

Syllabus

IN THE MATTER OF

AMERICAN REFRACTORIES INSTITUTE 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 4900. Complaint, Feb. 5, 1943—Decision, Apr. 13, 1948

In a proceeding in which a trade association, its corporate member manufacturers, and various individuals as officers thereof and members of its different committees and groups, were charged with various concerted acts and agreements in restraint of trade and competition, including agreements through provisions in their code and standard terms of sale relating to such matters as the specification of terms and conditions of sale, a prohibition against certain service guarantees, definitions of various classes of customers, and a contract provision requiring resale-price maintenance, and in which it appeared that, while there had been no further statement of said agreements since the return of an indictment against the association and some of its members by the Department of Justice, there was no decree or order which forbade the resumption thereof, it was recognized that since the corporate members for a period of many years had entered into and maintained agreements of such character, there was a probability of like collective action in the absence of a definite prohibition against it.

As respects the inclusion, through concert of action of one form or another, of provisions in a code of a trade association and in standard terms of sale thereof, relating to such matters as the specification of terms and conditions of sale, a prohibition against certain service guarantees, definitions of various classes of customers, and a contract provision requiring resale-price maintenance; while consideration was given to the fact that most of the provisions in said code and standard terms of sale had included terms and conditions of sale used in the industry over a period of years, the Commission was of the opinion that such fact did not justify respondents in the proceeding concerned in agreeing to formulate or adopt specific terms and conditions, or definitions of classes of customers, to be used by all of them in making their quotations and sales.

Where a trade association of manufacturers of refractory products, said manufacturers, and certain individuals associated therewith, as hereinafter set out; namely—

I. Said association, which was incorporated on or about April 14, 1925, by fourteen concerns, together with representatives of other manufacturers and sellers of refractory products, used in furnaces and other devices producing heat of sufficient intensity to melt or soften ordinary metals or ceramic materials, and consumed by the iron and steel industry largely, and also to a large, but lesser extent by the glass, copper-smelting, cement, and wood-pulp industries; and which—

(1) Carried on and developed various practices and policies of a prior unincorporated trade association, which, in existence from about March 5, 1913, until April 29, 1925, had many of the same members and functioned in the same manner.

(2) Thereafter acquired as members numerous other manufacturers and sellers of aforesaid products.

(3) Functioned not only through acts of its individual members, but also through a board of directors, and its officers and the officials of its numerous committees, such as classification, code of ethics, etc.

(4) The affairs and policies of which were controlled by the corporate manufacturers, who more particularly controlled its special or classification committee, maintained to formulate specific extra charges and quantity discounts applicable to special shapes of fire brick.

II. Some 37 corporate member manufacturers and sellers of refractories and refractory products, who produced and sold in excess of 75 percent of the domestic output of such products (amounting to between \$60,000,000 and \$100,000,000 annually), were joined individually and as a class as representative of all members, and were in competition with one another in so far as it was not restrained or destroyed by the acts and practices below set forth; and

III. Seven individuals, who had served as officials or agents of one or more of the corporate members or of said association or institute, and represented the same in relationships with representatives of other corporate members and other sellers of such products, and were joined as fairly representative of the numerous individuals who had so served as directors, officers, etc., of committees and divisional and geographical groups—

Acting with full knowledge of the activities of said Institute and of its committees, and of the preparation and adoption of classifications, schedules of extra charges, standard terms of sale, freight rate factors, the freight equalization, and zone systems, and the code of ethics and fair trade practices, as discussed in meetings of the Institute and set out in bulletins sent to all members, as hereinbelow indicated; and acting in concert, combination, and understanding with one another—

- (a) Formulated, devised, and recommended to each of the corporate member manufacturers specific extra charges and quantity discount applicable to the various numerous special shapes of fire brick, and special discounts applicable to refractory products, for the use of said member manufacturers, through the instrumentality of their classification committee (or otherwise), under a procedure whereby specific extra charges, as first agreed on by the committee and recommended to and approved by the board as finished revisions and recommended by the latter, were approved and adopted at a subsequent general meeting of the association, and followed thereafter by each of the corporate member manufacturers;
- (b) Expanded and supplemented thereby through their said committee the plan of percentage extra charges which (1) discontinued the manufacturers' pre-1913 practice of selling their brick in various shapes and sizes at prices roughly proportional to weight, and basing price of special shapes on that of the price per thousand of the 9-inch straight brick (along with adjustment for relative volume); and which (2) included or was built on a 1914 classification—following the recommendation of the committee on standardization—of shapes and sizes other than the 9-inch straight and the "9-inch series," and under which all other shapes were thereafter priced not only with adjustment for weight, but also with the addition of an extra charge, depending upon the class assigned thereto; and (3) included a price list

of about 40,000 "rectangular shapes" and lists of many other special shapes and sizes (for each of which there was proposed and recommended an extra charge in terms of a percentage variation from a base price), as developed from 1914 to 1920 by the committee on classification, and from 1920 to 1925 by a "classification engineer," and which was made use of and continued generally in use by the then and other members as revised from time to time; and

- (c) Revised also from time to time a similar plan which in 1921 had been carried over into the classification of silica brick;

With the result that said original plan, with its various revisions, which in no case exactly reflected the actual cost differentials between the various groups of shapes made by any one manufacturer, and which in later revisions (except that of 1940 which, by reason of the 1941 indictment was never put into effect) contained instructions also for determining when a quantity discount would be offered on special shapes (together with a table showing the amount of such discounts expressed as a reduction in the "percentage extra"), was made more effective as a price fixing device;

- (d) Acting further through their said classification committee, made a separate classification for the many special and often unusually complex shapes of fire brick designed by and sold to the "arch and wall companies"—sellers of a service consisting of the design of furnace linings and the purchase of the refractories therefor—and, in preparing said classification and later revisions, exchanged statistical and other information concerning the sales to each arch and wall company, assigned a separate percentage extra in the resulting classification to each of the principal shapes and sizes designed by and sold to each of said companies, and, as new shapes were designed from time to time, asked the association to assign a percentage extra thereto to manufacturer members who had received orders for the shapes concerned, together with a specification in the classification of the occasions on which the manufacturers were to charge for the cost of the molds; and,

Where each of said corporate member manufacturers—

- (e) Became a party to a prior and expanding agreement among the corporate manufacturer members who in 1913 belonged to the former association, to fix a material portion of the purchase price of such special shapes, and to quote and sell them at such percentage additions over the base price of the 9-inch straight brick, and at such quantity discounts, as had been from time to time compiled and established for and recommended to them by said Committee;
- (f) In furtherance of such agreement, received from the association or exchanged directly or through the association, at some time other than in the NRA period, and between 1925 and 1941, information concerning the percentage additions and mold costs to be charged to certain named customers, and made use thereof in making sales; and

Where said classification committee, in furtherance of such agreement—

- (g) Exchanged statistical and other information which revealed the production of specific manufacturers and, on occasion, the total purchases of and prices paid by specific purchasers; and
- (h) Following the 1937 revision of the classification for fire clay brick and the 1936 revision of that for silica fire brick, both of which by 1939 had become somewhat obsolete due to increasing labor costs, in that an adjust-

Syllabus

44 F. T. C.

ment of base prices could not adequately reflect the fact that such an increase has substantially more effect on the total cost of the complex special shapes than it does on the total cost of the base product—the 9-inch straight brick—began work on new revisions of both classifications, which culminated in May 1940 with the "Ninth Edition" of both, and of which 236 copies were distributed to members of the committee and of the association for examination prior to consideration of the adoption of an effective date therefor; and

Where said corporate member manufacturers—

- (i) In pursuing a common course of action in their simultaneous use of specific differentials, adopted by agreement for use in making up or announcing their price quotations, or for use in making their sales, acted in furtherance of and in continuation of the aforesaid agreements to fix prices and to otherwise restrain competition in the sale of refractories and refractory products; and

Following a Sherman Act indictment on June 23, 1941, of the association and some of its larger members and their officers (which charged agreement among defendants jointly to prepare and use the aforesaid classifications), entry of pleas of *nolo contendere* by all the defendants and imposition of fines, adoption of resolutions by the board of directors on July 10, 1941, discontinuing the classification committee, discontinuance of classification activities by the association, and its refusal of a number of requests for information concerning percentage extras and for distribution of copies of said classifications—

- (f) Continued, individually to use, in the absence of any decree or order preventing the resumption of classification activity by the association, the 1937 revision of the fire clay brick classification and the 1936 revision of that of the silica brick, together with minor revisions made since June 10, 1941, whereby there was determined by them an important element in arriving at the prices of such products; and

Where said association—

- (k) Approved (1) a uniform contract for agents in 1929, and printed and circulated it to the industry, and (2) in 1938 adopted a "Code of Ethics and Fair Trade Practices," formulated by its "Dealer Code of Ethics Committee," and recommended by its board of directors to the corporate member manufacturers for their adoption and use, which contained provisions specifying terms and conditions of sale, amounts of dealer discounts, a prohibition against certain service guarantees, and definitions of a number of types of buyers, including "manufacturers' agents," "dealer agents," and "retail dealers";

- (l) Circulated to its members, in 1939, a set of standard terms of sale, which aforesaid committee—discontinued, along with its activities, following the June 23, 1941, indictment by the Department of Justice—had prepared and which superseded some of the provisions in said code; and

Where each of said corporate manufacturer members—

- (m) Agreed with one or more of the others to have said dealer code of ethics committee formulate and prepare for their use, specified terms and conditions of sale, prohibition against certain service guarantees, definitions of various classes of customers, and contract provision requiring resale price maintenance; and

Where said corporate member manufacturers of fire brick, in accordance with an agreement to maintain and use the delivered-price system below described as originally agreed upon by some as early as 1921, and to which all the others later became parties—

- (n) Sold said brick in accordance with a freight equalization, delivered-price system, under which, in arriving at the figures in their quoted published-price lists for said brick, or carload quantities of fire-brick cement, it was provided that the quotations as made on a delivered basis and as quoted to any intending purchaser at destination should be the figures resulting from the use of a formula composed of an f. o. b. factory price quotation, plus whatever freight factor was necessary to equalize exactly the sum of a base price at certain specified basing points plus freight from one of such points, (but from which points said manufacturers did not, in most instances, make actual shipments to their customers); whereby each manufacturer was enabled to match exactly other manufacturers' quoted prices through use by all of identical methods for computing transportation charges, on the basis of standardized calculations, standardized weights, and "volume equivalents"; facilitated by the use of classifications and supplemental bulletins prepared by the association for the making of such computations; and

Where said association, its members, etc.—

- (o) Acting collectively through their traffic committee, from time to time met with representatives of the railroads and agreed with them to submit proposals to the Interstate Commerce Commission for increased rates which attempted to preserve and maintain existing differentials at destinations from all shipping points; and

Where all of said corporate member manufacturers and sellers of fire brick—

- (p) Became parties, upon becoming members of said institute, to an agreement upon factors which materially affect both their freight equalization delivered-price system and the total price of fire brick to all purchasers on a delivered basis, and which was in effect as early as 1921 among some of said manufacturer members and other members of the prior association;
- (q) Discussed with each other in meetings, correspondence and otherwise, specific present and future base and delivered prices, and the occasional failure of one of them to abide by certain base or delivered prices, and from time to time since the end of the NRA period on May 27, 1935, directly exchanged and circulated, in the case of some of their number, between and among themselves their respective price lists on fire brick, and distributed information concerning current prices by furnishing them to the trade magazine *Steel* for publication therein;
- (r) Continued after the NRA period to file prices with the association as they had done with it as code authority and as some, as members of the prior association, had done as early as 1920 and 1921, both directly and through its publicity bureau; and filed with all of their fellow members price lists, which contained the basing-point prices on carload quantities of fire brick and fire-brick cement, and the delivered-price quotations within certain price zones on less than carload quantities of fire-brick cement, and which were circulated and distributed by the association to all corporate members and any other manufacturer of refractories requesting the same, and exchange of which as a rule reflected the desire of the originator of the price

list to notify its competitors of the prices which it would thereafter quote;

- (s) From time to time exchanged bids or price quotations to be submitted to specific customers, and filed or exchanged, directly or through the association, such intimate details of their business as the names of certain customers, the prices paid by each, and the terms and conditions upon which particular and individual sales had been or were to be made, and disclosed thereby on many occasions a particular price by a particular corporate member to a particular customer;
- (t) Following the announcement, at a meeting of a district group of the prior association, on January 11, 1921, by a member manufacturer, of a decrease of its base prices on fire brick, effective on January 15 following, reduced their base prices in the same amount and on said effective date, in the case of 17 out of 18 manufacturers who then reported their prices to the publicity bureau of the association; and, in the case of various corporate members, within 2 weeks after the announcement by 3 other members of a new lower-price list on all fire brick sold by them, and their issuance of lists containing the same prices for comparable types and grades, issued new price lists and incorporated therein for their own products the new lower prices of said other 3 corporate members; and

Where each of said corporate member manufacturers of fire brick—

- (u) Agreed, on at least one occasion other than during the 1933-35 NRA period, with one or more other manufacturers of fire brick to fix prices of said product; to file, circulate and exchange current and future prices of fire brick between and among themselves directly or through the association or a trade publication; to exchange bids on quotations to be submitted by them on fire brick; to exchange intimate details of each other's business whereby the particular sale of fire brick, the identity of the buyer and seller, and the sale price was made known to each other; and to follow the leadership of a certain member or members in making changes in the price of said product; and

Where members of the specialty division of said institute, which functioned not only through representatives of its members, etc., but also through a board of directors, secretary, and various officials who composed its numerous committees, including that on ethics and fair trade practices, and through its geographical groups and subgroups; and for which were eligible manufacturers of fire-brick cement and of "plastic" and "castable" refractories, or "specialties" (constituting about 10 percent of the total dollar sales and about 5 percent of the total tonnage sales of the refractories industry), and among whom there were thus included as members during its existence as a separate division, some 16 of the corporate members of said institute—

- (v) Frequently discussed prices of specialties at meetings, in correspondence, and otherwise, and, at a meeting of its executive committee in 1937, agreed upon price schedules, which were exchanged between the members and were incorporated into price lists issued by them;
- (w) With intent and effect of fixing the delivered prices of less-than-carload lots of fire-brick cement and thereby eliminating price competition, agreed upon and quoted delivered prices for less-than-carload quantities thereof to all customers located within one of three geographical zones, in each one of which the delivered price quotations were identical for a specified quantity;

(x) Made use, in the case of said corporate members who no longer used said zone system of selling fire brick in less-than-carload quantities, of the freight equalization delivered price basis, and, in the case of all, used said basis for quotations on the sales of said product, in carload quantities, since 1935 at least; and, during the NRA period and until 1940, as respects most of the corporate member manufacturers of fire-brick cement, made use, though not at all times, of county-zone freight rate schedules, which said specialties division had prepared for them and use of which was not inconsistent with the larger zone system above described; and

Where said specialty division—

(y) Assisted said corporate member manufacturers in matching their delivered-price quotations or delivered costs on fire-brick cement to any intending purchaser at a given destination;

Use of which schedules had the effect of equalizing transportation costs on shipment of said product from any and all of said members' plants located in a given geographical area to any given destination, without regard to the actual mileage involved; and

Where all of said corporate member manufacturers of fire-brick cement—

(z) Entered into an agreement in 1936 to fix the delivered price to any intending purchaser and continued the same without interruption, up to the filing, in June 1941, of the indictment before referred to;

Effect of which understandings, agreements, combinations, and conspiracies and things done pursuant thereto and in furtherance thereof, as above set forth, was to unduly restrict, hinder, lessen, restrain, and suppress competition among said corporate member manufacturers in the sale of refractories and refractory products among the several states and in the District of Columbia, and to unduly restrict and restrain trade therein as aforesaid:

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

As respects the exchange of price lists in said proceeding, while consideration was given to the fact that many respondents purchased certain grades or special shapes of refractories from other respondents in order to offer a full line or to fill out an order, and to the fact that some respondents are large buyers and consumers of refractories manufactured by other respondents, and that some respondents are sales agents for other respondents, most of the exchanges of price lists as shown by the record could not be so explained, and reflected the desire of the originator of the price list to notify its competitors of the prices which it would thereafter quote.

In said proceeding in which it appeared that after the completion by the classification committee of the association, in 1940, of new revisions of both the fire clay and silica fire brick classifications, but before said classifications had been made effective, that the institute and some of its larger members and their officers were indicted on June 23, 1941, for violation of the Sherman Act; that said indictment charged, among other things, an agreement among the defendants jointly to prepare and use the aforesaid classifications; that all entered pleas of nolo contendere and were fined; that, at a meeting of the board of directors and members of the institute, on July 10, 1941, one of the resolutions adopted set forth that the classification committee was thereby

discontinued; that up to the closing of the record in the proceeding, classification activities had not been carried on by the institute and it had refused a number of requests for information concerning percentage extras and for distribution of copies of either the May 1940 or earlier revisions of the classifications concerned; that about 10,000 copies of the fire clay brick classification and 1,000 copies of the silica brick, both of the May 1940 revision, were printed but ordered retained in storage, and were there at the time of the complaint herein; that the president of the association, on April 27, 1942, stated that he was still hopeful that by action of OPA or other federal agency the industry would be permitted to use said books; that for most of the period from July 10, 1941, to the closing of the record, OPA did not permit the use of percentage extras higher than any which were in use by each company in March 1942; that up to September 19, 1946, each of the member manufacturers making fire brick continued to use the 1937 revision of the classification and the 1936 revision of the silica brick classification, together with minor revisions made since June 10, 1941; that present use of said revisions of such classifications determined an important element in arriving at the present prices of products concerned; and that there was no decree or order which prevented the resumption of classification activity by the institute:

The Commission concluded and was of the opinion that in the absence of an order in the proceeding concerned there was a probability that respondents would continue or renew the agreements, etc., and things done pursuant thereto and in furtherance thereof, as there involved, or enter into further understandings, etc., and do things pursuant to and in furtherance thereof with the identical effects as found in the proceeding in question.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Everette MacIntyre, *Mr. V. W. Summers*, *Mr. Reuben J. Martin*, *Mr. L. E. Creel, Jr.*, and *Mr. Robert R. MacIver* for the Commission.

Cahill, Gordon, Zachary & Reindel, of New York City, for American Refractories Institute and *W. J. Westphalen*.

Miller, Searl & Fitch, of Portsmouth, Ohio, for Aetna Fire Brick Co., The Davis Fire Brick Co., The Oak Hill Fire Brick & Coal Co., and The Pyro Clay Products Co.

Sullivan & Cromwell, of New York City, for The Babcock & Wilcox Co.

Stradley, Ronon, Stevens & Young, of Philadelphia, Pa., for Botfield Refractories Co.

Mr. Alvin H. Nelson, of Chicago, Ill., for Chicago Fire Brick Co.

Sidley, Austin, Burgess & Harper, of Chicago, Ill., for Chicago Retort & Fire Brick Co. and Illinois Clay Products Co.

Mr. John J. Dougherty, of Pittsburgh, Pa., for Climax Fire Brick Co.

Pershing, Bosworth, Dick & Dawson, of Denver, Colo., for The Denver Fire Clay Co.

Mr. Hugh A. Locke, of Birmingham, Ala., for Dixie Fire Brick Co., Inc.

Mr. Henry Brouillette, of Los Angeles, Calif., for Emsco Refractories Co.

Pentz & Silberblatt, of Clearfield, Pa., for J. H. France Refractories Co.

Montgomery, McCracken, Walker & Rhoads, of Philadelphia, Pa., for General Refractories Co.

Willson, Cunningham & McClellan, of St. Louis, Mo., for A. P. Green Fire Brick Co.

Mr. James E. MacCloskey, Jr., of Pittsburgh, Pa., for Harbison-Walker Refractories Co. and W. B. Coullie.

Mr. Howard Van Antwerp, Jr., of Ashland, Ky., for The Ironton Fire Brick Co.

Davis, Polk, Wardwell, Sunderland & Kiendl, of New York City, for Johns-Manville Corp.

Cobbs, Logan, Roos & Armstrong, of St. Louis, Mo., for Laclede-Christy Clay Products Co.

Adams, Childs, McKaig & Lukens, of Philadelphia, Pa., for E. J. Lavino & Co.

Ropke, Goldstein, Lampe & Roynter, of Louisville, Ky., for Louisville Fire Brick Works, Inc.

Reed, Smith, Shaw & McClay, of Pittsburgh, Pa., for The McLain Fire Brick Co.

Fry & Edwards, of Mexico, Mo., for Mexico Refractories Co. and Frank Piatt.

Mooney, Hahn, Loeser, Keough & Freedheim, of Cleveland, Ohio, for North American Refractories Co., H. H. Hopwood, J. D. Ramsay and E. M. Weinfurtnner.

Gregory, Gilruth & Hunter, of Chicago, Ill., for Plibrico Jointless Fire Brick Co.

Mr. M. Harvey Smedley, of New York City, for Guigley Co., Inc.

Embery, Outtersen & Fuges, of Philadelphia, Pa., for Richard C. Remy Son Co.

Slabaugh, Guinther, Jeter & Pflueger, of Akron, Ohio, and *Sanders, Gravelle, Whitlock & Howrey*, of Washington, D. C., for The Robinson Clay Products Co.

Hammack, McWilliams & Hammack, of Los Angeles, Calif., for St. Louis Fire Brick & Insulation Co.

Frost & Jacobs, of Cincinnati, Ohio, for The Charles Taylor Sons Co.

Complaint

44 F. T. C.

Prendergast & Prendergast, of Marshall, Tex., for Thermo Fire Brick Co. and Howard Hicks.

Mr. Frank C. Miller, and *Campbell, Houck & Thomas*, of Pittsburgh, Pa., for Union Mining Co.

Hill, Morgan & Farrer, of Los Angeles, Calif., for Vitrefrax Corp.

Mr. T. M. Pierce and *Mr. A. M. Menzi*, of St. Louis, Mo., for Walsh Refractories Corp.

Mr. Wallace Cooper, of St. Louis, Mo., for Wellsville Fire Brick Co.

Waite, Schindel & Bayless, of Cincinnati, Ohio, for the Executors of the Estate of Arthur P. Taylor.

Strong, Sullivan, Saylor & Ferguson, of Philadelphia, Pa., for R. P. Trump.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of section 5 of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

NATURE OF CHARGES

PARAGRAPHS 1. The charges as hereinafter set forth are to the effect that the respondents have combined and conspired to lessen competition and to restrain trade and commerce in the sale of refractories and refractory products, including nine-inch straight brick, special shapes, fire brick cement and high temperature mortars, in commerce, as "commerce" is defined in the Federal Trade Commission Act; that respondents have been and are making effective such combination and conspiracy through cooperative and collective action among themselves and with others; and that each respondent engaged in the manufacture and sale of refractories and refractory products, including 9-inch straight brick, special shapes, fire brick cement, and high temperature mortars, uses noncompetitive and unfair discriminatory methods and practices in furtherance of, and to make more effective, the objective of the said combination and conspiracy.

Complaint

DESCRIPTION OF RESPONDENTS

PAR. 2. (1) Respondent, American Refractories Institute, sometimes hereinafter referred to as institute, is a trade association organized and existing as a corporation under and by virtue of the laws of the State of Pennsylvania, with offices in the Oliver Building, Pittsburgh, Pa. Manufacturers and sellers of refractories and refractory products, listed and described in this paragraph, Nos. (2) to (40), inclusive, are represented in the membership of the said institute. The membership of the said respondent institute constitutes a class so numerous and changing as to make it impracticable to specifically name each of them all parties respondent herein. The manufacturers and sellers of refractories and refractory products who are listed and described in this paragraph, Nos. (2) to (40), inclusive, are represented in the membership of said institute, they are fairly representative of its whole membership, and are named as respondents herein in their individual capacities, in the capacities in which they have been represented, in the membership of said respondent, the American Refractories Institute, and as representatives of all members of said respondent, American Refractories Institute, as a class, including those not herein specifically named, who are also made respondents herein. Such respondents will sometimes hereinafter be referred to collectively as the corporate respondents, each of which has throughout at least a substantial part of the period covered by this complaint collaborated with and joined up with others, including all of the corporate respondents herein, in the cooperative and collective action hereinafter alleged. Each such respondent has also knowingly committed acts, or employed methods, practices or policies, with the foreseeable effects and results of aiding, abetting, encouraging, and otherwise furthering the purposes and objectives of the unlawful combination and action taken pursuant thereto, as hereinafter alleged. They are more particularly described as follows: (2) Respondent, Aetna Fire Brick Co., is an Ohio corporation with its office and principal place of business at Oak Hill, Ohio. (3) Respondent, The Babcock & Wilcox Co., is a New Jersey corporation with its office and principal place of business located at 85 Liberty Street, New York City. (4) Respondent, Botfield Refractories Co., is a Delaware corporation with its office and principal place of business located at Swanson and Clymer Streets, Philadelphia, Pa. (5) Respondent, Chicago Fire Brick Co., is an Illinois corporation with its office and principal place of business located at 1467 Elston Avenue, Chicago, Ill. (6) Respondent, Chicago

Complaint:

44 F. T. C.

Retort & Fire Brick Co., is an Illinois corporation with its office and principal place of business located at 208 South La Salle Street, Chicago, Ill. (7) Respondent, Climax Fire Brick Co., is a Pennsylvania corporation with its office and principal place of business located at Climax, Pa. (8) Respondent, The Davis Fire Brick Co., is an Ohio corporation with its office and principal place of business located at Oak Hill, Ohio. (9) Respondent, The Denver Fire Clay Co., is a Colorado corporation with its office and principal place of business located at 2301 Blake Street, Denver, Colo. (10) Respondent, Dixie Fire Brick Co., Inc., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at 823 Woodward Building, Birmingham, Ala. (11) Respondent, Emsco Refractories Co., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at 5601 South Boyle Avenue, Vernon, Calif., with its mail address given as P. O. Box 2313, Los Angeles, Calif. (12) Respondent, J. H. France Refractories Co., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at Snow Shoe, Pa. (13) Respondent, General Refractories Co., is a Pennsylvania corporation with its office and principal place of business located at 1600 Real Estate Trust Building, Philadelphia, Pa. (14) Respondent, A. P. Green Fire Brick Co., is a Missouri corporation with its office and principal place of business located at Mexico, Mo. (15) Respondent, Harbison-Walker Refractories Co., is a Pennsylvania corporation with its office and principal place of business located at 1800 Farmers Bank Building, Pittsburgh, Pa. (16) Respondent, Illinois Clay Products Co., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at Joliet, Ill. (17) Respondent, The Ironton Fire Brick Co., is an Ohio corporation with its office and principal place of business located at Ironton, Ohio. (18) Respondent, Johns-Manville Corp., is a New York corporation with its office and principal place of business located at New York City. (19) Respondent, Laclede-Christy Clay Products Co., is a Missouri corporation with its office and principal place of business located at 1711 Ambassador Building, St. Louis, Mo. (20) Respondent, E. J. Lavino & Co., is a Delaware corporation with its office and principal place of business located at 1528 Walnut Street, Philadelphia, Pa. (21) Respondent, Louisville Fire Brick Works, Inc., is a Kentucky corporation with its office and principal place of business located at Louis-

773 . . .

Complaint

ville, Ky. (22) Respondent, The Massillon Refractories Co., is an Ohio corporation with its office and principal place of business located at Massillon, Ohio. (23) Respondent, The McLain Fire Brick Co., is a Delaware corporation with its office and principal place of business located at 1239 Gulf Building, Pittsburgh, Pa. (24) Respondent, Mexico Refractories Co., is a Missouri corporation with its office and principal place of business located at Mexico, Mo. (25) Respondent, National Refractory Co., is a corporation, the place of whose incorporation is not known to the Commission, with its principal office and place of business located at 3001 South Fife Street, Tacoma, Wash. (26) Respondent, North American Refractories Co., is a Delaware corporation with its office and principal place of business located at National City Bank Building, Cleveland, Ohio. (27) Respondent, The Oak Hill Fire Brick & Coal Co., is an Ohio corporation with its office and principal place of business located at Oak Hill, Ohio. (28) Respondent, Plibrico Jointless Fire Brick Co., is an Illinois corporation with its office and principal place of business located at 1800 Kingsbury Street, Chicago, Ill. (29) Respondent, The Pyro Clay Products Co., is an Ohio corporation with its office and principal place of business located at Oak Hill, Ohio. (30) Respondent, Quigley Co., Inc., is a New York corporation with its office and principal place of business located at 56 West Forty-fifth Street, New York City. (31) Respondent, Richard C. Remmey Son Co., is a Pennsylvania corporation with its office and principal place of business located at Hedley Street and Delaware River, Philadelphia, Pa. (32) Respondent, The Robinson Clay Product Co., is a Maine corporation with its office and principal place of business located at 1100 Second National Bank Building, Akron, Ohio. (33) Respondent, St. Louis Fire Brick & Insulation Co., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at 3050 East Saluson Avenue, Huntington Park, Calif. (34) Respondent, The Charles Taylor Sons Co., is an Ohio corporation with its office and principal place of business located at 706 Burns Street, Cincinnati, Ohio. (35) Respondent, Thermo Fire Brick Co., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at Sulphur Springs, Tex. (36) Respondent, Union Mining Co., is a Maryland corporation with its office and principal place of business located at Oliver Building, Pittsburgh, Pa. (37) Respondent, M. D. Valentine & Bro. Co., is a New Jersey corporation with its office and principal place of busi-

Complaint

44 F. T. C.

ness located at Woodbridge, N. J. (38) Respondent, Vitrefrax Corp., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at 5050 Pacific Boulevard, Los Angeles, Calif. (39) Respondent, Walsh Refractories Corp., is a corporation, the place of whose incorporation is not known to the Commission, with its office and principal place of business located at 4070 North First Street, St. Louis, Mo. (40) Respondent, Wellsville Fire Brick Co., is a Missouri corporation with its office and principal place of business located at Wellsville, Mo.

The directors, officers, chairmen, and members of the various committees, geographical groups, and divisional groups of respondent institute constitutes a class so numerous and changing as to make it impracticable to specifically name each of all such directors, officers, chairmen and members of committees, geographical groups and divisional groups parties respondent herein. Each of the individual respondents described and listed below in this paragraph, Nos. (41) to (49), inclusive, has throughout at least a substantial part of the total period covered by this complaint served as an official, or agent of one or more of the corporate respondents, or of respondent institute, and in such capacity represented the same in its relationships with representatives of other corporate respondents and other sellers of refractories and refractory products in cooperatively and collectively formulating and putting into action the methods, practices and policies alleged herein to be unlawful. Such individual respondents are fairly representative of the individuals who have served as directors, officers, chairmen and members of committees, and officials in the geographical groups and divisional groups of respondent Institute, and are named as respondents herein in their individual capacities, in the capacities in which they have acted as a director, officer, agent or representative of respondent, American Refractories Institute, or as chairman, member, or representative of any of the committees, geographical groups or divisional groups of said respondent institute and as representatives of all members of said respondent, American Refractories Institute, and its directors, officers, committeemen, agents, and representatives, as a class, including those not herein specifically named, who are also made respondents herein.

Whenever the Christian or given names of any of the individual respondents herein named are unknown to the Commission, said Christian or given names are indicated by initial letters, as shown below.

The aforesaid individual respondents are listed and identified as follows: (41) Respondent, J. J. Brooks, Jr., is an individual with his residence located at 617 South Linden Avenue, Pittsburgh, Pa. (42) Respondent, W. B. Coullie, is an individual with his office located at 1800 Farmers Bank Building, Pittsburgh, Pa. (43) Respondent, H. H. Hopwood, is an individual with his office located at National City Bank Building, Cleveland, Ohio. (44) Respondent, Frank Piatt, is an individual with his office located at Mexico, Mo. (45) Respondent, J. D. Ramsay, is an individual with his office located at National City Bank Building, Cleveland, Ohio. (46) Respondent, C. P. Taylor, is an individual with his office located at 706 Burns Street, Cincinnati, Ohio. (47) Respondent, R. P. Trump, is an individual with his office located at 1600 Real Estate Trust Building, Philadelphia, Pa. (48) Respondent, E. M. Weinfurter, is an individual with his office located at National City Bank Building, Cleveland, Ohio. (49) Respondent, W. J. Westphalen, is an individual with his office located at 1872 Railway Exchange Building, St. Louis, Mo.

DESCRIPTION OF THE INDUSTRY AND BUSINESS OF RESPONDENTS

PAR. 3. Each of the respondents listed and described in paragraph 2, Nos. (2) to (40), inclusive, hereof, is a manufacturer of refractories and refractory products, including 9-inch straight brick, special shapes, fire brick, fire-brick cement and high-temperature mortars, as hereinafter defined. Materials for the production of refractories are mined and processed by the corporate respondents principally in the States of Pennsylvania, New Jersey, Ohio, Kentucky, Missouri, Indiana, Illinois, Maryland, Colorado, and California. They are, however, also mined and processed in other States. Refractories are important items in commerce, in that they are used, and must be used, in furnaces and other devices wherever heat is produced of sufficient intensity to melt or soften ordinary metals and ceramic materials. The iron and steel industry takes about 50 percent of the total annual production of refractories. Other large consumers are the glass industry, the copper-smelting industry, the cement industry and the wood-pulp industry. Refractory products and the cost of the same are directly important in the determination of the cost of steel and other items used in the War effort and in the costs incurred by home owners in preparing heating plants to use either coal or oil.

Refractory brick and tile are made from fire clay, or from a rock of high silica content called "Ganister." Fire clay, a natural mineral

Complaint

44 F. T. C.

earth, is usually found adjacent to seams of coal, and is mined either by the use of tunnels and shafts, or by the strip methods in open pits. Ganister is usually found near the surface, and is therefore more readily obtainable. The essential features of the various processes by which such raw materials are converted into refractory products are the crushing, grinding, and sorting of the raw material.

In the manufacture of fire brick additional operations include the possible addition of water to bring the material to the proper consistency, the formation of the desired shape by the use of moulds, and finally the heating or "burning" of the raw brick or tile at such a temperature that a partial fusion of the raw materials takes place, and a so-called "ceramic bond" is produced.

In the manufacture of fire-brick cement from the raw materials, the crushing, sorting, mixing, burning, and grinding of the raw materials are carried to the point of producing a fine powder which contains the essentials of the raw materials mixed in the proportion desired for bonding and heat-resisting qualities.

The refractories industry in the United States includes more than 100 manufacturers, the gross value of whose production amounts to between \$60,000,000 and \$75,000,000 annually. The corporate respondents herein produce, distribute, and sell in excess of 75 percent of the total annual volume of refractory products produced and sold in the United States.

The corporate respondents in the course and conduct of their business have regularly sold and shipped, and do sell and ship, refractories and refractory products, including 9-inch straight brick, special shapes, fire brick, fire-brick cement, and high-temperature mortars, to purchasers at points in the several States of the United States and the District of Columbia other than in the State of origin of the shipments in a regular current and flow of commerce. The term "commerce" as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Except for the adoption of the methods, practices and policies hereinafter described, said corporate respondents would be in active and substantial competition with each other, and others engaged in the refractories industry, in making and seeking to make sales of their products in commerce.

Respondent, institute, though it is not engaged in commerce, is and has for many years last past engaged in cooperating as a coconspirator with the corporate respondents and the individual respondents named herein in carrying out their unlawful acts in commerce in the manner hereinafter set forth.

DEFINITION AND EXPLANATION OF TERMS

PAR. 4. The terms "refractories" and "refractory products," wherever used or referred to in this complaint, mean any material which has a high melting point, is capable of withstanding the action of fuels and furnace gases, and which is suitable for use as an inside lining of furnaces and other heating apparatus.

The term "9-inch straight brick," wherever used or referred to in this complaint, means the standard-size brick of the refractories industry, the usual dimensions of which are approximately 9 by 4½ by 2½ inches, said 9-inch straight brick being a refractory product, as herein defined.

The term "special shapes," wherever used or referred to in this complaint, means all forms and sizes of refractory brick or tile other than 9-inch straight brick, said special shapes being refractory products, as herein defined.

The term "fire brick," wherever used or referred to in this complaint, means all forms and sizes of refractory brick or tile, said fire brick being refractory products as herein defined.

The term "fire brick cement," wherever used or referred to in this complaint, means refractory cement used in the production of mortar to withstand high temperatures, hereinafter called high temperature mortar, used in the bonding of fire brick and other refractory items in the lining of high-temperature furnaces.

The term "base prices," wherever used or referred to in this complaint, means the prices per thousand brick, not including freight, at which 9-inch straight brick of the various types and quantities are sold.

The term "extra charges," wherever used or referred to in this complaint, means the percentages of the base prices which are added to such base prices in computing the prices of special shapes.

OFFENSES CHARGED

PAR. 5. Respondents named in the caption hereof and as listed and described in paragraph 2 hereof have cooperated in the maintenance of and do now cooperate in the maintenance and operation of an unlawful combination (more fully hereinafter described in detail in the specifications of the purposes, acts and results accomplished pursuant thereto) between and among themselves and others not named herein as respondents, to hinder, frustrate, suppress and eliminate competition in the manufacture, sale and distribution of refractories and refractory products, including 9-inch straight brick, special shapes, fire

Complaint

44 F. T. C.

brick, fire brick cement, and high temperature mortars in the course of the aforesaid commerce.

The general purpose and result of the said combination have been and are now accomplished through cooperative and collective action in which respondents have engaged, continued and are now carrying out, the promotion of a common course of action, mutual agreement, understanding and conspiracy to employ and in the actual employment of the acts, methods, systems, practices, and policies hereinafter described and set forth. Through such employment said combination is aided, abetted, encouraged and made more effective by participation of each of the corporate respondents and each of the individual respondents therein through their separate but parallel and concurrent employment and use of the acts, methods, systems, practices, and policies hereinafter set forth.

Pursuant to, in furtherance of, and in order to effectuate the purposes and objectives of the aforesaid combination, respondents as a part of their said common course of action formulated, adopted, performed and put into effect, among others, the overt acts and used the methods, systems, practices and policies listed, described and set forth in the immediately succeeding subparagraphs numbered (1) to (29), inclusive, of this paragraph 5.

(1) Respondents have mutually agreed to fix and maintain, and have collectively fixed and maintained prices at which refractories and refractory products are sold and offered for sale by the corporate respondents herein.

(2) Respondents have mutually agreed to fix and maintain, and have collectively fixed and maintained base prices at which corporate respondents sell and offer for sale 9-inch straight brick and uniform extra charges added to such base prices at which corporate respondents sell and offer for sale special shapes and special sizes of refractory brick and tile.

(3) A number of the corporate respondents herein; namely, Aetna Fire Brick Co., Chicago Retort & Fire Brick Co., Climax Fire Brick Co., The Davis Fire Brick Co., The Denver Fire Clay Co., A. P. Green Fire Brick Co., Harbison-Walker Refractories Co., The Ironton Fire Brick Co., E. J. Lavino & Co. (originally known as Lavino Refractories Co.), Louisville Fire Brick Works, Inc., The Massillon Refractories Co., The McLain Fire Brick Co., The Oak Hill Fire Brick & Coal Co., The Pyro Clay Products Co., The Robinson Clay Product Co., The Charles Taylor Sons Co., Union Mining Co., M. D. Valentine & Bro. Co., Walsh Refractories Corp., and Wellsville Fire Brick Co., and others engaged in the refractories industry being presently

unknown to the Commission, joined and participated in an unlawful combination of collective and cooperative effort through the operation of their trade association, Refractories Manufacturers Association, an unincorporated voluntary association of manufacturers of refractories and refractory products which was organized on or about March 5, 1913, and continued until April 29, 1925. Said corporate respondents used said association throughout that period as an instrument or vehicle for their joint and cooperative purpose and action, and to continue and make more effective conspiracies and practices theretofore engaged in, pursued and used collectively by a number of their group to raise, fix, determine, establish, and maintain arbitrary, artificial, and noncompetitive prices in the sale of refractories and refractory products in commerce.

(4) The aforesaid Refractories Manufacturers Association functioned not only through the separate but parallel and concurrent actions of its individual members, including a number of the corporate respondents herein and others, but also through a president, vice presidents, secretary, treasurer, and various officials who composed its numerous committees. Among such committees was a committee on standardization and a committee on classification. Among such officials were various officials of organized geographical and product district groups and subgroups, including: (a) eastern Pennsylvania, New York, New Jersey, and New England group, (b) Pennsylvania-Maryland group, (c) northern Ohio group, (d) southern Ohio-Kentucky group, (e) Missouri-Illinois group, (f) Rocky Mountain group, and (g) Pacific coast group.

(5) For substantial periods of time during the existence of the aforesaid Refractories Manufacturers Association the following served it in the capacities indicated: One Frederick W. Donahoe, deceased, served as its secretary. One Frank G. Valentine, president of respondent, M. D. Valentine & Bro. Co., served as its president. Respondent, J. E. Lewis, an official of Harbison-Walker Refractories Co., respondent, J. J. Brooks, Jr., official of respondent, Harbison-Walker Refractories Co., Charles H. Claiborne, an official of respondent, Union Mining Co., respondent, H. H. Hopwood, now an official of respondent, North American Refractories Co., one J. M. McKinly, deceased, who then was an official of Crescent Refractories Co., Curwensville, Pa., and who later was an official of respondent, North American Refractories Co., and other persons, represented the Refractories Manufacturers Association as members of its executive committee, standardization committee, classification committee, and in other capacities.

Complaint

44 F. T. C.

(6) The standardization committee of the said Refractories Manufacturers Association as early as 1913 promulgated for and recommended to the members of the said association a classification of fire brick shapes and sizes other than those of the 9-inch series; for example, classes A, B, and C. Each classification comprised rectangular shapes and sizes falling within prescribed limitations of dimension and weight. Said Standardization Committee further recommended that "prices be computed" on a basis of cubic inches and to add "at least \$6 up extra per thousand to the base price of all shapes weighing up to 100 pounds." Subsequently, the recommendations thus made were at a meeting of the members of the said association "approved paragraph by paragraph—and adopted by the association."

(7) During the period 1914 to 1920 the classification committee of the said Refractories Manufacturers Association assumed and performed the function previously performed by the said standardization committee in promulgating for and recommending to the members of the said association extra charges to be made for each of a number of classes of special shapes and sizes of refractory brick and tile. During 1920 it, in turn, was replaced by a classification engineer, the aforesaid J. M. McKinly, who at their direction proceeded to co-operate with and assist those of the corporate respondents herein who were then members of the said Refractories Manufacturers Association by promulgating for and recommending to them extra charges to be made and which they did make on special shapes and special sizes of refractory brick and tile. The said J. M. McKinly actively engaged in the work of developing and classifying numerous so-called irregular shapes and sizes of refractory brick and tile and within 5 years had completed his brick and tile price list of approximately 40,000 so-called rectangular shapes and lists of many other special shapes and sizes. For each such shape and size he prepared an "extra charge" in terms of a percentage variation from the base price being quoted and charged by the corporate respondents for 9-inch straight brick and tile. He recommended to the members of the said Refractories Manufacturers Association and later to other corporate respondents herein that they adopt and use his said classification and percentage plan of "extra charges" for pricing special shapes and sizes of refractory tile and brick by adding them to said base prices for 9-inch straight refractory brick and tile. Pursuant to such recommendations of said J. M. McKinly and in cooperation and collective action with all other corporate respondents each of the corporate respondents herein adopted and used, has continued and does now use the aforesaid J. M. McKinly classification and percentage plan of

"extra charges," together with such revisions as were determined upon from time to time as a result of collective consideration, suggestion, and direction by said respondents.

(8) On or about April 14, 1925, representatives of all the corporate respondents herein except respondent North American Refractories Co., together with representatives of other manufacturers and sellers of refractory products, created, organized, and caused to be incorporated under the laws of the State of Pennsylvania respondent American Refractories Institute to serve the corporate respondents as a trade association through their representatives, in the promotion of their mutual interests, and now use said institute as an instrument or vehicle for their joint cooperative purpose and action in hindering, frustrating, suppressing, and eliminating competition in price and otherwise in the sale and distribution of refractories and refractory products in commerce. Throughout the period since about 1929 respondent, North American Refractories Co., has been represented in the membership of respondent institute and has continuously engaged in cooperative and collective action with the other corporate respondents in using the said institute for their joint and cooperative purpose and action in hindering, frustrating, suppressing, and eliminating competition in the sale of refractories and refractory products in commerce as aforesaid.

(9) Respondent institute has, since its organization in 1925, functioned not only through the separate but parallel and concurrent action of its individual members, including representatives of the corporate respondents and others, but also through a board of directors, president, vice presidents, secretary-treasurer, and various officials who have composed its numerous committees, including an executive committee, special committee, classification committee, steering committee, traffic committee, and dealer-code of ethics committee. Respondent institute has also functioned through various officials of its organized geographical and product divisions, district groups and sub-groups, including: (a) Pennsylvania district group; (b) Colorado, Montana, Wyoming, district group; (c) Ohio, western Pennsylvania, West Virginia district group; (d) Texas district group; (e) Alabama, Virginia, Tennessee district group; (f) Kentucky district group; (g) New Jersey, New England, Maryland district group; (h) Missouri, Illinois, Indiana district group; (i) northern California district group; (j) southern California district group; (k) Washington, Idaho district group; (l) ladle and hot top division; (m) basic refractories division; (n) silica refractories division; (o) plastic fire clay division; (p) specialty refractories division; (q) sleeves,

Complaint

44 F. T. C.

nozzle, and runner brick division; and (r) fire brick and tile division.

(10) The manufacturers and sellers of refractories and refractory products, including corporate respondents, individual respondents, and their representatives, have organized between and among themselves a "fire brick division" of the industry which functions not only through the separate but parallel and concurrent action of its individual members, including representatives of corporate respondents and others, but also through various officials, members of committees and organizations of geographical groups and subgroups. Through such means and agents policies, plans and programs are promulgated, organized, and executed in hindrance, frustration, suppression and elimination of price competition in the sale of refractory brick and tile, including fire clay brick, 9-inch straight brick, special shapes and sizes, in commerce.

(11) The Specialty Refractories Division of the respondent institute functions not only through the separate but parallel and concurrent action of its individual members, including representatives of the corporate respondents and others, but also through a board of directors, secretary, treasurer and various officials who compose its numerous committees, including an executive committee, special committee, classification committee, traffic committee, and dealer code of ethics committee. Said division also functions through various geographical groups and subgroups thereof which promulgate, organize and execute policies, plans, and programs in the hindrance, frustration, suppression, and elimination of price competition in the sale of fire brick cement and high temperature mortars in commerce.

(12) For substantial periods of time since the organization of respondent Institute the following served it either as officers, directors or as members of one or more of its various committees and district groups and divisions: John M. Baggott, J. E. Brinckerhoff, J. J. Brooks, Jr., W. B. Coullie, C. C. Edmunds, J. C. Evans, James Graham, A. P. Green, John L. Green, Floyd L. Greene, R. E. Griffith, R. A. Hitchins, Howard Hicks, H. H. Hopwood, O. L. Jones, J. E. Lewis, E. F. Myers, James A. Patterson, W. H. Peterson, Frank Piatt, Herbert B. Plunkett, J. D. Ramsay, J. T. Roberts, F. C. Sammons, W. A. S. Schaefer, Charles C. Small, R. R. Smith, C. P. Taylor, Drew M. Thorpe, R. P. Trump, E. M. Weinfurtner, W. J. Westphalen, and Raymond Willey.

(13) The officers, board of directors, executive committee, and steering committee of the respondent institute promulgated, organized, and executed the general policies, plans, and programs of the insti-

tute in hindering, frustrating, suppressing, and eliminating price competition as alleged herein.

(14) Corporate respondents, directly and through individuals named as respondents herein, control the affairs and policies of respondent institute, and more particularly the membership, affairs and policies of the aforesaid special committee of respondent institute which has been maintained and operated by all respondents herein for the purpose of formulating, devising for and recommending to the corporate respondents uniform scales of extra charges applicable to special shapes and special sizes of refractory brick and tile, and uniform quantity discounts and special discounts applicable to all refractory products; and respondents from time to time cooperatively and collectively through said special committee and through other methods, ways and means have formulated, devised, and recommended to, and caused to be adopted and used by corporate respondents scales of uniform extra charges applicable to special shapes and special sizes of refractory brick and tile and uniform quantity discounts and special discounts applicable to all refractory products in their sale and distribution of such products in commerce.

(15) Respondents have held meetings and discussed, and do now hold meetings from time to time and discuss, the occasional failure or refusal of some manufacturers and sellers of refractories and refractory products to abide by the uniform base prices, schedules of extra charges, and discounts formulated, adopted, and used as aforesaid. During the course of such meetings and discussions respondents have agreed and are now parties to an agreement among themselves that collective efforts be made, and which are made, to induce offending members of the industry to adhere to the uniform base prices, schedules of extras and discounts agreed upon, formulated, adopted and used as aforesaid by corporate respondents.

(16) The classification committee of respondent institute has from time to time formulated, devised for and recommended to the corporate respondents fire-clay brick classifications which they adopted and used as a part of their collective considerations and agreements on base prices for 9-inch straight brick and on extra charges for special shapes and special sizes of refractory brick and tile. For a substantial period of time respondent W. B. Coullie served corporate respondents as chairman of said classification committee in performing the work as aforesaid which previously had been performed in part for the corporate respondents by the aforesaid J. M. McKinly when he served

Complaint

44 F. T. C.

as classification engineer of the Refractories Manufacturers Association as hereinbefore set forth.

(17) Respondent cooperatively and collectively through the traffic committee of respondent institute (which committee for a substantial period of time has operated under the chairmanship of respondent R. P. Trump) have formulated, devised, and prepared for and recommended to the corporate respondents certain common pricing factors which have been and are incorrectly designated as "freight rates" and which factors have been and are for the purpose and promote the result of enabling the respective corporate respondents to match their delivered price quotations or delivered costs as quoted by them to any intending purchaser at a given destination on any of the products offered by them for sale in commerce. Corporate respondents have proceeded to use and do now use the common pricing factors so recommended to them as aforesaid by the said traffic committee, respondent R. P. Trump, and other of their common agents upon whom they have and do now depend for such recommendations and service.

(18) For the purpose and with the result of assisting corporate respondents in the matching of their quotations of delivered costs and delivered prices, respondents have been taken collective action designed to and which has had the effect of equalizing transportation costs on shipments of refractories and refractory products from any and all of their plants located in a given general geographical area to any given destination although such plants are variously located with regard to such destination on a mileage basis.

(19) The dealer-code of ethics committee (sometimes referred to by representatives of the corporate respondents as the reorganization committee) of respondent institute on or about June 13, 1938, formulated, devised, and prepared for the corporate respondents and recommended to them for their adoption and use a so-called code of ethics and fair trade practices which provided for the fixing of specified terms of sale for refractories and refractory products, prohibitions against certain service guarantees, and the adoption of uniform business practices and terms designed to enforce and make more effective the aforesaid price-fixing agreements of the respondents. The plans and provisions thus recommended by the said dealer-code of ethics committee of respondent institute have resulted in and do now promote a further lessening of competition and fixing prices in the sale of refractories and refractory products.

(20) During the period of the National Industrial Recovery Act, 1933-1935, the corporate respondents utilized and abused the privileges afforded them under said act to further promote and establish

their price-fixing agreements, mutual understandings, common course of action, and cooperative effort to restrain trade and lessen competition in the sale of refractories and refractory products in commerce.

(21) Corporate respondents have reported to, filed with, and exchanged between and among themselves directly and indirectly through respondent Institute and otherwise intimate details of each other's business. Information thus filed and exchanged between and among said corporate respondents have included such details as the names of certain of their customers, the prices paid by each of such customers, the terms and conditions upon which particular and individual sales are made by particular corporate respondents, and the volume of business placed in particular instances with particular corporate respondents by its customers.

(22) Corporate respondents have filed and exchanged their respective price lists between and among themselves directly and through respondent Institute. Said price lists contained the basing point prices on carload quantities of fire brick cement and fire brick and the delivered price quotations for and within various price zones on less than carload quantities of fire brick cement, hereinafter described.

(23) Corporate respondents, in cooperation with each other, have throughout several years last past, promulgated lists of base prices of refractories and refractory products after holding meetings and discussions among themselves and with others and have caused such lists to be anonymously announced and published to the general public as market prices through the cooperation of various publishers of trade papers, including the publishers of the trade paper Steel.

(24) Corporate respondents, by mutual agreement, have adopted and used and now use a price leadership plan whereby respondent, Harbison-Walker, and respondent, General, generally lead in the announcement and publication of price increases and decreases on refractories and refractory products. Pursuant to and as a part of such price leadership "plan," the price announcements and publications of respondent, Harbison-Walker, and respondent, General, are adopted and followed by other corporate respondents in their sale of refractories and refractory products in commerce.

(25) Corporate respondents have concurrently adopted, maintained, and used uniform definitions of various classes of purchasers of refractories and refractory products, so that corporate respondents all classify their respective customers in the same manner for pricing purposes; have concurrently fixed, established, and maintained standard differentials in prices between different classes of customers;

and have concurrently adopted and maintained uniform contracts for the sale of refractories and refractory products.

(26) Corporate respondents have mutually agreed to enter into and cooperatively enforce written "minimum resale price agreements" with their respective dealers and customers pursuant to and under which such dealers and customers are required to maintain in their resale of refractories and refractory products the resale prices prescribed and cooperatively and collectively determined and mutually agreed upon by corporate respondents in said resale price agreements.

(27) Corporate respondents have attempted to keep up an appearance of genuine competition and have made false claims and deceived buyers regarding same in their submission of bids and price quotations to buyers of refractories and refractory products, while in reality they were acting collusively and collectively in an effort to frustrate and suppress competition and honest rivalry between and among themselves.

(28) Corporate respondents have agreed to adopt and have adopted and maintained systems of delivered-price quotations and delivered costs designed to prevent and which do prevent reflection in such quotations or costs of any differences in costs of raw materials or freight from the corporate respondents' respective places of manufacture to the places of business of intending purchasers of refractories and refractory products. Said systems deprive some of said purchasers of advantages in delivered costs which would otherwise accrue to them because of their proximity to the places of production.

(29) Corporate respondents through cooperative and collective action have adopted and used various price fixing formulae in making and announcing their price quotations and in such a way that the delivered costs of their respective products to any purchaser are matched and made identical by all members, regardless of which one of them may supply any purchaser or user and regardless of which producing plant the goods are purchased and shipped from. Such results are obtained by said corporate respondents through their separate but parallel and concurrent employment and use of the pricing methods which for convenience here are referred to as the freight equalization pricing practice or system and the zone pricing practice or system and which are more fully and particularly described in paragraphs 6, 7, and 8 hereof.

PAR. 6. Each corporate respondent in its offers to sell fire brick and fire-brick cement, for the purpose and with the result of making more effective the matching of its delivered price quotations with the de-

livered price quotations of the other corporate respondents and the consequent hindrance, frustration, suppression and elimination of price competition through the operation of the unlawful combination alleged in paragraph 5 hereof, with knowledge that each other corporate respondent concurrently does likewise, generally refrains from quoting f. o. b. its place of production or shipment prices that are independent of and unrelated to a freight equalization pricing practice or system and to a zone pricing practice or system, which are more fully described and set forth in paragraphs 7 and 8 hereof.

Each corporate respondent in its offers to sell fire brick and fire brick cement, for the purpose and with the result of making more effective the matching of its delivered price quotations with the delivered price quotations of the other corporate respondents and the consequent hindrance, frustration, suppression and elimination of price competition through the operation of the unlawful combination alleged in paragraph 5 hereof, and for the further purpose and with the effect of keeping other corporate respondents informed as to what its prices are to be and of matching its quotations of delivered prices or delivered costs with those of other corporate respondents as made to any intending purchaser, with knowledge that each other corporate respondent concurrently does likewise, uses the freight equalization pricing practice or system and the zone delivered pricing practice or system more fully described in paragraphs 7 and 8 hereof. Each corporate respondent thereby assists each other corporate respondent in maintaining a situation whereby purchasers are unable to find any difference or advantage in the delivered price or delivered cost quotations of one corporate respondent as against those of other corporate respondents.

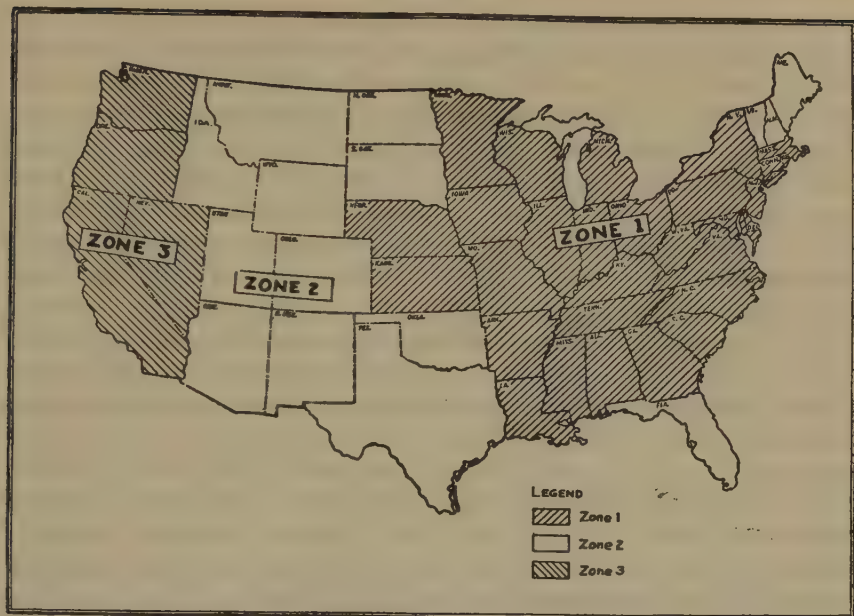
PAR. 7. Respondents' freight equalization delivered price practice or system.—Each corporate respondent, in arriving at the figures quoted in its published price lists relating to fire brick and to carload quantities of fire brick cement, provides that the delivered cost quoted to any intending purchaser or user at destination shall be the figure resulting from use of a formula composed of an f. o. b. factory price quotation plus whatever freight factor is necessary to exactly equalize or match the sum of a base price at certain specified basing points plus freight from some one of such basing points to the buyer's destination as announced by some one or more of the corporate respondents, with the result that all corporate respondents are enabled to match their quotations on fire brick and carload quantities of fire brick cement to any intending purchaser or user at his destination.

Said corporate respondents produce fire brick and carload quantities of fire brick cement and ship same to their respective customers from points other than the points used as the basing points from which freight is equalized and their quotations of delivered costs matched.

Each corporate respondent, in its use of the aforesaid freight equalization delivered price practice or system, notwithstanding differences in the actual freight rates from its place of business and manufacture to the different locations of its different customers and lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, exacts, and receives as an inherent and necessary incident to the freight equalization practice of delivered price quotations substantially larger net amounts per unit of product from its customers located at or near its place of business and manufacture than from other customers located at greater distances. Such nearby customers are thereby required to pay more, and more distant customers to pay less, to the respective corporate respondents for fire brick and fire brick cement than would be the case were their price quotations determined by the forces of competition.

Each corporate respondent, as aforesaid, uses said freight equalization pricing practice or system as a device by which it and other corporate respondents are aided not only in suppressing price competition, but incidentally in depriving their respective nearby customers of price advantages which otherwise the latter would naturally enjoy by reason of their proximity to the place of production. As a necessary and inherent incident to such pricing practices each corporate respondent discriminates against its nearby customers in favor of those more distantly located.

PAR. 8. *Respondent's zone delivered pricing practice or system.*—Each corporate respondent has adopted and now uses the practice of quoting an arbitrarily determined and noncompetitive delivered price to all customers located within a certain geographical "Zone" for less than carload quantities of fire brick cement, and in doing so has arbitrarily divided the United States into three zones, as shown by the map immediately following:



The delivered price quotations made to any intending purchaser wherever located within zone 1 are identically the same for a specified quantity of fire brick cement in less than carload lots. The same is true with respect to delivered price quotations made to any intending customer wherever located within zone 2 except that the price thus quoted is somewhat higher than the price quoted to customers located within zone 1. The same is true with respect to the delivered price quotations made to any intending purchaser wherever located within zone 3 except that the prices thus quoted are higher than those quoted with zone 2 and on occasions are made only after inquiry is made of officials of the specialties division.

The delivered price quotations thus made consist of a plant selling price plus an averaged freight rate factor. The averaged freight rate factor for each zone is a figure representing an average rate of freight from certain points within the zone involved, and designated by each corporate respondent as a "distribution point," to certain arbitrarily selected points in the zone. In the case of zone 1, warehouse stocks are maintained by each of the corporate respondents in a number of cities which are recognized by each of the corporate respondents as major distributing centers. From such distributing centers rather than from the producing points, the freight is computed

and averaged. This average is then taken and used as a pricing factor to be added to the plant selling price in calculating and computing the delivered price quotation to any customer located within the zone involved despite the fact that many such intending purchasers and users are located at or near the place of manufacture and shipment and other purchasers and users are located great distances away, and that many purchasers and users are not located at the aforesaid arbitrarily selected delivery points but at places taking different rates of freight from the distributing points; also despite the fact that the cost of shipping fire brick cement from its place of manufacture ranges from zero with respect to customers who take delivery at its place of manufacture to very substantial amounts which form a substantial part of the net prices realized from the delivered price quotations when sold to customers located at distances of 100 miles or more from the place of manufacture.

Each corporate respondent uses the aforesaid zone delivered pricing practice or system in order that it and the other corporate respondents might match, and through its use they are enabled to and do match, the delivered cost as quoted by all of the other corporate respondents to any intending purchaser or user of fire brick cement at any destination at a given time.

Each corporate respondent, through the use of the aforesaid zone delivered pricing practice or system, notwithstanding differences in the actual freight rates from its place of business and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, exacts and receives, as a necessary and inherent incident to the aforesaid zone delivering pricing practice or system, larger net sums and amounts for products of equal quality and quantity from its customers located at or near its place of business or manufacture than from customers located at greater distances. Such nearby customers are thereby required to pay more and the more distant customers to pay less to the respective corporate respondents for fire brick cement than would otherwise be the case if the forces of competition made and determined the price quotations of each such corporate respondent.

Each corporate respondent, as aforesaid, uses said zone delivered pricing practice or system as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which otherwise they would naturally enjoy by reason of their proximity to points of production, but as a necessary and inher-

ent incident of such use it discriminates against its nearby customers in favor of other customers more distantly located.

PAR. 9. The inherent and necessary effects of the adoption and maintenance by the corporate respondents of the delivered-price systems and practices described and alleged in paragraphs 6, 7, and 8 herein include all and singularly the following, to wit:

(1) They eliminate all price competition between corporate respondents in the sale of said refractories and refractory products in their respective markets and all competition naturally inherent in markets adjacent to several places of manufacturing and distribution of said products although far removed from each other.

(2) They fix and control by concurrent and parallel action of all corporate respondents, an arbitrary and substantial portion of the total cost of the product to any and every purchaser upon a basis having no relation to differences in cost of production, in selling costs, in actual transportation cost, or in profits on particular sales. Such arbitrary result is accomplished notwithstanding substantial differences in the delivered cost to the respective corporate respondents for raw materials shipped to them and for finished refractories and refractory products shipped by them to their respective customers.

(3) They levy an additional financial burden in varying arbitrary sums upon a large number of purchasers from any and all respondents, for the sole purpose of reimbursing respondents for losses voluntarily incurred on other sales in order to accomplish their unlawful purpose to destroy price competition in the sale of refractories and refractory products and to create for the corporate respondents a monopoly therein and thereof.

(4) They constitute unfair and oppressive discrimination against the refractory purchasing public in large areas of the United States by depriving such purchasers of the advantage otherwise accruing to them from proximity of such purchasers to the factories of corporate respondents and by compelling such purchasers to pay increases over what the net price of refractories and refractory products to such purchasers would have been if fixed by competition among respondents, such differences in net price approximating the advantages in freight rates enjoyed by such purchasers over purchasers remote from such factories; thus compelling such nearby purchasers to pay not only the actual freight rates on the products purchased by them respectively, but also in effect to pay portions of the cost of transportation of such products to other and more distant purchasers from such factories.

(5) They substantially lessen competition among corporate respondents in all parts of the United States, each respondent member voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over all competitors within the local market nearer freightwise to its factory than to the factory of a competitor, in consideration of a similar surrender and cancellation by other respondent members.

(6) They contribute to unnecessary and undue enhancement of costs of materials used by industries directly engaged in producing supplies for use in the war effort of the United States.

PAR. 10. The combinations, agreements, and understandings of the respondents and the acts, practices, pricing methods, systems, devices, and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; promote discrimination against some buyers and users of refractories and refractory products; have a dangerous tendency and capacity to restrain unreasonably commerce in said products; have actually hindered, frustrated, suppressed and eliminated competition in such products in commerce, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of section 5 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 February 5, 1943, issued and subsequently served its complaint in this proceeding on the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the filing of respondents' answers to said complaint, testimony and other evidence were introduced and certain stipulations of facts were made on the record before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence and stipulated facts were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint, answers, testimony and other evidence, and stipulated facts, together with proposed findings as to the facts, conclusion, and order recommended by counsel supporting the complaint (the recommended decision of the trial examiner and other intervening procedure having been waived); and the Commission, having duly considered the matter and being now

fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (A) Respondent, American Refractories Institute (sometimes hereinafter referred to as institute), is a trade association organized and existing as a corporation under and by virtue of the laws of the State of Pennsylvania. Its office is presently located in the Railway Exchange Building, St. Louis, Mo.

(B) 1. The respondents named in this subparagraph, and sometimes hereinafter referred to collectively as "corporate respondents," are manufacturers and sellers of refractories and refractory products. Except as otherwise specifically stated in this subparagraph, each of them is a member of respondent institute, the membership of which constitutes a class so numerous and changing as to make it impracticable to specifically name every member as a party respondent. The corporate respondents named in this subparagraph are fairly representative of the whole membership of the institute and are named herein, as charged in the complaint, individually and as representatives of all members of said institute as a class, including those not specifically named.

2. Respondent, Aetna Fire Brick Co., is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at Oak Hill, Ohio.

3. Respondent, The Babcock & Wilcox Co., is a corporation organized and existing under the laws of the State of New Jersey, with its office and principal place of business at 85 Liberty Street, New York, N. Y.

4. Respondent, Botfield Refractories Co., is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at Swanson and Clymer Streets, Philadelphia, Pa.

5. Respondent, Chicago Fire Brick Co., is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 1467 Elston Avenue, Chicago, Ill.

6. Respondent, Chicago Retort & Fire Brick Co., is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 208 South La Salle Street, Chicago, Ill.

7. Respondent, Climax Fire Brick Co., is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business at Climax, Pa.

Findings

44 F. T. C.

8. Respondent, The Davis Fire Brick Co., is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at Oak Hill, Ohio.

9. Respondent, The Denver Fire Clay Co., is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 2301 Blake Street, Denver, Colo.

10. Respondent, Dixie Fire Brick Co., Inc. (the respondent named in the complaint as Dixie Fire Brick Co., Inc.), is a corporation organized and existing under the laws of the State of Alabama, with its office and principal place of business at 824 Woodward Building, Birmingham, Ala.

11. As to respondent, Emsco Refractories Co. (the respondent named in the complaint as Emsco Refractories Co.), the complaint in this proceeding was dismissed by order entered on August 7, 1946, for the reasons appearing in such order, and this company is not hereafter referred to in these findings.

12. Respondent, J. H. France Refractories Co., is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business at Snow Shoe, Pa.

13. Respondent, General Refractories Co., is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business at 1600 Real Estate Trust Building, Philadelphia, Pa.

14. Respondent, A. P. Green Fire Brick Co., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business at Mexico, Mo.

15. Respondent, Harbison-Walker Refractories Co. (the concern named in the complaint as Harbison-Walker Refractories Co.), is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business at 1800 Farmers Bank Building, Pittsburgh, Pa.

16. Respondent, Illinois Clay Products Co., is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at Joliet, Ill.

17. Respondent, The Ironton Fire Brick Co., is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at Ironton, Ohio.

18. Respondent, Johns-Manville Sales Corp. (named in the complaint as Johns-Manville Corp.), is a corporation organized and existing under the laws of the State of Delaware, with its office and

principal place of business at New York, N. Y. It is a wholly owned subsidiary of the Johns-Manville Corp.

19. Respondent, Laclede-Christy Clay Products Co. (named in the complaint as Laclede-Christy Clay Products Co.), is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business at 1711 Ambassador Building, St. Louis, Mo.

20. Respondent, E. J. Lavino & Co. (named in the complaint as E. J. Lavino & Co.), is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 1528 Walnut Street, Philadelphia, Pa.

21. Respondent, Louisville Fire Brick Works, Inc., is a corporation organized and existing under the laws of the State of Kentucky, with its office and principal place of business at Louisville, Ky.

22. Respondent, The Massillon Refractories Co., is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at Massillon, Ohio.

23. Respondent, The McLain Fire Brick Co., is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 1239 Gulf Building, Pittsburgh, Pa.

24. Respondent, Mexico Refractories Co., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business at Mexico, Mo.

25. As to respondent, National Refractory Co., the record indicates it is not a member of the institute and the record does not show its participation in the acts and practices hereinafter found. The complaint will be dismissed as to this respondent and it is not hereafter referred to in these findings.

26. Respondent, North American Refractories Co., is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at National City Bank Building, Cleveland, Ohio.

27. Respondent, The Oak Hill Fire Brick & Coal Co., is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at Oak Hill, Ohio.

28. Respondent, Plibrico Jointless Firebrick Co., is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 1800 Kingsbury Street, Chicago, Ill.

Findings

44 F. T. C.

29. Respondent, The Pyro Clay Products Co., is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at Oak Hill, Ohio.

30. Respondent, Quigley Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 527 Fifth Avenue, New York, N. Y.

31. Respondent, Richard C. Remmey Son Co., is a Pennsylvania corporation, with its office and principal place of business at Hedley Street and Delaware River, Philadelphia, Pa.

32. Respondent, The Robinson Clay Product Co., is a corporation organized and existing under the laws of the State of Maine, with its office and principal place of business at 1100 Second National Bank Building, Akron, Ohio.

33. Respondent, St. Louis Fire Brick & Insulation Co. (named in the complaint as St. Louis Fire Brick & Insulation Co.), is a corporation organized and existing under the laws of the State of California, with its office and principal place of business at 3050 East Slauson Avenue, Huntington Park, Calif.

34. Respondent, The Chas. Taylor Sons Co. (named in the complaint as The Charles Taylor Sons Co.), is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at 710 Burns Street, Cincinnati, Ohio.

35. Respondent, Thermo Fire Brick Co., is a corporation organized and existing under the laws of the State of Texas, with its office and principal place of business at 215 East Houston Avenue, Marshall, Tex.

36. Respondent, Union Industries, Inc. (named in the complaint as Union Mining Co., but by change of name now Union Industries, Inc.), is a corporation organized and existing under the laws of the State of Maryland, with its office and principal place of business at Pittsburgh, Pa.

37. Respondent, M. D. Valentine & Bro. Co., is a corporation organized and existing under the laws of the State of New Jersey, with its office and principal place of business at Woodbridge, N. J.

38. Respondent, Vitrefrax Corp., is a corporation organized and existing under the laws of the State of California, with its office and principal place of business at 5050 Pacific Boulevard, Los Angeles, Calif.

39. Respondent, Walsh Refractories Corp., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business at 4070 North First Street, St. Louis, Mo.

40. Respondent, Wellsville Fire Brick Co. (named in the complaint as Wellsville Fire Brick Co.), is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business at Wellsville, Mo.

(C) 1. The respondents named in this subparagraph are individuals who have in each instance, throughout at least a substantial part of the period covered by the complaint herein, served as officials or agents of one or more of the corporate respondents or of respondent Institute, and have represented the same in relationships with representatives of other corporate respondents and other sellers of refractories and refractory products. These individual respondents are fairly representative of the numerous individuals who have served as directors, officers, chairmen, members of committees, and officials in divisional and geographical groups of respondents. All such individuals constitute a class so numerous and changing as to make it impracticable to specifically name each as a respondent herein, and the individual respondents named in this subparagraph are named as charged in their individual capacities and as representatives of all the members of the respondent Institute and their agents, including those not specifically named.

2. Respondent, J. J. Brooks, Jr., is now deceased and the complaint will be dismissed as to him.

3. Respondent, W. B. Coullie, is an individual who served in various capacities as an official of respondent Institute, as chairman of the Classification Committee, and who is at present an official of respondent, Harbison-Walker Refractories Company, with his address at 1800 Farmers Bank Building, Pittsburgh, Pa.

4. Respondent, H. H. Hopwood, is an individual who has served in various capacities as an official of respondent Institute and who is at present an official of respondent, North American Refractories Co., with his address at National City Bank Building, Cleveland, Ohio.

5. Respondent, Frank Piatt is an individual who was formerly president of respondent Institute and who is now an official of respondent, Mexico Refractories Co., with his address at Mexico, Mo.

6. Respondent, J. D. Ramsay, is an individual who has served in various capacities as an official of respondent Institute and who is now the president of respondent, North American Refractories Co., with his address at National City Bank Building, Cleveland, Ohio.

7. Respondent, A. P. Taylor (named in the complaint as C. P. Taylor), is now deceased and the complaint will be dismissed as to him.

8. Respondent, R. P. Trump, is an individual who has served as chairman of the traffic committee of respondent institute and as an

Findings

44 F. T. C.

official of respondent, General Refractories Co., and whose address is in care of counsel representing him in this proceeding.

9. Respondent, E. M. Weinfurtner, is an individual who has served in various capacities as an official of respondent Institute and who is now an official of North American Refractories Co., with his address at National City Bank Building, Cleveland, Ohio.

10. Respondent, W. J. Westphalen, is an individual who was formerly president of respondent, Laclede-Christy Clay Products Co., and who since October 1, 1937, has been president of the respondent institute, with his present address at 1872 Railway Exchange Building, St. Louis, Mo.

(D) The record shows that the following-named concerns, though not specifically named in the complaint, were members of the institute as of June 15, 1945: Acme Brick Co., Fort Worth 2, Tex.; Acme Fire Clay Works, New Cumberland, W. Va.; Alliance Clay Products Co., Alliance, Ohio; Alsey Brick & Tile Co., Alsey, Ill.; Atlantic Refractories Co., 214 Grand Building, Macon, Ga.; Betson Plastic Fire Brick Co., 1417 Jefferson Avenue, Buffalo, N. Y.; Coors Porcelain Co., Eighth and Ford Streets, Golden, Colo.; Denver Sewer Pipe & Clay Co., P. O. Box 2329, Denver 1, Colo.; Diamond Fire Brick Co., Canon City, Colo.; Eberts Clay Co., Wellsville, Ohio; Egan Webster & Co., 2435 Koppers Building, Pittsburgh 19, Pa.; Eureka Fire Brick Works, 1100 Jones Law Building, Pittsburgh, Pa.; Federal Refractories Corp., P. O. Box 350, Akron, Ohio; Garfield Refractories Co., Bolivar, Pa.; Gladding, McBean & Co., 2901 Los Feliz Boulevard, Los Angeles 26, Calif.; Golden Fire Brick Co., P. O. Box 292, Golden, Colo.; Hammond Fire Brick Co., Fairmont, W. Va.; C. P. Hancock & Son, P. O. Box 421, Riverside, Calif.; Hanley Co. Inc., 101 Park Avenue, New York, N. Y.; Hope Fire Clay Co., McArthur, Ohio; The Howard Co., P. O. Drawer 1880, New Haven 8, Conn.; Kittanning Brick Co., P. O. Box 282, Kittanning, Pa.; Logan Clay Products Co., 201 Bowen Street, Logan, Ohio; Glen R. McClintock & Co., Oliver Building, Pittsburgh 22, Pa.; Mount Jewett Fire Clay Co., Mount Jewett, Pa.; New Castle Refractories Co., P. O. Box 230, New Castle, Pa.; Niles Fire Brick Co., 165 E. Paris Avenue, Niles, Ohio; North State Pyrophyllite Co., Inc., Pomona, N. C.; Daniel O'Neill, general delivery, Brookville, Pa.; Osceola Silica & Fire Brick Co., Osceola Mills, Pa.; Pacific Clay Products, 306 West Avenue 26, Los Angeles 31, Calif.; George F. Pettinos, Inc., 1206 Locust Street, Philadelphia, Pa.; Frank B. Pope Co., 2806 Koppers Building, Pittsburgh 19, Pa.; Portsmouth Clay Products Co., South Webster, Ohio; Pyrolite Products Co., 1228 West Seventy-fourth Street,

Claremont & Ohio, The Rutland Co., Ohio Water Hydrant Works, Chicago & Ill., Portland Fire Brick Co., Tanners' Coats and Abrasive Bricks, Pacific Coking Bricks Co., Canton, Ohio, Brown & Butler Refractories Co., 1200 Second National Building, Akron & Ohio, Brown & Butler's Bricks, Inc., P. O. Levee 100, Johnstown, Pa., Brown and Brick & Tile Co., Treadwell, Idaho, East Pitt Clay Co., East Lake City, Utah, White Knight Co., Monaca, Pa., West Lehigh Valley Co., 400 Central Building, Pittsburgh, Pa., West Virginia Brick Co., Charleston, W. Va., Williams-Sawyer Manufacturing Co., Westborough, Ohio, Williams Valley Products Co., 1010 Broadway, New York, Portland, Oreg., and also, in addition, the following were members of the Institute as of March 17, 1911: Portland Co., Milwaukee, Wis., Iowa Fire Brick Co., Kane Building, San Francisco, Calif., Norton-Holmes Fire Brick Co., Wrentham, N. J., Refractories Corp., 5155 Broadway Blvd., Los Angeles, Calif., American Fire Brick Co., Kane Building, San Francisco, Calif.

Par. C. The respondents named in subparagraph (B) of paragraph 1 are engaged in the production, sale, and distribution of refractories and refractory products, and in the various thereof each respondent was named as being respondents in the various that respondent has not been mentioned, named, or designated as hereinafter set forth. Pursuant to such made in the course and conduct of its said business, each said respondent regularly transports refractories or refractory products, or causes them to be transported, from the place in which produced to purchasers thereof at locations in the several States of the United States and in the District of Columbia, and has procured, and now maintains, a constant course of trade and commerce in such products among and between the several States of the United States and in the District of Columbia. The other respondents named in paragraph 1 are not individually engaged in the production, sale, or distribution of refractories or refractory products, but have participated in, aided, assisted, and conspired with the other respondents in planning, doing, and performing the acts and practices hereinafter set forth.

Par. 1. (A) Refractories and refractory products are used in furnaces and other devices where heat is produced of substances pertaining to such or other ordinary metals or ceramic materials. Refractory brick and tile are made from the clay or from a mass of high silica content called gneiss. Such raw materials are converted into refractory products by crushing, grinding, and sintering the raw material, and—in the case of the brick—forming the desired shape by the use of molds, and then heating or "burning" the raw brick or tile in

such temperature that a partial fusion of the raw materials takes place and a so-called ceramic bond is produced. In the case of fire-brick cement the crushing, sorting, mixing, burning, and grinding of the raw materials are carried to the point of producing a fine powder which contains the raw materials mixed in the proportion desired for bonding and heat-resisting qualities. Materials for the production of refractories are mined and processed by the corporate respondents principally in the States of Pennsylvania, New Jersey, Ohio, Kentucky, Missouri, Indiana, Illinois, Maryland, Colorado, and California, although such materials are also mined and processed in other States.

(B) The refractories industry in the United States includes more than 100 manufacturers, the gross value of whose production amounts to between \$60,000,000 and \$100,000,000 annually. Of this total the corporate respondents herein produce, distribute, and sell in excess of 75 percent. The largest consumer of refractories is the iron and steel industry, which takes about one-half of the total annual production of such products. The glass, copper smelting, cement, and wood-pulp industries are also large consumers of refractories.

(C) 1. Insulating fire brick have a low thermal conductivity and a bulk density of less than 70 pounds per cubic foot, and they are not considered to be within the scope of the present proceeding.

2. The terms "refractories" and "refractory products" are used herein to designate any material which has a high melting point, is capable of withstanding the action of fuels and furnace gases, and is suitable for use as an inside lining of furnaces and other heating apparatus.

3. The term "9-inch straight brick," sometimes hereinafter used, means the standard size brick of the refractories industry, the usual dimensions of which are approximately 9 by $4\frac{1}{2}$ by $2\frac{1}{2}$ inches.

4. The term "special shapes," sometimes hereinafter used, means all forms and sizes of refractory brick or tile other than 9-inch straight brick.

5. The term "fire brick" sometimes hereinafter used, means all forms and sizes of refractory brick or tile made from fire clay or silica.

6. The term "fire brick cement," sometimes hereinafter used, means refractory cement used in the production of mortars to withstand high temperatures, sometimes called high temperature mortar, and used in the bonding of fire brick and other refractory items in the lining of high temperature furnaces.

7. The term "base prices," sometimes hereinafter used, means the

price per thousand brick, not including freight, at which 9-inch straight brick of the various types and qualities are sold.

8. The term "extra charges," sometimes hereinafter used, means the percentages of the base prices which are added to such base prices in computing the prices of special shapes.

PAR. 4. (A) Fire brick are made of many grades of raw material, with many different special characteristics for particular uses. There are at least five recognized grades of such brick designated as "high alumina," "super duty," "high heat duty," "intermediate duty," and "low heat duty." Brick of any designated grade produced by one manufacturer is not necessarily identical with that classified in the same grade but produced by another manufacturer, but all brands of fire brick which are classified in the same grade compete primarily with one another and are considered equivalent for pricing purposes. A manufacturer of fire brick may offer a number of different grades of fire brick, with each grade represented by several brands manufactured from clays from different fields and each brand may be offered in as many as 40,000 different shapes and sizes.

(B) The corporate respondents manufacturing fire brick or fire brick cement, or both, are as follows:

Name of respondent:	Products	
Aetna Fire Brick Co.....	Brick	
The Babcock & Wilcox Co.....		Cement
Botfield Refractories Co.....	Brick	Cement
Chicago Fire Brick Co.....		Cement
Chicago Retort & Fire Brick Co.....	Brick	Cement
Climax Fire Brick Co.....	Brick	
The Davis Fire Brick Co.....	Brick	
The Denver Fire Clay Co.....	Brick	Cement
Dixie Fire Brick Co., Inc.....	Brick	Cement
J. H. France Refractories Co.....	Brick	Cement
General Refractories Co.....	Brick	Cement
A. P. Green Fire Brick Co.....	Brick	Cement
Harbison-Walker Refractories Co.....	Brick	Cement
Illinois Clay Products Co.....	Brick	
The Ironton Fire Brick Co.....	Brick	Cement
Johns-Manville Sales Corp.....		Cement
Laclede-Christy Clay Products Co.....	Brick	Cement
E. J. Lavino and Co.....		Cement
Louisville Fire Brick Works, Inc.....	Brick	Cement
The Massillon Refractories Co.....	Brick	Cement
The McLain Fire Brick Co.....	Brick	
Mexico Refractories Co.....	Brick	Cement
North American Refractories Co.....	Brick	Cement
The Oak Hill Fire Brick & Coal Co.....	Brick	
Plibrico Jointless Fire Brick Co.....	Brick	Cement
The Pyro Clay Products Co.....	Brick	Cement

Findings

44 F. T. C.

Name of respondent:

Products

Quigley Company, Inc.....	Brick	Cement
Richard C. Remmey Son Co.....	Brick	
The Robinson Clay Product Co.....	Brick	Cement
St. Louis Fire Brick & Insulation Co.....	Brick	Cement
The Chas. Taylor Sons Co.....	Brick	Cement
Thermo Fire Brick Co.....	Brick	Cement
Union Industries, Inc.....	Brick	Cement
M. D. Valentine & Bro. Co.....	Brick	Cement
Vitrefrac Corp.....	Brick	Cement
Walsh Refractories Corp.....	Brick	Cement
Wellsville Fire Brick Co.....	Brick	Cement

(c) For many years prior to 1913 fire brick manufacturers sold their various shapes and sizes of fire brick at prices roughly proportional to their various weights. A price per thousand 9-inch straight brick was quoted for each brand, and all special shapes of fire brick of that brand were sold at that price, with adjustment on the basis of their relative volume of material, so that the price of different shapes and sizes was directly proportional to their relative volume.

PAR. 5. On or about March 5, 1913, an unincorporated trade association designated as Refractories Manufacturers Association was formed, and it continued in operation until April 29, 1925. Respondents, Aetna Fire Brick Co., Chicago Retort & Fire Brick Co., Climax Fire Brick Co., The Davis Fire Brick Co., The Denver Fire Clay Co., A. P. Green Fire Brick Co., Harbison-Walker Refractories Co., The Ironton Fire Brick Co., E. J. Lavino & Co., Louisville Fire Brick Works, Inc., The Massillon Refractories Co., The McLain Fire Brick Co., The Oak Hill Fire Brick & Coal Co., The Pyro Clay Products Co., The Robinson Clay Products Co., The Chas. Taylor Sons Co., M. D. Valentine & Bro. Co., and Wellsville Fire Brick Co., together with others engaged in the refractories industry, joined said association and participated in its operation. This association functioned not only through its board of directors elected by the corporate respondents just named, and others, but also through a president, vice president, secretary, treasurer, and the various officials who composed its numerous committees, including a committee on standardization and committee on classification, and its numerous organized geographical product district groups and subgroups.

PAR. 6. As early as 1913 the committee on standardization of the Refractories Manufacturers Association promulgated for and recommended to the members of said association a classification of firebrick shapes and sizes other than the 9-inch straight brick and a small group of shapes known as the 9-inch series. Each class consisted of rectan-

gular shapes and sizes falling within prescribed limitations of dimension and weight, which limitations the committee agreed upon as roughly approximating differences in difficulty of manufacture, and the classes were identified, for example, as classes A, B, and C. To each such class a minimum extra charge was assigned, for example, \$3 for class B. This classification was approved and adopted by the members of the association in January 1914. Prior to this time the industry did not have a common set of price differentials; all shapes and sizes had been sold at prices roughly proportional to their weights. After the adoption of the classes, only the 9-inch straight brick and the small number of shapes known as the 9-inch series continue to be sold at a figure adjusted only for weight. All other shapes were priced not only with an adjustment for weight, but also with the addition of an extra charge, the amount depending upon the class to which the special shape was assigned.

PAR. 7. During the period from 1914 to 1920 a committee on classification of the Refractories Manufacturers Association assumed and performed the function, previously performed by the committee on standardization, of promulgating for and recommending to the members of the association extra charges to be made for each of a number of special shapes of firebrick. Beginning in 1920, this committee was replaced by an individual, J. M. McKinley, referred to as "classification engineer," who proceeded to cooperate with and assist those of the corporate respondents herein who were then members of said Refractories Manufacturers Association, and others, by recommending to them extra charges to be made, and which they did make, on special shapes of firebrick. The said J. M. McKinley actively engaged in the work of developing and classifying numerous so-called irregular shapes and sizes of firebrick, within 5 years completed his firebrick price list of approximately 40,000 so-called rectangular shapes and lists of many other special shapes and sizes. For each such shape and size he prepared an extra charge in terms of a percentage variation from a base price quoted and charged by the corporate respondents for 9-inch straight brick. He recommended to the members of the Refractories Manufacturers Association and later to other corporate respondents herein that they adopt and use his said classification and percentage plan of extra charges for pricing special shapes of firebrick. Each of the corporate respondents manufacturing or selling firebrick adopted and used, and has continued to use, and does now generally use in the sale of firebrick this classification and percentage plan of extra charges, as revised and modified from time to time.

Findings

44 F. T. C.

PAR. 8. (A) On or about April 14, 1925, respondents, Chicago Re-tort & Fire Brick Co., Climax Fire Brick Co., General Refractories Co., A. P. Green Fire Brick Co., Harbison-Walker Refractories Co., The Ironton Fire Brick Co., Laclede-Christy Clay Products Co., E. J. Lavino & Co., Louisville Fire Brick Works, Inc., The McLain Fire Brick Co., The Chas. Taylor Sons Co., Thermo Fire Brick Co., Union Industries, Inc., and Wellsville Fire Brick Co., together with representatives of other manufacturers and sellers of refractory products created, organized, and caused to be incorporated under the laws of the State of Pennsylvania respondent American Refractories Institute to serve its members as a trade association. All of the other corporate respondents herein became members of the institute before March 1, 1935.

(B) At various times since its organization the institute has functioned not only through acts of its individual members, but also through a board of directors elected by its members and through a president, vice presidents, secretary-treasurer, and various officials who have composed its numerous committees, including an executive committee, special committee, classification committee, dealer-code of ethics committee, and traffic committee. Certain members of its board of directors were also officials of its product divisions, district groups and subgroups, and of the geographical groups, including the Pennsylvania district group, the Colorado-Montana-Wyoming district group, the Ohio-western Pennsylvania-West Virginia district group, the Texas district group, the Alabama-Virginia-Tennessee district group, the Kentucky district group, the New Jersey-New England-Maryland district group, the Missouri-Illinois-Indiana district group, the northern California district group, the southern California district group, the Washington-Idaho district group, the ladle and hot top division, the basic refractories division, the silica refractories division, the plastic fire clay division, the specialty division, the sleeves, nozzle, and runner brick division, and the fire brick and tile division.

(C) The corporate respondents control the affairs and policies of the Institute and have more particularly controlled the membership, affairs, and policies of the special or classification committee of said institute. This committee was maintained and operated for the purpose and effect of formulating, devising, and recommending to each of the corporate respondents specific extra charges and quantity discounts applicable to special shapes of fire brick. Through this committee and by other means respondents have from time to time formulated, devised, and recommended to each of the corporate respon-

dents specific extra charges and quantity discounts applicable to special shapes of fire brick and special discounts applicable to refractory products for their use in the sale and distribution of such products. For a substantial period of time respondent W. B. Coullie served as chairman of this committee in performing in part the work which J. M. McKinley had previously performed for the Refractories Manufacturers Association. From time to time the committee expanded and supplemented the plan of percentage extra charges devised by J. M. McKinley for the pricing of all shapes of fire brick except the 9-inch straight brick and the 9-inch series. These revisions, expansions, and supplements made the plan more effective as a price-fixing device. A similar plan which was carried over into the classification of silica brick about 1921 was also revised from time to time by the committee. By the end of 1937 the fire brick classification had been revised about seven times and the silica classification about five times. Each revision of the classifications involved substantial changes in the extra charges or percentage extras for some of the special shapes.

(D) None of the various revisions of the fire-brick or silica classifications contained "percentage extras" which exactly reflected the actual cost differentials between the various groups of shapes made by any one manufacturer of fire-clay or silica fire brick. All of the latter revisions of these classifications prepared by the committee, except the 1940 revisions, contained instructions for determining when a quantity discount would be offered on special shapes, together with a table showing the amount of such discount expressed as a reduction in the "percentage extra."

PAR. 9. Many of the special shapes of fire brick are sold to a group of buyers known as arch and wall companies. These concerns sell a service consisting of the design of furnace linings and the purchase of the refractories therefor from the fire-brick manufacturers. Many of the special shapes designed by the arch and wall companies are unusually complex and difficult to make. The classification committee placed such shapes in a separate arch and wall classification which became effective April 1, 1937. In preparing this classification and later revisions thereof, the members of the committee exchanged statistical and other information concerning the sales made by the industry to each arch and wall company. The resulting classification assigned a separate percentage extra to each of the principal shapes and sizes designed by and sold to each of the arch and wall companies. As new shapes were designed from time to time between 1937 and 1939 respondents asked the institute to assign, and it did assign, a percent-

Findings

44 F. T. C.

age extra to such new shapes for use in pricing them. The percentage extra assigned was obtained from the institute by manufacturers who had received orders of the same shape from the same arch and wall company, and such information was frequently requested and given. This arch and wall classification also specified the occasions on which the manufacturers were to charge or were not to charge the arch and wall companies for the cost of the molds.

PAR. 10. (A) Each of the revisions of the fire-clay and silica fire brick and the arch and wall classifications prepared between 1925 and 1937 involved an agreement by the committee members to recommend specific extra charges. In each instance all of the committee members recommended the finished revisions to the board of directors of the institute, except that during the NRA period for 1933-35 the recommendations were to the code authority of the industry, which included the board of directors of the institute and others. In each instance the board of directors or, during NRA, the code authority approved the revision and recommended it for adoption, and the revision was approved at a general meeting of the institute. In some instances the members present voted to adopt the revision, in others the revision was by vote "recommended for adoption," and thereafter each of the corporate respondents manufacturing fire brick adopted and used the classification so recommended in connection with sales made.

(B) At the end of 1937 the classification then in effect for fire-clay firebrick had been last revised in April 1937, and the classification for silica-fire brick in July 1936. Between 1937 and 1939 increasing labor costs made these classifications somewhat obsolete because an adjustment of base prices could not adequately reflect the fact that an increase of labor costs has substantially more effect on the total cost of the more complex and difficult special shapes than it does on the total cost of the base product—the 9-inch straight brick. The classification committee, therefore, began work on new revisions of both the fire-clay and silica firebrick classifications, and this work culminated early in 1940 with an edition of both classifications known as the ninth edition. This edition was completed in May 1940, and 236 copies thereof were distributed to members of the committee and members of the institute for examination prior to consideration of the adoption of an effective date. The setting of an effective date was discussed in an institute meeting on June 5, 1940.

PAR. 11. (A) The Department of Justice began an investigation of the industry early in 1941 and on June 23, 1941, the institute and some of its larger members and their officers were indicted for vio-

lation of the Sherman Act. This indictment charged, among other things, an agreement among the defendants jointly to prepare and use the aforesaid classifications. All of the defendants entered pleas of *nolo contendere* and were fined. On July 10, 1941, at a meeting of the board of directors and members of the institute, several resolutions were adopted, one of which contained the statement that the classification committee was thereby discontinued; and up to the closing of the record in this proceeding classification activities have not been carried on by the institute, and the institute has refused a number of requests for information concerning percentage extras and for distribution of copies of either the May 1940 or earlier revisions of the classifications.

(B) There has been no decree or order which prevents the resumption of classification activity by the institute, and there is a probability it may be resumed. Up to September 19, 1946, each of the corporate respondents manufacturing firebrick continued to use, and now uses, in the sale of firebrick the April 1, 1937, revision of the fire-clay brick classification and the 1936 revision of the silica-brick classification, together with such minor revisions thereof as may have been made since June 10, 1941. The present use of these revisions of the classifications by respondents determines an important element in arriving at the present prices of such products. About 10,000 copies of the fire-clay-brick classification and 1,000 copies of the silica-brick classification, both of the May 1940 revision, were printed. At the time of the indictment the board of directors of the institute ordered these copies retained in storage, where they were at the time of the filing of the complaint herein. On April 27, 1942, the president of the institute stated in a letter that he was still hoping that by action of OPA or other agency of the Federal Government the industry would be permitted to use these books. For most of the period from July 10, 1941, to the closing of the record in this case OPA did not permit the use of percentage extras higher than any which were in use by each company in March 1942. Most of the respondents herein were then using the percentages contained in the 1937 revision.

PAR. 12. Each of the respondents manufacturing fire brick has been a party to an agreement with one or more of the other respondents that each would quote and sell special shapes of fire brick at such percentage additions over base price of 9-inch straight brick and at such quantity discounts as have from time to time been compiled and established for and recommended to them by the classification committee through the board of directors of the institute. In furtherance of such agreement, all respondents manufacturing fire brick have at some time between 1925 and 1941, other than in the NRA pe-

riod of 1933-35, received from the institute or have exchanged directly or through the Institute information concerning the percentage additions and mold costs to be charged to certain named customers, and have used such information in making sales. In furtherance of such agreement, the members of the classification committee have also exchanged statistical and other information which revealed the production of specific manufacturers and, on occasion, the total purchases of and prices paid by specific purchasers. This agreement began in 1913 among the corporate respondents then members of the Refractories Manufacturers Association, and was widened to include the remaining corporate respondents as each joined the institute. Said agreement constitutes an agreement to fix a material portion of the purchase price of special shapes. When the corporate respondents pursued, as they did, a common course of action in simultaneously using specific differentials adopted by agreement for use in making up or announcing their price quotations or for use in making their sales, they were acting in furtherance and in continuation of the aforesaid agreements to fix prices and to otherwise restrain price competition in the sale of refractories and refractory products.

PAR. 13. (A) In 1929 the board of directors of the institute approved a uniform contract for agents, which, after approval by the institute, was printed and circulated to the industry. About June 1938 the dealer-code of ethics committee of the institute completed the formulation of and recommended to the board of directors of the institute a code of ethics and fair-trade practices. The board of directors then recommended this code to the corporate respondents for their adoption and use, and at a regular meeting of the institute said code was adopted. This code contained provisions specifying terms and conditions of sale for refractories and refractory products; amounts of dealer discounts; a prohibition against certain service guarantees; and definitions of a number of types of buyers, including manufacturers agents, dealer-agents, and retail dealers. The committee prepared for the corporate respondents and recommended to them for their adoption and use a set of standard terms of sale which superseded some of the provisions in the code. On September 27, 1939, copies of this recommendation, containing specified terms and conditions of sale for refractories and refractory products, were circulated by the institute to its members. At a meeting of the board of directors and membership of the institute on July 10, 1941, subsequent to the indictment hereinbefore referred to, the dealer-code of ethics committee was discontinued and its activities have not since been carried on by the institute.

(B) Each corporate respondent agreed with one or more other respondents to have the dealer-code of ethics committee of the institute formulate, devise, and prepare for the corporate respondents and recommend to them through the board of directors of the institute for their adoption and use, specified terms and conditions of sale, a prohibition against certain service guarantees, definitions of various classes of customers, and a contract provision requiring resale price maintenance. Although there has been no further statement of these agreements since July 1941, there is no decree or order which forbids the resumption thereof. Because of the fact that the corporate respondents, over a period of many years, have entered into and maintained agreements of this character, there is a probability of like collective action in the absence of a definite prohibition against it. Consideration has been given to the fact that most of the provisions in the code and standard terms of sale have included terms and conditions of sale used in this industry over a period of years, but the Commission is of the opinion that this does not justify the several respondents in agreeing to formulate or agreeing to adopt specific terms and conditions or definitions of classes of customers to be used by all of them in making their quotations and sales.

PAR. 14. (A) The corporate respondents manufacturing fire brick have for many years sold such brick on a freight-equalization, delivered-price system. Under this system such respondents, in arriving at the figures quoted in their published price lists for fire brick or carload quantities of fire-brick cement, provide that the quotations as made on a delivered basis and as quoted to any intending purchaser at destination shall be the figures resulting from the use of a formula composed of an f. o. b. factory-price quotation plus whatever freight factor is necessary to exactly equalize the sum of a base price at certain specified base points, plus freight from one of such points. Each of such basing points is a production point, but said corporate respondents in most instances ship to their respective customers from points other than the basing point. Said corporate respondents have not only so quoted and do now so quote, but also generally adhere to such quotations in making sales. The use of this system was agreed upon among the corporate respondents as early as 1921 and since then all of the corporate respondents have become parties to an agreement to maintain and use such system, and each has performed in accordance with the agreement.

(B) The aforesaid system will enable each manufacturer to exactly match other manufacturers' quoted prices when all manufacturers use identical methods for the computation of transportation charges.

Such identical methods have been used. For example, in the computation of railroad freight, said manufacturers round out the figure resulting from the multiplication of the railroad rates in dollars per net ton by the weight of the shipment in net tons to the nearest 5 cents on total freight and the nearest one-tenth of a cent on each special shape brick. The various classifications prepared by the Institute and used by all respondents manufacturing fire brick have contained a table to be used in making the computation above described, and said respondents have used, and do now generally use, this table in making such computation. The use of said table insures identity of result when the same weights and railroad rates are used. The computation of freight on a given shipment from one point to another would vary between said respondents unless all of them computed the weight of the shipment in the same manner. The actual weight of a given product such as fire brick of a given size, shape, and grade varies somewhat from one producing area to another and from time to time. The weights used for computing actual railroad freight are the actual weights. However, as early as March 1919 the Refractories Manufacturers Association distributed a report of its Standardization Committee which set a standard weight for the purpose of computing freight on 9-inch straight brick of 7 pounds for fire clay brick and 6 pounds for silica brick. Subsequently, each of the various classifications issued by the Institute has contained a section stating that a standard weight as given therein is to be used for the calculation of all fire-brick shipments whenever freight is included in the price quoted to an intending purchaser. In bulletins issued by the Institute simultaneously with the classifications, exceptions from the use of this standard weight have been granted to specified producing districts and other standard weights at the same time assigned to such districts. The corporate respondents manufacturing fire brick have adopted and used the applicable standard weights as given in the classifications or the bulletins in their quotations and sales of fire brick on a destination basis. Uniformity in the computation of freight on such shapes also depends upon the use by all manufacturers of the same weight for each shape. In addition to the establishment of standard weights for the 9-inch straight fire clay brick and 9-inch straight silica brick, the classifications issued by the Institute contain figures called volume equivalents for the conversion of the volume of any special shape into multiples of 9-inch straight brick. Said classifications further provide that when freight is included in the price quoted to any intending purchaser, the weight of any special shape shall be computed by multiplying the standard weight of the 9-inch

straight brick by the volume equivalent given in the classification for that special shape. Although a table of mathematically exact volume equivalents might be useful to said respondents in computing actual freight, the volume equivalents assigned to special shapes in the various classifications have in no instance, except in the so-called ninth edition, which never went into general use, contained less than 5 per cent error. Despite this error, all respondents manufacturing fire brick have used the volume equivalents assigned in the classification in computing the freight in the price quoted to any intending purchaser on a delivered basis.

(C) Acting collectively through the traffic committee, the respondents have from time to time met with representatives of the railroads when rate increases were under consideration and have agreed with such representatives to submit proposals to the Interstate Commerce Commission for increased rates which attempted as far as possible to preserve and maintain existing differentials at destinations from all shipping points.

(D) All respondents manufacturing and selling fire brick have, through the institute and its classification committee, agreed upon factors which materially affect both their freight-equalization, delivered-price system and the total price of fire brick to all purchasers on a delivered basis. Such agreement was in effect as early as 1921 among the respondents and others then members of the Refractories Manufacturers Association, and such agreement was joined by the other corporate respondents coincident with their becoming members of respondent institute.

PAR. 15. (A) The corporate respondents manufacturing fire brick have, on many occasions, discussed with each other in meetings, in correspondence, and otherwise, specific present and future base and delivered prices, and the occasional failure of one of them to abide by certain base or delivered prices. From time to time since May 27, 1935, some of said corporate respondents have directly exchanged and circulated between and among themselves their respective price lists on fire brick. Respondents have distributed information concerning current prices by furnishing them to the trade magazine Steel for publication therein.

(B) In 1920 and 1921 the corporate respondents then members of the Refractories Manufacturers Association filed and exchanged their respective price lists between and among themselves, directly, and through the publicity bureau of said association. From January 1934 to May 1935 all the corporate respondents filed and exchanged their respective price lists through the institute, which served as code

Findings

44 F. T. C.

authority in the administration of the NRA code for the industry. For a time after May 27, 1935, and until March 1936, the corporate respondents continued to file prices with the institute and all of the corporate respondents filed at least one price list subsequent to June 1935. During the period from May 27, 1935, to March 1936, and as late as June 1936, the institute continued to circulate and distribute the prices most recently filed with it by each corporate respondent to all corporate respondents and any other manufacturer of refractories requesting copies. Price lists thus filed with the institute from January 1934 to March 1936 contained the basing-point prices on carload quantities of fire brick and fire brick cement, and the delivered-price quotations for and within certain price zones on less-than-carload quantities of fire brick cement. Consideration has been given to the fact that many respondents purchased certain grades or special shapes of refractories from other respondents in order to offer a full line or to fill out an order, and to the fact that some respondents are large buyers and consumers of refractories manufactured by other respondents, and that some respondents are sales agents for other respondents. However, most of the exchanges of price lists as shown by the record cannot be so explained, and they reflect the desire of the originator of the price list to notify its competitors of the prices which it will thereafter quote.

(C) From time to time the corporate respondents have exchanged bids or price quotations to be submitted to specific customers, and said respondents have from time to time reported to, filed with, or exchanged between or among themselves, directly or through the institute, such intimate details of their business as the names of certain of their customers, the prices paid by each of such customers, and the terms and conditions upon which particular and individual sales have been made or were to be made. On many such occasions the information reported, filed, or exchanged disclosed a particular price by a particular corporate respondent to a particular customer.

(D) At a meeting of the central Pennsylvania district group of the Refractories Manufacturers Association on January 11, 1921, respondent, Harbison-Walker Refractories Co., announced a decrease of its base prices on fire brick effective January 15, 1921. On the latter date 17 of 19 refractory manufacturers reporting their prices to the publicity bureau of the Refractories Manufacturers Association reduced their base prices in the same amount. As of April 13, 1938, respondents, Harbison-Walker Refractories Co., General Refractories Co., and North American Refractories Co., made effective a new lower price list on all fire brick sold by them. The three price lists contained the

same prices for comparable types and grades. Within two weeks other respondents issued price lists incorporating the new lower prices for their products of comparable type and grade.

(E) Each corporate respondent manufacturing fire brick has on at least one occasion other than during the 1933-35 NRA period agreed with one or more other manufacturers of fire brick to fix prices of fire brick; to file, circulate, and exchange current and future prices, of fire brick between and among themselves, directly or through the institute or a trade publication; to exchange bids on quotations to be submitted by them on fire brick; to exchange intimate details of each others' business whereby the particular sale of fire brick, the identity of the buyer and seller, and the sale price was made known to each other; and to follow the leadership of a certain respondent or certain respondents in making changes in the price of fire brick.

PAR. 16. (A) The specialty division of the institute was formed about September 3, 1936, and continued until it was merged into the brick division of the institute on June 5, 1940. The specialty division functioned not only through representatives of the corporate respondents and others, but also through a board of directors, secretary, and various officials who composed its numerous committees, including an executive committee, technical advisory committee, steering committee, special committee, dealer committee, and committee on ethics and fair trade practices. It also functioned through members of various geographical groups and subgroups. Manufacturers of fire brick cement and of plastic and castable refractories, all of which products were known as specialties, were eligible for membership in this division. Such specialties constitute about 10 percent of the total dollar sales and about 5 percent of the total tonnage sales of the refractories industry. Among respondents who were members of the specialty division during all or part of its existence as a separate division are the following: The Babcock & Wilcox Co., Botfield Refractories Co., The Denver Fire Clay Co., General Refractories Co., A. P. Green Fire Brick Co., Harbison-Walker Refractories Co., The Ironston Fire Brick Co., Johns-Manville Sales Corp., Laclede-Christy Clay Products Co., Mexico Refractories Co., Plibrico Jointless Firebrick Co., Quigley Co., Inc., The Robinson Clay Product Co., The Chas. Taylor Sons Co., Vitrefrax Corp., and Walsh Refractories Corp.

(B) Respondent members of the specialty division frequently discussed prices of specialties at meetings, in correspondence, and otherwise. On March 24, 1937, at a meeting of the Executive Committee of this division, the members present discussed and agreed upon price schedules. These schedules were exchanged between the various

members of the specialty division and were incorporated into price lists issued by such members.

(C) The corporate respondents manufacturing or selling fire brick cement agreed upon and used the practice of quoting delivered prices for less-than-carload quantities of fire brick cement to all customers located within a certain geographical zone. The States of Washington, Oregon, California, and Nevada were designated as zone 3; the States of Idaho, Montana, North Dakota, South Dakota, Wyoming, Utah, Colorado, Arizona, New Mexico, Oklahoma, Texas, Florida, Maine, Vermont, and New Hampshire were designated as zone 2; all other States of the United States and the District of Columbia were designated as zone 1. The delivered-price quotations thus made to intending purchasers, wherever located within zone 1, were identical for a specified quantity of fire brick cement in less-than-carload lots. The same was true with respect to delivered-price quotations made to intending purchasers located within zone 2, except that the prices thus quoted were somewhat higher than the prices quoted to customers located within zone 1. The same was true with respect to the delivered-price quotations made to intending purchasers located within zone 3, except that the prices thus quoted were higher than those quoted within zone 2, and on occasions were made only after inquiry had been made of officials of the specialty division. The zones were designated by respondents for the purpose and with the effect of fixing the delivered prices of less-than-carload lots of fire brick cement. The corporate respondents manufacturing or selling fire brick cement made their sales in accordance with this method and the use thereof eliminated price competition.

(D) The aforesaid method of quoting on less-than-carload quantities of fire brick cement began during the NRA period and continued until about the time the specialty division was merged into the brick division of the institute in June 1940. By the end of 1940 most of said respondents were quoting less-than-carload quantities of fire brick cement on the freight-equalization, delivered-price basis already described in Paragraph Fourteen. Those respondents not now using the zone system of selling less-than-carload quantities of fire brick cement now use the freight-equalization, delivered-price basis for less-than-carload quantities of fire brick cement. All of the corporate respondents quoting and selling carload quantities of fire brick cement have used, at least since 1935, and now use, the freight-equalization, delivered-price basis for such quotations and sales.

(E) During its existence as a separate division of the institute, the specialties division formulated, prepared for, and recommended

773

Findings

to the corporate respondents certain county-zone freight rate schedules for use in the sale of fire brick cement. The use of these county-zone freight rate schedules was not inconsistent with the larger zone system heretofore described, and they assisted the corporate respondents to match their delivered-price quotations or delivered costs on fire brick cement as quoted by them to any intending purchaser at a given destination. During the NRA and until 1940, most of the corporate respondents manufacturing fire brick cement usually, but not at all times, used the county-zone freight rate schedules. The use of these schedules had the effect of equalizing transportation costs on shipment of said product from any and all of their plants located in a given geographical area to any given destination, although such plants were variously located with regard to such destination on a mileage basis.

(F) All the corporate respondents manufacturing fire brick cement entered into an agreement in 1936 to fix the delivered price which would be quoted to any intending purchaser and at which said product would be sold to such purchaser. This agreement continued without interruption until June 1941, when the indictment heretofore referred to was filed.

PAR. 17. Each of the respondents in this proceeding was fully aware of the activities of the institute and of its committees and of the preparation and adoption of classifications, schedules of extra charges, standard terms of sale, freight-rate factors, the freight-equalization and zone systems, and the code of ethics and fair-trade practices, all of which were discussed in meetings of the institute and set out in bulletins which were sent to all members of the institute.

PAR. 18. The aforesaid understandings, agreements, combinations, and conspiracies, and the things done pursuant thereto and in furtherance thereof, as herein found, have had the effect of unduly restricting, hindering, lessening, restraining, and suppressing competition between and among the corporate respondents in the sale of refractories and refractory products among and between the several States of the United States and in the District of Columbia and of unduly restricting and restraining trade in such products as aforesaid. In the absence of an order in this proceeding there is a probability that respondents will continue or renew the same or enter into further such understandings, agreements, combinations, or conspiracies, and will do things pursuant to and in furtherance thereof with the identical effects herein found.

Order

44 F. T. C.

CONCLUSION

The acts, practices, and methods of the respondents, as herein found, are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices 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 on the complaint of the Commission, the answers of respondents, testimony, and other evidence introduced and certain stipulations of facts made on the record before an examiner of the Commission theretofore duly designated by it, and proposed findings as to the facts, conclusion, and order recommended by counsel supporting the complaint (a recommended decision by the trial examiner and other intervening procedure, including briefs and oral arguments, having been waived); 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 respondents, American Refractories Institute, an incorporated trade association, its directors, officers, members, representatives, agents, and employees; the corporate respondents, Aetna Fire Brick Co., The Babcock & Wilcox Co., Botfield Refractories Co., Chicago Fire Brick Co., Chicago Retort & Fire Brick Co., Climax Fire Brick Co., The Davis Fire Brick Co., The Denver Fire Clay Co., Dixie Fire Brick Co., Inc., J. H. France Refractories Co., General Refractories Co., A. P. Green Fire Brick Co., Harbison-Walker Refractories Co., Illinois Clay Products Co., The Ironton Fire Brick Co., Johns-Manville Sales Corp., Laclede-Christy Clay Products Co., E. J. Lavino & Co., Louisville Fire Brick Works, Inc., The Massillon Refractories Co., the McLain Fire Brick Co., Mexico Refractories Co., North American Refractories Co., The Oak Hill Fire Brick & Coal Co., Plibrico Jointless Firebrick Co., The Pyro Clay Products Co., Quigley Co., Inc., Richard C. Remmey Son Co., The Robinson Clay Product Co., St. Louis Fire Brick & Insulation Co., The Chas. Taylor Sons Co., Thermo Fire Brick Co., Union Industries, Inc., M. D. Valentine & Bro. Co., Vitrefrax Corp., Walsh Refractories Corp., and Wellsville Fire Brick Co., their respective officers, representatives, agents, and employees; and the individual respondents, W. B. Coullie, H. H. Hopwood, Frank Piatt, J. D. Ramsay, R. P. Trump, E. M. Weinfurter, and W. J. Westphalen, their respective representatives, agents, and employees, in or in connection with the

offering for sale, sale, and distribution of refractories and refractory products 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 planned common course of action, understanding, agreement, combination, or conspiracy between 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 things:

1. Quoting or selling at prices calculated or determined pursuant to, or in accordance with, the freight-equalization, delivered-price system or the zone delivered-price system; or quoting or selling at prices calculated or determined pursuant to, or in accordance with, any other planned system or formula which produces identical price quotations or prices, or which prevents purchasers from finding any advantages in price in dealing with one or more of the respondents as against any of the other respondents.

2. Establishing, fixing, or maintaining prices, terms, or conditions of sale, or adhering to any prices, terms, or conditions of sale so fixed or maintained.

3. Formulating, devising, adopting, or using compilations of extra charges or deductions from charges made or quoted on any refractory product, whether or not in the form of a classification listing graduations by percentage designations.

4. Establishing or maintaining delivered-price zones or price differentials between such zones.

5. Filing, exchanging, distributing, or relaying among the corporate respondents, or any of them, or any of their representatives, or through respondent, American Refractories Institute, or through any other medium or central agency price information showing current or future prices or conditions of sale of any particular respondent, or bid or price quotation submitted or to be submitted on any prospective piece of business.

6. Filing, exchanging, distributing, or relaying among the corporate respondents, or any of them, or any of their representatives, or through respondent, American Refractories Institute, or through any other medium or central agency, information concerning prices charged particular customers or information concerning volume of production, sales, or shipments where the identity of the manufacturer, seller, or purchaser can be determined through such information and which has the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale.

7. Collecting, compiling, circulating, or exchanging between or among respondents, or any of them, freight rate factors or transportation charges used or to be used as a factor in computing prices or price quotations; or using, directly or indirectly, any such information so collected, compiled, or received, as a factor in computing price quotations.

8. Adopting, using, or in any way following any price quotations announced by particular respondents, or any of them, whereby quotations are made uniform or matched.

9. Formulating, devising, adopting, circulating, or exchanging information concerning the customer classification granted or to be granted to any specific purchaser; or determining any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

10. Formulating, adopting, using, or enforcing any minimum resale price agreements pursuant to and under which dealers and customers are required to maintain resale prices, terms or conditions, collectively or cooperatively determined by any two or more sellers.

11. Systematically quoting or selling on a delivered basis calculated as, or equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

12. Quoting or selling on a delivered basis which systematically reflects the inclusion of a charge or factor for transportation greater than the actual cost of transportation from point of shipment to destination.

13. Quoting or selling at prices which systematically differ among purchasers in terms of nets f. o. b. point of shipment, according to locations of purchasers, with said nets higher as applicable in sales to nearby customers than to those more distantly located, and which f. o. b. nets, plus common-carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents.

14. Doing or causing to be done any of the things listed in the preceding paragraphs 1 to 13, and the doing of which is forbidden in this order, through action of respondent American Refractories Institute, or any subdivision or committee of said Institute, or any other individual, corporation, or organization.

It is further ordered, That nothing contained in this order shall be construed as prohibiting any of the corporate respondents from entering into such contracts or agreements relating to the maintenance of resale prices as are permitted under the provisions of the Miller-

Tydings Act; or from taking such action relating to its export sales as is permitted under the provisions of the Webb-Pomerene Act; or from the establishment or maintenance of any lawful bona fide agreements, discussions, or other action solely between any corporate respondent and its directors, officers, and employees, or between the officers, directors, or employees of any corporate respondent relating solely to the carrying on of that corporation's sole and separate business, or between any corporate respondent and any of its wholly owned subsidiaries.

It is further ordered, That for the reasons appearing in the findings as to the facts in this proceeding the complaint be, and the same hereby is, dismissed as to respondents, National Refractory Co., a corporation, J. J. Brooks, Jr., an individual, and A. P. Taylor, an individual.

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

HILLMAN PERIODICALS, INC., ALEX L. HILLMAN, PHIL KEENAN, AND MORRIS B. LEVINE, AND NOVEL SELECTIONS, INC.

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

Docket 5440. Complaint, May 29, 1946—Decision, Apr. 13, 1948

Where a corporation, three officers thereof, who controlled its advertising policies and business activities, and its wholly owned subsidiary, engaged in the interstate sale and distribution of magazines, books, and other publications, including reprints of published books from which, in the course of reprinting, they had deleted or caused to be deleted portions of the text, usually condensing the books from some 75,000 words to 55,000 words more or less, so that their said reprints were abridged editions—

- (a) Falsely, deceptively, and misleadingly made use of such typical statements as "complete and unabridged," "a full-length novel," on the front covers of said abridged editions, without indicating in any way in the publication that the books were not complete reprints of the original, and thereafter, while discontinuing the use of the former statement, continued the use of the latter, without giving adequate and sufficient notice to the purchasing public as to said reprints being abridgements, through the statement, in small and inconspicuous type on the reverse of the title page, of some such statement as " * * * has been cut to speed the story" or " * * * represents an abridgement of the original to speed the action";
- (b) Failed to disclose in advertising materials issued by them with reference to said reprints which they sold and distributed, that the publications so advertised were in fact abridged editions; and
- (c) Substituted new or altered titles which differed from the original titles in reprints of books published by them from time to time, without giving any adequate and sufficient notice of said fact to the purchasing public through use of some such statement in small and inconspicuous type on the reverse of the title page as " * * * was originally published under the title of," etc.; with tendency thereby to cause purchasers to buy said books, titles of which had been changed, as different publications;

Capacity and tendency of which false, misleading, and deceptive representations were to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that books and publications offered for sale by them were complete and unabridged editions of those published theretofore, and had not been previously published under any other title than that which appeared thereon:

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. Randolph Preston*, trial examiner.

Mr. John M. Russell for the Commission.