

Syllabus

IN THE MATTER OF

RETAIL COAL MERCHANTS 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 3911. Complaint, Oct. 5, 1939—Decision, Jan. 19, 1942

Where an association of all the retail coal dealers in and about Richmond, Va., with two or three exceptions, selling and distributing 80 to 90 percent of all the coal sold at retail in such trade area; and, as their competitors, purchasing the major portion of their coal from dealers in other States; together with the officers and the members thereof who were in competition with one another and with others in said trade area except as restricted by acts and practices below set forth;

Following their conception of a plan under which schedules of uniform prices, terms and conditions of sale on the various grades and varieties of coal sold were placed, at regular intervals, in the hands of all retailer members, who, in order to remain such, were required to establish and maintain such fixed schedules;

In pursuance of a scheme to compel a number of retail coal dealers in said city—who declined to join the association and to observe such fixed schedule of prices, etc., but continued to sell coal on a competitive basis, at prices usually substantially lower—to become members and maintain such prices, etc., through agreements with wholesale dealers supplying most of the coal shipped into Richmond, under which such wholesalers would refuse to sell or ship coal to any retailer in the area in question who was not a member or who, being a member, did not maintain the association's prices—

- (a) Conducted an intensive campaign among nonmember dealers to bring them into the association and threatened them with the loss of their sources of coal unless they became members;
- (b) Called on wholesale coal dealers and urged them under threat of boycott to cooperate with the association by refusing to sell coal to any dealer who was not a member thereof or who, being such, did not maintain association prices;
- (c) Attempted to induce such wholesalers to insert in their contracts with retailers a clause to the effect that if the dealer failed to conduct his business in conformity with the standards approved by his locality, the wholesaler would have the right to discontinue supplying coal under the contract;
- (d) Arranged joint meetings between the members of the association and wholesale coal dealers and there, under threat of boycott, sought and secured cooperation of latter;
- (e) Issued a list of "cooperators," showing the names of retailer members in one column and the names of certain wholesalers in the other, and distributed such list among the retailers and wholesalers named;

With the result that it became increasingly difficult for the twenty-odd non-member retailers in said city to obtain coal and they concluded it necessary to, and did, join the association in question, following which they had such difficulty no further; and

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Where three corporations and four partners, large wholesalers of coal or sales agents for operators of coal mines, selling and distributing the output of mines in West Virginia, Ohio, and Virginia, to retailers in various States, including the aforesaid association members—

- (f) Agreed with said association and the officers and members that they would not ship to nonmember retail coal dealers, in city aforesaid, or to those whose coal prices did not conform to those agreed upon;

With the result that said understanding and conspiracy had the effect of—

(1) Unlawfully restricting and restraining the movement in commerce of coal purchased by retail coal dealers in said city for resale in trade area in question and of thus restricting resale, and substantially enhancing prices of such coal to the consuming public, and maintaining prices at artificial levels, and otherwise depriving the public of benefits which would flow from normal competition; and of

(2) Eliminating price competition among members and between such members and other competitors in the resale of coal in the trade area in question; with tendency and capacity to create in such members a monopoly in the purchase of coal in interstate commerce for resale in said trade area, and in the sale of coal at retail therein:

Held, That such agreement, understanding, combination, and conspiracy, and the acts and things done in furtherance thereof, as above set forth, were all to the prejudice of the public and constituted unfair methods of competition in commerce.

Before *Mr. John W. Addison* and *Mr. Randolph Preston*, trial examiners.

Mr. Wilbur N. Baughman, *Mr. J. W. Brookfield, Jr.* and *Mr. Edward L. Smith* for the Commission.

Richardson & Kemper, of Bluefield, W. Va., for Bluefield Coal & Coke Co.

Hayden & Dalzell, of Washington, D. C., for Cabell Coal Co., Inc.

Brown, Jackson & Knight, of Charleston, W. Va., for Cabin Creek Consolidated Sales Co.

Hunton, Williams, Anderson, Gay & Moore, of Richmond, Va., for A. T. Massey Coal Co.

Barbour, Garnett, Pickett & Keith, of Washington, D. C., for Red Jacket Coal Sales Co.

Mr. George C. Peery, of Tazewell, Va., and *Mr. George D. Horning, Jr.*, of Washington, D. C., for Virginia Smokeless Coal Co.

Mahan, Bacon & White, of Fayetteville, W. Va., for White Oak Coal Co.

Blue, Dayton & Campbell, of Charleston, W. Va., for Wyatt Coal Sales Co.

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 Retail Coal Merchants Association, hereinafter referred to as either "association respondent" or "respondent"; D. Walton Mallory, Edwin A. Newmann, A. Holland White, and Charles H. Hall, Jr., hereinafter referred to as either "officers respondents" or "respondents"; L. D. Wingfield and James L. Hatcher, as coowners of Wingfield-Hatcher Coal Co.; A. M. Hungerford, doing business as Hungerford Coal Co.; Massey-Wood & West, a corporation; Sydnor-Howey & Co., Inc., a corporation; D. W. Mallory & Co., Inc., a corporation; Ellison & Hawes, Inc., a corporation; W. E. Seaton & Sons, Inc., a corporation; and Gill Fuel Co., Inc., a corporation, separately and as members of respondent, Retail Coal Merchants Association, and as representatives of the members of said respondent as a class, hereinafter referred to as "members respondents" or "respondents"; Bluefield Coal and Coke Co., a corporation; Cabell Coal Co., Inc., a corporation; Cabin Creek Consolidated Sales Co., a corporation; A. T. Massey Coal Co., a corporation; Red Jacket Coal Sales Co., a corporation; George W. St. Clair, Robert Henry Moore, Mrs. Robert Henry Moore, Katherine St. Clair Santori, and Houston St. Clair, partners, doing business under the partnership name of Virginia Smokeless Coal Co.; White Oak Coal Co., a corporation; and Wyatt Coal Sales Co., a corporation; hereinafter referred to as either "wholesale dealers respondents" or as "respondents," have violated the provisions of the 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 complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Retail Coal Merchants Association, is an association of coal dealers, organized on April 18, 1930, as a corporation, under the laws of the State of Virginia, with its principal office and place of business located at 209 Broad-Grace Arcade Building, Richmond, Va. The membership of said respondent is composed of approximately all the retail coal dealers located in and about Richmond, Va. The ostensible purpose of the respondent Association, according to its bylaws, is to establish and maintain a standard of honorable dealing in the retail coal business in that vicinity.

The names and addresses of the officers of said respondent, Retail Coal Merchants Association, who individually and as such officers of said respondent, are named as respondents herein, are:

D. Walton Mallory, president, c/o D. W. Mallory & Co., Inc.,
Richmond, Va.

Edwin D. Newmann, vice president, Richmond, Va.

A. Holland White, treasurer, Richmond, Va.

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Charles H. Hall, Jr., secretary, Retail Coal Merchants Association, 209 Broad-Grace Arcade Building, Richmond, Va.

The membership of said respondent, Retail Coal Merchants Association, constitutes a class so numerous and changing as to make it impracticable to specifically name them all as parties respondent herein. The following respondents, among others, are members of said respondent, Retail Coal Merchants Association, are fairly representative of the whole membership, and are named as respondents herein in their individual capacities, in their capacities as members of said respondent, Retail Coal Merchants Association, and as representatives of all members of said respondent, Retail Coal Merchants Association, as a class, including those not herein specifically named who are also made respondents herein:

L. D. Wingfield and James L. Hatcher, are coowners of the business operated as Wingfield-Hatcher Coal Company, with their office and principal place of business being located in Richmond, Va.

A. M. Hungerford, is the individual owner of the Hungerford Coal Company, which was established in 1925 and has his office and principal place of business located at 717 East Gray Street, Richmond, Va.

Massey-Wood & West, is a corporation, organized under the laws of the State of Virginia in 1928, with its office and principal place of business being located at Lombardy Underpass, Richmond, Va.

Sydnor-Howey & Co., Inc., is a corporation organized under the laws of the State of Virginia in 1913, with its principal place of business located in Richmond, Va.

D. W. Mallory & Co., Inc., is a corporation, organized and existing under the laws of the State of Virginia, with its office and principal place of business being located in Richmond, Va.

Ellison & Hawes, Inc., is a corporation, organized and existing under the laws of the State of Virginia, with its office and principal place of business being located at 530 East Main Street, Richmond, Va.

W. E. Seaton & Sons, Inc., is a corporation, organized under the laws of the State of Virginia in 1928, with its office and principal place of business being located at 1129 West Marshall Street, Richmond, Va.

Gill Fuel Co., Inc., is a corporation, organized and existing under the laws of the State of Virginia, with its office and

principal place of business being located at 21st and Decatur Streets, Richmond, Va.

PAR. 2. Respondent, Bluefield Coal & Coke Co., is a corporation organized and existing under the laws of the State of West Virginia, with principal offices located at Bluefield, W. Va.

Respondent, Cabell Coal Co., Inc., is a corporation organized and existing under the laws of the State of Virginia, with principal offices located at Covington, Va.

Respondent, Cabin Creek Consolidated Sales Co., is a corporation, organized and existing under the laws of the State of Delaware, with principal offices located at Cincinnati, Ohio.

Respondent, A. T. Massey Coal Co., is a corporation, organized and existing under the laws of the State of Virginia, with principal offices located at Richmond, Va.

Respondent, Red Jacket Coal Sales Co., is a corporation, organized and existing under the laws of the State of Delaware, with principal offices located at Columbus, Ohio.

Respondents. George W. St. Clair, Robert Henry Moore, Mrs. Robert Henry Moore, Katherine St. Clair Santori, and Houston St. Clair, are partners, doing business under the partnership name of Virginia Smokeless Coal Co., with their principal offices located at Tazewell, Va.

Respondent, White Oak Coal Co., is a corporation, organized and existing under the laws of the State of West Virginia, with principal offices located at Mount Hope, W. Va.

Respondent, Wyatt Coal Sales Co., is a corporation, organized and existing under the laws of the State of West Virginia, with principal offices located at Charleston, W. Va.

All of said wholesale dealer respondents are engaged in the wholesale coal business at the respective points of location hereinabove indicated.

PAR. 3. The members respondents of the association respondent, in the course and conduct of their respective businesses, sell and distribute a large percentage (probably 90 percent) of all the coal sold at retail in the trade area in and around Richmond, Va.

PAR. 4. Members respondents are in competition with one another and with other retail coal dealers in Richmond, Va., in selling, and seeking to sell, coal at retail in the trade area in and around Richmond, Va., except insofar as said competition has been hindered, lessened, restrained, or restricted, or potential competition among them forestalled, by the unlawful understanding, agreement, combi-

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nation, and conspiracy, and the acts, policies, and practices done pursuant thereto, as hereinafter set out.

PAR. 5. Members respondents and their said competitors purchase practically all the coal necessary for the conduct of their respective businesses from producers whose mines and places of business are located in States other than the State of Virginia, and when said purchases are made, and as a part thereof, said producers regularly have shipped, or caused to be shipped, and do ship, or cause to be shipped, the coal from their respective mines and their respective places of business located in the several States of the United States, in commerce, into, through, and between the various States of the United States, to the member respondents and their said competitors located in Richmond, Va.

PAR. 6. The wholesale dealers respondents comprise large coal mine operators or sales agents therefor, who, in the course and conduct of their business, operate, or obtain the output of, various coal mines situated in the States of West Virginia, Ohio, and Virginia, and who, thereafter in the course and conduct of their business, sell and distribute said coal at wholesale to retail coal dealers located in the various States of the United States and in the District of Columbia, including the members respondents hereinbefore referred to, and as a part of said sales and distribution ship, or cause to be shipped, said coal from the afore-mentioned mines to the purchasers thereof located in States of the United States other than those in which said mines are situated.

PAR. 7. Said wholesale dealers respondents and members respondents, in the manner before described, maintain a constant current of trade in coal in commerce between and among the several States of the United States and particularly between the States of West Virginia, Ohio, and Virginia.

PAR. 8. For several years last past association respondent, officers respondents, members respondents, and wholesale dealers respondents, have entered into, and thereafter carried out, an understanding, agreement, combination, and conspiracy for the purpose, and with the effect, of unlawfully restricting, restraining, suppressing, and eliminating competition in, and monopolizing, the retail sale of coal in the trade area in and around Richmond, Va., purchased by said dealers in the manner hereinbefore described.

PAR. 9. Pursuant to this understanding, agreement, combination, and conspiracy, entered into by and between and among the aforesaid respondents, and in furtherance thereof, the said respondents have, among other acts and things, done the following:

(a) The wholesale dealers respondents have agreed with the members respondents, acting through and by means of the association respondent, not to ship, and they have refrained from shipping, coal from the mines of said wholesale dealers respondents located in States of the United States other than the State of Virginia, to those retail coal dealers in Richmond, Va., who are not members of association respondent, or whose retail prices on coal in the trade area in and around Richmond, Va., do not conform to those agreed upon by members respondents.

(b) Members respondents have agreed among themselves as to the retail prices, terms and conditions of sale to be quoted and collected for their coal; have caused such prices, terms and conditions of sale to be filed with association respondent, who in turn distributes same to all members respondents and to the aforesaid wholesale dealers respondents, who are referred to therein as "cooperators"; and have agreed among themselves to adhere to such prices, terms and conditions of sale pending the filing of changes with association respondent.

(c) Members respondents, accompanied by the secretary of the association respondent, have called on wholesale coal dealers, including the wholesale dealers respondents, and outlined their plans and urged said wholesale coal dealers under threat of boycott to cooperate with them by refusing to sell coal to any nonmember or to any dealer who undersold the association, thus eliminating all price competition and forcing all nonmembers to join the association if they wanted to stay in business.

(d) Association respondent, through its secretary, has arranged joint meetings between members respondents and wholesale dealers respondents, in different cities and towns in the State of Virginia, as well as in Washington, D. C., where the plans, purposes, and practices of the association and its members were outlined to the wholesale dealers and their cooperation solicited, under threat of boycott.

(e) Association respondent and its members conducted intensive campaigns amongst all nonmembers to get them to join the association, with the result that all eligible retail coal dealers in Richmond, Va., but one, finally joined the association under actual threat from the members respondents and the wholesale dealers respondents that no supply of coal would be obtainable otherwise.

(f) Association respondent, through its secretary, attempted to get wholesale coal dealers to insert in their contracts, or renewals thereof, with retail dealers, a clause to the effect that if the said retail dealer failed to conduct his business in conformity with the standards approved by his locality, the shipper would have the right, after 30 days' notice, to discontinue supplying coal under the contract.

(g) Said association respondent, officers and members respondents, and wholesale dealers respondents have used, and are now using, other collective and collusive means and methods to effectuate the aforementioned agreement, combination, and conspiracy.

PAR. 10. Each of the respondents, at the times herein mentioned, acted in concert with one or more of the other respondents in doing and performing the acts and things herein alleged in furtherance of the understanding, agreement, combination, and conspiracy hereinbefore set out.

PAR. 11. The afore-mentioned agreement, understanding, combination, and conspiracy, and the things done thereunder, and pursuant thereto, and in furtherance thereof, as hereinbefore alleged, have had, and do have, the effect of unlawfully restricting and restraining the movement in commerce, between and among the several States of the United States, of coal purchased by the retail coal dealers in Richmond, Va., for resale in the trade area in and around said city; of unduly and unlawfully restricting the resale of coal purchased by said retailers in Richmond, Va., in the manner hereinbefore described, in the trade area in and around Richmond, Va.; of substantially enhancing prices of said coal to the consuming public thereof; of maintaining said prices at artificial levels, and otherwise depriving the public of the benefits that would flow from normal competition among members respondents and between said members respondents and other retail coal dealers in Richmond, Va.; of eliminating price competition among members respondents and between said members respondents and other competitors in the resale of coal purchased in the manner before described in the trade area in and around Richmond, Va., with the tendency and capacity of creating in members respondents a monopoly in said trade.

Said agreement, understanding, combination, and conspiracy, and the acts and things done thereunder and pursuant thereto, as above alleged, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 5, 1939, issued and subsequently served its complaint in this proceeding upon the respondents, Retail Coal Merchants Association, a corporation; D. Walton Mallory, individually and as president of Retail Coal Merchants Association; Edwin D. Newmann, individually and as vice president of Retail Coal

Merchants Association; A. Holland White, individually and as treasurer of Retail Coal Merchants Association; Charles H. Hall, Jr., individually and as secretary of Retail Coal Merchants Association; L. D. Wingfield and James L. Hatcher, as coowners of Wingfield-Hatcher Coal Co.; A. M. Hungerford, doing business as Hungerford Coal Co.; Massey-Wood & West, a corporation; Sydnor-Howey & Co., Inc., a corporation; D. W. Mallory & Co., Inc., a corporation; Ellison & Hawes, Inc., a corporation; W. E. Seaton & Sons, Inc., a corporation; and Gill Fuel Co., Inc., a corporation, members of Retail Coal Merchants Association; Bluefield Coal & Coke Co., a corporation; Cabell Coal Co., Inc., a corporation; Cabin Creek Consolidated Sales Co., a corporation; A. T. Massey Coal Co., a corporation; Red Jacket Coal Sales Co., a corporation; George W. St. Clair, Robert Henry Moore, Mrs. Robert Henry Moore, Katherine St. Clair Santori, and Houston St. Clair, partners, doing business under the partnership name of Virginia Smokeless Coal Co.; White Oak Coal Co., a corporation; and Wyatt Coal Sales Co., a corporation, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

After the filing by the respondents of their answers to said complaint, testimony and other evidence in support of the allegations of said complaint were introduced by attorneys for the Commission, and in opposition thereto by attorneys for the respondents, before trial examiners of the Commission theretofore duly designated by it. Thereafter, on March 12, 1941, the Commission, by order entered herein, granted the motion of respondents, Retail Coal Merchants Association, and the officers and members thereof, for permission to withdraw their original answer, and to substitute therefor an answer admitting all of the material allegations of fact set forth in said complaint, and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Subsequently additional hearings were held before said trial examiners at which further testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced with respect to the other respondents herein (respondent, A. T. Massey Coal Co., however, offering no testimony or other evidence in opposition to the allegations of said complaint). All of the testimony and other evidence introduced at the hearings held herein were duly recorded and filed in the office of the Commission.

Thereafter the proceeding regularly came on for final hearing before the Commission on the complaint, answers, testimony, and other evi-

dence, report of the trial examiners upon the evidence and the exceptions thereto, briefs in support of and in opposition to the complaint, and oral argument, 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. Respondent, Retail Coal Merchants Association, is an association of coal dealers, organized on April 18, 1930, as a corporation under the laws of the State of Virginia, with its principal office and place of business located at 209 Broad-Grace Arcade Building, Richmond, Va. The membership of the association includes, with some two or three exceptions, all of the retail coal dealers located in and about Richmond, Va. The ostensible purpose of the association, according to its bylaws, is to establish and maintain a standard of honorable dealing in the retail coal business in that vicinity.

The names and addresses of the officers of the association, who are joined as respondents herein both individually and as such officers, are:

D. Walton Mallory, president, % D. W. Mallory & Co., Inc., Richmond, Va.

Edwin D. Newmann, vice president, Richmond, Va.

A. Holland White, treasurer, Richmond, Va.

Charles H. Hall, Jr., secretary, Retail Coal Merchants Association, 209 Broad-Grace Arcade Building, Richmond, Va.

The membership of the association constitutes a class so numerous and changing as to make it impracticable specifically to name all of them herein. The following respondents are members of the association, and are fairly representative of the whole membership. They are named as respondents in this proceeding in their individual capacities, in their capacities as members of the association, and as representatives of all members of the association as a class, including those members who are not specifically named herein:

L. D. Wingfield and James L. Hatcher are coowners of the business operated as Wingfield-Hatcher Coal Co., with their office and principal place of business located in Richmond, Va.

A. M. Hungerford is the individual owner of the Hungerford Coal Co., which was established in 1925 and has his office and principal place of business located at 717 East Gray Street, Richmond, Va.

Massey-Wood & West is a corporation organized under the laws of the State of Virginia in 1928, with its office and principal place of business located at Lombardy Underpass, Richmond, Va.

Sydnor-Howey & Co., Inc., is a corporation organized under the laws of the State of Virginia in 1913, with its principal place of business located in Richmond, Va.

D. W. Mallory & Co., Inc., is a corporation organized under the laws of the State of Virginia, with its office and principal place of business located in Richmond, Va.

Ellison & Hawes, Inc., is a corporation organized under the laws of the State of Virginia, with its office and principal place of business located at 530 East Main Street, Richmond, Va.

W. E. Seaton & Sons, Inc., is a corporation organized under the laws of the State of Virginia in 1928, with its office and principal place of business located at 1129 West Marshall Street, Richmond, Va.

Gill Fuel Co., Inc., is a corporation organized under the laws of the State of Virginia, with its office and principal place of business located at Twenty-first and Decatur Streets, Richmond, Va.

PAR. 2. Respondent, Bluefield Coal & Coke Co., is a corporation organized and existing under the laws of the State of West Virginia, with its principal offices located at Bluefield, W. Va.

Respondent, Cabell Coal Co., Inc., is a corporation organized and existing under the laws of the State of Virginia, with its principal offices located at Covington, Va.

Respondent, Cabin Creek Consolidated Sales Co., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at Cincinnati, Ohio.

Respondent, A. T. Massey Coal Co., is a corporation organized and existing under the laws of the State of Virginia, with its principal offices located at Richmond, Va.

Respondent, Red Jacket Coal Sales Co., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at Columbus, Ohio.

Respondents, Robert Henry Moore, Mrs. Robert Henry Moore, Katherine St. Clair Santori, and Houston St. Clair, are copartners, doing business under the partnership name of Virginia Smokeless Coal Co., with their principal offices located at Tazewell, Va. George W. St. Clair, who was formerly a member of the copartnership, and who was named in the complaint as a respondent, died shortly after this proceeding was instituted.

Respondent, White Oak Coal Co., is a corporation organized and existing under the laws of the State of West Virginia, with its principal offices located at Charleston, W. Va.

Respondent, Wyatt Coal Sales Co., is a corporation organized and existing under the laws of the State of West Virginia, with its principal offices located at Charleston, W. Va.

The Commission having concluded that the evidence is insufficient to establish that respondents, Bluefield Coal & Coke Co., Cabin Creek Consolidated Sales Co., Red Jacket Coal Sales Co., and Wyatt Coal Sales Co., were parties to the combination and conspiracy hereinafter described, the terms "respondents" and "wholesale dealer respondents," as used hereinafter, will not include these four respondents, unless the contrary is indicated.

PAR. 3. The members of the respondent association, in the course and conduct of their respective businesses, sell and distribute the major portion (some 80 to 90 percent) of all of the coal sold at retail in the trade area in and around Richmond, Va.

PAR. 4. These member respondents are in competition with one another and with other retail coal dealers in Richmond, Va., in the purchase of coal in commerce among and between the several States of the United States, and in the sale and the offering for sale of such coal at retail in the trade area in and around Richmond, Va., except insofar as such competition has been hindered, lessened, restrained, and restricted, and except insofar as potential competition has been forestalled, by the acts and practices hereinafter set forth.

PAR. 5. The member respondents and their competitors purchase the major portion of all the coal necessary for the conduct of their respective businesses from wholesale dealers or sales agents whose places of business are located in States other than the State of Virginia. When such purchases are made, and as a part thereof, such wholesale dealers and sales agents ship such coal, or cause such coal to be shipped, from their respective places of business located in the several States of the United States in commerce into, through, and between various States of the United States, to the member respondents and their competitors located in Richmond, Va.

PAR. 6. The wholesale dealer respondents are large wholesalers of coal or sales agents for operators of coal mines. Such wholesale dealer respondents, in the course and conduct of their business, obtain the output of various coal mines situated in the States of West Virginia, Ohio, and Virginia, and thereafter in the course and conduct of their business sell and distribute such coal to retail coal dealers located in the various States of the United States, including the member respondents hereinabove referred to. As a part of such sale and distribution, such

wholesale dealer respondents ship such coal, or cause such coal to be shipped, from the aforesaid mines to the purchasers thereof located in States of the United States other than those in which such mines are situated.

Respondent, Virginia Smokeless Coal Co., is the sales agent of a mining corporation which owns and operates coal mines located in Tazewell County, Va., and in Buchanan County, Va. Until some time in the year 1937, the main office of the Virginia Smokeless Coal Co. was located in Bluefield, W. Va., and all orders obtained by the company's sales representatives from dealers in Richmond, Va., and elsewhere were forwarded to such main office for acceptance or rejection. In 1937 such main office was moved to Tazewell, Va. Coal sold to purchasers in Richmond is transported by rail from the mines in Tazewell County or Buchanan County, Va., to Bluefield, W. Va., where it is weighed on the scales of the railway company. It then continues by rail to its destination in Richmond. This method of handling and route of shipment has obtained for many years, both before and after the main office of the company was moved from Bluefield to Tazewell.

PAR. 7. The wholesale dealer respondents and the member respondents, in the manner above described, maintain and have maintained a constant current and course of trade in coal in commerce among and between the several States of the United States.

PAR. 8. Several years ago respondent association, through its officers and members, conceived the idea of establishing and maintaining a system of uniform prices, terms, and conditions governing the sale of coal at retail in the Richmond trade area. The exact date on which the plan was conceived is not disclosed by the record, but the plan was put into active operation as early as 1936, and remained in active operation until after the institution of this proceeding. Under the plan, schedules of prices, terms, and conditions of sale on the various grades and varieties of coal sold in that area were prepared by the association at regular intervals and placed in the hands of all retail dealers who were members of the association. In order for a retail dealer to remain a member of the association it was necessary that he establish and maintain the schedule of prices, terms, and conditions of sale fixed by the association.

PAR. 9. There were at the time of the beginning of the operation of the plan a number of retail coal dealers in Richmond who were not members of the association. These dealers declined to observe the schedule of prices, terms, and conditions fixed by the association and refused to join the association but continued to sell coal on a competitive basis, their prices usually being substantially less than the prices maintained by the association members. For the purpose

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of compelling these independent dealers to become members of the association and maintain the association's schedule of uniform prices, terms, and conditions of sale, the association conceived the idea of entering into agreements with certain wholesale coal dealers who supplied most of the coal shipped into Richmond, under which agreements such wholesale dealers would refuse to sell or ship coal to any retail dealer in that area who was not a member of the association or who, being a member of the association, did not maintain the prices fixed by the association.

An intensive campaign was conducted by the association and its members among such nonmember dealers for the purpose of bringing them into the association, such dealers being threatened with the loss of their sources of coal unless they became members of the association. Officers and members of the association also called on wholesale coal dealers and urged such wholesalers, under threat of boycott, to cooperate with the association by refusing to sell coal to any dealer who was not a member of the association or who, being a member, did not maintain the association prices. The association also attempted to induce such wholesalers to insert in their contracts with retail dealers a clause to the effect that if the dealer failed to conduct his business in conformity with the standards approved by his locality, the wholesaler would have the right to discontinue supplying coal under the contract.

In further pursuance of its plan the association arranged for a meeting between representatives of the association and certain of the wholesalers, which meeting was held at the John Marshall Hotel in Richmond on July 23, 1936. At this meeting representatives of respondents, Cabell Coal Co., Inc., A. T. Massey Coal Co., and White Oak Coal Co., were present. Exactly what transpired at the meeting is not clear from the record, but a cooperative program between the association and the wholesalers was discussed, and this meeting was the forerunner of a second meeting held in Washington, D. C.

With respect to this second meeting, the association, through its executive secretary, addressed a letter on August 7, 1936, to nine wholesale coal dealers, among whom were respondents, Cabell Coal Co., Inc., A. T. Massey Coal Co., Virginia Smokeless Coal Co., and White Oak Coal Co. This letter read as follows:

With further reference to our meeting in Richmond, on July 23d, and as per the recommendation made at that meeting, we have appointed Messrs. F. S. Levering, president of E. P. Murphy & Son; Ivor Massey, president of Massey, Wood & West, Inc.; and Arthur M. Hungerford, owner and manager of Hungerford Coal Co., to meet with you gentlemen and carry to a successful conclusion the matters discussed at the above meeting.

Believing further that we should meet on neutral ground, I would thank you to advise me if you, or your representative, with full authority to act, could meet the committee in Washington, D. C., on Friday, August 14th. Immediately upon your reply I will arrange for the hour and place of meeting.

In the event that this date does not meet your schedule, I would suggest that in your reply you name several dates, any one of which would make it possible for you to be present.

May I suggest, gentlemen, that the Retail Coal Merchants of Richmond have not in the past, nor do they anticipate in the future, trying to force you gentlemen to do anything unethical or unlawful, our desire being simply to work out a cooperative program suitable to all parties concerned.

On August 11, 1936, the association, through its executive secretary, addressed a second letter to the same addresses, this second letter reading as follows:

With further reference to my letter of August 7th, and your several replies in which suggestions were made for a meeting between the dates of August 17th and September 8th, we have decided to make a compromise and now request that you arrange to meet in Washington, D. C., on Tuesday, August 25th.

Our present plan is to hold this meeting in the Ambassador Hotel at 10:00 a. m., therefore, unless we advise you to the contrary, we will be expecting you as per the above.

Please bear in mind that your representative at this meeting should have full authority to act for your company, and in the meantime we will advise you of any change in the plan.

This meeting was held in Washington, D. C., on August 25, 1936, as announced in this letter, there being present, among others, the executive secretary of the association, a number of retail dealers who constituted a committee appointed by the association, and representatives of a number of wholesale dealers, including respondents Cabell Coal Co., Inc., Virginia Smokeless Coal Co., and White Oak Coal Co. Cabell Coal Co., Inc., was represented by both its president and its vice president, Virginia Smokeless Coal Co. by its sales representative in the Richmond area, and White Oak Coal Co. by its president. During the course of the meeting the committee representing the association requested the wholesalers to agree that they would not sell or ship coal to any retail coal dealer in Richmond who was not a member of the association. That the wholesale dealer respondents did enter into this agreement is evidenced by developments following the meeting.

PAR. 10. Subsequent to this meeting the association issued what was known as a list of "cooperators." This list was divided into two columns, one showing the names of all of the retail dealers in Richmond who were then members of the association, and the other showing the names of certain wholesale dealers. This latter column included, among other wholesale dealers, the names of respondents, Cabell Coal

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Co., Inc., A. T. Massey Coal Co., Virginia Smokeless Coal Co., and White Oak Coal Co. This list of cooperators was distributed among the retailers and wholesalers named therein, and the respondent wholesalers thereby had knowledge that their names were included in the list. None of them made any effort to repudiate the action of the association in listing them as cooperators, nor was any protest of any kind made by them with respect to their being named as cooperators.

PAR. 11. After the meeting in Washington and the issuance and distribution of the list of cooperators it became increasingly difficult for the retail dealers in Richmond who were not members of the association, to obtain coal. A number of instances are disclosed by the record in which respondents Cabell Coal Co., Inc., A. T. Massey Coal Co., Virginia Smokeless Coal Co., and White Oak Coal Co., declined to sell or ship coal to dealers because they were not members of the association. The situation among nonmember dealers thereby became so difficult that in May 1937 a meeting was held by them for the purpose of discussing their inability to obtain coal. A committee was appointed at this meeting for the purpose of investigating the matter, and upon the basis of the report of this committee practically all of these nonmember dealers, some twenty in number, concluded that in order for them to be able to continue in business and obtain coal it would be necessary that they join the association, and they did in fact for that reason become members immediately thereafter. After joining the association they had no further difficulty in obtaining coal. There were only some two or three dealers in Richmond who remained outside the association, and these dealers, because of their nonmembership in the association, continued to experience difficulty in obtaining coal.

PAR. 12. A further circumstance showing that the agreement referred to above was entered into at the meeting of August 25, 1936, and that respondents, Cabell Coal Co., Inc., and Virginia Smokeless Coal Co. in particular; were parties to the agreement, is a letter addressed to each of these companies by the association on March 3, 1937, which read as follows:

The time is approaching for further action, as a result of our meeting at the Ambassador Hotel, in Washington, D. C., on August 25, 1936, and we would request that you arrange to meet with us at the Hamilton Hotel, Washington, D. C., on Wednesday, March 10th, at 10 a. m., at which time we will make report to you, regarding our efforts and hope that we will have your confirmation on your intentions to carry out your part of our agreement.

Thanking you for your cooperation, and awaiting your prompt advices that you will meet with us on the above date, we beg to remain,

Both Cabell Coal Co., Inc. and Virginia Smokeless Coal Co. replied by letter, the former accepting the invitation and the latter declining

it, stating that "It is taking every bit of energy and time we have to keep our mines running this month." In neither of these replies, however, was any exception taken to the references made in the association's letter to the meeting in Washington and the "agreement" between the parties.

So far as the record discloses, this meeting scheduled for March 10, 1937, was never held:

PAR. 13. The Commission finds that the respondents entered into and thereafter carried out an understanding, agreement, combination, and conspiracy for the purpose of unlawfully restricting, suppressing, and eliminating competition in the purchase by retail dealers in Richmond, Va., of coal in commerce among and between the several States of the United States, and in the retail sale of such coal in the trade area in and around said city. The Commission further finds that this agreement, understanding, combination, and conspiracy, and the things done thereunder and pursuant thereto and in furtherance thereof, have had and do have the effect of unlawfully restricting and restraining the movement in commerce among and between the several States of the United States of coal purchased by retail coal dealers in Richmond, Va., for resale in the trade area in and around said city; of unduly and unlawfully restricting the resale of coal purchased by such retailers in the trade area in and around Richmond, Va.; of substantially enhancing prices of such coal to the consuming public; of maintaining such prices at artificial levels and otherwise depriving the public of the benefits which would flow from normal competition among member respondents and between such member respondents and other retail coal dealers in Richmond, Va.; and of eliminating price competition among member respondents and between such member respondents and other competitors in the resale of coal in the trade area in and around Richmond, Va., with the tendency and capacity to create in such member respondents a monopoly in the purchase of coal in commerce among and between the several States of the United States, for resale in the trade area in and around Richmond, Va., and in the sale of coal at retail in such area.

CONCLUSION

The aforesaid agreement, understanding, combination, and conspiracy, and the acts and things done thereunder and pursuant thereto and in furtherance thereof, as herein found, are all to the prejudice of the public 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 complaint of the Commission, the answers of the respondents, including the answer of respondent association and the officers and members thereof admitting all the material allegations of fact in said complaint, testimony and other evidence taken before trial examiners of the Commission theretofore duly designated by it, in support of and in opposition to the allegations of said complaint, report of the trial examiners upon the evidence and the exceptions thereto, briefs in support of and in opposition to the complaint, and oral argument, and the Commission having made its findings as to the facts and its conclusion that certain of the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Retail Coal Merchants Association, a corporation; and D. Walton Mallory, Edwin D. Newmann, A. Holland White, and Charles H. Hall, Jr., individually and as officers of said association; and L. D. Wingfield and James L. Hatcher, trading as Wingfield-Hatcher Coal Co.; A. M. Hungerford, trading as Hungerford Coal Co.; Massey-Wood & West, a corporation; Sydnor-Howey & Co., Inc., a corporation; D. W. Mallory & Co., Inc., a corporation; Ellison & Hawes, Inc., a corporation; W. E. Seaton & Sons, Inc., a corporation; and Gill Fuel Co., Inc., a corporation, individually and as members of said association; and all other members of said association, as representatives for whom the said members named above were made respondents herein; and the officers, representatives, agents, and employees of all of the respective members of said association; directly or through any corporate or other device, in connection with the purchase by such members, or any of them, of coal in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Carrying out any understanding, agreement, combination, or conspiracy with wholesale coal dealers, and from entering into any future understanding, agreement, combination, or conspiracy with wholesale coal dealers, for the purpose or with the effect of restricting, restraining, suppressing, or eliminating competition in, or monopolizing, the retail sale of coal in the trade area in and around Richmond, Va.

2. Agreeing or carrying out any agreement through respondent association, or through any other cooperative agency, with wholesale coal dealers, that such wholesale coal dealers will not ship coal from mines located in States of the United States other than the State of Virginia, or coal from or through States other than the State of

Virginia, to retail coal dealers in Richmond, Va., who are not members of said respondent association, or any other association of which respondents may be members, or to retailers in Richmond, Va., whose prices for coal in the trade area in and around said city do not conform to those agreed upon by the members of such association.

3. Calling upon wholesale coal dealers and urging such wholesale coal dealers, under threat of boycott, to cooperate with the said respondents by refusing to sell coal to any nonmember of said association, or to any dealer underselling the prices fixed by said association.

4. Arranging joint meetings between the members of said association and wholesale coal dealers, and there seeking such cooperation of such wholesale coal dealers, under threat of boycott.

5. Soliciting nonmembers of said respondent association to join said association, under threat that no supply of coal will be obtainable by such nonmembers unless they join said association.

6. Attempting, through the secretary of said association, or by any other person or means, to induce wholesale coal dealers shipping coal from or through States other than the State of Virginia into the city of Richmond, Va., to insert in their contracts with retail dealers a clause to the effect that if the retail dealer fails to conduct his business in conformity with the price standards approved by respondents in his locality, the shipper shall have the right to discontinue supplying coal under such contracts.

7. Using any other collective or collusive means or methods to effectuate any understanding, agreement, combination, or conspiracy for the purpose of or with the effect of restraining, restricting, suppressing, and eliminating competition in, or monopolizing, the importation from States other than the State of Virginia of coal to be sold at retail in the trade area in and around Richmond, Va.

It is further ordered, That respondents Cabell Coal Co., Inc., a corporation; A. T. Massey Coal Co., a corporation; White Oak Coal Co., a corporation; and Robert Henry Moore, Mrs. Robert Henry Moore, Katherine St. Clair Santori, and Houston St. Clair, individually and doing business under the name Virginia Smokeless Coal Co. or under any other name; and respondent's officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of coal in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Carrying out any understanding, agreement, combination, or conspiracy among themselves, or with respondent association or the

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officers or members thereof, and from entering into any future understanding, agreement, combination, or conspiracy, for the purpose or with the effect of restricting, restraining, suppressing, or eliminating competition in, or monopolizing, the retail sale of coal in the trade area in and around Richmond, Va.

2. Agreeing or carrying out any agreement among themselves, or with respondent association or the officers or members thereof, or with any other cooperative agency, that respondents will not ship coal from mines located in States of the United States other than the State of Virginia, or coal from or through States other than the State of Virginia, to retail coal dealers in Richmond, Va., who are not members of said association, or to retailers in Richmond, Va., whose prices for coal in the trade area in and around said city do not conform to those agreed upon by the members of said association.

3. Using any other collective or collusive means or methods to effectuate any understanding, agreement, combination, or conspiracy for the purpose of or with the effect of restraining, restricting, suppressing, and eliminating competition in, or monopolizing, the importation from States other than the State of Virginia, of coal to be sold at retail in the trade area in and around Richmond, Va.

It is further ordered, That all of the respondents against whom this order is directed 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.

It is further ordered, That this proceeding be, and it hereby is, dismissed as to respondents Bluefield Coal and Coke Co., a corporation; Cabin Creek Consolidated Sales Co., a corporation; Red Jacket Coal Sales Co., a corporation; and Wyatt Coal Sales Co., a corporation.

The respondent, George W. St. Clair, having died subsequent to the institution of this proceeding: *It is further ordered*, That this proceeding be, and it hereby is, dismissed as to said respondent.

Syllabus

IN THE MATTER OF

FANNIE P. FOX, TRADING AS SURE LABORATORIES.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 3948. Complaint, Nov. 13, 1939—Decision, Jan. 26, 1942

Where an individual engaged in the manufacture and interstate sale of her "Sure" drug-containing preparation for use as a breath purifier; by advertisements in newspapers and periodicals and circulars, leaflets, pamphlets, and other advertising literature—

(a) Represented directly and indirectly that her said product was not a perfume but was a neutralizing agent which would neutralize all odors and remove every trace of offensive breath including odors from liquor, tobacco, onions, garlic, and other foods; and that by its use unpleasant breath odors, regardless of the cause, would be instantly destroyed and the user given a clean, sweet, unobjectionable breath;

The facts being that her said preparation would not affect or remove the cause of conditions responsible for unpleasant breath but action thereof was limited to temporarily covering up or masking the same; it had negligible antiseptic properties and would not inhibit the growth of bacteria in the mouth or be effective in destroying them; its essential quality was that of a perfume by reason of its content of aromatic volatile oils; and it was not a neutralizing agent or a breath purifier; and

(b) Represented that salesmen and distributors of her said preparation could establish a permanent and profitable business, setting forth, among other things, in her advertisements that "One man has averaged over \$300 profit weekly for the last sixty days";

The facts being that the maximum net earnings made by her salesmen in the ordinary course of business was \$7.50 a day or \$45.00 a week, they paying \$1.00 for a two-dozen container assortment on display cards and selling them to jobbers or wholesalers at \$1.28 and to retailers at \$1.60 each, and she based her estimate of the earnings of the particular salesman, upon whose performance aforesaid claim was based, upon the difference between the cost and resale price, with no consideration of expense incurred in making sales, and conceded that no other salesman or distributor had ever earned any comparable amount;

With the effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that such representations were true and of inducing it, by reason thereof, to purchase substantial quantities of the preparation in question:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Miles J. Furnas* and *Mr. Randolph Preston*, trial examiners.

Mr. Randolph W. Branch for the Commission.

Bussian & DeBolt, of Chicago, Ill., for respondent.