

Syllabus

IN THE MATTER OF
SOUTHERN VITRIFIED PIPE 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*Docket 3868. Complaint, Aug. 8, 1939¹—Decision, May 31, 1940*

Where nine corporations engaged in the manufacture and sale of vitrified clay sewer pipe, and members of an association which included most of the manufacturers of said product located in that part of the United States lying east of the Mississippi and south of the Ohio and Potomac Rivers, and who (1) sold product in question, important item in modern construction, sanitation, and community development and frequently bought and used by municipalities and by State and Federal governments for improvement of their own properties and by governmental emergency relief agencies, such as the Works Progress Administration of the United States Government, and other agencies dealing with the relief of unemployment and other results of the depression, direct to municipalities, counties, States and the Federal Government, and to dealers at the same prices, terms, and conditions of sale, and direct to large contractors, (2) had control of a large, valuable, and continuous trade and commerce among the several States in such product, large quantities of which they sold and shipped and caused to be transported and delivered to purchasers across State lines, and (3) were in a position, to the extent that they acted concertedly and cooperatively in the production and price of their products, both to dominate and manipulate the market in which Governmental agencies and unorganized consumers must buy such products in territory in which said manufacturers did business;

Acting concertedly and by agreements among themselves, and through their said association, as the case might be, and continuing, pursuant to agreement, understanding, and cooperation among themselves, acts, practices, and agreements which were in effect, mostly, during the period covered by the Code for the Industry under the National Industrial Recovery Act, and with intent of substantially suppressing and restricting competition as to price and otherwise in sale of vitrified clay sewer pipe in commerce among the several States where they did business—

- (a) Fixed and agreed among themselves on prices, terms, and conditions of sale to be quoted and collected for their products, and caused such prices, etc., to be filed with their said association and to be compiled and distributed among themselves and their customers, and agreed to and did adhere to such prices, etc., pending the filing of changes therein with association aforesaid;
- (b) Agreed among themselves that quotations and sales should be made upon a delivered basis only, with freight equalized from members' respective shipping points, so that cost of their products to any given buyer when delivered from any point was identical at any given destination, regardless of variations in freight from different places of production and shipment, and

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entered into agreement or understanding among themselves by which, despite differences in actual weights of vitrified clay sewer pipe, as produced and shipped by the various manufacturers, the weights to be used in the calculation of freight charges, freight equalizations, delivered price, and discounts, were made uniform, and agreed upon higher prices for delivery of their products by truck than when delivered by railroad, with intent and effect of discouraging truck delivery and preventing reductions below level of identical delivered prices calculated on a rail freight basis;

- (c) Refused, by united policy, to quote and sell to aforesaid Government purchasing agencies on an f. o. b. mill basis, and therein and thereby tended to and did deprive the Federal Government of opportunity to benefit from land grant and other special railroad rates to which it was lawfully entitled, and, in advance of submission and opening of sealed bids on Federal, State, and municipal projects requiring product aforesaid, exchanged among themselves prices which they intended to quote and prevented, in prices quoted, any divergence, and agreed with respective dealer customers as to prices to be quoted by latter in bidding on pipe for Works Progress Administration and other projects financed by the Government, with intent and effect of causing submission of identical bids by dealers aforesaid;
- (d) Made complaints to officers of their association to whom, along with committees and employees, they had delegated function of preventing deviation from price and other agreements herein concerned restricting competition among the members involved, of suspected deviations from the prices and terms agreed upon, and caused investigations to be made of such complaints, including examination of books and records of suspected offenders, and entered into discussions among themselves and with manufacturers suspected or charged with such deviations, with intent and effect of obtaining renewed adherence to agreements on prices and related matters, and made use of meetings of their association as occasion for discussing, making, amending, and renewing such agreements, and maintained committee thereof with intent and effect of preventing deviation from agreed prices by threats, argument, and propaganda, to the effect that such deviations would constitute violation of Federal laws against price discrimination and subject such deviators to corrective action by the Commission;
- (e) Agreed among themselves as to differentials in price to be charged on sales to dealers, as compared with those to building contractors, and thus agreed as to what concerns should be recognized as dealers and entitled to purchase at dealers' prices, terms and discounts;
- (f) Attempted, by interchange of information among themselves, to restrict production of vitrified clay sewer pipe to an amount that could be sold and shipped at the prices established and maintained by their aforesaid agreements, and, acting directly and in cooperation with their association, its officers and directors, collaborated with other trade associations of manufacturers of said product in other sections of the United States, with intent and effect of restraining price competition between member manufacturers concerned, selling into territory covered by some other association, and manufacturers in said territory selling into that covered by their own association; and
- (g) Employed certain organization, of which two general officers of their own association were part owners, as agency for putting into effect and carrying out above policy, rules, practices, and methods of competition;

With effect, as incident to and a necessary result of their agreed policy of making delivered prices only and of equalizing their agreed delivered prices by equalizing freight from various shipping points to any given destination, that they, manufacturers aforesaid, habitually and systematically demanded, charged, accepted, and received larger sums of money per unit of product from their customers located near their respective plants than from their customers located at greater distances, thereby forced nearby customers to pay more, while more distant customers were allowed to pay less to respective manufacturers herein involved, deprived their nearby customers of any price advantage by reason of their proximity to the place of production, and thereby habitually and systematically discriminated in price among their respective customers in bad faith in order to suppress competition in price among themselves, and with result that, by means of the agreements, rules, policies, practices, and cooperative methods of competition adopted and carried out by concerted action and agreement as aforesaid, they, the manufacturers herein concerned, deprived purchasers and consumers of vitrified clay sewer pipe of the advantages of normal competition that would otherwise exist among such manufacturers, compelled unorganized purchasers, thereby, to buy at prices and terms determined collectively and collusively by themselves, and artificially enhanced the amounts exacted from such purchasers above the amounts obtainable had there been no such collusive action:

Held, That such acts and practices of said manufacturers, their association, and officers and directors thereof as above set forth, were all to the prejudice of the public and had a dangerous tendency to and actually hindered and prevented price competition between and among themselves in their sale of vitrified clay sewer pipe in commerce; and placed in themselves the power to control and enhance prices; and created in such manufacturers a monopoly in the sale of vitrified clay sewer pipe in commerce in aforesaid part of the United States; and unreasonably restrained such commerce in said products in said territory; and constituted unfair methods of competition in commerce.

Before *Mr. Randolph Preston*, trial examiner.

Mr. Curtis C. Shears for the Commission.

Covington, Burling, Rublee, Acheson & Shorb, of Washington, D. C., and *Carter, Ledyard & Milburn*, of New York City, for Southern Vitrified Pipe Association, *W. Clement Boren, Jr., D. M. Strickland, John M. Byrne, Pomona Terra Cotta Co., Pine Hall Brick and Pipe Co., The Columbia Clay Co., Georgia Vitrified Brick and Clay Co., Cannelton Sewer Pipe Co., Owensboro Sewer Pipe Co.*, and also, along with

Mr. Clifford Histed, of Kansas City, Mo., for *Cliff B. Beasley and W. S. Dickey Clay Manufacturing Co.*;

Mr. Harry Boulton and Mr. William T. Davis, of Clearfield, Pa., for *Lee Clay Products Co.*; and

Miller & Lowrey, of Macon, Ga., for *Oconee Clay Products Co.*

Woodward, Dawson & Hobson, of Louisville, Ky., for *Trustee in Bankruptcy of P. Bannon Pipe Co.*

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that the respondents named and represented in the caption hereof have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. The Commission names and includes as respondents in this proceeding the Southern Vitrified Pipe Association, Cliff B. Beasley, president of said Association, W. Clement Boren, Jr., its vice president, D. M. Strickland, its secretary-manager and John M. Byrne, its treasurer. It joins these individuals both separately and as representatives of all the members of respondent Association. The Commission also includes as respondents in this proceeding the members of the board of directors of said respondent Association both individually and as representatives of the members, but the names of such Board are not at present known to the Commission. The Commission also names and includes as respondents in this proceeding both separately and as representatives of the entire membership the following members: W. S. Dickey Clay Manufacturing Co., Lee Clay Products Co., Pomona Terra Cotta Co., Pine Hall Brick & Pipe Co., The Columbia Clay Co., Georgia Vitrified Brick & Clay Co., Oconee Clay Products Co., Cannelton Sewer Pipe Co., Owensboro Sewer Pipe Co., and P. Bannon Pipe Co.

PAR. 2. The Southern Vitrified Pipe Association is a voluntary unincorporated trade association with its office and principal place of business at Cincinnati, Ohio. The membership of respondent Association comprises all or practically all of the manufacturers of vitrified clay sewer pipe located in that part of the United States lying east of the Mississippi and south of the Ohio and Potomac Rivers.

Respondent, W. S. Dickey Clay Manufacturing Co., is a corporation organized and existing under the laws of the State of Delaware and has its general office and principal place of business at Kansas City, Mo. It does the largest volume of business of any of respondent manufacturers and has producing plants in Alabama and Tennessee, as well as pipe producing plants in States outside the territory represented by respondent Association.

Respondent, Lee Clay Products Co., is a corporation organized and existing under the laws of the State of Kentucky, with offices and producing plant located at Clearfield, Ky.

Respondent, Pomona Terra Cotta Co., is a corporation organized and existing under the laws of the State of North Carolina with offices and producing plant located at Pomona in that State.

Respondent, Pine Hall Brick & Pipe Co., is a corporation organized and existing under the laws of the State of North Carolina, with offices at Winston-Salem and producing plant at Ceramic in that State.

Respondent, The Columbia Clay Co., is a corporation organized and existing under the laws of the State of South Carolina with offices and producing plant located near Columbia in that State.

Respondent, Georgia Vitrified Brick & Clay Co., is a corporation organized and existing under the laws of the State of Georgia with office and principal place of business at Augusta, Ga., and producing plant at Cambria, Ga.

Respondent, Oconee Clay Products Co., is a corporation organized and existing under the laws of the State of Georgia, with office, principal place of business, and producing plant at Milledgeville, in that State.

Cannelton Sewer Pipe Co. is a corporation organized and existing under the laws of the States of Indiana with office and principal place of business at Cannelton in that State.

Respondent, Owensboro Sewer Pipe Co. is a corporation organized and existing under the laws of the State of Kentucky with office and principal place of business at Owensboro, Ky.

Respondent, P. Bannon Pipe Co. is a corporation organized and existing under the laws of the State of Kentucky with office and producing plant at Louisville in that State.

PAR. 3. The vitrified clay sewer pipe with which this proceeding is concerned is an important item in modern construction, sanitation, and community development. It is frequently bought and used by municipalities, State, and Federal governments for the improvement of their own properties and also by Governmental emergency relief agencies, such as the Works Progress Administration of the United States Government, and other agencies dealing with the relief of unemployment and other results of the depression.

PAR. 4. Respondent manufacturers sell their products direct to municipalities, counties, States, and the Federal Government, and to dealers, at the same prices, terms, and conditions of sale. Their products are also sold direct to large contractors and to jobbers. Respondent manufacturers have control of a large, valuable, and continuous trade in commerce among the several States in the commodity with which this proceeding deals, and in the course of such trade and commerce sell and ship and cause to be transported and delivered, large quantities of material and finished products across State lines. To

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the extent that respondent manufacturers act collusively and collectively in the production and pricing of their goods they are in a position both to dominate and manipulate the market in which Governmental agencies and unorganized consumers must buy such goods in the territory where respondent manufacturers do business.

PAR. 5. For more than 5 years last past respondent Association, its officers, directors, and members, and respondent manufacturers have engaged in a wrongful, and unlawful combination and conspiracy among themselves, for the purpose and with the effect of substantially suppressing and frustrating competition as to price and otherwise in the sale of vitrified clay sewer pipe in commerce among the several States where respondent manufacturers do business. To that end respondents, by concerted action and agreement among themselves, and with others not joined herein as respondents, have adopted and carried out the following policies, rules, practices, and methods of competition:

(a) Respondents have agreed among themselves as to the prices, terms, and conditions of sale to be quoted and collected for their products, have caused such prices, terms, and conditions of sale to be filed with respondent Association and to be compiled and distributed among themselves and their customers, and have agreed to adhere to such prices, terms, and conditions of sale pending the filing of changes therein with respondent Association.

(b) Pursuant to the agreement above alleged, respondent manufacturers have adhered to such prices, terms, and conditions of sale in the making of price quotations and in the making of actual sales.

(c) Respondent manufacturers have agreed among themselves that quotations and sales should be made upon a delivered basis only, with freight equalized from their respective shipping points, so that the cost of their products to any given buyer when delivered from any point, would be identical at any given destination regardless of the variations in freight from different places of production and shipment.

(d) By concerted action respondent manufacturers have reached an agreement or understanding among themselves by which, despite differences in the actual weights of vitrified clay sewer pipe as produced and shipped by the various manufacturers, the weights to be used in the calculation of freight charges, freight equalizations, delivered prices and discounts were made uniform.

(e) By a united policy of refusing to quote and sell to the aforesaid Government purchasing agencies on an f. o. b. mill basis, respondents have entered into an agreement that tends to deprive and has deprived the Federal Government of the opportunity to benefit from

land grant and other special railroad rates to which it is lawfully entitled.

(f) In advance of the submission and opening of sealed bids on Federal, State, and municipal projects requiring vitrified clay sewer pipe, respondent manufacturers have exchanged among themselves the prices which they intended to quote in such bids and thereby prevented any divergence in the prices quoted.

(g) Respondent manufacturers have agreed with their respective dealer customers as to the prices to be quoted by such dealers when bidding on pipe for the Works Progress Administration and other projects financed by the Government, for the purpose and with the effect of causing such dealers to submit identical bids.

(h) The members of respondent Association have selected its officers, committees, and employees and have delegated to them the function of preventing deviation from the price agreements and other agreements herein alleged restricting competition among the respondent manufacturers. Respondent manufacturers have made complaints to their Association officers of suspected deviation from the prices and terms agreed upon and have caused investigations to be made of such complaints, including examination of the books and records of the suspected offenders. Respondent officers and manufacturers have discussed such complaints among themselves and with manufacturers suspected or charged with such deviations, for the purpose and with the effect of obtaining renewed adherence to the alleged agreements on prices and related matters. Meetings of respondent Association have been used by respondent manufacturers as the occasion for discussing, making, amending, and renewing such agreements.

(i) Respondent manufacturers have maintained a committee of their Association for the purpose and with the effect of preventing deviation from their agreed prices by threats, argument, and propaganda to the effect that such deviation would constitute a violation of Federal laws against discrimination in price and would subject such deviators to corrective action by the Federal Trade Commission.

(j) Respondent manufacturers have agreed upon higher prices for delivery of their products by truck than when delivered by railroad, for the purpose and with the effect of discouraging truck delivery and of preventing reductions below the level of identical delivered prices calculated on a rail freight basis.

(k) Respondent manufacturers have agreed among themselves as to the differentials in price to be charged on sales to dealers as compared to building contractors.

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(l) Respondent manufacturers have agreed among themselves as to what concerns should be recognized as dealers and entitled to purchase at dealers' prices, terms, and discounts.

(m) Respondent manufacturers have attempted by interchange of information among themselves to restrict the production of vitrified clay sewer pipe to an amount that could be sold and shipped at the prices established and maintained by the agreements among respondents heretofore alleged.

(n) Most of the acts, practices, and agreements referred to above were in effect during the period covered by the code for the industry under the National Industrial Recovery Act, and have continued in effect pursuant to agreement, understanding, and cooperation among respondents.

(o) Respondent Association, officers, and manufacturers have collaborated with other trade associations composed of other manufacturers of vitrified clay sewer pipe located in other sections of the United States for the purpose and with the effect of restraining price competition between respondent manufacturers who sell into territory covered by some other association and manufacturers in such territory who sell into the territory covered by respondent Association.

(p) Respondent manufacturers have employed "The Byrne Organization" of which respondents Strickland and Byrne are part owners, as an agency for putting into effect and carrying out the above policies, rules, practices, and methods of competition.

PAR. 6. As an incident to and a necessary result of their agreed policy of making delivered prices only and of equalizing their agreed delivered prices by equalizing freight from various shipping points to any given destination, the respective respondent manufacturers have habitually and systematically demanded, charged, accepted, and received larger sums of money per unit of product from their customers located near their respective plants than from their customers located at greater distances, have thereby forced nearby customers to pay more in order that more distant ones might pay less to the respective respondent manufacturers, have deprived their nearby customers of any price advantage by reason of their proximity to the place of production, and have thereby habitually and systematically discriminated in price among their respective customers in bad faith in order to suppress competition in price among respondent manufacturers.

PAR. 7. By means of the aforesaid agreements, understandings, rules, policies, practices, and cooperative methods of competition, respondents have deprived purchasers and consumers of vitrified clay sewer pipe of the advantages of normal competition that would oth-

erwise exist among respondent manufacturers. Respondents have thereby compelled unorganized purchasers to buy at prices and terms determined collectively and collusively by respondents and have artificially enhanced the amounts exacted from such purchasers above the amounts obtainable had there been no such determination. The amounts exacted from public purchasing agencies constitute part of the financial obligations of Government payable either with or without interest out of tax receipts.

PAR. 8. The above-alleged acts and things done by respondents are all to the injury and prejudice of the public engaged in the purchase and resale of vitrified clay sewer pipe, of competitors engaged in the production and sale thereof, and of consumers of such commodity, and constitute unfair methods of competition and unfair or deceptive acts and practices in interstate commerce within the intent and meaning of section 5 of an act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 8, 1939, issued, and on August 9, 1939, served, its complaint in this proceeding upon respondents Southern Vitrified Pipe Association, Cliff B. Beasley, president, W. Clement Boren, Jr., vice president, D. M. Strickland, secretary-manager, and John M. Byrne, Treasurer, and W. S. Dickey Clay Manufacturing Co., Lee Clay Products Co., Pomona Terra Cotta Co., Pine Hall Brick & Pipe Co., The Columbia Clay Co., Georgia Vitrified Brick & Clay Co., Oconee Clay Products Co., Cannelton Sewer Pipe Co., Owensboro Sewer Pipe Co., and P. Bannon Pipe Co., charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of the respondents' answers, the Commission, by order entered herein, granted motion of all the respondents, except P. Bannon Pipe Co., for permission to withdraw said answers and to substitute therefor answers admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answers were duly filed in the office of the Commission. Thereafter, by stipulation between counsel for the Commission and counsel for the respondents, the Commission on April 23, 1940, entered its order amending *nunc pro tunc* its complaint and respondents waived notice of hearing, oral argument, and written briefs

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before the Commission on this amendment, and further waived service of an amended answer to said amended complaint, and it was agreed and ordered that the substitute admission answers to the original complaint be considered the answers to said amended complaint. Thereafter this proceeding regularly came on for final hearing before the Commission on the said amended complaint, and answer of P. Bannon Pipe Co. and substitute answers of all the other respondents, and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The Southern Vitriified Pipe Association is a voluntary unincorporated trade association with its office and principal place of business at Cincinnati, Ohio. The membership of respondent Association comprises most of the manufacturers of vitrified clay sewer pipe located in that part of the United States lying east of the Mississippi and south of the Ohio and Potomac Rivers.

Respondent, W. S. Dickey Clay Manufacturing Co., is a corporation organized and existing under the laws of the State of Delaware, and has its general office and principal place of business at Kansas City, Mo. It does the largest volume of business of any of respondent manufacturers and has producing plants in Alabama and Tennessee, as well as pipe-producing plants in States outside the territory served by members of respondent Association.

Respondent, Lee Clay Products Co., is a corporation organized and existing under the laws of the State of Kentucky, with offices and producing plant located at Clearfield, Ky.

Respondent, Pomona Terra Cotta Co., is a corporation organized and existing under the laws of the State of North Carolina, with offices and producing plant located at Pomona in that State.

Respondent, Pine Hall Brick & Pipe Co., is a corporation organized and existing under the laws of the State of North Carolina, with offices at Winston-Salem and producing plant at Ceramic in that State.

Respondent, The Columbia Clay Co., is a corporation organized and existing under the laws of the State of South Carolina, with offices and producing plant located near Columbia in that State.

Respondent, Georgia Vitrified Brick & Clay Co., is a corporation organized and existing under the laws of the State of Georgia, with office and principal place of business at Augusta, Ga., and producing plant at Cambria, Ga.

Respondent, Oconee Clay Products Co., is a corporation organized and existing under the laws of the State of Georgia, with office, principal place of business, and producing plant at Milledgeville, in that State. Said Oconee Clay Products Co., resigned as a member of respondent Association in 1937.

Respondent, Cannelton Sewer Pipe Co., is a corporation organized and existing under the laws of the State of Indiana, with office and principal place of business at Cannelton in that State.

Respondent, Owensboro Sewer Pipe Co., is a corporation organized and existing under the laws of the State of Kentucky, with office and principal place of business at Owensboro, Ky.

Respondent, P. Bannon Pipe Co., a corporation organized under the laws of the State of Kentucky, filed a petition in bankruptcy on April 12, 1932, and on April 13, 1932, was duly adjudicated a bankrupt by the United States District Court for the Western District of Kentucky. Thereafter, on June 27, 1932, one Maxwell S. Barker was duly elected Trustee in Bankruptcy for the said P. Bannon Pipe Co., and thereafter and until December 19, 1938, operated the sewer pipe manufacturing plant of the P. Bannon Pipe Co. under authority of orders entered in the District Court of the United States for the Western District of Kentucky. On or about December 19, 1938, the said Maxwell S. Barker as trustee of the said P. Bannon Pipe Co., bankrupt, pursuant to the proper orders of the court aforesaid, sold all the assets of the said P. Bannon Pipe Co. and since that time has distributed to the creditors of the said P. Bannon Pipe Co. all of the funds coming into his hands as trustee for that estate. On or about September 10, 1939, the said Maxwell S. Barker died, and no other trustee has been selected as the estate has been fully administered.

PAR. 2. The vitrified clay sewer pipe with which this proceeding is concerned is an important item in modern construction, sanitation, and community development. It is frequently bought and used by municipalities, State and Federal governments for the improvement of their own properties and also by governmental emergency relief agencies, such as the Works Progress Administration of the United States Government, and other agencies dealing with the relief of unemployment and other results of the depression.

PAR. 3. Respondent manufacturers sell vitrified clay sewer pipe direct to municipalities, counties, States, and the Federal Government and to dealers at the same prices, terms, and conditions of sale. They also sell their products direct to large contractors. Respondent manufacturers have control of a large, valuable and continuous trade and commerce among the several States in vitrified

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clay sewer pipe, and in the course of such trade and commerce sell and ship, and cause to be transported and delivered to the purchasers thereof, large quantities of vitrified clay sewer pipe across State lines. To the extent that respondent manufacturers act concertedly and cooperatively in the production and pricing of their products as hereinafter set forth, they are in a position both to dominate and manipulate the market in which governmental agencies and unorganized consumers must buy such products in the territory where respondent manufacturers do business.

PAR. 4. For more than 5 years last past, respondent Association, its officers, directors, and members, and the respondent manufacturers, for the purpose of substantially suppressing and restricting competition as to price and otherwise in the sale of vitrified clay sewer pipe in commerce among the several States where respondent manufacturers do business, by concerted action and agreement among themselves have adopted and put into effect the following policies, rules, practices, and methods of competition:

(a) Respondent manufacturers have agreed among themselves as to the prices, terms, and conditions of sale to be quoted and collected for their products, have caused such prices, terms, and conditions of sale to be filed with respondent Association and to be compiled and distributed among themselves and their customers, and have agreed to adhere to such prices, terms, and conditions of sale pending the filing of changes therein with respondent Association.

(b) Pursuant to the foregoing agreement, respondent manufacturers have adhered to such prices, terms, and conditions of sale in the making of price quotations and in the making of actual sales.

(c) Respondent manufacturers have agreed among themselves that quotations and sales should be made upon a delivered basis only, with freight equalized from their respective shipping points, so that the cost of their products to any given buyer when delivered from any point is identical at any given destination regardless of the variations in freight from different places of production and shipment.

(d) Respondent manufacturers entered into an agreement or understanding among themselves by which, despite differences in the actual weights of vitrified clay sewer pipe as produced and shipped by the various manufacturers, the weights to be used in the calculation of freight charges, freight equalizations, delivered prices, and discounts were and are made uniform.

(e) By a united policy of refusing to quote and sell to the aforesaid Government purchasing agencies on an f. o. b. mill basis, respondent manufacturers have entered into an agreement that tends to deprive and has deprived the Federal Government of the opportunity

to benefit from land grant and other special railroad rates to which it is lawfully entitled.

(f) In advance of the submission and opening of sealed bids on Federal, State, and municipal projects requiring vitrified clay sewer pipe, respondent manufacturers have exchanged among themselves the prices which they intended to quote in such bids and prevented any divergence in the prices quoted.

(g) Respondent manufacturers have agreed with their respective dealer customers as to the prices to be quoted by such dealers when bidding on pipe for the Works Progress Administration and other projects financed by the Government, for the purpose and with the effect of causing such dealers to submit identical bids.

(h) The respondent manufacturers, members of respondent Association, have selected its officers, committees, and employees and have delegated to them the function of preventing deviation from the price agreements and other agreements herein alleged restricting competition among the respondent manufacturers. Respondent manufacturers have made complaints to said Association officers of suspected deviations from the prices and terms agreed upon and have caused investigations to be made of such complaints, including examination of the books and records of the suspected offenders. Respondent officers and manufacturers have discussed such complaints among themselves and with manufacturers suspected or charged with such deviations, for the purpose and with the effect of obtaining renewed adherence to the said agreements on prices and related matters. Meetings of respondent Association have been used by respondent manufacturers as the occasion for discussing, making, amending, and renewing such agreements.

(i) Respondent manufacturers have maintained a committee of said Association for the purpose and with the effect of preventing deviation from their agreed prices by threats, argument, and propaganda to the effect that such deviation would constitute a violation of Federal laws against discrimination in price and would subject such deviators to corrective action by the Federal Trade Commission.

(j) Respondent manufacturers have agreed upon higher prices for delivery of their products by truck than when delivered by railroad, for the purpose and with the effect of discouraging truck delivery and of preventing reductions below the level of identical delivered prices calculated on a rail freight basis.

(k) Respondent manufacturers have agreed among themselves as to the differentials in price to be charged on sales to dealers as compared to building contractors.

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(*l*) Respondent manufacturers have agreed among themselves as to what concerns should be recognized as dealers and entitled to purchase at dealers' prices, terms, and discounts.

(*m*) Respondent manufacturers have attempted by interchange of information among themselves to restrict the production of vitrified clay sewer pipe to an amount that could be sold and shipped at the prices established and maintained by the agreements among respondents heretofore set forth.

(*n*) Most of the acts, practices, and agreements referred to above were in effect during the period covered by the Code for the Industry under the National Industrial Recovery Act, and have continued in effect pursuant to agreement, understanding, and cooperation among respondents.

(*o*) Respondent manufacturers, through and in cooperation with respondent Association, its officers, and directors, have collaborated with other trade associations composed of other manufacturers of vitrified clay sewer pipe located in other sections of the United States for the purpose and with the effect of restraining price competition between respondent manufacturers who sell into territory covered by some other association and manufacturers in such territory who sell into the territory covered by respondent Association.

(*p*) Respondents have employed "The Byrne Organization," of which respondents Strickland and Byrne are part owners, as an agency for putting into effect and carrying out the above policies, rules, practices, and methods of competition.

PAR. 5. As an incident to and a necessary result of their agreed policy of making delivered prices only and of equalizing their agreed delivered prices by equalizing freight from various shipping points to any given destination, the respective respondent manufacturers have habitually and systematically demanded, charged, accepted, and received larger sums of money per unit of product from their customers located near their respective plants than from their customers located at greater distances; have thereby forced nearby customers to pay more, and more distant customers were allowed to pay less to the respective respondent manufacturers; have deprived their nearby customers of any price advantage by reason of their proximity to the place of production; and have thereby habitually and systematically discriminated in price among their respective customers in bad faith in order to suppress competition in price among respondent manufacturers.

PAR. 6. By means of the agreements, rules, policies, practices, and cooperative methods of competition adopted and carried out by concerted action and agreement as aforesaid, respondents have deprived

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purchasers and consumers of vitrified clay sewer pipe of the advantages of normal competition that would otherwise exist among respondent manufacturers; and have thereby compelled unorganized purchasers to buy at prices and terms determined collectively and collusively by respondents and have artificially enhanced the amounts exacted from such purchasers above the amounts obtainable had there been no such collusive action.

CONCLUSION

The acts and practices of the respondents as herein set forth are all to the prejudice of the public; have a dangerous tendency to and have actually hindered and prevented price competition between and among respondents in the sale of vitrified clay sewer pipe in commerce within the intent and meaning of the Federal Trade Commission Act; have placed in respondents the power to control and enhance prices; have created in the respondent manufacturers a monopoly in the sale of vitrified clay sewer pipe in such commerce in that part of the United States lying east of the Mississippi River and south of the Ohio and Potomac Rivers; have unreasonably restrained such commerce in said products in said territory; and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission and the answers of respondents, in which answers all of the respondents except P. Bannon Pipe Co., admit all the material allegations of fact set forth in said amended complaint and state that they waive all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondents, except P. Bannon Pipe Co., have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, W. S. Dickey Clay Manufacturing Co., Lee Clay Products Co., Pomona Terra Cotta Co., Pine Hall Brick & Pipe Co., The Columbia Clay Co., Georgia Vitrified Brick & Clay Co., Oconee Clay Products Co., Cannelton Sewer Pipe Co., Owensboro Sewer Pipe Co., and their officers, representatives, agents, and employees, directly or through respondent Southern Vitrified Pipe Association, or through respondents Cliff B. Beasley, W. Clement Boren, Jr., D. M. Strickland, or John M. Byrne, or through any corporate or other device, do forthwith cease and desist, in connection

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with the offering for sale or sale and distribution of vitrified clay sewer pipe in interstate commerce or in the District of Columbia, from doing and performing by concerted action, agreement or understanding between any two or more of them, the following acts and things:

1. Fixing or establishing prices, terms, and conditions of sale at which they will sell vitrified clay sewer pipe products to the purchasing public.

2. Entering into, participating in, or carrying on, through the respondent Association or under its auspices or through any other central agency, meetings, or otherwise, discussions and exchanges of information concerning proposed or future prices, terms, and conditions of sale at which they will sell vitrified clay sewer pipe products to the purchasing public.

3. Promising to adhere to filed prices, terms, and conditions of sale for their said products pending the filing of changes therein with respondent Southern Vitrified Pipe Association.

4. Pursuant to any promise or assurance, adhering to filed prices, terms, and conditions of sale in the making of quotations or sales of their said products.

5. Making quotations and sales of their said products upon a delivered basis only, with freight equalized from their respective shipping points, so that the cost of their said products to any given buyer, when delivered from any point, will be identical at any given destination, regardless of variations in freight from different places of production and shipment.

6. Fixing arbitrary weights to be used in the calculation of freight charges and freight equalizations so that delivered prices and discounts are made uniform.

7. Refusing to quote and sell to Government purchasing agencies on an f. o. b. mill basis.

8. Exchanging among themselves, in advance of the submission and opening of sealed bids on Federal, State, and municipal projects requiring vitrified clay sewer pipe, the prices which they propose to quote in such bids.

9. Fixing and establishing differentials in price to be charged on sales to dealers as compared with sales to building contractors.

10. Agreeing with their respective dealer customers as to the prices to be quoted by such dealers on the resale of vitrified clay sewer pipe.

11. Determining what concerns shall be recognized as dealers and entitled to purchase at dealers' prices, terms, and discounts.

12. Restricting the quantity of vitrified clay sewer pipe to be produced by the respondent manufacturers or any of them.

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Order

13. Collaborating with trade associations composed of manufacturers of vitrified clay sewer pipe located in other sections of the United States, but who sell vitrified clay sewer pipe in the territory served by said respondent manufacturers east of the Mississippi River and south of the Ohio and Potomac Rivers, for the purpose and with the effect of restricting and restraining competition as to prices, terms, and conditions of sale of said products in said territory.

14. Obtaining adherence to prices, terms, and conditions of sale of their said products filed by said manufacturers with the respondent Association or any other central agency, by exchanging information at meetings held under the auspices of said Association, or otherwise, as to prices, terms, and conditions of sale at which said products have been sold by respondent manufacturers; by making and investigating complaints of alleged deviations in prices, terms, and conditions of sale by said manufacturers; by the examination of books and records of the suspected offenders and by threats of legal action against such offenders.

15. Employing "The Byrne Organization," of which respondents D. M. Strickland and John M. Byrne are part owners, or any other person, partnership, or corporation, to act as an agency for putting into effect or carrying out, directly or indirectly, any of the policies, rules, practices, or methods of competition prohibited by this order.

It is further ordered, That the amended complaint herein be, and the same hereby is, dismissed as to P. Bannon Pipe Co.

It is further ordered, That all of the respondents, except P. Bannon Pipe Co., 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 they have complied with this order.

IN THE MATTER OF
LADY ESTHER, LTD.

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

Docket 3917. Complaint, Oct. 6, 1939—Decision, May 31, 1940

Where a corporation, engaged in sale and distribution of cosmetics and other toilet preparations, including its Lady Esther Face Cream, to wholesale and retail purchasers in other states and to members of the public direct, in substantial competition with others engaged in the distribution and sale of face creams, cosmetics, and other toilet preparations adapted to and used for the same general purposes as its said Lady Esther Face Cream in commerce among the various States; in its advertisements of its said face cream in newspapers and other periodicals of general circulation and in the various States and in said District, and in circulars and other printed or written matter distributed in commerce, and through broadcasts from radio stations of extra-state audience, and in statements and other advertisements which it disseminated and which were intended and likely to induce purchase of its aforesaid face cream in commerce—

- (a) Represented, directly or through implication, that its said Lady Esther Face Cream penetrated the skin and to the bottom of the pores thereof and removed dirt from the outside which had gotten into or under the skin and filled said pores, through its action in sinking into the pores and then flushing out waste matter therein, and that the method of cleaning the skin of the face by the use of its said cream was different from that of other skin-cleaning preparations in that, unlike the others, it cleaned more than the exterior openings of the pores.

Facts being, it did not thus penetrate the skin or have any unique or unusual or active penetrative properties in relation thereto, outside dirt does not get into or under the skin or become imbedded therein, etc., as above set forth by it, its said cream will not remove such dirt, if so located, or cleanse the pores below the exterior openings thereof, and principal effect of its said product is to cleanse outer surface of skin and exterior openings of pores, as do many other skin cleaners, and its said method was no different in such general respect from that of such others, and any absorptive and lubricating effect as distinguished from penetrative action of said product is of temporary duration, determined by such factors as length of time lubricating ingredients remain on skin and amount of absorption of such ingredients.

- (b) Represented that its said product would overcome, correct or cure dry skin and was as efficacious on an oily skin as on a dry one, and that cause of an oily skin was same as that of a dry one, and that soap and water were injurious to the skin and dried it, and that a dry skin was an old one and the cause of all wrinkles, which tiny lines became, and that use of said product supplied a dry skin with what it needed to overcome or cure such condition;

Facts being that its said product would not overcome, correct or cure a dry skin or do more in correcting it than furnish, as aforesaid, temporary supply of lubrication which was not identical with secretions supplied by the skin and