

Syllabus

IN THE MATTER OF

UNITED STATES MALTSTERS 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 3555. Complaint, Aug. 24, 1938—Decision, Dec. 29, 1942

Where a substantial number of corporations which manufactured more than 65 percent of all the malt made and sold in the United States and engaged in interstate sale thereof, and were, prior to 1930, in price competition with one another and would subsequently have been so but for agreements and practices below set forth; acting through their Association—

- (a) Entered into and carried out certain understandings and agreements with intent and effect of fixing and maintaining uniform prices, terms, and conditions of sale in the sale and distribution of malt, and of otherwise restraining and eliminating competition in the sale thereof in commerce; and maintained the prices thus fixed until changed by notice from their Association, as more particularly below set forth; and

Where such corporations, pursuant to said agreements, acting under the direction of a certain firm to which was paid \$30,000 per annum, collected through assessments against each member—

- (b) Organized and operated said unincorporated voluntary trade Association, to promote their mutual interests and serve as an instrument for their joint action in restricting and eliminating competition in sale and distribution of malt in commerce; and

Where said Association, directed by aforesaid firm and its business manager and secretary who participated in the regular meetings of its Executive Committee—

- (c) Collected and disseminated information as to prices, terms, and conditions of sale, and statistical data used in carrying out said agreements; and

Where its said members—

- (d) Agreed, through resolutions passed at the regular meetings of the Association and its Executive Committee, upon various details in connection with the conduct of their respective businesses, and abided by them, including such matters as uniform application of freight rates; uniform reporting of delinquent accounts; grading standards; quotation of prices on delivery or f. o. b. final destination basis only; grading specifications for use where a "guaranty" of specifications was required; refusal of sales to purchasers who would not agree not to resell; use of seller's contracts only; exclusion of sales agents handling domestic malt from sale of imported; the supplying of their current price lists to the Association for distribution; the inclusion with the daily sales reports to members of a record of cancellations of unfilled contracts; and the adoption of a uniform discount of $\frac{1}{4}$ cent per bushel for cash;

- (e) Agreed upon and carried out a method of price reporting under which they daily reported the delivered prices, which they employed at all times, on an "f. o. b. Chicago basis"; whereby the Association and members—by reason

of the Association's daily reports to them, were immediately enabled to determine that prices were at all times identical and uniform for the various grades of malt sold;

- (f) Agreed to and did fix and maintain the delivered price of malt, and accomplished uniformity thereof through use of Chicago as a common basing point, from which freight was calculated irrespective of the fact that the malt plants and most of the members were not there located, but were at various points in the United States with different freight rates to given destinations;
- (g) Adopted and uniformly followed a method of changing the price of malt to their customers, under which any member desiring to deviate from the price quoted, wired or telephoned the secretary of the Association advising him of the new f. o. b. Chicago base price and the effective date thereof; which information the Association's secretary on the same day transmitted to all other members making a similar product by wire or telephone, and to all members not making similar product, by mail; it being the practice of the members, in the event of increase, to give their customers a limited opportunity to place business at the old price and to respect contracts calling for the current and lower price, and, in the case of a decrease, to require conformance to the higher contract prices specified;
- (h) Agreed to and did from time to time furnish their said Association, for distribution to the remaining members, with copies of their price lists which quoted current and future prices on various grades at "f. o. b. Chicago basis"; and submitted to a checking of their books through accountants employed by firm above referred to, which checking showed no deviation in prices charged from those quoted;
- (i) Agreed to, and did, adopt and maintain uniform terms and conditions of sale; and, following a discussion of a cash discount, not theretofore allowed, between a representative of the Brewers Association and their Executive Committee and allowance of a discount of $\frac{1}{2}$ cent per bushel by one of their number, quoted malt on that basis; and
- (j) Did not deviate from such uniform prices, terms, and conditions of sale, notwithstanding fact that, except in the case of unusual and violent market fluctuations, the market price of malt and barley had little or no relation to the price of malt quoted by them; and their varying manufacturing costs, varying prices paid for barley, and varying costs of transportation and of cleaning raw barley, as well as the difference in malt produced by the various manufacturer members, in the absence of any price fixing agreement, would preclude uniformity of price and result in price competition;

With effect of unduly restraining and suppressing competition in the sale and distribution of malt in commerce, and of depriving the public of the full benefit of competition in said commerce between and among such members, and between them and their competitors;

Held, That such acts and practices of said Association and members were all to the prejudice of competitors and of the public; had a dangerous tendency to and did actually suppress and eliminate competition in the sale and distribution of malt in commerce; placed in them the power to control and enhance prices; unreasonably restrained such commerce in malt; and constituted unfair methods of competition in commerce.

Before *Mr. Robert S. Hall* and *Mr. Webster Ballinger*, trial examiners.

Mr. Edward L. Smith for the Commission.

Complaint

Mr. William W. Corlett, of New York City, and *Poppenhusen, Johnston, Thompson & Raymond*, of Chicago, Ill., for respondents; together with *Hubbard, Baker & Rice*, of Chicago, Ill., for respondent Albert Schwill & 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 United States Maltsters Association, Chilton Malting Co., The Columbia Malting Co., Froedtert Grain & Malting Co., Wm. E. Kreiner & Sons, Inc., The Kurth Malting Co., Interior Malt & Grain Co., The Ladish-Stoppenbach Co., George J. Meyer Malt & Grain Corporation, Milwaukee Western Malt Co., Northwestern Malt & Grain Co., The Francis Perot's Sons Malting Co., Rahr Malting Co., H. W. Rickel & Co., L. Rosenheimer Malt & Grain Co., The Konrad Schreier Co., Albert Schwill & Co., Daniel D. Weschler & Sons, Inc., West Bend Malting Co., and Wisconsin Malting Co., hereinafter referred to 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, United States Maltsters Association, is a voluntary unincorporated association, whose membership is composed of respondents named in paragraph 2 hereof, which firms are engaged in the manufacture and sale of malt. It was organized in 1930 under the name Bureau of Barley and Malt Statistics, its name being changed to its present name on or about August 10, 1933. Its office is in Chicago, Ill.

PAR. 2. The following respondents are corporations with their principal places of business in the cities hereinafter mentioned, to wit:

Name of respondent:	Principal place of business
Chilton Malting Co.....	Chilton, Wis.
The Columbia Malting Co.....	Chicago, Ill.
Froedtert Grain & Malting Co.....	Milwaukee, Wis.
Wm. E. Kreiner & Sons, Inc.....	Buffalo, N. Y.
The Kurth Malting Co.....	Wilwaukee, Wis.
Interior Malt & Grain Co.....	Minneapolis, Minn.
The Ladish-Stoppenbach Co.....	Milwaukee, Wis.
George J. Meyer Malt & Grain Corporation.....	Buffalo, N. Y.
Milwaukee Western Malt Co.....	Milwaukee, Wis.
Northwestern Malt & Grain Co.....	Chicago, Ill.
The Francis Perot's Sons Malting Co.....	Philadelphia, Pa.
Rahr Malting Co.....	Manitowoc, Wis.
H. W. Rickel & Co.....	Detroit, Mich.

Complaint

35 F. T. C.

Name of respondent—Continued.	Principal place of business
L. Rosenheimer Malt & Grain Co.....	Kewaskum, Wis.
The Konrad Schreier Co.....	Sheboygan, Wis.
Albert Schwill & Co.....	Chicago, Ill.
Daniel D. Weschler & Sons, Inc.....	Milwaukee, Wis.
West Bend Malting Co.....	West Bend, Wis.
Wisconsin Malting Co.....	Manitowoc, Wis.

PAR. 3. The respondents named in paragraph 2 hereof are now, and since their organizations have been, engaged in the manufacture, at their respective places of business, of malt, and in the sale thereof. In the course and conduct of their businesses, all the said respondents, for more than 8 years last past, have caused, and still cause, such malt, when sold by them, to be transported in commerce from their respective places of business to, into and through various States of the United States other than the States in which they respectively have their place of business, to the purchasers in such other States and in the District of Columbia to whom said malt is and has been sold. The amount of malt manufactured and sold by said respondents constitutes, and at all times since 1929 has constituted, more than 65 percent of all of the malt manufactured in the United States and sold therein. Many purchasers of malt have no regular source of supply excepting from said respondents, and since 1929 have had no regular source of supply of malt excepting from said respondents.

Said respondents were, prior to 1930, in competition as to price with one another in the sale of malt between and among the various States of the United States, the territories thereof, and in the District of Columbia, and but for the combination, agreement, understanding, and conspiracy hereinafter described said respondents would have been at all times since 1929, and would now be, in such competition with one another.

PAR. 4. On or about August 5, 1930, respondents named in paragraph 2 hereof, for the purpose of eliminating price competition among themselves, entered into, through and by respondent United States Maltsters Association, have since carried out, and are still carrying out, through and by respondent, United States Maltsters Association, an agreement, combination, understanding, and conspiracy among themselves to fix and maintain, and by which they have fixed and maintained, uniform delivered prices to be and which have been and are still being exacted by them from their purchasers of malt in commerce between and among the various States of the United States and in the District of Columbia. Pursuant to, and for the purpose of carrying out the aforesaid agreement, combination,

understanding, and conspiracy, respondents have done, among other things, the following:

(a) By agreement have fixed and maintained and still fix and maintain, uniform delivered prices for malt sold by respondents named in paragraph 2 hereof and by each of them.

(b) Each of the respondents named in paragraph 2 hereof agreed to file and does file with the respondent association a schedule of prices, terms, and conditions of all sales at which it will and does sell malt.

(c) Each said respondent named in paragraph 2 hereof agreed that it would not and does not deviate from the prices, terms, and conditions of sale stated in its prices filed with respondent association.

(d) Respondent association collects from and disseminates among the respondents named in paragraph 2 hereof information as to prices, terms, and conditions of sale and other information used and useful in carrying out the said agreement, combination, understanding, and conspiracy.

PAR. 5. The acts and practices of the respondents as herein alleged are all to 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 malt 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 respondents a monopoly in the sale of malt in such commerce; have unreasonably restrained such commerce in malt, and 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 August 24, 1938, issued and subsequently served its complaint in this proceeding upon the respondents, United States Maltsters Association, Chilton Malting Co., The Columbia Malting Co., Froedtert Grain & Malting Co., Wm. E. Kreiner & Sons, Inc., The Kurth Malting Co., Interior Malt & Grain Co., the Ladish-Stoppenbach Co., George J. Meyer Malt & Grain Corporation, Milwaukee Western Malt Co., Northwestern Malt & Grain Co., Perot Malting Co. (named respondent herein under the style of "The Francis Perot's Sons Malting Co."), Rahr Malting Co., H. W. Rickel & Co., L. Rosenheimer Malt & Grain Co., Schreier Malting Co. (named respondent herein under the style of "The Konrad

Schreier Co."), Albert Schwill & Co., Daniel D. Weschler & Sons, Inc., West Bend Malting Co., and Wisconsin Malting 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 respondents' answers thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Edward L. Smith, attorney for the Commission, and in opposition to the allegations of the complaint by W. W. Corlett, Edward R. Johnston, and Russell Baker, attorneys for the respondents, before Robert S. Hall, a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Subsequent thereto, Webster Ballinger, a trial examiner of the Commission was duly designated and appointed to prepare and file trial examiner's report upon the evidence in this matter, vice Robert S. Hall, deceased. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answers thereto, testimony and other evidence, report of Trial Examiner Webster Ballinger upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel; 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, United States Malsters Association, hereinafter referred to as "respondent Association," is an unincorporated voluntary trade association, with its principal office and place of business located at Chicago, Ill. Said respondent Association was organized in 1930 and existed under the name of "Bureau of Barley and Malt Statistics" until August 10, 1933, when the name of said respondent Association was changed to "United States Malsters Association." The membership of said respondent Association includes all of the commercial manufacturers of malt in the United States, with the exception of five, two of which are located in California.

PAR. 2. Respondent, Chilton Malting Co., is a corporation, having its principal place of business at 127-149 Main Street, Chilton, Wis.

Respondent, The Columbia Malting Co., is a corporation, having its principal office at 332 S. La Salle Street, Chicago, Ill.

Respondent, Froedtert Grain & Malting Co., Inc., is a corporation, having its principal place of business at Milwaukee, Wis.

Respondent, Wm. E. Kreiner & Sons, Inc., is a corporation, having its principal place of business at Buffalo, N. Y.

Respondent, The Kurth Malting Co., is a corporation, having its principal place of business at Milwaukee, Wis.

Respondent, Interior Malt & Grain Co., is a corporation, which had its principal place of business at Minneapolis, Minn. This respondent was a wholly owned subsidiary of respondent, The Kurth Malting Co. and is now out of business.

Respondent, The Ladish-Stoppenbach Co., is a corporation, having its principal place of business at Milwaukee, Wis. Respondent, George J. Meyer Malt & Grain Corporation, is a corporation, having its principal place of business at Buffalo, N. Y.

Respondent, Milwaukee Western Malt Co., is a corporation, having its principal place of business at Milwaukee, Wis.

Respondent, Northwestern Malt & Grain Co., is a corporation, having its principal place of business at Chicago, Ill.

Respondent, Perot Malting Co., is a corporation, having its principal office at 808 Lafayette Building, Philadelphia, Pa. This respondent was known as "The Francis Perot's Sons Malting Co." prior to 1937, at which time it changed its name to "Perot Malting Co."

Respondent, Rahr Malting Co., is a corporation, having its principal place of business at Manitowoc, Wis. This respondent was known as "Cereal Products Co." prior to 1933, at which time it changed its name to "Rahr Malting Co."

Respondent, H. W. Rickel & Co., is a corporation, having its principal office at 1825 Adelaide Street, Detroit, Mich.

Respondent, L. Rosenheimer Malt & Grain Co., is a corporation, having its principal place of business at Kewaskum, Wis.

Respondent, Schreier Malting Co., is a corporation, having its principal place of business at Sheboygan, Wis. This respondent was known as "The Konrad Schreier Co." prior to October 3, 1935, at which time it changed its name to "Schreier Malting Co."

Respondent, Albert Schwill & Company, is a corporation, having its office at 141 W. Jackson Boulevard, Chicago, Ill.

Respondent, Daniel D. Weschler & Sons, Inc., is a corporation, having its principal office at 4295 W. Burnham Street, Milwaukee, Wis.

Respondent, West Bend Malting Company, is a corporation, having its principal place of business at West Bend, Wis.

Respondent, Wisconsin Malting Company, is a corporation, having its principal place of business at Manitowoc, Wis.

Findings

35 F. T. C.

The above-named respondents are all commercial manufacturers of malt and constitute the entire membership of respondent Association. For convenience, the above-named respondents, except Interior Malt & Grain Co., will hereinafter be referred to as "respondent members."

PAR. 3. At the time of the organization of the respondent Association, its membership was composed of all of the respondent members hereinbefore named, except The Columbia Malting Co., Interior Malt & Grain Co., Schreier Malting Co., and Wisconsin Malting Co. The Schreier Malting Co. became a member in 1931. The Columbia Malting Co. became a member in 1933, and the Wisconsin Malting Co. became a member in 1934. The Interior Malt & Grain Co., being a subsidiary of The Kurth Malting Co., did not at any time hold an individual membership in the respondent Association.

PAR. 4. The respondent members of the respondent Association are now, and for several years last past have been, engaged in the business of manufacturing and selling malt. In the course and conduct of their respective businesses, said respondent members cause such malt, when sold by them, to be transported from their respective places of business to the various purchasers thereof located in the various States of the United States other than the States in which their respective shipments originate. Said respondent members maintain, and at all times mentioned herein have maintained, a course of trade in said malt in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 5. Prior to 1930 said respondent members were in competition as to price with one another in the sale and distribution of malt in commerce between and among the various States of the United States and in the District of Columbia and would now be in free and open competition with one another in said commerce but for the agreements, practices, and methods as hereinafter set forth.

PAR. 6. Malt is made chiefly from malting barley and is principally sold to brewers for the making of beer, ale, porter, and other malt beverages. There are three recognized grades of brewer's malt, viz, standard, choice, and fancy. The barley used in the manufacture of brewer's malt is grown chiefly in the Middle West, largely in the four principal barley-producing States, Wisconsin, Minnesota, North Dakota, and South Dakota, and to a limited extent in the States of Iowa, Michigan, Illinois, Ohio, New York, and California. While the Department of Agriculture has divided barley into several grades, such grading is not followed by commercial maltsters in purchasing barley for processing into malt.

PAR. 7. The common and usual method of purchasing barley for malting purposes is to make the purchase by sample, as the barley to be used must be of suitable size and uniformity, and have high germinating properties. As a result, barley used for malting purposes commands a higher price in the grain market over ordinary barley. Malting barley is purchased by malsters directly from farmers and country elevators, and in the terminal markets of Minneapolis, Milwaukee, and Chicago, of which Minneapolis is the most important. In some cases, when conditions indicate a possible advance in barley prices, malsters occasionally purchase in "round lots" for future delivery. In such "round lots" purchases the barley is likewise purchased on the basis of a sample of the barley which is to be received. In rare instances barley is purchased before it is harvested, in which case no sample is used but the purchase is made on the basis of grade.

PAR. 8. The manufacturing process followed in the processing of malt barley consists of thoroughly cleansing the barley so as to remove therefrom, as far as possible, all foreign matter, broken and small kernels, chaff, seeds, and dirt. The clean barley is then placed in compartments and subjected to a steeping and germinating process, as a result of which a change takes place in the barley which converts the nonsoluble starch to a soluble starch. The malt is then dried and stored in bins for shipment.

PAR. 9. There are several brewers located in the United States who manufacture malt for use in their breweries but who are not engaged in the commercial sale of malt. Brewers generally are dependent upon commercial maltsters for their supply of malt. The malt manufactured by the respondent members constitutes more than 65 percent of all the malt manufactured and sold in the United States.

PAR. 10. During the time herein referred to, the respondent members entered into, and thereafter carried out, certain understandings, agreements, combinations, and conspiracies for the purpose, and with the effect, of fixing and maintaining uniform prices, terms, and conditions of sale in the sale and distribution of malt and of otherwise restricting, restraining, monopolizing, suppressing, and eliminating competition in the sale of malt in commerce among and between the several States of the United States and in the District of Columbia. Furthermore, the respondent members agreed to, and did, maintain the prices so fixed until modified or changed by notice from the respondent Association.

PAR. 11. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, said respondent members, under the direction of, and with the cooperation of, Steven-

Findings

35 F. T. C.

son, Jordan & Harrison, organized and operated respondent Association as an unincorporated voluntary trade association to promote the mutual interests of the respondent members and to serve as an instrument or vehicle for the joint and cooperative purpose and action of respondent members in hindering, frustrating, suppressing, lessening, restraining, and eliminating competition in price and otherwise, in the sale and distribution of malt in commerce among and between the various States.

During all times since the organization of respondent Association, A. R. Stevenson, or some other member of the firm of Stevenson, Jordan & Harrison, acted as business manager of respondent Association, and A. H. Dyer, an employee of the firm of Stevenson, Jordan & Harrison, acted as secretary of said respondent Association. Other members or employees of said firm of Stevenson, Jordan & Harrison attended and participated in the regular meetings of the Executive Committee of said respondent Association.

The respondent United States Maltsters Association, from its inception and throughout its entire existence, has been directed and guided by the firm of Stevenson, Jordan & Harrison, which firm was paid a salary of \$30,000 per annum, payable in monthly installments of \$2,500. Assessments were made against each member of said respondent Association in the form of dues for the purpose of financing the Association.

The respondent Association, pursuant to the purposes for which it was organized, has, during its entire existence, collected and disseminated among the respondent members information as to prices, terms, and conditions of sale, and other information and statistical data useful for and which have been used in carrying out said understandings, agreements, combinations, and conspiracies.

Regular meetings of the members of the respondent Association were held, usually monthly, from its inception July 1, 1930, which meetings were usually attended by all or a majority of the respondent members. Such meetings of respondent members were usually preceded by a meeting of the Executive Committee, at which time various matters were discussed before submission to the general meeting. While the membership of the respondent Association consisted of only 15 to 18 members during the course of its existence, the Executive Committee consisted of from 5 to 7 members, exclusive of the representatives of Stevenson, Jordan, & Harrison, who usually attended the meetings of the Executive Committee. At the meetings of the Executive Committee and the meetings of the regular members, matters of general interest to the respondent members were discussed and considered. It was also customary to distribute to members of

the Executive Committee and to respondent members, copies of the Association's daily report for the preceding day, showing prices at which malt was being sold by the respondent members.

PAR. 12. In furtherance of said understandings, agreements, combinations, and conspiracies, and in order to carry out the purposes for which said respondent Association was organized, the respondent members agreed from time to time upon various details in connection with the conduct of their respective businesses, which were adopted by means of resolutions passed by the respondent members at the regular meetings of the respondent Association and its Executive Committee. All such resolutions when adopted by the respondent members at such meetings were uniformly followed by such respondent members without any deviation therefrom. Examples of such agreements adopted in the form of resolutions are the following:

1. At a meeting of respondent Association held August 5, 1930, the respondent members agreed that the freight rate to all points not previously listed in the freight-rate schedule be supplemented to the regular freight-rate schedule and be sent to each member and, pending such action, that each member apply the freight rate from Chicago, except to intermediate points between Minneapolis and Chicago.

2. At a regular meeting of the respondent Association held August 22, 1930, the respondent members agreed upon a method of reporting delinquent accounts to the respondent Association, whereby in the future each respondent member would report monthly all accounts that are unpaid after 60 days or more from date of invoice and also report all accounts that are covered by note settlement.

3. At a regular meeting of respondent Association held September 11, 1930, respondent members agreed upon the adoption of grading standards to apply immediately to all sales of barley malt.

4. At a regular meeting of respondent Association held September 11, 1930, respondent members agreed to quote only delivered prices or f. o. b. final destination.

5. At a regular meeting of respondent Association held October 31, 1930, the respondent members agreed to adopt the grading specifications recommended by the Executive Committee in all instances where a "guaranty" of specifications is required.

6. At a regular meeting of respondent Association held June 29, 1933, respondent members agreed not to sell malt to purchasers unless such purchasers agreed not to resell said malt, and said respondent members have since carried out said agreement.

7. At a regular meeting of the respondent Association held October 18, 1933, respondent members agreed that only sellers' contracts should

be used on any malt sale and that no riders should be added that would alter the spirit or substance of the standard form of contract.

8. At a regular meeting of respondent Association held December 15, 1933, respondent members agreed not to permit sales agents handling domestic malt to sell imported malt.

9. At a regular meeting of respondent Association held January 10, 1934, respondent members agreed that each respondent member send 25 copies of its current price list to the respondent Association for distribution by the respondent Association to each of the respondent members, which was generally continued until 1940.

10. At a regular meeting of respondent Association held May 11, 1937, respondent members agreed that the respondent Association add a record of cancellations of unfilled contracts to the daily sales report to members.

11. At a regular meeting of the respondent Association held February 10, 1938, respondent members agreed to allow a uniform discount of $\frac{1}{2}$ cent per bushel for cash, which was thereafter continued as the uniform cash discount for all respondent members.

PAR. 13. Pursuant to said understandings, combinations, and conspiracies, and in furtherance thereof, said respondent members, with the active cooperation of respondent Association, agreed upon, adopted, and carried out a method of price reporting which has been followed throughout the existence of respondent Association.

Through this price reporting system, each of the respondents agreed to, and did, make daily reports to the respondent Association of sales made by it, which information was in turn immediately compiled and issued to all members of the Association in the form of daily reports from the respondent Association to its members.

All of the respondent members of the Association have at all times quoted and sold malt f. o. b. point of delivery or at delivered prices. However, in reporting prices at which malt was sold in their daily reports to the respondent Association, the respondent members reported such prices on what was known as the "f. o. b. Chicago basis." This represented the price at which the malt would have been sold if the sales had been made f. o. b. Chicago. By reporting to the Association on "f. o. b. Chicago basis," the Association was immediately enabled to determine the uniformity of prices maintained by the respondent members and, in turn, the Association, by reporting sales in its daily reports on an "f. o. b. Chicago basis" to the respondent members, enabled such respondent members to determine if uniformity in price was being followed.

The prices "f. o. b. Chicago basis" reported by the respective respondent members in their daily reports since the organization of

respondent Association, have at all times been identical and uniform for the various grades of malt sold, and there has at no time been any deviation from such reported prices by any of the respondent members.

PAR. 14. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, said respondent members agreed to fix and maintain, and did fix and maintain, the delivered price of malt. Uniformity of delivered prices was achieved by the respondent members through the use of Chicago, Ill., as a common basing point, that is, as the point from which the freight was calculated, irrespective of the fact that the malting plants of most of the respondent members were not located in Chicago but were located at various other points in the United States and had different freight rates to given destinations. By using a common point as a basis for price quotations, namely, Chicago, Ill., and basing the freight calculation on the fiction that all shipments originated at Chicago, the respondent members attained a uniformity of delivered prices.

PAR. 15. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, said respondent members, with the active cooperation of respondent Association, further agreed upon, adopted, and carried out a definite method of modifying or changing the price of malt to the customers of the respondent members, which has been uniformly followed by all respondent members.

Whenever any respondent member offered or proposed to offer malt for sale at a price other than the price it had theretofore quoted, as shown by any price list distributed by it or as shown upon its daily report to the Association, such member promptly wired or telephoned the Secretary of the Association, advising him of the price "f. o. b. Chicago basis" quoted and whether such price would be effective immediately or at a future date, and usually confirmed the telegram or telephone message by mail. Immediately upon receipt of the telegram or telephone message from such member, the Secretary of respondent Association on the same day advised all other respondent members of the Association making a similar product, by wire or telephone, the new price "f. o. b. Chicago basis" offered or proposed and the effective date thereof, and transmitted the same information the same day to all other members who were not making a similar product, by mail.

In the event such price quotation involved an increase in the price of malt, it was customary for such respondent member, upon such increase in price, to notify its various customers and prospective customers of such increase and give them an opportunity within a certain specified time within which to place orders at the previous or lower price. A respondent member, in reporting an increase in the quota-

tion on the price of malt, usually advised the respondent Association that as of the date of notification, or effective at some future date, it would increase the price of malt.

Immediately upon receipt of notification from the respondent Association of change in quoted price, all the respondent members uniformly adopted such price and immediately notified their customers and prospective customers of such change in price and, where the change involved an increase in price, gave such customers and prospective customers an opportunity to purchase at the previous price within a specified time.

In those cases when the respondent members had contracted with their customers for future delivery of malt at the current price existing at the time of the execution of such contract, such prices were uniformly maintained against any increase in the price of malt; and in the case of a decrease in price the respondent members generally required performance of the contract at the prices specified therein.

PAR. 16. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, said respondent members further agreed to, and did from time to time, furnish the respondent Association with copies of their price lists, showing current and future prices, in quantities sufficient in number to permit the Association to distribute such price lists to the remaining respondent members of said Association. Immediately upon receipt of such price lists the respondent Association distributed such lists to the various respondent members. Such price lists all quoted prices on various grades of malt at "f. o. b. Chicago basis" and usually specified that such prices were to be effective either immediately or at some specified date in the future and were to remain in effect for specific future periods of time.

PAR. 17. In order to determine that the respondent members were selling malt at the prices reported to the Association, the books of the respondent members of the Association were checked from time to time by accountants employed by the firm of Stevenson, Jordan, & Harrison in order to ascertain that the prices reported by the Respondent members in their daily reports and in price lists coincided with the prices charged by such respondent members to their customers as appeared from their books and invoices. Except as to minor errors in computation, no deviation from quoted prices was found by such check of the books and records of respondent members.

PAR. 18. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, said respondent members agreed to adopt, and did adopt and maintain, uniform terms

and conditions of sale in connection with the sale and distribution of their malt. Prior to 1938 no cash discount was allowed by any respondent member to any of its customers. In February 1938, a representative of the Brewers' Association met with the Executive Committee of respondent Association to discuss the allowance of a cash discount on the purchase of malt from respondent members. Thereafter, at a meeting of the Association on February 10, 1938, Mr. Ruh, an officer of respondent, Albert Schwill & Co., announced that his company had decided to allow a cash discount of $\frac{1}{2}$ cent per bushel. Thereafter, all of the respondent members immediately quoted malt to customers and prospective customers on the basis of a cash discount of $\frac{1}{2}$ cent per bushel.

PAR. 19. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, said respondent members have uniformly maintained prices, terms, and conditions of sale of malt and have not deviated therefrom.

The principal element entering into the cost of malt is the cost of the malting barley, which represents approximately from 80 to 85 percent of the cost of manufacturing malt. Except in the case of unusual and violent fluctuations in the malting-barley market, the market price of malting barley since the organization of the respondent Association has had little or no relation to the price of malt quoted by respondent members. For example, although there has been a wide variance in the prices paid for malting barley by the individual respondent members, the price of malt has remained absolutely constant without change of any kind from November 16, 1938, to the time the testimony in this case was concluded on March 17, 1941. The prices during this entire period, which were uniformly charged by all of the respondent members for the various grades of barley malt, were 85 cents per bushel for standard malt, 89 cents per bushel for choice malt, and 93 cents per bushel for fancy malt, "f. o. b. Chicago basis." In the case of bulk shipments, the respondent members charged the above prices less 1 cent per bushel, or 84 cents, 88 cents, and 92 cents for standard, choice, and fancy malt, respectively, "f. o. b. Chicago basis."

PAR. 20. The Commission further finds that there are important factors connected with the manufacture and sale of malt which, in the absence of any price-fixing agreement, would preclude uniformity of price and result in price competition.

Net manufacturing costs of the respondent members were not uniform but, based upon reports made by such respondent members to the respondent Association, such costs varied as much as 20 percent to 30 percent.

The prices paid for barley by the various respondent members were not uniform but, instead, much of such barley was purchased on a fluctuating market. The prices paid for barley purchased direct from the farmers, from country elevators, and upon the various exchanges were all different.

The cost of transportation of barley was not uniform among all of said respondent members. Certain of respondent members who were suitably located for lake transportation caused their barley to be shipped by boat to their processing plants; others were required to use rail transportation. The cost of shipping by boat was much lower than the cost of shipping by rail. Certain of the respondent members, by reason of their location between freight rate break points, were entitled to the malting-in-transit privilege, whereby the barley was unloaded at their plants, processed, and the shipment continued as malt at the same rate as applied to the barley, which is lower than the freight rate on malt. Other respondents, not being located at such intermediate points between so-called freight rate break points, were not entitled to such malting-in-transit privilege, which increased the transportation rate of their product.

The location of certain of respondent members' plants near the point of origin of the barley used for malting purposes in some instances gave such respondent members an advantage in cost of transporting barley.

The difference in cost of cleaning raw barley before subjecting it to the steeping process varied among the respondent members from 3 to 10 cents per bushel. Furthermore, these cleaning costs varied from year to year and from month to month, and even varied in various cars delivered in the same shipment, depending upon the character and nature of the barley shipped.

The difference in malt produced by the various respondent members also constituted a factor which should bring about price competition among the respondents. In the original selection of barley for malting purposes, various maltsters sometimes differ as to the grade of barley preferred in making malt, and the finished malt distributed by such maltsters was not uniform as between each other, and in some cases brewmasters found it necessary to keep the malt of different maltsters separate in making their beer. In fact, the malt of certain of the respondent members was refused by certain brewers because such malt did not measure up to the brewers' standards as well as the malt produced by other respondent members.

PAR. 21. The afore-said understandings, agreements, combinations, and conspiracies, and the things done thereunder and pursuant thereto and in furtherance thereof as hereinabove found, have had, and do

have, the effect of unduly lessening, restricting, restraining, and suppressing competition in the sale and distribution of malt in commerce among and between the several States of the United States, and of depriving the public of the full benefit of competition in said commerce between and among the respondent members and between them and their competitors.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice of competitors of respondents and of the public, and have a dangerous tendency to and have actually frustrated, hindered, suppressed, lessened, restrained, and eliminated competition in the sale and distribution of malt in commerce as "commerce" is defined in the Federal Trade Commission Act; have placed in respondents the power to control and enhance prices; have unreasonably restrained such commerce in malt; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 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, testimony and other evidence in support of the allegations of said complaint and in opposition thereto, taken before Robert S. Hall, a trial examiner of the Commission theretofore duly designated by it, report of Webster Ballinger, a trial examiner appointed to prepare and file a trial examiner's report upon the evidence, vice Robert S. Hall, deceased, and exceptions filed thereto, briefs filed in support of the complaint and in opposition thereto, and oral arguments of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, United States Maltsters Association, an unincorporated association, Chilton Malting Co., a corporation, The Columbia Malting Co., a corporation, Froedtert Grain & Malting Co., a corporation, Wm. E. Kreiner & Sons, Inc., a corporation, The Kurth Malting Co., a corporation, The Ladish-Stoppenbach Co., a corporation, George J. Meyer Malt & Grain Corporation, a corporation, Milwaukee Western Malt Co., a corporation, Northwestern Malt & Grain Co., a corporation, Perot Malting Co., a corporation, Rahr Malting Co., a corporation, H. W. Rickel & Co., a corporation, L. Rosenheimer Malt & Grain Co., a corporation, Schreier Malting Co., a corporation, Albert Schwill & Co., a corporation, Daniel D. Wesch-

ler & Sons, Inc., a corporation, West Bend Malting Co., a corporation, and Wisconsin Malting Co., a corporation, and their respective officers, agents, representatives, and employees, in connection with the offering for sale, sale, and distribution of malt in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any common course of action, agreement, understanding, combination, or conspiracy between and among any two or more of said respondents or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts or practices:

1. Establishing, fixing, or maintaining prices, terms, or conditions of sale for malt, or adhering to or promising to adhere to the prices, terms, or conditions of sale so fixed.

2. Holding or participating in any meeting, discussion, or exchange of information among themselves or under the auspices of respondent United States Maltsters Association or any other medium or agency concerning proposed or future prices, terms, or conditions of sale.

3. Exchanging, distributing, or relaying among manufacturing respondents or any of them or through respondent United States Maltsters Association or through any other medium or central agency, price lists or other information showing current or future prices, terms, or conditions of sale or information showing current or future prices, terms, or conditions of sale of any particular respondent.

4. Authorizing or permitting examination of the books or other records of the respondent manufacturers by any agent of the United States Maltsters Association or by any agent of the respondents or any of them, to determine or check the prices at which any given respondent manufacturer has made sales, is currently making sales, or expects to make sales.

5. Formulating, establishing, putting into operation, continuing, or using in any way any reporting plan using Chicago, Ill., or any other common basing point which results in the establishment and maintenance among the respondent members or any two or more of them of uniform delivered prices to any given destination.

6. Quoting prices, terms, and conditions of sale determined under a method or system of a common basing point for the purpose, or with the effect, of making the delivered price quotation of any two or more of the respondents the same to any given destination.

7. Formulating or putting into operation any other practice or plan which has the purpose or the tendency or effect of fixing prices for malt, or otherwise restricting, restraining, or eliminating competition in the sale and distribution of such products.

8. Employing or utilizing respondent, -United States Maltsters Association, or any other medium or central agency as an instrument, vehicle, or aid in performing or doing any of the acts and practices prohibited by this order.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to Interior Malt & Grain Co., a corporation.

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

IN THE MATTER OF
COPPER ROOFS CORPORATION

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

Docket 4651. Complaint, Dec. 3, 1941—Decision, Dec. 29, 1942

Where a corporation, engaged in competitive interstate sale and distribution of copper roofing material which, made to its specifications by another concern, it sold to dealers, roofing contractors and supply houses, supplying to purchasers detailed instructions describing the patented method of application, and frequently assisting the dealer in connection with the application of the first order or first few orders; in advertising its said product through leaflets, circulars, and other printed matter which it furnished to its salesmen and to dealers who used it in soliciting the purchase of the roofing by the public—

(a) Represented, directly or by implication, that its said product was impervious to all weather and climatic conditions, being proof against wind, hurricane, storm, and hail; afforded permanent protection against rain; was everlasting and earthquakeproof; that the copper used therein was the same as that used in the roofs of the ancient European cathedrals; and that the roofing possessed insulating properties and made houses warmer in winter and cooler in summer;

The facts being that while the standard weight of copper ordinarily used for roofing purposes is 16 ounces per square foot, its roofing weighed 3 ounces per square foot, and as such was not of sufficient thickness and strength, in the opinion of the trade, to provide a satisfactory roofing material; copper used by it therein could not properly be compared with that used to roof ancient cathedrals in which the material was much thicker and heavier; and the other claims made by it, as above set forth, were false and misleading; and

(b) Represented that the roofing was applied by factory-trained men only, and that it itself applied the roofing material and was responsible for defects in material or workmanship;

The facts being it was usually applied by employees of local dealers or roofing contractors, very few of whom had ever had any factory training; and it did not itself apply the roofing in the usual case, or ordinarily assume responsibility for defects in material or workmanship;

With tendency and capacity of misleading and deceiving a substantial number of dealers and members of the purchasing public into the mistaken belief that said roofing possessed qualities and characteristics which it did not, thereby causing such public to purchase substantial quantities of the roofing; whereby trade was diverted unfairly to it from competitors:

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

Before *Mr. Andrew B. Duvall*, trial examiner.

Mr. James I. Rooney and *Mr. R. P. Bellinger* for the Commission.

Quarles, Spence & Quarles, of Milwaukee, Wis., for respondent.