell lottery or prize packages or assortments of candy and sell, in competition with its break-and-take assortments, straight goods or merchandise, in sales of which a marked decrease has been noted by the many candy manufacturers thereof who do not make and sell the break-and-take draw or deal assortments, whenever latter have appeared in their markets, due to gambling or lottery feature connected therewith, and consumers' preference therefor by reason of such feature;

With result that competitors, many of whom regard sale and distribution of candy by such method as morally bad and as encouraging gambling and especially among children, as injurious to candy industry through resulting in merchandising of a chance or lottery instead of candy, and as providing retail merchants with means of violating the laws of several States, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to consuming public, were put to a competitive disadvantage, and trade was unfairly diverted to it from its said competitors and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry:

Held, That such acts and practices were all to the prejudice of the public and competitors, and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank for the Commission.

Mr. Victor W. Milch, of New York City, for respondent.

¹ Amended and supplemental.