

# INVESTIGATIONS AND RECOMMENDATIONS UNDER THE EXPORT TRADE ACT

IN THE MATTER OF

CARBON BLACK EXPORT, INC., ET AL.<sup>1</sup>

REPORT OF INVESTIGATION, CONCLUSION, AND RECOMMENDATIONS IN RE  
ALLEGED VIOLATIONS OF THE EXPORT TRADE ACT, APPROVED APRIL 10,  
1918

*Docket 202-5. Notice and Summons, October 28, 1944. Report, Conclusions, and  
Recommendations, July 12, 1949*

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<sup>1</sup> The officers, directors and stockholders joined as respondents, follow :

Officers : C. E. Kayser, president and director, 500 Fifth Avenue, New York 18, N. Y. ;  
Reid L. Carr, secretary and director, 45 East Forty-second Street, New York 17, N. Y. ;  
F. R. Cantzlaar, treasurer, 41 East Forty-second Street, New York 17, N. Y.

Directors : Godfrey L. Cabot, 77 Franklin Street, Boston 10, Mass. ; Thomas D. Cabot,  
77 Franklin Street, Boston 10, Mass. ; Oscar Nelson, United Carbon Co. Building, Charles-  
ton 27, W. Va. ; R. H. Eagles, 460 West Thirty-fourth Street, New York 1, N. Y. ; Hans W.  
Huber, 460 West Thirty-fourth Street, New York 1, N. Y. ; Robert I. Wishnick, 295 Mad-  
ison Avenue, New York 17, N. Y. ; L. C. Herkness, Tenth and Lombard Streets, Philadelphia,  
Pa.

Stockholders : United Carbon Co., Inc., United Carbon Co. Building, Charleston 27,  
W. Va. ; Columbian Carbon Co., 45 East Forty-second Street, New York 17, N. Y. ; Godfrey  
L. Cabot, Inc., 77 Franklin Street, Boston 10, Mass. ; J. M. Huber Corp., 460 West Thirty-  
fourth Street, New York 1, N. Y. ; Panhandle Carbon Co., Inc., 295 Madison Avenue, New  
York 17, N. Y. ; Chas. Eneu Johnson & Co., Tenth and Lombard Streets, Philadelphia, Pa.

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## SYLLABUS

Where a Webb-Pomerene Export Trade Act association, the stockholder members of which included six producers of carbon black and which—

- (1) Was organized in 1933 by 8 producers of said product to meet the threat of some 10 or 12 foreign rubber manufacturer consumers of approximately 80 percent of all carbon black exported, who were large enough to be able to act independently and to go into the carbon-black business on their own, and whose actions included the practices of (a) insistence on liberal credit terms, (b) bad faith rejection of merchandise, (c) demand for excessive discounts, and (d) a price-decline clause in contracts which enabled purchasers, upon the allegation of a lower offer, to procure more favorable terms; and
  - (2) Limited its dealings to so-called "channel black" as distinguished from the more recent "furnace black"; provided for stock participation by the stockholding members on the basis of the proportion of export business allotted to each by negotiation as his so-called quota; provided that the stockholders enter into contracts with it to sell carbon black in export exclusively through it; and was authorized by the terms of the contract with its members to purchase not more than 10 percent of its annual export requirements from nonmembers, for the purpose, as testified, of inviting participation in the association's advantages—
- (a) Extended its legitimate objective of maintaining a price policy for its products, to nonmember competitors by way of procuring "intention to cooperate" and "assurance to follow association prices closely" and to observe its terms, in agreements and arrangements entered into with various such concerns;
  - (b) Entered into agreements and arrangements with nonmembers under which it undertook to impose restrictions upon the volume of their exports and production, and upon the source and quantity of their supply of natural gas, raw material of carbon black;
  - (c) Made membership overtures to prospective new stockholders which resulted in trial operations extending from 3 to 9 years, and under which the nonmember recipients of such overtures enjoyed "all the advantages of mem-

bership without the necessity of making an investment" and thereby had conferred upon them benefits which were lawfully obtainable only by compliance with the Export Trade Act; and

- (d) Practiced bad policy in making use of the same housing, administrative officer, and personnel for the conduct of its export trade office activities, as were used by a trade association concerned with the industry's domestic trade, which the export association was by statute enjoined not to restrain:

*Held*, That certain agreements made and acts done by said association, as hereinbefore indicated, were in violation of law; and

*Recommended*, pursuant to the provisions of said Export Trade Act authorizing the Commission so to do, that Carbon Black Export, Inc.—

- (1) Refrain in the future, from adhering to, maintaining, or entering into any understanding, agreement or arrangement with American producers of carbon black who are not regularly admitted and recognized members, including producers whose membership is in process of solicitation, where said producers agree to sell only at fixed prices and terms, or in apportioned quantities;
- (2) Cease and desist in the future from discussing, negotiating, concerning or seeking an agreement upon, any plan, arrangement, scheme or understanding whereby the production of any American producer or potential producer of carbon black is affected, deterred, forestalled, limited or prevented, or where the purpose or intent is to accomplish any of said results; and
- (3) Conduct its office activities on a basis wherein it shall not permit itself to be quartered in joint offices with any domestic trade association or statistical and advisory group; and that it engage and retain officer personnel which shall have no affiliation by way of employment, membership or honorarium with any such trade association or group; and

*Ordered*, That the association file within 30 days a report stating whether it has elected to comply with such recommendations, and, if so, the manner in which it has so complied.

As respects the specification in the bill of particulars which challenged the contracts between the member manufacturers and the Phillips Petroleum Co., which supplied one-third of the natural gas used in the manufacture of channel black, on the ground that the practice of making payment through a percentage of the carbon black produced therefrom required said company to export such carbon black thus acquired by it exclusively through the stockholders of the association and to refuse to quote or sell such carbon black for export to other American exporters—

It appeared from the evidence that the contracts in question, as carried out, amounted to a sale of natural gas by Phillips to the carbon-black producer, payment for which was made by the latter in cash on the basis of the average price received by the manufacturer for the black sold by him under the royalty arrangement; that the agreements concerned were between individual member producers and Phillips and not between the association and said corporation; and that regardless of said corporation's assurance in 1933 that it would export no black, it would not in any event have exported any since it was not then a producer of any kind of black; and that there was nothing in the situation disclosed that could or did restrain the export trade of independent competitors or effect any of the other restraints excepted in the proviso of section 2 of the Webb-Pomerene Law.

As regards the basic agreement among the members of the association which bound each one to confine its exports of black to those made through the association—except in the cases of Mexico and Canada, as to which the

producer agreed to use reasonable care to see that exports were for use and consumption therein and to prevent their diversion to other foreign countries—and under which each member agreed that the association should act as its exclusive agent for the sale of all its export carbon black and that it would export only through the association, whereby the association was enabled to control the channels of distribution for all the export carbon black which originated with the stockholder members—

It appeared that while the association membership always represented the bulk of the production and most of the exports—though there had always been nonmember producers—investigation of operations under the association's contract with its members and its control over the distribution of its members' product disclosed that the principle requirements in its selection of distributors had been their financial responsibility, their willingness to adhere to suggested prices, and their technical skill and facilities—qualities found requisite in coping with certain practices of large foreign buyers, i. e., commission splitting, liberal credit terms, unwarranted rejection of shipments, and black-market operations; disclosed no evidence that the trade of bona fide American exporters, buying and selling in export trade, was restrained; and disclosed also that two nonmember producers had recently entered the export field in a substantial way, which materially changed the competitive situation from that which existed when the testimony was taken; and that the record as a whole did not disclose any of the effects prohibited by the provisos of the Webb Act in said connection or as challenged in the bill of particulars, and therefore afforded no basis for any recommendations to the association relative thereto.

In said connection the association was not obligated to employ sales agents in this country to sell its black in foreign countries in which it already had agents rendering sales services, or to quote to agents in this country for foreign buyers who were being serviced by its foreign agents; nor was it obligated to designate distributors who lacked the technical skill or facilities required of those whom it did appoint for such service.

As respects the foregoing conclusion that the record as a whole did not disclose any of the prohibited effects, such determination was provisional and did not constitute a ruling or determination of the question of the validity of practices or contractual arrangements similar to those used by the association, which, under other factual situations or circumstances might contravene the law; but was a provisional determination, and the Commission retained jurisdiction to take appropriate action should judicial authority with final jurisdiction hereafter hold that exclusive dealing contracts or arrangements, such as present in the instant proceeding, are illegal per se.

In said proceeding the investigation developed no evidence of agreements with foreign producers or with associations of foreign producers, or evidence of regulation of sales to the country's insular possessions or any failure to file information required by the Commission.

As respects the charge that contracts were entered into with manufacturers of carbon black which limited and restricted their production and sale of said products within the United States; appeared that in two cases considered nonmembers denied any such agreement and actually increased their production; and, as respects certain suggestions for curtailment in the midst of a bulk price differential war, made in certain letters between different concerns or their officers, that no evidence was adduced showing that the export association was involved therein, and that testimony was also given that curtailment, for various reasons set forth, was never practiced by any common concert.

In regard to the specifications of the bill of particulars which raised the issue of contracts with the association stockholders, other manufacturers and other owners which caused them to use care that domestic sales made by them were not for export and to take cautions to prevent the export of carbon black sold by them for use or consumption within the United States—

The investigation produced no evidence of such contracts with nonmembers or other owners of carbon black—excepting one nonmember who thereafter became a member; and,

As respects the agreement among members, testimony of officers of association members was to the effect that such restrictions, i. e., that the producer agreed to use reasonable care that exports made to Canada or Mexico were not diverted to other foreign countries; that carbon black sold by the producer in the United States should be exported only through the association; and that all of the obligations on the part of the producer were undertaken on its behalf and that of any and all subsidiary or controlled corporations in which the producer might then or thereafter directly or indirectly own or control 50 percent or more of the stock; were essential to the preservation of the cooperative effort.

As respects the investigation of a bulk differential price war, and the Cabot Co.'s price differential, under which carbon black was delivered to domestic users at an economy variously estimated at from an eighth to a quarter of a cent a pound, and there was precipitated "a price war in the domestic market, in the course of which, following November 1, 1937, the price of carbon black fell from 5 to 2¼ cents per pound," evidence failed to disclose that the association participated in or was a party to any dealings or arrangements which might have been made in said connection.

In said proceeding and investigation it further appeared that the association had operated on a nonprofit basis, and had had to call, from time to time, for pro rata assessments from its stockholders; that from the date of its organization, its prices for carbon black had been higher than those prevailing in the domestic market; and that the activities of six new producers indicated that competition to the association might soon assume considerable proportions.

In said proceeding the record contained information indicating the imminence of considerable competition from production potential located propitiously near seaboard in nine foreign gas and oil areas, and also indicated that the stockholders of the association were firmly convinced, as a result of their experience in export trade, that such an association as that herein concerned, was the best, if not the only practicable, means of dealing with such foreign nationals' groups as represented by the continued presence in this country, after the war, of former purchasing agencies for 10 nations, which continued to exist in Washington mainly in an advisory capacity for furthering the economic interests of their countries in home buying and for dealing with the Economic Cooperation Administration.

Before *Mr. John W. Norwood* and *Mr. Clyde M. Hadley*, trial examiners.

*Mr. P. C. Kolinski*, of Washington, D. C., for the Commission.

*Mr. Henry Ward Beer*, of New York City, for all respondents.

*Mr. Fred C. Fernald* and *Mr. Warren F. Rideout*, both of Boston; for *Godfrey L. Cabot*, *Thomas D. Cabot, Inc.*, and *Godfrey L. Cabot, Inc.*

*Mr. John W. Beveridge*, of Borger, Tex., for *J. M. Huber Corp.*

## REPORT OF INVESTIGATION

## I. THE PROCEEDINGS

Under the provisions of an act of Congress approved April 10, 1918, entitled "An act to Promote Export Trade and for other purposes" (40 Stat. 516; 15 U. S. C. A., secs. 61-65) commonly known as the Webb-Pomerene Act, and by virtue of the authority conferred upon it by said act, the Federal Trade Commission did, on the 28th day of October 1944, issue its Notice of Investigation and Summons to Carbon Black Export, Inc. (hereinafter called the "Association"), its officers, directors, and stockholders, as named above, setting forth therein that the Commission had reason to believe that certain agreements made and acts done by the above-named parties may be in violation of law as more specifically set out in the bill of particulars thereto attached.

Thereafter, investigational hearings were held before trial examiners appointed for the purpose by the Commission, at Washington, D. C., February 5, 6, 7, and 8, 1945; and June 19, 20, 21, and 22, 1945; Philadelphia, Pa., January 15, 1946; New York, N. Y., January 16, 17, and 18, 1946; Boston, Mass., January 22 and 23, 1946; Akron, Ohio, January 29, 30, and 31, 1946; Chicago, Ill., February 4, 1946; Amarillo, Tex., February 7, 1946; Bartlesville, Okla., February 11 and 12, 1946; New York, N. Y., June 4, 5, 6, and 7, 1946; and Washington, D. C., August 20, 1946, at which sworn testimony and documentary evidence were received in the record. The parties were requested and permitted to make such statements for the record and submit such information to the Commission as they desired to offer. Trial Examiner John W. Norwood presided at the hearing held in Washington, D. C., from February 5 to June 22, 1945, and thereafter Trial Examiner Clyde M. Hadley presided at all the remaining hearings, closing the taking of testimony and admission of evidence at the conclusion of the Washington, D. C., hearing on August 20, 1946.

The proceedings were reduced to writing and the transcript of the record and exhibit were filed in the office of the Commission. The Commission, having examined and analyzed the record, makes this its report on the facts.

## II. THE ASSOCIATION

A. *Description of Organization*

The association is a corporation organized with 1,000 shares of non-par common stock under the laws of Delaware on May 7, 1933. Pursuant to the Webb-Pomerene law, it filed with the Federal Trade Commission a statement accompanied by the requisite documents on June 15, 1933, which was formally accepted for filing by the Commission on

March 1, 1935. It is a so-called "full functioning" export trade association, and since organization has maintained its office at 500 Fifth Avenue, New York, N. Y. Stockholders at the date of issuance of the summons herein were: United Carbon Co., Inc., Charleston, W. Va.; Columbian Carbon Co., New York, N. Y.; Godfrey L. Cabot, Inc., Boston, Mass.; J. M. Huber Corp., New York, N. Y.; Panhandle Carbon Co., Inc., New York, N. Y.; and Chas. Eneu Johnson & Co., Philadelphia, Pa. Excepting for the last named, which became a stockholder on June 18, 1936, the others have been stockholders since incorporation of the association.

#### *B. Officers and Directors*

The officers and directors at the date of issuance of the summons herein were C. E. Kayser, president and director; Reid L. Carr, secretary and director; and F. R. Cantzlaar, treasurer. The remaining directors of a board of nine were, with company affiliation noted: Godfrey L. Cabot (Cabot); Thomas D. Cabot (Cabot); Oscar Nelson (United); R. H. Eagles (Huber); Hans W. Huber (Huber); Robert I. Wishnick (Panhandle); and L. C. Herkness (Johnson). These directors, with the exception of Mr. Herkness, who was elected in 1936, have served continuously since the association's organization. C. E. Kayser served as president from date of organization until December 31, 1945, when he was succeeded by the present incumbent, H. L. Titus, of the Cabot organization. Reid L. Carr served as secretary from date of organization until September 18, 1946, when he was succeeded by C. E. Kayser, the present incumbent. F. R. Cantzlaar served as treasurer from date of organization until December 31, 1945, when he was succeeded by the present incumbent, E. T. Villareal, who had served as assistant treasurer since 1936.

### III. HISTORICAL BACKGROUND

#### *A. Commodity Involved*

"Carbon black is the commercial name of the soot of gas. The first carbon black that came into commerce was made about 80 years ago in Philadelphia, on a drum 3 feet in diameter, made of sheet iron, and by the contact of the flames from ordinary steatite burners impinging on the surface of the drum." With this brief characterization as an introduction, the second witness called in the inquiry, Dr. Godfrey L. Cabot, president of the Cabot Co., gave a history of the product. Dr. Cabot, employed in the industry since 1882, detailed the following highlights of its development.

Carbon black was first used to make glossing for printer's ink. From the year 1872, it was manufactured from natural gas on soap-

stone plates, in West Virginia. Production volume in 1887 was about a million pounds and its use confined to printer's ink and stove polish. By 1900, it was being used in paints, varnishes, coloring paper, sealing wax, putty, and carbon paper. About the year 1915, it began to replace lamp black in rubber manufacture because of its two very marked characteristics: intense color and mixing strength. It proved to increase the potential strength of rubber and to greatly increase its resistance to abrasion. This new use stimulated its manufacture so that production volume increased from 20 million to 25 million pounds in 1914 to 700 million pounds in 1944. At the present time, about 90 percent of carbon black goes into the rubber industry and 10 percent to inks and paints. The Appalachian area as a source of supply proved inadequate and between 1920 and 1930 the industry moved to Louisiana and Texas.

Dr. Cabot described improvements in the process of manufacturing carbon black that followed the use of soapstone equipment. The first use of iron plates consisted of circular plates, 24 feet in diameter, with revolving gas burners underneath which made the carbon black by "impingement of gas flame on a horizontal surface." In a later variation of this method, Dr. Cabot devised a roller-bearing base on which the circular plate revolved over fixed gas burners. Another method made use of revolving cylinders against which a flame was impinged, resulting in a product called "Peerless Black" which had good lengthening capacity, a quality desirable for certain paint trades.

A major development occurred about 1900 with the invention by Hoskins and McNutt of the channel method, in which channel iron beams of 6- to 8-inch widths are moved back and forth over fixed gas burners. While this method did not greatly increase carbon black extraction, it came into general use because of simplicity of its construction and adaptability to accurate upkeep and maintenance.

The retort method, devised by Mr. Cottrell, was the next great innovation. In this process, gas is burned in a large retort with an inadequate supply of air, resulting in precipitation of a smudge from which the carbon black is chemically removed. Its great advantage lies in the fact that carbon black recovery in the direct contact methods averages about 3 percent of the weight of the gas used whereas the retort method produces recoveries as high as 18 percent, or six times as much. This process, and a later one known as the thermatonic, which was not described, account for the term "furnace" black, applied to carbon black so produced.

The handling of carbon black has been materially improved by a process developed during the past 20 years, of molding powdered black into hard spherical pellets thereby permitting its packaging in smaller containers and eliminating dust from handling operations.

Dr. Cabot is a chemist by profession. He stated that the exact chemical formula for carbon black has never been derived, but that it is comprised of carbon, hydrogen, oxygen, and other elements, with the carbon percentage ranging from 84 to 96 percent. It is not soluble in anything except molten iron. It has no competitor in its quality of conferring tensile strength and abrasion resistance to rubber. He concluded his description with the statement that the Cabot Co. commenced carbon black exports to England in 1891, but that they were not the first such American exporters, Binney & Smith Co., who for years accounted for half of our carbon black exports, being already in the English market in 1891.

The physical movement of gas from the well to carbon black plants was traced by Mr. Carr, the association's secretary, as follows (Tr. 414):

Q. Would you for the record, if you are able to do so, trace in a general way the physical movement of the gas from the well to carbon black plants?

A. In general the procedure is something as follows: There are in the field certain gas wells which are owned and operated by producers or producing companies. The gas from these wells is sold in the first instance to the owner or proprietor of a natural gasoline plant under a contract, the general tenor of which is that the natural gasoline plant owner will pay to the producer a royalty measured by the amount and price of the gasoline extracted. He will return to the producer such gas as the producer may need for operating his properties, and will then have the right to sell the balance of the residue gas, dividing the proceeds, less expenses of sale, equally between the proprietor of the gasoline plant and the producer of the gas.

Q. That latter point you refer to is known as residue gas.

A. Residue of the gas after the gasoline has been extracted.

Q. After the gasoline has been extracted, what happens to this residue gas so far as the carbon black plants are concerned?

A. Well, if it is sold for carbon black purposes it is delivered to the carbon black plant. Sometimes it is delivered at the plant. It is delivered at the outlet of the gasoline plant according to the terms of the particular contract.

Q. The contracts we are referring to in general are contracts for the acquisition of this residue gas from the gasoline plants after they have extracted the gasoline from the hydrocarbons to be manufactured into carbon black?

A. That is right.

Trial Examiner Norwood. Is that residue gas used in pipes for illuminating?

The Witness. It might be, but under the law of Texas as it now stands, where most of the carbon black manufacturing is carried on, you can use lawfully for the manufacture of channel black only sour gas, gas which would not be suitable for domestic use, without purification or what is technically known as residue casing head gas, casing head gas being gas produced around the casing head of the oil well as distinguished from true natural gas.

Carbon black was subject to war-time emergency orders. Its manufacture, and sale upon allocation, was regulated under W. P. B. Order M-300 (exhibit 395). Under this order, furnace black was made subject to allocation on November 1, 1942, and channel black placed under similar restriction on August 1, 1944. These controls

were lifted on July 31, 1946. This product was likewise subject to price control under O. P. A. Order S. R. 14 (exhibit 396), which was in effect from March 31, 1942, until June 30, 1946. On April 1, 1946, the Office of International Trade ordered a limitation of 9,000,000 pounds per month on all exports of carbon black.

During the war period, furnace black production was greatly increased because of its adaptability in the manufacture of synthetic rubber, and it accounted for 40 percent of carbon black production by May 6, 1946, when application for export price was filed (exhibit 680 A). Four stockholders, Cabot, Columbian, United, and Huber, commenced manufacture of furnace black along with their channel black production. In addition, four outside manufacturers, i. e., non-members, engaged in furnace black production: Phillips Petroleum Co.; Thermatonic Carbon Co.; Jefferson Lake Sulphur Co.; and Crown Carbon Co. The Office of Price Administration accepted the association's filing of export prices on furnace black on behalf of the four stockholders above named. The resultant prices were 5.20 and 6.20 cents per pound for S. R. F. (semireinforcing black) in 50-pound paper and 300-pound wooden case containers respectively; and 6.80 and 7.80 cents per pound on similar weights of H. M. F. (high-modulation black). The Office of Price Administration, in acknowledging the May 6, 1946, filing, replied on May 17, 1946, in reference to furnace black as follows (exhibit 683): "Inasmuch as your new items are merely variations of carbon black upon which a premium is allowable this office has no objection to your applying to these new items those premiums which have been approved for your other types of carbon black." The prices filed are maximum F. A. S. prices, Houston, Tex. On April 1, 1946, the association entered into agency contracts with its four stockholders who produced furnace black (Cabot, Columbian, United, and Huber) on terms permitting it to set a C. I. F. price which would allow for payment of an 8 percent commission to distributors, "extra packaging cost, port transfer charges, loading charges, ocean freights, marine insurance, forwarding fees, cash discounts and the like." The contracts have no relation to stockholders' production capacities, involve no quota arrangement, run for a short term (first expiration date being December 31, 1946) and the association's compensation as agent is fixed at fifteen-hundredths of 1 cent (0.15) per pound of furnace black "consumed in foreign countries except Canada and Mexico." Mr. Titus, the association's president, who prepared and handled the O. P. A. application and data testified that the stockholders acted independently of each other and that the F. A. S. prices were rounded off at fractions of a cent under the permissible ceilings. He testified that 30,000,000 pounds of furnace black valued at \$2,000,000 had been exported be-

tween April 1 and August 1, 1946. He further testified that the association's directors had authorized execution of similar agency contracts with nonmember manufacturers of furnace black but that none had made application at the date of testimony, August 20, 1946. Likewise, no such manufacturer had made application for membership in the association, but that "if any one of them should ask to become members, we would immediately consider the problem of what would be an equitable share of the corporation for them to own."<sup>1</sup>

There is no testimony or evidence along the lines of the specifications in the bill of particulars which in any way concerns export trade in the furnace type of carbon black, which, as above related, became such article of commerce in April 1946.

The engagement in furnace black business, however, necessitated action to draw the exact distinction between channel and furnace types of carbon black. The commodity was defined in the certificate of incorporation as follows:

1. In such export trade, to act as the agent, broker, consignee or factor, or otherwise for the account of others, in respect of the sale, purchase, or other acquisition, exchange, contracting for, handling, dealing in, trade and commerce in, transportation and disposition of carbon black and other pigments manufactured from natural gas, gasoline plant vapors, casinghead gas and/or residue casinghead gas, and other merchandise, commodities and articles or materials of commerce of every kind and nature.

The definition appeared in the original sales agreement of May 2, 1933, between the association and producer stockholders, as follows:

FIRST. Wherever used in this agreement, the term "carbon black" means all black pigments manufactured or produced in whole or part from natural gas, gasoline plant vapors, casinghead gas, and/or residue casinghead gas, except high grade carbon blacks as hereinafter defined; the term "high grade carbon blacks" means all black pigments manufactured or produced from natural gas, gasoline plant vapors, casinghead gas, and/or residue casinghead gas, sold by the Producer at a price exceeding by not less than 5 cents per pound the average market price at which ordinary carbon blacks are at the time sold; \* \* \*.

The association's directors, by resolution adopted December 19, 1945, amended the foregoing first paragraph of the sales agreement, as follows:

By insertion in line 5 of paragraph FIRST thereof after the word "gas," the words "by impingement of a flame upon a metallic surface," and by insertion in line 9 of paragraph numbered FIRST thereof after the word "gas" the words "by impingement of a flame upon a metallic surface."

Mr. Titus testified that the purpose of this amendment was to limit dealings under the sales agreement to channel black, but not to limit or restrict "Carbexport's right to deal with other types of carbon black."<sup>2</sup>

<sup>1</sup> T. 2008-2033. Ex. 498, 679-684.

<sup>2</sup> T. 2032. Ex. 12, 15, 498.

*B. Carbon Black Export Association, Inc., (Former Group)*

Carbon Black Export Association, Inc., was incorporated under Delaware law on November 21, 1929, "to engage solely in export trade, as the term 'export trade' is defined in the act of Congress \* \* \*." Capitalization consisted of 2,500 shares of non par common stock issued to 6 members: Godfrey L. Cabot, Inc.; United Carbon Co.; J. M. Huber, Inc.; The Palmer Gas Products Corp.; Binney & Smith Co.; and R. W. Greeff & Co., Inc. The first three named were manufacturers (or producers as more frequently described in the record) of carbon black, and the last three named were dealers and distributors of carbon black. Each member was represented on the board of directors and the Export Price Committee.

This was not a so-called "full functioning" association, each member selling carbon black in export trade through its agents on its own account at prices determined from time to time by the Export Price Committee. Annual reports were filed with the Commission's Export Trade Office for the dates January 1, 1931, 1932, and 1933. The last of these reports showed omission of Godfrey L. Cabot, Inc., from the membership list and its replacement by Wishnick-Tumpeer, Inc. No subsequent annual reports were filed since this corporation was formally dissolved on December 1, 1933.

*C. Transition period*

Mr. C. E. Kayser, the first president of Carbon Black Export, Inc., the association here under consideration, graduated from Columbia University in 1909 and was employed until 1923 by the American Metal Co., Ltd., in connection with the operation of its zinc smelter gas supply facilities in Kansas, Oklahoma, and Arkansas. From 1923 until May 1932, he operated his own prospecting company, the Mississippi Valey Oil Co., of which he was president. In late May 1932 Mr. Kayser undertook an independent survey of the export trade business of the carbon black industry. He was introduced to members of the industry by Mr. Clyde Alexander, an official of Phillips Petroleum Co., and testified that he undertook the survey for the following carbon black producers: Columbian Carbon Co.; United Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber, Inc.; and the Palmer Corp. He studied the records of the existing export association (described in par. B above), and the office records of its members, reaching two definite conclusions by the middle of November 1932. These were, first, that the then existing association was comprised of diverse interests, the outlook of producers and distributors on any problem being bound to be diverse and divergent; second, that the group was "an advisory board which attempted to use its rights to make regula-

tions for the export market for its members, attempted to enforce them, but had nothing to enforce them with."

The real problem of the existing association, he testified, stemmed from the existence in the export market of some 10 or 12 large rubber manufacturer consumers of approximately 80 percent of all carbon black exported. These consumers were large enough to be able to act independently and to tacitly threaten to go into the carbon black business on their own. The actions of these large consumers resulted in four bad practices: First, the terms on which sellers were required to sell export carbon black made it possible for carbon black to arrive in Europe before payment was due, thus placing the unpaid for commodity some three to eight thousand miles distant from the supplier; second, frequency of rejections by purchasers on some doubtful ground of inferior quality; third, the demand of buyers for excessive discounts on grounds that some competitor supplier had offered a similar discount; and fourth, a price decline clause in export sales contracts which forced the seller "to accept the buyer's statement that he knew of or had himself had an offer at a lower price." Contemporary correspondence offered in evidence appears to confirm these conclusions.<sup>3</sup> Mr. R. H. DeGreeff, of R. W. Greeff & Co., Inc., a member of the first association, wrote member J. M. Huber, Inc., on October 5, 1932, as follows (exhibit 1):

Please be advised that we wish to resign as members of the association, effective immediately, and the writer at the same time desires to resign as an officer and director. Since the two important producers in the industry have withdrawn from the association, we can see no purpose in our continuing to remain as members, but we shall be pleased to resume our cooperation at any time a constructive plan covering the industry's export business is put forward.

We cannot see, however, how any plan can be successful which does not include a quota basis, uniform agency arrangements and sales contracts, as well as definite arrangements by which all sales are being handled by the association, thereby giving it the fullest possible control of the business.

#### *D. Carbon Black Export, Inc. (Present Group)*

A meeting was held in New York City in December 1932, attended by representatives of producers Columbian, United, Cabot, Huber, and Palmer, and presided over by Mr. Amos L. Beaty, then president of the American Petroleum Institute. At this meeting, it was concluded to form a new association comprised wholly of producers, and to consider the need of making such organization the exclusive agent of the producers. Thereafter, on May 16, 1933, the present association, Carbon Black Export, Inc., was incorporated under Delaware law, with 10,000 shares of capital stock without par value. The objects and purposes of the corporation are "to engage solely in export

<sup>3</sup> T. 9-20. Ex. 1-5.

trade, as the term 'export trade' is defined in the act of Congress known as the 'Webb Act.' The full functioning character of the association is revealed in the first two specific corporate purposes. The first, section 1, authorizing dealings in carbon black as an agent is set forth at page 1255 above. The second, authorizing buying and selling carbon black on its account, reads (exhibit 11) :

2. In such export trade, to buy or otherwise acquire, sell, exchange, contract for, handle and otherwise deal in, for its own account or for the account of others, carbon black and such other pigments and such other merchandise, commodities and articles and/or materials of commerce of every kind and nature.

The producers organizing the association and forming its first stockholders were: United Carbon Co.; Columbian Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber of La., Inc.; Century Carbon Co.; Panhandle Carbon Co.; Texas Carbon Industries, Inc.; and the Palmer Carbon Co.

Two of the above-named stockholders had some interest in the first association which was still "limping" along in early 1933. Texas Carbon Industries, Inc., was the producer-supplier for R. W. Greeff & Co., Inc., a distributor member of the first association. Mr. Kayser testified that the difficulty in this case was solved by "satisfying T. C. I. with the quota" of export business assigned to it and Greeff was "given the kind of assurance that he would not be eliminated" as a distributor. The Palmer Carbon Co.'s interest in the first association lay in the membership of its distributor therein, Palmer Gas Products Corp. However, it agreed to join the present association "if some substantial portion of its inventory were taken off its hands." This was accomplished by the purchase in May 1933 of 5,016,500 pounds of carbon black at 2 cents a pound from the Palmer company by five of above-named producer members: Columbian, United, Cabot, Huber, and Wishnick-Tumpeer. Mr. Kayser acted as clearing house for this transaction but did not remember whether any of the purchased product was exported. He testified that Phillips Petroleum Co. acted as the ostensible purchaser from Palmer because Palmer "had gas relations with the Phillips Petroleum Co. and, knowing Phillips were not in the confidence of others because they were not sellers of carbon black, they chose to make the deal through Phillips so they would be certain as to being paid;" and further that Phillips did not acquire title or pay or receive money, merely accommodating Palmer. Mr. Reid Carr testified to the same effect giving as his impression that Phillips did not acquire title to the Palmer black and made no profit or loss on the transaction, but that the transaction was cleared through Phillips as a matter of convenience. He added that Columbian's share of this purchase was sold in the regular course of business, some domestic and some export.<sup>4</sup>

<sup>4</sup> T. 45-61; 522; 1674. Ex. 6 A-F.

A copy of the bylaws of the association as adopted at time of organization is contained in the record as exhibit 10. There have been several amendments. Section 5 of article II, providing originally for three directors, was amended June 13, 1933, increasing the number of directors to 12, and later, by September 18, 1946, amendment, to 13. Two significant amendments, as revealed by the association's January 1, 1946, report to the Commission, were adopted on December 19, 1945. The first of these liberalizing the qualifications for president, repealed from article III, section 2, the sentence reading:

The president shall not at his election or during his tenure of office be or theretofore have been an officer (other than a member of the board of directors) or an employee or agent of any stockholder of this corporation.

The second consisted of a further demarcation between channel and furnace carbon black. To article VI, section 6, "Miscellaneous Provisions," there was added a sentence negating application to furnace black, the section, as amended, reading as follows:

SEC. 6. *Export prices.*—Export prices of all carbon black sold by the corporation shall be fixed and changed from time to time only (a) by the affirmative vote of the holders of a majority of those shares of the capital stock of the corporation entitled to vote present in person or represented by proxy at any annual or special meeting of the stockholders of the corporation at which a quorum thereof, as provided in section 3 of article I of these bylaws, shall be so present or represented, or by the consent in writing of the holders of a majority of the total number of shares outstanding, without a meeting: *Provided, however,* That the president shall concur in such affirmative vote or written consent, or (b) without such concurrence, by the affirmative vote of the holders of two-thirds of those shares of such stock so present or represented at any such meeting with such quorum or by the consent in writing of the holders of two-thirds of the total number of shares outstanding, without a meeting. Nothing in this section contained shall be deemed to apply to carbon black manufactured by the furnace process.

In the course of the year following its organization, the officers of the association prepared and submitted to the Commission a form of producer's contract which provided for a quota of export carbon black business to be handled exclusively through the association. The bill of particulars specified such exclusive contracts with stockholders, nonstockholders, and with Phillips Petroleum Corp. A form of distributor's contract was developed prior to 1940. The bill of particulars also further specifies restrictions on distributors' choice of agents; requirements that distributors deal exclusively in the association's carbon black; contracts fixing resale prices to distributors, agents, and consumers; and restrictive contracts with American manufacturer exporters who are not stockholders of the association. The investigation developed no evidence of agreements with foreign producers or with associations of foreign producers, nor any evidence of regulation of sales to our insular possessions, nor any failure to file information required by the Commission.

## FEDERAL TRADE COMMISSION

## IV. EXPORT TRADE OPERATIONS INVESTIGATED

*A. Association-Phillips Petroleum Co. Contract*

Mr. Reid Carr gave testimony as to the history of the royalty provision in contracts for purchase of gas by carbon black producers. His company, the Columbian, made its first contract for purchase of royalty gas from Phillips Petroleum Co. on December 10, 1936. He estimated that such royalty contracts were put in practice by members of the industry as early as 1928. He referred to exhibit 356 A-F as typical of a gas purchase contract at a definite price per thousand cubic feet. This particular contract was entered into on October 1, 1924, between Phillips Petroleum Co. (first party) and Columbian Carbon Co. (second party). Its first five paragraphs are here quoted in full, the last referring to price:

FIRST. That First Party is the owner of certain plants or factories for the extraction of gasoline from natural gas situated near the town of Pioneer, Eastland County, Texas, which plants are at present capable of handling thirty million cubic feet of natural gas per day.

SECOND. That First Party has entered into contracts with lessees under certain oil and gas leases covering land in the vicinity of said plants by the terms of which contracts First Party purchases gas from said lessees, which gas is used in and passed through said plants and gasoline extracted therefrom. That after the extraction of gasoline from the said gas by First Party it is necessary to return to the said lessees stripped or residue gas for development and operating purposes.

THIRD. That through the operation of said plants a large surplus of so-called tail, stripped, or residue gas is available at the exhaust of said plants after the extraction of gasoline from said gas and after the return of gas to the lessees for development and operating purposes. That Second Party is the manufacturer of carbon black and desires to erect a plant at or near the town of Pioneer, Eastland County, Texas, for the manufacture of carbon black from the aforesaid gas, pursuant to a permit heretofore issued by the Railroad Commission of Texas and assigned to the Columbian Carbon Company, or its nominee, and is desirous of purchasing, and First Party is desirous of selling, the aforesaid residue or stripped gas to be used in such manufacture.

FOURTH. Now, therefore, in consideration of the premises and of the terms, conditions, covenants, and agreements hereinafter set forth it is agreed by and between the parties hereto that Second Party shall ninety days after the execution of this agreement begin construction of pipe lines to convey the gas from First Party's plants and the erection of a plant of such size and capacity as may be necessary to consume not less than four and one-half million cubic feet of gas per twenty-four hours for the manufacture of carbon black, said plant to be in operation in at least one hundred and eighty (180) days from the date of this agreement.

FIFTH. The price shall be two and one-half ( $2\frac{1}{2}$ ) cent per thousand cubic feet during the first two and one-half ( $2\frac{1}{2}$ ) years of said contract, and three (3) cents per thousand cubic feet during the remaining two and one-half ( $2\frac{1}{2}$ ) years thereof.

He referred to exhibit 358 A-J as illustrating the royalty mode of payment. This was a contract dated September 7, 1928, between Philtex Oil Co. and The Palmer Corp. of Louisiana, the price provisions reading as follows:

14. The price to be paid to Seller for gas delivered to Buyer shall be thirty (30%) percent of the carbon black production of Buyer's plant, which shall, at Buyer's expense, be placed in Buyer's warehouses in paper bags, uncompressed. In the event Seller's share of the production shall be sold in compressed form, then Buyer shall be allowed what would under all circumstances be a reasonable fee for compressing same. Seller's share of said production shall be stored in the warehouses of Buyer without cost to Seller, but shall be held subject to Seller's risk. In this connection, however, it is understood and agreed that Buyer may obtain insurance, if possible, guaranteeing it against loss by fire or from any other source that it may deem advisable to insure against, which insurance shall cover all carbon black in said warehouses owned by both Buyer and Seller, and Seller hereby obligates and binds itself to pay its pro rata part of any and all insurance premiums due under any insurance policy purchased by Buyer, said payment to be made by Seller immediately upon receipt of bill for its pro rata part of said insurance premium or premiums; Provided, however, that Seller shall have the right and option to carry its own risk as to its share of the said production, by notifying Buyer of its intention so to do.

15. It is understood and agreed that Buyer will sell Seller's stocks in at least the proportion that Buyer sells its own stock and Buyer will make monthly settlements with Seller for sales of Seller's carbon black. Seller shall pay Buyer the actual sales costs of selling Seller's share of such carbon black, which shall not exceed five (5%) percent of the sales price.

Mr. Carr expressed his belief "that the Phillips Petroleum Co. changed its basis from the sale of gas at a flat price per thousand to the royalty basis in order to encourage a wider sale of gas for carbon black purposes. The royalty contract offered very great advantages to the producer of the black as compared with the producer who paid at flat price for his gas, because the royalty, under the royalty contract if there was an overproduction and the producer had to stock his black, he didn't have to pay for the gas. He only had to pay for the gas as it was sold. In the second place, if the price went down, the price of gas automatically went down with it. Whereas, under a fixed price contract, the producer had to pay for his gas at the end of every month whether he sold his back or not, and he had no protection in the case of falling market."<sup>5</sup>

Mr. F. E. Rice, vice president of Phillips Petroleum Co., testified that he had been with the company over 27 years and was familiar with the practices surrounding gas supplies to carbon black plants, giving the following additional facts. Oil or gas leases with landowners provide for a royalty of one-eighth of the proceeds from sale of gas or oil. His company pays the landowner royalty for the amount of natural gasoline which they extract, and if it utilizes the

<sup>5</sup> T. 433-435.

butanes and propanes (which are referred to as "heavier fractions") it pays a higher price. The gas which remains is called residue gas, which may be used for fuel and light or for carbon black production. A royalty of one-eighth of the proceeds of such sales must be paid the landowner. Residue gas from which the heavier fractions have been extracted furnishes a decreased production of carbon black. He testified further that Phillips company in 1944 sold 232 million cubic feet or 25 percent of the 910 million cubic feet of gas consumed by the carbon black industry; in addition it furnished 66½ million cubic feet to plants in which it held a half interest, making the total of gas furnished to the industry by Phillips, 33 percent. Total production of carbon black in 1944 was 431,721,000 pounds; its 30 percent royalty share of this amounted to 28,850,000 pounds, or 7 percent of the total; its share of production in half-owned plants was 27,500,000 pounds, or 6.6 percent, making its proportion of total carbon black production in 1944, 13.6 percent. These proportions had not varied substantially during the 10 or 12 years preceding 1944. Most of the major oil companies, including Skelly, Shell, Magnolia, Shamrock, Gulf, and Cities Service furnish gas to the carbon black industry.

Respecting the royalty paid by carbon black producers, Mr. Rice testified that certain changes had been made in its mode of computation. In the Philtex-Palmer gas contract of September 7, 1928, exhibit 358, quoted in paragraph IV A above, the royalty provision read "30 percent of the carbon black production of Buyer's plant." Mr. Rice referred to exhibit 466 in the record, photostat copy of a letter from Phillips Petroleum Co. to Palmer Carbon Co., dated April 6, 1934, modifying such royalty payment provision, and reading, in part, as follows:

1. The selling price of royalty black moving from the plant during any month shall be the average price f. o. b. plant, received by you on domestic sales during the month, without regard to actual destination.

This change, he testified, was done at the insistence of the company's accounting division whose auditors "in the chaotic condition of the export market were having a hard time determining just what payments should be made."

Later on, in 1939 and 1940, as these contractors were renewed, the basis of royalty computation was modified to include the export price for carbon black, because "we knew the export market was a higher priced market than the domestic market at that time, so we wanted to share in any sales of our black in that market." he testified. He added "we are kind of opportunists in a way, we try to get the highest price for our carbon black, and 1939 and 1940 it was to our advantage to change these back, and in instances we did." At a later date, Mr. Rice submitted a letter dated March 1, 1946, in the record as exhibit 524-A-F, which details contract extensions with six carbon black pro-

ducers, four of whom agreed to acceptance of export prices in royalty computation.<sup>6</sup>

The scope of the investigation necessarily did not include the landowner's interest in royalty charges on gas used in making carbon black, but covering the period of time just discussed there is in the record, as exhibit 324 A, a photostat copy of a letter dated April 10, 1939, from C. E. Kayser to Oscar Nelson, in which the pertinent portions, the second and third paragraphs, read as follows:

The Royalty Owners Association for the Texas Panhandle held a well attended meeting in Amarillo on March 8th. Ernest Thompson, Railroad Commissioner, and Senator C. C. Small were present. Much of the meeting was taken up on blaming the carbon black manufacturers for the low returns Royalty Owners receive on natural gas produced from their properties. The Amarillo News-Globe of the 9th reports on Senator Small's contribution to the meeting as follows:

"The Senator (Small) also took a rather significant filing at the carbon black companies, who he said were in a big way responsible for the low returns on gas royalty being paid for gas processed for carbon black, by holding the price to such a low level. He intimated clearly that a law shutting off carbon black manufacture might be a real remedy until such time that it became scarce enough to command a reasonable price."

The second specification in the bill of particulars reads as follows:

2. Contract with Phillips Petroleum Company, a petroleum producer which sells large quantities of natural gas to Carbexport's stockholders and other manufacturers of carbon black for the production of carbon black, and which is paid therefor in a percentage of the carbon black produced therefrom, which contract requires and causes said petroleum company to export such carbon black thus acquired by it exclusively through the stockholders of Carbexport and to refuse to quote or sell, directly or indirectly, such carbon black for export to other American exporters.

#### THE PHILLIPS CONTRACT IN QUESTION

Contained in the record are exhibits 25 A, B, and C. The first two recite the conditions of an escrow agreement entered into at the time of organization of the present association, and refer specifically to the receipt of an agreement by Phillips (exhibit 25 C) not to export royalty carbon black of association members with whom Phillips has royalty gas contracts. The exhibits are here reproduced:

#### EXHIBIT 25 A

MARCH 8, 1933.

REID, L. CARR, ESQ.,  
120 Broadway,  
New York City.

DEAR SIR: We hand you herewith two copies of the Sales Agreement and Subscription Agreement between our Company and Carbon Black Export, Inc., both duly executed by our Company.

<sup>6</sup> T. 1464-1476.

You are hereby directed to hold said agreements in escrow and to deliver same only upon the following conditions, viz:

1. Receipt by you of sales agreements and subscription agreements of like tenor, duly executed by the following companies, respectively: Godfrey L. Cabot, Inc., United Carbon Company, Columbian Carbon Company, J. M. Huber Company of Louisiana, and Palmer Corporation.

2. Receipt by you of either (a) a letter signed by Phillips Petroleum Company agreeing for the term of five years from January 1, 1934, not to export carbon black except as part of the contract quota of United Carbon Company and Godfrey L. Cabot, Inc., or (b) a sales agreement executed by Phillips Petroleum Company of like tenor with that signed by the other companies above named, and fixing such contract quota as our company may approve.

Until the conditions above specified are performed, said agreements are not to be considered as binding or effective for any purpose.

Upon compliance with both the foregoing conditions, you are to deliver said agreements, and to return to our Company one copy of each duly executed by Carbon Black Export, Inc.

Yours very truly,

UNITED CARBON COMPANY,  
By \_\_\_\_\_

RLC/Mac.

EXHIBIT 25 B

CLARK, CARR & ELLIS,  
120 Broadway,  
New York, May 5, 1933.

UNITED CARBON COMPANY,  
Union Building,  
Charleston, W. Va.

GENTLEMEN: Under date of March 8, you delivered to me executed copies of Sales Agreement and Subscription Agreement with Carbon Black Export, Inc., upon certain conditions, one of which was:

"2. Receipt by you of either (a) a letter signed by Phillips Petroleum Company agreeing for the term of five years from January 1st, 1934, not to export carbon black except as part of the contract quota of United Carbon Company and Godfrey L. Cabot, Inc., or (b) a sales agreement executed by Phillips Petroleum Company of like tenor with that signed by the other companies above-named, and fixing such contract quota as our company may approve."

The Phillips Petroleum Company have submitted to me a proposed letter, of which I enclose a copy, and would ask you to advise me promptly whether you will authorize me to accept the same as in satisfaction of the escrow condition above-quoted.

I might add that at the time the escrow agreement was signed it was considered probable that the Phillips Petroleum Company would purchase the plant of the Panhandle Carbon Company. I am informed that arrangements have since been made whereby said plant is to be purchased by Wishnick Tumpeer & Company or by some subsidiary corporation controlled by them, but they have agreed that the product of said plant shall be included in the quota of the Century Carbon Company.

Yours very truly,

(Signed) REID L. CARR.

## EXHIBIT 25 C

MAY 2, 1933.

Mr. REID L. CARR,  
120 Broadway,  
New York, N. Y.

DEAR SIR: With reference to the marketing of carbon black which we receive in payment for gas, and with reference to this company taking stock in Carbon Black Export, Inc., this is to advise that the carbon black producing companies with which we have these contracts market our black along with theirs, and they are members of Carbon Black Export, Inc. Therefore we ourselves shall not export any of this black during the five-year period from January 1, 1934. For the same reason we do not consider it necessary for us to take stock in Carbon Black Export, Inc.

Yours very truly,

PHILLIPS PETROLEUM COMPANY.

By -----

Renewal of the contract (exhibit 25 C) dated May 2, 1933, was reported to a directors' meeting of the association held on March 25, 1936 (exhibit 99 A) in a report by the president, Mr. Kayser, which reads as follows:

He also stated that a new undertaking has been obtained from Phillips Petroleum Company extending to December 31, 1945, their original agreement not to export carbon black except through the quota of producer Stockholders of the Corporation.

The renewal itself is dated February 1, 1936, and is contained in the record as exhibit 462, reading as follows:

FEBRUARY 1, 1936.

File: R-42-36-61.

CARBON BLACK EXPORT, INC.,  
500 Fifth Avenue,  
New York, N. Y.

GENTLEMEN: Under date of May 2, 1933, we wrote a letter to Mr. Reid L. Carr, reading as follows:

"With reference to the marketing of carbon black which we receive in payment for gas, and with reference to this company taking stock in Carbon Black Export, Inc., this is to advise that the carbon black producing companies with which we have these contracts market our black along with theirs, and they are members of Carbon Black Export, Inc. Therefore we ourselves shall not export any of this black during the five-year period from January 1, 1934. For the same reason we do not consider it necessary for us to take stock in Carbon Black Export, Inc."

We now understand that the carbon black producers are ready to renew their contracts for export of carbon black through Carbon Black Export, Inc., for a term of ten years ending December 31, 1945, provided Phillips Petroleum Company will renew the agreement above quoted for said and extended term. This we hereby do.

We are further informed that an increased export quota has been awarded to Panhandle Carbon Company on the understanding that no black will be exported during said term, except under said quota, from the unit now being constructed

by us and Panhandle Carbon Company jointly. This understanding we also confirm.

Very truly yours,

(Sgd.) F. E. RICE.

C-C R. F. Hamilton.

During the period covered by the investigation, the Phillips company had royalty gas contracts with all association stockholders excepting Cabot and Huber.

Mr. Carr testified concerning exhibit 25 C as follows:<sup>7</sup>

At the time the escrow agreement was made, I undersand that the Phillips Petroleum Co. was the owner of the Panhandle Carbon Co. plant and that it was the desire of the parties that if Phillips Petroleum Co. retained possession of that plant, it would obtain a quota or waive a quota, as the escrow letter expresses. In the interim period between March 8 and May 5, when the second letter was written, I am informed the Phillips Petroleum Co. sold that plant to Mr. R. I. Wishnick and Mr. Wishnick agreed to include the Panhandle plant under his Century Carbon Co. quota.

Phillips Petroleum Co. had contracts with various manufacturers of carbon black whereby in lieu of receiving a specified price per thousand cubic feet for the gas supplied by Phillips Petroleum Co. to such manufacturers for carbon black manufacture, Phillips Petroleum Co. would receive a specified percentage, I think in most, if not all the cases, 30 percent of the proceeds of the sale of black less a selling commission. These contracts required the manufacturer to sell the black pro rata or in the same proportion.

Q. That is, 30 percent of all black sold was considered to be a royalty on the sale of black?

A. Yes, less whatever sales commissions or other expenses were allowed in the agreement.

Q. Now, what did 25-C accomplish with respect to that so-called royalty on the black?

A. I should not think it accomplished anything because, as the letter says, the carbon black producing companies, it reads as follows, I should say:

"The carbon black producing companies market our black (that is, Phillips black) along with theirs and they are members of Carbon Black Export, Inc."

In other words, Phillips Petroleum Co., as I understand it, under these contracts had no right to market any black and never did market any black, was not in the business of selling black at all.

Q. But it says further:

"Therefore, we ourselves shall not export any of this black during the 5-year period from January 1, 1934."

What is meant by "this black"?

A. That means their pro rata share of the black which was to be the royalty on the black to be sold.

Q. To pay for the gas?

A. To pay for the gas?

At no time prior to May 2, 1933, when this letter from Phillips Petroleum Co. was written, had the Phillips Petroleum Co. itself marketed any carbon black either in the domestic or in the export trade. I further understand that no black has ever been segregated and set apart as belonging to the Phillips Pe-

<sup>7</sup>T. 145; 146; 150; 376.

troleum Co. under royalty contracts of this type, it being the practice to load, ship, or place in warehouses all the black produced from each plant without any attempt to earmark any particular part thereof as belonging to the Phillips Petroleum Co.

Attention is called to the following points in connection with the aforesaid gas contracts between Phillips and Columbian.

The contract dated December 10, 1936 (exhibit 369A-J) between Phillips and Columbian provides as follows:

"14. It is understood and agreed that Buyer will sell Seller's stock in at least the proportion that Buyer sells its own stocks, and Buyer is to make monthly settlements with Seller for the sales of carbon black.

"15. The price to be paid by Buyer to Seller for Seller's share of carbon black sold shall be the average price f. o. b. plant received by Buyer on domestic sales during the month of such sales without regard to actual destination of shipments. If carbon black moves from the plant, it shall be regarded as sold by Buyer even in the event of its going into storage elsewhere."

These clauses show:

1. That it was not contemplated that any particular black should be segregated or sold to Phillips, or that Phillips should have any *jus disponendi* over any black. Instead, all the black was to be sold by Columbian and Phillips' only right was to receive its proportionate share of the average price.

2. That the basis of settlement was not the amount actually received by Columbian but the average price on domestic sales f. o. b. plant, thus excluding from consideration the price received on export sales and on domestic l. c. l. sales ex warehouse. This is wholly inconsistent with the notion that 30 percent of the black was to be segregated and treated as Phillips' separate property. If the latter had been the intention, the contract would have required Columbian to account to Phillips for the actual amounts received on the sale of Phillips' black, not for the average price based on domestic sales f. o. b. plant.

3. There was nothing whatever to prevent Columbian from selling all or any part of the production of the plant in the export market, but Phillips by this clause deprived itself of the right to participate in any excess of the export price over the domestic price. This is hardly consistent with the theory that the Export corporation was a creature or creation of Phillips, designed for the purpose of enhancing Phillips' profit.

The contract between Phillips and Columbian dated May 17, 1940 (exhibit 373 A-R) provided:

"14. It is understood and agreed that Buyer will sell Seller's stock in at least the proportion that Buyer sells its own stocks, and Buyer is to make monthly settlement with Seller for the sales of carbon black.

"15. The price to be paid by Buyer to Seller for Seller's share of the carbon black sold shall be the average price (subject to the exception and to the deductions hereinafter specified) received by Buyer upon all sales of carbon black of like kind and quality, f. o. b. the various factories of the Buyer in the domestic and export markets, shipped in the calendar month preceding the month for which settlement is made. If carbon black is moved from the plant, it shall be regarded as sold by Buyer, even in the event of its going into storage elsewhere. In computing said average price, Buyer shall except and exclude all sales of less than carload lots in which delivery is made from any warehouse located at a place other than the location of a carbon black factory of Buyer."

Under this contract, export sales were to be taken into account in determining the settling price, but the price was to be the average received by Buyer upon all sales of black of like kind and quality f. o. b. all its plants. It was not the

price received for any particular black contemplated as belonging to Phillips or even the average price received from the black produced at this particular factory. Again, this is wholly inconsistent with the motion that 30 percent of the black was to be segregated and dealt with as Phillips' separate property.

The provisions of the contract of September 12, 1939 (exhibit 371 A-J), between Phillips and Columbian are essentially similar to those last above quoted, and the same comments generally apply to them.

The two contracts made by Phillips with The Palmer Corp. dated respectively September 7, 1928 (exhibit 358 A-K), and July 13, 1929 (exhibit 361 A-K), contain the following provision:

"It is understood and agreed that Buyer will sell Seller's stocks in at least the proportion that Buyer sells its own stock, and Buyer will make monthly settlements with Seller for sales of Seller's carbon black. Seller shall pay Buyer the actual sales cost of selling Seller's share of such carbon black which shall not exceed 5 percent of the sales price."

None of these contracts contains any clause whereby Phillips is given the right to require delivery to it of black in kind, instead of a share of the proceeds of the sale. None of said contracts contains any clause whereby the producer of the black is required to segregate or earmark any particular black as the specific property of Phillips. None of said contracts gives Phillips any right to dictate to what customers or in what markets or at what price the black shall be sold. The producer is perfectly free to sell or ship or deal with it as he pleases, subject only to his obligation to account to Phillips for its value determined in the manner that the contracts respectively provide.

The suggestion that the letter given by Phillips at the time of the organization of the Export corporation (exhibit 25 C) deprived Phillips of the right to sell royalty black in the export market is thus answered:

Phillips never had any right under these contracts to take any royalty black in kind, or to sell it in any market, whether domestic or foreign, but only the right to receive payment for the royalty black under the conditions and at the prices provided in said respective contracts. This right was neither enlarged nor diminished by the latter. The producing companies were still free to sell the royalty black along with their own either in the domestic or in the export market. They were still bound to sell royalty black proportionately with their own, though the price at which settlement was to be made with Phillips was not uniform but varied according to the provisions of each particular contract.

Mr. Carr testified that Phillips' transfer of its interest in the Pan-handle plant neither enlarged nor diminished its rights under the royalty contracts, they having no right to take the royalty black in kind or to export it. He gave his opinion that in reference to the royalty black the Phillips' letter (exhibit 25 C) was a nullity. He recalled no discussion on this subject with Phillips' officers but believed they construed the contract in the same way. He testified with respect to the extension (exhibit 462) as follows:<sup>8</sup>

My position in regards the extension of the agreement is the same as it was as regards the original agreement, namely, that it did not confer upon nor take away from Phillips any right of disposition over the black. It was still royalty black for which we were bound to account in dollars rather than in kind.

<sup>8</sup> T. 420-424.

Testimony about the title to the royalty black was as follows:<sup>9</sup>

Q. Is it your contention, Mr. Carr, that the title to any black did not pass to Phillips?

A. That is a difficult question because the agreement provides that while—some of the agreements provide that while the black is in warehouse it is at Phillips' risk and to that extent the provision of the agreement is, the two provisions of the agreement are slightly inconsistent with one another. There are many cases, as you know in law, where agreements are drawn which look both ways.

For example, it is sometimes difficult to distinguish technically between a bailment and the sale, from the terms of the agreement itself. There have been many such cases in the courts.

Q. What is your opinion? Did title to the black pass to Phillips or not, according to these contracts?

A. I think that Phillips became the owner of an undivided 30 percent interest in the black. But with no right to assume specific possession of that 30 percent interest or to dictate how or to whom or where or at what price it should be disposed of.

Further on the same subject:<sup>10</sup>

A. So far as I know, in every instance, the black is sold by the black producer and the specified proportion of the proceeds is accounted for by the producer to Phillips Petroleum Co. Of course, I have direct personal knowledge only of the Columbian Carbon Co., but I believe that that practice was general throughout the industry.

Q. I think there is probably no debate about that. Is there?

A. I think not.

Q. That you sold Phillips black?

A. We sold all the black.

Q. Phillips, as well as your own?

A. Yes, if it was technically Phillips' title. I don't want to quibble about the question of legal title, their 30 percent in the black.

Mr. Oscar Nelson could not explain exhibits 25 A, B, and C, testifying that the transaction concerned organization of the association and was handled by his counsel.

Mr. Kayser testified that he understood that Phillips had no title to the royalty black which was merely reference "to a device for determining the price that Phillips are to get for their gas." He further testified that the original contract and the extension "can mean nothing." His testimony with reference to the extension reads as follows:<sup>11</sup>

Phillips letter of February 1, 1936, exhibit 462, was written several months after the members of Carbexport had unequivocally agreed to extension of their Sales Agreements. The date of the said extensions was November 15, 1935. My recollection of the reason for the late date of the Phillips letter is that some time in January of 1936, my then secretary asked me if the Phillips undertaking,

<sup>9</sup> T. 425.

<sup>10</sup> T. 428.

<sup>11</sup> T. 1763; 1913.

which she had run across in the contract files, ought not be renewed whereupon I put in a telephone call for Mr. Rice at Bartlesville and, upon reaching him, asked him to have a renewal sent along.

A day or two later Mr. Rice phoned back to say his management couldn't see any reason for the need of the renewal and asked if I could see any in view of the fact that they no longer owned the Panhandle plant.

I agreed, but suggested that since the renewal would commit Phillips to nothing, its issuance could do no harm but might look like a gesture of good will from the principal gas supplier to his consumers. Mr. Rice agreed to put the matter before his management in this light and the letter of February 1, 1936, exhibit 462, resulted.

The appearance of an item in the minutes of the directors' meeting of March 25, 1936, exhibit 99, reporting the receipt by this respondent of the Phillips renewal was merely by way of routine. My recollection is that the announcement of the fact elicited no display of interest on the part of any director present.

Mr. K. S. Adams, president of the Phillips company, had had nothing to do with the organization of Carbon Black Export, Inc., nor has he had any correspondence or contacts with its officers. He further testified that since the formation of Carbon Black Export, Inc., in 1933, the Phillips company has neither produced independently nor exported any carbon black. He added that the company had, in 1943, constructed its own full-owned plant for manufacture of "Philblack," a furnace black, but that at the date of testimony, February 11, 1946, a department for the export of furnace black was still in process of formation.<sup>12</sup>

Mr. F. E. Rice, vice president of the Phillips company, gave testimony in reference to exhibits 25 A-C and 462, as follows:<sup>13</sup>

Q. I don't want to ask you to interpret an agreement we have in writing here, but nevertheless I will ask you what were you bound to do under this contract?

A. Well, as I understand it, we were bound to sell our royalty black to Carbon Black Export members in the export business only through Carbon Black Export.

Q. Now, you had royalty black, did you not, that was produced by carbon black manufacturers, other than those who were members of Carbon Black Export, did you not?

A. Yes, sir.

Q. Was that royalty black exported?

A. In some instances, yes, sir.

Q. How was it exported?

A. By the manufacturers.

Q. Through Carbon Black Export?

A. No, sir.

Q. Well, now what were some of the companies—there is no secret about it—you see the point I am after, do you not—what were some of the companies that you sold gas to and for which royalty black was due you during this period that was exported, do you know?

A. Crescent was one.

<sup>12</sup> T. 1400-1421.

<sup>13</sup> T. 1486.

Q. And do you take it that that did not violate the contract, 462?

A. No, sir.

Q. In other words, 462 did not cover black that was produced by those manufacturers who were not members of Carbon Black Export?

A. That is correct.

*B. Exclusive Contracts With Stockholders*

The bill of particulars sets forth its third specification as follows:

3. Contracts with its stockholders, all of whom are manufacturers of carbon black, which require and cause them to sell carbon black for export exclusively to Carbexport, and to refuse to quote or sell, directly or indirectly, carbon black for export to other American exporters.

At the time of organization of the association, it filed with the Commission on June 15, 1933, certified copies of its by-laws and certificate of incorporation, and a copy of a proposed sales agreement dated May 25, 1933, a copy of which appears in the record as exhibit 12. Following correspondence with the Commission, certain changes were made in the contract, by amendments dated October 13, 1933, and May 18, 1934. As amended and finally executed, a photostat copy of the contract made with Columbian Carbon Co. is included in the record as exhibits 15 A-Q 16, 17 A-B, and 18. (The identical contracts of stockholders Cabot, Johnson, United, Texas Carbon Industries, Panhandle, Palmer, and Huber appear in the record as exhibits 565, 66, 67, 68, 69, 71, and 72.)

The relevant portions of said contract are here set forth. Paragraph First (in part):

The term "export carbon black" means all carbon black which is for export, or is in the course of being exported, or has been exported from the United States or any territory thereof, to any foreign nation or nations, country or countries, except that it shall not include (a) carbon black exported to the Dominion of Canada and intended for use or consumption in Canada, or (b) carbon black exported *by through railroad shipments* to Mexico and intended for use and consumption in Mexico; the term "Stockholders" means those, including the Producer, who have now entered into or shall hereafter enter into sales agreements with the Corporation substantially identical in form with this agreement; the term "pro rata" means in the ratio of the contract quotas of the Stockholders or so much thereof as shall at any given time be in effect; "year" means a calendar year and "month" means a calendar month.

The italicized phrase, "by through railroad shipments," was deleted by amendment dated October 13, 1933, exhibit 16.

THIRD. Beginning on the 1st day of January 1934, and ending on the termination of this agreement as prescribed in paragraph TWENTY-FIFTH hereof or on the earlier termination hereof as provided in paragraph numbered TWENTY-FIRST, the Producer shall not directly or indirectly sell or deliver any export carbon black except through the Corporation as hereinafter provided. The Corporation shall act as exclusive agent for the Producer in and for the sale of all the Producer's export carbon black. The Producer further agrees through-

out the term of this agreement to use reasonable care that exports made by the Producer to Canada or Mexico are intended for use and consumption in those countries and shall not be diverted to other foreign countries, and also that carbon black sold by the Producer in the United States shall be exported only through the Corporation.

(The last sentence embodies the amendment of May 18, 1934, exhibit 17 A.)

FIFTH (*in part*). The Corporation shall allot to the Producer, and the Producer shall have the right to supply, subject to the provisions of this agreement, in each calendar year during which this agreement shall be in force 25.933 percent (25.933%) of the total requirements of the Corporation of export carbon black. The "total requirements" of the Corporation as used herein shall denote the total quantity of export carbon black required by the Corporation for sale to its foreign customers and/or for consignment to its foreign distributors. Such percentage is hereafter referred to as the "contract quota." The Corporation reserves the right to purchase from persons, firms or corporations other than Stockholders, such part of its total requirements of export carbon black as the Corporation may in its discretion from time to time to determine, provided that the aggregate amount of export carbon black so purchased by the Corporation in any calendar year shall not exceed ten percent (10%) of such total requirements of the Corporation for such year. If and to the extent that such purchases shall be made, the contract quota of the Producer and of each of the other Stockholders for such year shall be reduced pro rata.

THIRTEENTH. On or before the twentieth of each calendar month, the Producer shall render to the Corporation in such form and manner, including detail, as shall from time to time be prescribed by the Board of Directors of the Corporation, a report showing the production, stock and shipments of carbon black of the Producer and its subsidiary and/or controlled corporations during the calendar month preceding.

SIXTEENTH. In case the President of the Corporation shall at any time determine that any carbon black produced by the Producer has been exported in any manner other than through the Corporation and that the Producer sold said carbon black for export or with knowledge that same was intended for export, or omitted to take reasonable precaution to prevent the same from being exported, the President of the Corporation shall charge the Producer with a commission on said carbon black so exported at the rate at the time in effect hereunder, and may, in addition, in his discretion, without action of the Board of Directors of the Corporation, deduct from the Producer's contract quota for the current year a quantity equal to double the quantity so exported. It shall be for the President of the Corporation to decide whether a given sale of the carbon black of Producer that was exported was or was not sold for export within the meaning of this paragraph, and the Producer agrees to be bound by such decision.

SEVENTEENTH. (*in part*). All the obligations of this agreement on the part of the Producer are undertaken on behalf of the Producer and of any and all subsidiary or controlled corporations in which the Producer may now or hereafter directly or indirectly own or control fifty percent (50%) or more of the stock.

Said obligations shall also extend to and cover the export carbon black of any factory which the Producer or any subsidiary and/or controlled corporation may now or hereafter directly or indirectly lease, operate or control, or in which the Producer or any subsidiary and/or controlled corporation may now or hereafter own a financial interest of fifty percent (50%) or more.

TWENTY-THIRD. The actual or potential productive capacity of Producer's carbon black factories is one important element in fixing Producer's contract quota

hereunder. Accordingly, it is agreed that in case during the term of this agreement Producer, or any subsidiary or controlled corporation, shall sell, transfer, lease, or otherwise dispose of any carbon black factory or part thereof now or hereafter owned by it, and the purchaser, assignee, transferee, or lessee thereof, as the case may be, shall not assume and agree to be bound by all the provisions of this agreement, then and in that case, the contract quota of the Producer for the remaining term of this agreement may be reduced without the Producer's consent, to such extent as the Board of Directors of the Corporation in its discretion may determine by majority vote, and none of the provisions of paragraph SIXTH hereof shall be applicable to such reduction. Provided that nothing in this paragraph contained shall apply to any case where the Producer or any subsidiary or controlled corporation shall in good faith abandon operation of any plant or part thereof and demolish the same and sell for scrap the materials salvaged therefrom.

Mr. Kayser testified that the original stockholders and parties to the contract, Columbian Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber, Inc.; United Carbon Co.; Palmer Corp.; Texas Carbon Industries; and Century Carbon Co., represented roughly 85 percent of this country's carbon black production. He named as nonmember producers the following: Crescent Carbon Co., Imperial Oil & Gas Products Co., Magnolia Petroleum Co., and Herkness Carbon Co. He testified further that there was no requirement in the contract forcing the producer to supply carbon black but that the producer always retained the right to state whether he intended to fulfill his quota. The quotas, he testified, "were arrived at through what appeared to me to be plain, simple trading. When the attempt was made to arrive at an agreement on the quotas, each member made a guess." The three large members, Columbian, United, and Cabot "whacked up 75 percent among themselves and the lesser producers would attempt to arrive at a division of the remaining 25 percent. Eventually they got themselves squared around to a 100 percent division." His testimony on the factor of production was:<sup>14</sup>

Q. Now, I ask you to tell me whether or not it is a fact or was a fact at the time, that the actual potential production capacity was an important element in fixing the quota?

A. Well, I do not know how to answer that, to make a categorical statement like that about what took place in a horse trade. It is possible that there were some who felt that they would tend for a quota that would represent a share of the export market that was equal to their share of the total production. There were probably others who felt that that would not result in a figure that represented that share of the export market which they had enjoyed prior to Carbon Export, and they contended the opposite.

Mr. Reid L. Carr, who drafted the contract, testified that the language of the agreement "speaks for itself" on the requirement that producers sell for export exclusively to Carbon Export, and that it

<sup>14</sup> T. 79; 230-234.

was not his "purpose in drawing the agreement to provide for any restraint of the domestic market."<sup>15</sup>

Mr. Oscar Nelson testified on this particular, as follows:<sup>16</sup>

For many reasons, I regard this exclusive feature as being essential to the maintenance and effective functioning of Carbexport. To allow producers' black to be indirectly diverted to export markets outside of the association and in excess of producers' quota makes the quota arrangement meaningless. Moreover, it enables the producer to sell in excess of his quota at prices slightly under Carbexport's fixed price, using that as an umbrella. It is my judgment that if Carbexport as the selling agent for the producers does not have authority that makes its agency exclusive, the Export Association cannot succeed.

Mr. Hans Huber's testimony on the exclusive provision of the contract was as follows:<sup>17</sup>

In this connection I feel I must emphasize the importance to the American carbon black industry, and no doubt to most American industries which export and which are threatened by foreign competition, of a feature which is the essence of Carbexport and without which Carbexport cannot hope to operate effectively.

Carbexport must be allowed to forbid the sale by its members of any carbon black obviously intended for export to anyone outside of Carbexport. An agreement among members of an association that they must sell abroad or for consumption abroad only in conformance with established prices and terms of sale is no agreement at all, if such members are free to sell to a class of persons at any price and on any terms. It is not possible to maintain established prices and sales terms when producers are required to sell through distributors not bound by such prices and terms and when a premium is placed on foreign consumers' purchasing from such distributors rather than from those distributors who have contracted to observe uniform prices and terms.

Mr. Thomas D. Cabot testified on the exclusive feature, as follows:<sup>18</sup>

I think it fundamental in an association such as ours that the members be restricted from exporting black directly or indirectly through other channels. Otherwise, quotas become meaningless. A member can get both his quota of the association's market and such additional market as he can attain through other channels.

His testimony on the negotiation of quotas reads as follows:

Q. In your opinion is there any way that Carbon Black Export could function in the absence of some quota device?

A. We tried that and it did not work. The trouble is that unless you have quotas there is always the urge on the part of individuals to increase their sales and also of the agents to increase the sales of the agents. The agents are difficult to control. If they cut commissions neither the principal nor the competitor can be sure that they have done it. They suspect that they have often when they have not.

We have found by experience that before we had quotas there was what we might call chiseling in the foreign market.

<sup>15</sup> T. 137.

<sup>16</sup> T. 627.

<sup>17</sup> T. 752.

<sup>18</sup> T. 1083; 1101.

Q. So that in your opinion a quota arrangement of some kind is essential to the smooth functioning of an organization such as Carbon Black Export?

A. I believe it is. That is our experience.

Q. What do you believe should be the factor which controls quota or the factors which control quota?

A. Quota is a matter of negotiation or compromise.

We based the quota originally partly on the relative producing capacities of the various people that went into the Carbon Black Export, Inc., and partly on the ratio of sales in the foreign markets of the various people who went into Carbon Black Export, Inc., but in the last analysis it was nothing but a horse trade. We sat down and each set down on paper a percentage he thought he ought to have, and we added it up and it came out 150 percent, and we had to trade that down until we got within 100 percent.

Q. Irrespective of what has happened in the past, I ask you whether or not you think quotas should be determined by productive capacity in this country?

A. In the long run I think it would approach productive capacity in this country, particularly if Carbon Black Export exists for a long time, because over a long period the question of export sales becomes less and less important.

Q. There may be some question as of this moment as to whether production should govern quota. Should that doubt, if it exists, be removed by ruling of the Commission or the courts, in your opinion?

A. In my opinion there are no dangers in having a quota if quotas are in direct proportion with producing capacity.

Q. When you say there are no dangers, you have what dangers in mind?

A. Dangers to the buying public in this country.

In the course of operations under the contract, Mr. Kayser, on June 5, 1935, "brought to all members' attention" information contained in the following letter (photostat, exhibit 41A) :

JUNE 5, 1935.

Mr. OSCAR NELSON,  
United Carbon Co.,  
Charleston, W. Va.

DEAR MR. NELSON: Clause Sixteen of the Sales Agreement between producers and the Corporation is producer's notice that he is obligated to see to it that none of his production goes into export except thru the Corporation. Clause Two of the agreement between distributors and the Corporation is distributor's notice that it is his responsibility to see to it that black which he sells in the United States, Canada or Mexico shall be sold for consumption in those countries, and shall not be exported to any other country.

We feel it necessary to remind both producers and distributors of their obligations in this respect because we discover that Crescent Carbon Company and/or Canada Carbon Black Company, the latter being the former's distributor in both the domestic and export markets, are attempting to make purchases of black from members of the Corporation which, though the intention is not expressed at the time the offer of purchase is made, are intended for export.

Very truly yours,

CARBON BLACK EXPORT, INC.

Mr. Nelson replied (exhibit 41 B) on June 15, 1935, writing "I am entirely in accord with your letter." Mr. Kayser testified in connection therewith as follows:<sup>19</sup>

<sup>19</sup> T. 188.

Q. Was Crescent Carbon Co. referred to in these letters as a member or stockholder of the corporation?

A. No, Crescent Carbon Co. was not.

Q. Who is Canada Carbon Co.?

A. It was the distributor for Crescent Carbon Co. My brief explanation is incorrect. It had nothing to do with the situation I thought was being covered. In all probability it was reported that producers in the export corporation were selling to producers or distributors outside of the export corporation.

Q. This was to stop that?

A. This was the warning that that was contrary to the contract. That letter was probably circulated to everybody in the organization or connected with the organization in any way.

Q. Was either Crescent or Canadian, one or the other, or both, apparently trying to purchase black from members of the corporation?

A. One might have purchased it, I don't recall it.

Stockholding membership changes occurred as follows: In December 1934, the United Co. acquired the plants of the Century and the Texas Carbon Industry Cos.; and Columbian acquired the Palmer Carbon Co. Copies of documents of assignment effectuating these transfers appear in the record as exhibits 181 to 184. Chas. Eneu Johnson & Co. became a stockholder on June 18, 1936. On September 16, 1936, Keystone Carbon Co. became a stockholder but shortly thereafter it was acquired by Columbian Carbon Co. As the result of purchases of carbon black made by the association from Continental Carbon Co. beginning September 29, 1937, this company, in 1942, was given a quota of 5.58 percent, though a nonmember. (This transaction is further discussed in par. IV-C hereof.)

The foregoing membership changes were duly recorded in directors' minutes, as follows: Exhibit 95 B. April 24, 1935, meeting:

The president advised the board that Palmer Carbon Co. had officially announced that it had sold its plant and assets, including its stock in Carbon Black Export, Inc., to Columbian Carbon Co., that this fact was verified by Columbian Carbon Co., and that Palmer Carbon Co. asked permission to transfer its stock in this corporation to Columbian Carbon Co. On motion made, seconded and carried, the permission to make such transfer was unanimously granted.

Exhibit 97 A. July 24, 1935, meeting:

It was moved and the resolution was unanimously adopted that the transfer of the sales agreement between the corporation and Century Carbon Co. dated May 25, 1933, and the stock in the corporation owned by Century Carbon Co. to United Carbon Co. be approved.

It was moved and the resolution was unanimously adopted that the transfer to United Carbon Co., Inc., of the sales agreements with the corporation held by United Carbon Co. dated May 25, 1933, and the shares of capital stock of the corporation held by United Carbon Co. be approved.

It was moved and the resolution was unanimously adopted that the transfer to United Carbon Co., Inc., of the sales agreement between the corporation and Texas Carbon Industries, Inc., dated May 2, 1933, and the shares of capital stock of the corporation held by Texas Carbon Industries, Inc., be approved.

## Exhibit 100 A. April 30, 1936, minutes:

The president further reported that he had arranged with Chas. Eneu Johnson & Co., successor to Herkness Carbon Co., to become a stockholder in the corporation and to accept a sales agreement with a quota of 4 percent.

Upon motion duly made and carried, it was

*Resolved.* That upon execution and delivery of the same standard sales agreement between Chas. Eneu Johnson & Co., and the corporation as exists between the corporation and the producers who are at present stockholders, such sales agreement providing for an export quota of 4 percent, the president and secretary be and they are hereby authorized to issue to Chas. Eneu Johnson & Co. against its check for \$29,200, 292 shares of capital stock of the corporation.

## Exhibit 101 B. November 13, 1936, meeting:

The president further reported that Columbian Carbon Co. has purchased the stock of Keystone Carbon Co. and has requested the approval of the transfer of Keystone's shares of the capital stock of Carbon Black Export, Inc., to Columbian Carbon Co. and also approval of the assignment of the sales agreement between Keystone Carbon Co. and Carbexport dated September 16, 1936, to Columbian Carbon Co.

Upon motion duly made, seconded, and carried, the following resolutions were adopted:

*Resolved.* That the transfer to Columbian Carbon Co., of 216 shares of capital stock in this corporation owned by Keystone Carbon Co., be and is hereby approved.

*Resolved.* That this board hereby approves the assignment to Columbian Carbon Co. by Keystone Carbon Co. of its sales agreement with Carbon Black Export Inc., dated September 16, 1936.

In explanation of earlier testimony (Tr. 233) concerning the relation between production and quotas, Mr. Kayser gave the following history of quota changes, reflecting the aforementioned membership changes:<sup>20</sup>

Regardless of the language Mr. Layton quotes from a sales agreement amendment in his question on page 233, lines 12-18, the fact is that export quotas were never on the basis of member production ratios until January 1942. This will readily be seen from the following comparisons of quota ratios with production ratios.

## May 1933

|                        | Export<br>quotas<br>(percent) | Production<br>ratios<br>(percent) |
|------------------------|-------------------------------|-----------------------------------|
| Cabot.....             | 18. 103                       | 22. 386                           |
| Columbian.....         | 25. 933                       | 26. 032                           |
| Huber.....             | 13. 000                       | 13. 855                           |
| Panhandle Century..... | 4. 400                        | 6. 692                            |
| Palmer.....            | 2. 400                        | 3. 361                            |
| Texas Carbon.....      | 3. 000                        | 4. 255                            |
| United.....            | 33. 164                       | 23. 419                           |
|                        | 100. 000                      | 100. 000                          |

<sup>20</sup> T. 1702-1705.

In the fall of 1935 the expiry date of sales agreements was extended from December 31, 1938, to December 31, 1945. Quotas were then altered as of January 1, 1936, to meet the request of Panhandle Carbon Co. mentioned (R. 22) above. The relationship of resulting quota rearrangements to production ratios of members then became as follows:

| <i>Jan. 1, 1936</i> |                                        |                                            |
|---------------------|----------------------------------------|--------------------------------------------|
|                     | <i>Export<br/>quotas<br/>(percent)</i> | <i>Production<br/>ratios<br/>(percent)</i> |
| Cabot.....          | 18. 103                                | 23. 063                                    |
| Columbian.....      | 28. 333                                | 30. 257                                    |
| Huber.....          | 12. 800                                | 10. 767                                    |
| Panhandle.....      | 2. 500                                 | 2. 546                                     |
| United.....         | 38. 264                                | 33. 367                                    |
|                     | 100. 000                               | 100. 000                                   |

Quotas were again revised with the consent of all holders of sales agreements as of October 1, 1936, to make room for two as to Chas. Eneu Johnson and Keystone Carbon. The relation of the new quotas to production ratios at the time was as follows:

| <i>October 1936</i> |                                        |                                            |
|---------------------|----------------------------------------|--------------------------------------------|
|                     | <i>Export<br/>quotas<br/>(percent)</i> | <i>Production<br/>ratios<br/>(percent)</i> |
| Cabot.....          | 16. 858                                | 22. 350                                    |
| Columbian.....      | 29. 384                                | 29. 648                                    |
| Huber.....          | 11. 919                                | 10. 939                                    |
| Johnson.....        | 3. 880                                 | 1. 109                                     |
| Panhandle.....      | 2. 328                                 | 2. 491                                     |
| United.....         | 35. 631                                | 33. 463                                    |
|                     | 100. 000                               | 100. 000                                   |

As of January 1, 1942, there was another general revision of quotas incident to the extension of sales agreements beyond December 31, 1945, the then terminating date, to December 31, 1951. Export quotas were then established on a closer relationship to production ratios, as I argued that they should be in the memorandum of April 21, 1941, which is exhibit 113 (b) and (c). The comparison of the two ratios is as follows, treating the percentage allowed Continental Carbon Co., a nonmember, as a quota percentage:

| <i>January 1942</i> |                                        |                                            |
|---------------------|----------------------------------------|--------------------------------------------|
|                     | <i>Export<br/>quotas<br/>(percent)</i> | <i>Production<br/>ratios<br/>(percent)</i> |
| Cabot.....          | 21. 245                                | 22. 097                                    |
| Columbian.....      | 28. 403                                | 28. 170                                    |
| Huber.....          | 10. 050                                | 10. 079                                    |
| Johnson.....        | 2. 965                                 | 1. 777                                     |
| Panhandle.....      | 2. 198                                 | 2. 119                                     |
| United.....         | 29. 459                                | 29. 179                                    |
| Continental.....    | 5. 580                                 | 6. 579                                     |
|                     | 100. 000                               | 100. 000                                   |

There is further evidence in the record relating to the exclusive feature of the contract. The directors, on May 25, 1937 (exhibit 102 A-C), adopted a resolution reading as follows:

*Resolved*, That producers who are stockholders in Carbon Black Export, Inc., report to said corporation monthly all sales of carbon black made by them to producers who are not stockholders and all sales of carbon black to any other person or persons for account of such producers who are not stockholders.

Mr. Reid Carr testified that the purpose of the resolution was "to see whether we were living up to that clause of the producers' agreement with Carbexport with reference to using reasonable precaution to see that sales were not made in the export trade than through Carbon Black Export."

Mr. Kayser, on May 28, 1937, following passage of the foregoing resolution, addressed a letter to Mr. Oscar Nelson reading as follows (exhibit 185-A):

MR. OSCAR NELSON,  
United Carbon Co.,  
Charleston, W. Va.

DEAR MR. NELSON: It was agreed at the last meeting of the directors of Carbexport that producers who are stockholders in Carbon Black Export, Inc., report to us monthly all sales of carbon black made by them to producers who are not stockholders, and all sales of carbon black to any other person or persons for account of such producers who are not stockholders.

It was not the purpose of this agreement to release producers under contract to Carbexport from their obligation not to permit their black to go into export through any other source than Carbexport. Its purpose was to establish a record of all sales made by members of Carbexport to nonmembers of black for domestic use only, and to make that record available to members. The reports to be made are entirely separate from the reports made by members to National Gas Products Association. The records of N. G. P. A. are, of course, not available to Carbon Black Export, Inc.

Very truly yours,

CARBON BLACK EXPORT, INC.

This exhibit was accompanied by exhibits 185 C and D, photostats of correspondence between the association and Columbian which disclosed sales to outsiders in March 1940, by Cabot, Columbian, United, and Johnson.

Mr. Carr was of the impression that he had not received a copy of the foregoing letter, but testified that "the purpose of obtaining these reports was to furnish the information on which he (Kayser) would be able to check up if he thought that the members were not living up to their obligations to Carbon Black Export."<sup>21</sup>

Mr. Kayser testified as follows:<sup>22</sup>

Q. What was the purpose of that reporting of these sales by members to non-members?

<sup>21</sup> T. 532.

<sup>22</sup> T. 268-269.

A. The sales agreement obliges the signers, the members, to take reasonable care that the carbon black they sell domestically shall not be exported otherwise than through Carbexport. At that time this question came up—

Q. As to whether or not they should report, you mean?

A. Yes. Or I will put it this way: In May 1937, or in the month before, I do not remember, which, the question arose, or it was brought out, rather, that sales were made by members in the domestic market to nonmembers and others. This was simply out of the discussion that a resolution came to the effect that the only action that should be taken to remind members of their obligations under the sales agreement was to report to the corporation such sales as they made to outsiders, nonmembers particularly.

Mr. Hans Huber testified as to exhibits 185 A-C and D, as follows: <sup>23</sup>

Q. Are you familiar with the requirement of exports that producer members should report their domestic sales to nonmembers?

A. Yes.

Q. What is the purpose of that reporting, Mr. Huber? Does that have anything to do with the subject matter of paragraph 11?

A. The entire strength of Carbexport rests upon the fact that each producer had a quota. Now, if he could circumvent his quota, or add to his quota by selling his black to somebody else, and he selling it, and in that way getting a much larger share of the export market than he was entitled to, that obviously would undermine all of Carbexport.

I believe I pointed out in my previous testimony that the reason the old association, or one of the principal reasons, it failed, is because there was no quota system, and there was nobody that stood between the producer and the distributors.

Q. My question is, without referring to a specific example, if you sold X pounds to a nonmember producer and you reported that to Mr. Kayser, how could that be utilized in aiding and protecting the exporting of black outside the corporation? How was it used?

A. How was that knowledge used?

Q. Yes.

A. Each producer was responsible to see that all his export carbon black went through Carbexport. Now, this would have been a route to circumvent it, and Carbexport certainly must know if any routes to circumvent the quota to go through Carbexport were in effect.

Q. I don't want to appear too persistent. I want to direct your attention to exhibit 185-A.

If you will please just turn for a moment to 185-C which shows the reports being made in conformity with that. For instance, on 185-C, of what value was it for Carbexport to know that Cabot sold 360 pounds to Imperial, or that Columbian sold 80,000 pounds to Imperial, or United sold 184,000 to Imperial in domestic sales?

A. These particular quantities would be of no value, but if the quantities had been substantially larger, it would have been of value.

Q. Tell me how it works. How does the value attach to it?

A. Let's suppose a hypothetical producer outside of Carbexport has a production of 3 million pounds. The most he can export, then, would be 3 million pounds, but he probably had some domestic business too. So it would be less than 3 million pounds.

<sup>23</sup> T. 769.

Now, let's suppose the outside producer buys 6 million pounds. Now he can potentially export 9 million pounds. Or, let us suppose that he merely realizes all of the black that he sells in the domestic market by black he purchases. It makes him that much larger an exporter. And by the same token it allows the producer member to sell black which eventually finds its way to export in addition to his quota.

Exhibit 120, is a photostatic copy of a letter from Mr. Kayser to Mr. Nelson dated January 16, 1935, the first two paragraphs of which read as follows:

I now have before me the completed statistics for the year 1934, and I am able to give you the information you requested of me last Saturday.

Stocks on hand at December 31, 1934, exceeded stocks on hand as of the same date in 1933 by approximately 21,800,000 lbs. The largest tonnage increase was on the part of United Carbon Company. In the following order of importance increases occurred with other members: Huber, Columbian, Texas Carbon Industries, Century and Panhandle (Combined) Palmer, Keystone, and Crescent. Decreases in stocks took place in the operations of Cabot, Magnolia, and Imperial. The Cabot decrease was large if viewed from the standpoint and most other members of the industry had increases. But from the standpoint of the effect on Cabot's total stocks, it was not very great.

Mr. Kayser questioned about the reference to "stocks on hand," testified:<sup>24</sup>

The WITNESS. Our members did not report anything to us in a statistical way. Our statistics were built up on what we got in the way of bills and evidence of shipments, and so on, the information we had as to the movement of carbon black from United States shores abroad, and the reports we got from agents and distributors.

Q. I was under the impression, Mr. Kayser, I may be wrong, and this is the reason I brought it out, that the stockholders in Carbexport, reported to Carbexport, as such, certain data as to their production and stock.

A. The agreement which I imagine you have in your hand allows Carbexport to collect such data from its members, but it never did, except perhaps in the first instance, I do not know that even to be true, that would be the only exception, when the subscription agreements were under consideration, or rather, when they were in operation.

Q. Then I shall not attempt to find it because we have isolated the point now. You are stating, am I correct, that although Carbexport had the authority under its agreement with the producers to require production and other statistics with reference to stocks, it never exercised that right?

Q. As to exhibit 120 A and B, a letter addressed by you to Mr. Oscar Nelson, dated January 6, 1935, it discusses in part, at least, does it not, Mr. Kayser, stocks on hand as of a certain date?

A. It does.

Q. Where did you gain the information as to stocks that you refer to?

A. At that time I was secretary of the Code Authority and secretary of the National Gas Products Association as well.

<sup>24</sup> T. 240-244.

Q. And the National Gas Products Association, what is that? I think it is already in the record, but I am not sure.

A. It is a statistical agency for the industry.

Q. Commonly known as the Domestic Trade Association of the Industry?

A. Yes.

\* \* \* \* \*

Q. Mr. Kayser, can you explain why you wrote this letter concerning such a matter on the stationery of Carbon Black Export, Inc.?

A. Well, it probably arises out of the fact that either my secretary or I did not realize it was either a Code Authority matter or a National Gas Products Association matter. I notice it is not signed Carbon Black Export by me, it is a personal letter from me to Mr. Nelson on a Carbexport letterhead. It would indicate carelessness in distinguishing between the functions.

Q. Was it a practice of yours to attempt to aid producer companies in the disposition of their stocks to other companies on the letterhead of Carbexport?

A. I would be surprised if you find any such letters, other letters in the files. It was not a practice.

Q. Nevertheless, to make it doubly clear, at this time you held three positions?

A. That is right.

Q. With Carbexport, the Domestic Trade Association and the Code Authority?

A. That is right.

Q. And there was no fine differentiation in at least the clerical work or the use of stationery?

A. I think probably there was considerable confusion of this on the part of the office personnel before it got the distinctions that I was aware of and I would not be a bit surprised if there were in the early part of my functioning in these three capacities, National Gas Products Association letters in the Carbexport file and vice versa, as well as the Code Authority.

Q. Again, I want to say, if I am not mistaken in the matter, I noted in the sales agreement this power of the corporation to gather these statistics and I saw, of course, here in this letter apparently your use of them but nevertheless, you have given your explanation of it, is that right?

A. That is my explanation. I would like to elucidate a bit more for your benefit. These three capacities in which I functioned and which we have just mentioned, fell as mantles on my shoulders within a very short period of time, between May 1933 and I think September of the same year, so that it probably took some application on the part of the personnel in my office to make these distinctions in the files that I was aware of.

Q. Of course, when the code went out, you went out with it?

A. That is right.

Q. You have maintained your position with the Domestic Trade Association?

A. I am still its assistant secretary and treasurer.

Exhibits 113 to 118 consist of photostats of correspondence between Kayser and Messrs. Nelson and Treadgold, officers of United, which took place between April 21 and November 10, 1941, interchanging information preliminary to the 1942 contract quota changes above related. The following eight paragraphs are reproduced from a lengthy memorandum by Mr. Kayser, dated April 21, 1941 (exhibit 113 B-C):

The Cabot Company intends, perhaps at the very next meeting of Carbexport, to open up the question of member export quotas by proposing a revision, at least

as far as it is concerned. I understand that it will contend that its own quota, which is in fact 15.917% although nominally 16.858%, is unreasonably low.

In my estimation such a contention has merit. If that is correct the entire percentage arrangement is entitled to revision.

Quotas were originally arrived at in probably the only effective way then available, namely by "horse trading." There was no experience, or at least no recorded experience, by which the effects or influences of any set-up could be gauged. Such experience exists today, not only in the years of records collected by the Corporation which has administered this quota system but also in the more complete general statistics with which the industry has occupied itself in the same period.

It seems to me that an objective study of tonnage and price movements in the last several years in the light of these records indicates that, notwithstanding evident deficiencies, quota allotments to Carbexport producers in some relationship to their respective ratios of production is a sounder, and therefore better, arrangement than the present one.

This disadvantage can be statistically demonstrated. If quotas had been equivalent to production ratios during, say, the years 1937-41 inclusive (production for 1941 being calculated on the basis of the production for the first quarter to get an approximate figure for that year) they would compare with actual average quotas as they have been for the period as follows:

|                    | Production<br>(pounds) | Ratios  | Actual<br>average<br>(per-<br>cent) |
|--------------------|------------------------|---------|-------------------------------------|
| Cabot.....         | 504,772,070            | 22.126  | 15.917                              |
| Columbian.....     | 673,157,739            | 29.507  | 27.744                              |
| Continental.....   | 5.58                   | 8.743   | 7.778                               |
| and Panhandle..... | 2.328                  |         |                                     |
| Huber.....         | 214,057,835            | 9.383   | 11.254                              |
| Johnson.....       | 28,075,935             | 1.231   | 3.664                               |
| United.....        | 661,821,531            | 29.010  | 33.643                              |
|                    | 2,281,324,326          | 100.000 | 100.000                             |

The present arrangement therefore forces those stockholders whose export quota is less than their production ratio to find a place in the domestic market for the black represented by the difference. In other words they have to dispose in the domestic market of an amount in excess of their production ratio applied to domestic volume and have to do so, additionally, for the less of the two price benefits.

The effect of that situation over the last 5 years on the Cabot Company, for instance, has been that they have had to find extra place in the domestic market for a total of approximately 39 million pounds, or some 8 million pounds per year (calculation: Total exports for 5-year period 631,065,779 lbs. of which 22.126% is 139,629,614 lbs. and 15.917% is 100,446,740 lbs.). Furthermore they have had to dispose of this quantity at from  $\frac{3}{4}\text{¢}$  to 1¢ per pound less than the net price received by their fellow-stockholders in Carbexport from export sales. By this same process of calculation the total amount of member black in this "distressed" position for the same period has been approximately 56,500,000 lbs., or an average of approximately 11,000,000 lbs. per year.

It seems to me that the policy of continuing the present quota set-up is unsound. Carbexport is in the position of deliberately thrusting a competitive hurdle into a situation where it has no legal right to interfere and where, by its own declaration of intent and under its general conduct, it has never wanted

to interfere. The effect of the present arrangement is also a handicap in some respects to Carbexport itself. One such respect is that no formula can be established for the acceptance of non-Carbexport operators into stockholdership that will affect stockholders with self-evident equity.

Exhibit 180 consists of a list of the membership of the National Gas Products Association, being the following: Godfrey L. Cabot, Inc.; Columbian Carbon Co.; Crescent Carbon Co.; J. M. Huber Corp.; Imperial Oil & Gas Products Co.; Chas. Eneu Johnson & Co.; Continental Carbon Co.; Panhandle Carbon Co.; United Carbon Co. Inc.; and Crown Carbon Co. (a reporting nonmember).

Contained in the record are copies of statistical records of the National Gas Products Association, identified as exhibits 124 to 141. Exhibits 124 to 132 consist of carbon black production records of the membership for the years 1934 to 1942. Exhibits 132 to 141 consist of monthly carbon black production, sales, and inventory records of the membership on charts containing previous annual totals on the same subjects for comparative purposes.

Testimony of Mr. Kayser with reference to exhibits 124 to 141 was as follows: <sup>25</sup>

Q. Can you identify those documents, exhibits 124 through 141?

A. Yes. These are the monthly statistical reports or they are typical of the monthly statistical reports which the National Gas Products Association supplies to its members or to members of the industry who participate in supplying the data.

Q. Now, what was your function, if any, as secretary in the preparation of exhibits 124 through 141?

A. As secretary of the National Gas Products Association, questionnaires were sent monthly to the members of the industry who were members of the National Gas Products Association, and that was, I believe, all of them, on which they made returns of their monthly production, sales and stocks on hand. These individual reports were consolidated into industry reports, which you have here. These reports I recognize as our own and I volunteered them to the examiner.

Q. Who called on you?

A. Yes.

Q. So that the statement that you do make is that these exhibits, 124 through 141, were the result of your activities as an official of the Domestic Trade Association and not in exercise of your power under the sales agreements with the stockholders of Carbexport, is that right?

A. That is exactly right.

Contained in the record are exhibits 379 and 380. These are statistical charts described by Mr. Reid Carr as having been prepared from official data published by the United States Bureau of Mines. Exhibit 379, titled "Stocks," is a statistical record in millions of pounds of carbon black stocks at the end of each year from 1923 to 1941. Exhibits 380 consists of a statistical record of domestic and export sales

<sup>25</sup> T. 246-247.

in millions of pounds of carbon black for the years 1925 to 1941. These charts are here reproduced (exhibit 379).

*Stocks*

|           |             |           |             |
|-----------|-------------|-----------|-------------|
| 1923----- | 38,320,814  | 1933----- | 155,969,000 |
| 1924----- | 95,671,246  | 1934----- | 171,799,000 |
| 1925----- | 96,023,448  | 1935----- | 136,086,000 |
| 1926----- | 108,378,101 | 1936----- | 79,582,000  |
| 1927----- | 82,831,000  | 1937----- | 100,497,000 |
| 1928----- | 50,240,000  | 1938----- | 166,159,000 |
| 1929----- | 132,203,000 | 1939----- | 130,792,000 |
| 1930----- | 259,245,000 | 1940----- | 169,587,000 |
| 1931----- | 281,667,000 | 1941----- | 118,847,000 |
| 1932----- | 257,998,000 |           |             |

## EXHIBIT 380

*Sales*

| Year      | Domestic                 | Export                   | Total       |
|-----------|--------------------------|--------------------------|-------------|
| 1925----- | 132,448,691              | 43,182,635               | 175,631,326 |
| 1926----- | 128,294,321              | 39,210,389               | 167,504,710 |
| 1927----- | 168,999,000              | 54,431,000               | 223,430,000 |
| 1928----- | 202,676,000              | 77,903,000               | 280,579,000 |
| 1929----- | 191,977,000              | 91,829,000               | 283,806,000 |
| 1930----- | 167,279,000              | 84,260,000               | 251,539,000 |
| 1931----- | 161,712,000              | 96,714,000               | 258,426,000 |
| 1932----- | 161,483,000              | 100,072,000              | 261,555,000 |
| 1933----- | 222,182,000              | 152,286,000              | 374,468,000 |
| 1934----- | 191,992,000              | 120,620,000              | 312,612,000 |
| 1935----- | 245,351,000              | 142,185,000              | 387,536,000 |
| 1936----- | 313,018,000              | 154,718,000              | 467,736,000 |
| 1937----- | 305,362,000              | 184,253,000              | 489,615,000 |
| 1938----- | 243,474,000              | 167,968,000              | 411,442,000 |
| 1939----- | 356,705,000              | 203,828,000              | 560,533,000 |
| 1940----- | 352,156,000              | 177,618,000              | 529,774,000 |
| 1941----- | <sup>1</sup> 532,009,000 | <sup>2</sup> 112,735,000 | 644,744,000 |

<sup>1</sup> Exports for October to December 1941 included under "Domestic" to avoid disclosing export figures.

<sup>2</sup> Figures cover January to September, inclusive.

Mr. Kayser's testimony concerning exhibits 120 and 185 A-D reported above at footnote 24, was given at the Washington, D. C., hearing held on February 7, 1945, at which time he still held the office of assistant secretary-treasurer of National Gas Products Association, sometimes referred to as N. G. P. A. The record contains the following additional information on this intermingling of offices.

Exhibit 177 is a photostatic copy of a letter dated December 29, 1942, from Mr. Kayser to Mr. Nelson, on N. G. P. A. letterhead, reading as follows:

No meeting has been held of this Association since November 13, 1936. A number of its members have lately suggested the desirability of such a meeting at an early date, so that all adherents may have a report on Association activities since 1936 and may have the opportunity to discuss what, if any, additional activities could be undertaken for the industry's benefit and to assist in the nation's war program. Mr. Godfrey L. Cabot having resigned as President some time since, his successor should be elected.

A meeting of the Association is therefore called herewith for 10 A. M. Wednesday, February 3, 1948. Will you kindly arrange to attend.

Exhibit 178 B is a photostatic copy of a letter dated December 16, 1943, from Mr. Kayser to Mr. Nelson, on N. G. P. A. letterhead, reading as follows:

Since 1934, when Carbon Black Export, Inc. and National Gas Products Association became domiciled in the same office, Carbexport personnel has handled the Association's work free of cost to the latter. The only items collected for have been extraordinary ones, such as traveling expenses advanced and an occasional telephone call that has definitely been identified at our switchboard as Association business. The arrangement meant little in the way of expense to Carbexport in the early years of the mutual domicile. The principal Association business was then the collection of statistics and the issue of monthly reports. In late years, however, the Association's interests have enlarged to the point where appreciable time by Carbexport personnel and money are expended in handling its activities. There are other reports than the usual monthly statistics. There is more correspondence. There is more telephoning on matters of purely Association interest. The use of supplies and equipment is greater.

Since it is impossible always to determine (1) just how personnel time should be divided between the two organizations, (2) what telephone calls are essentially either Associated or Carbexport business or, (3) how the use of general office supplies and equipment should be distributed, I think the Association should pay Carbexport a fixed monthly fee which would cover use of space, general office supplies, postage, telephone and personnel service, in fact everything except cost of stationery and the rare item of traveling expense.

Our recommendation is that the fee be fixed, until further agreement, at \$100 per month. We are addressing you, simultaneously with all other members, to ask if you will approve such a fee.

Mr. Nelson replied to this letter on December 23, 1943 (exhibit 177 A), writing "I approve your recommendation that a fee of \$100 per month be fixed as payment to Carbexport for this work."

Mr. Kayser's testimony given on June 6, 1946, at the New York City hearing, in further explanation of these exhibits, reads as follows:<sup>26</sup>

The only ordinary activity of National Gas Products Association from the time I became its association secretary late in 1933 up to December 1942, the date of exhibit 177, was that of collecting statistics as to monthly production, shipments and stocks from each of the members and consolidating them into an over-all monthly report, of which exhibits 124 to 141 in this case are examples, for circulation among the members. Occasionally routine matters such as freight rates, minimum carload regulations, general tax questions, etc., were handled by this respondent as executive secretary of the association. When necessary I would use some of the stenographic and clerical personnel in Carbexport's office, the mimeograph machine located there and a small amount of mimeograph paper to assist in association work. The cost of this assistance and material would not average over \$20 per month. That is the reason this respondent used the word "nominal" in exhibit 178 (b) to describe the expense prior to 1942. The actual work of the National Gas Products Association was done by this respondent who received \$250 per month for doing it.

<sup>26</sup> T. 1766; 1933.

fact and asked permission of the board of governors of N. G. P. A. to pay Carbexport from the N. G. P. A. funds an amount which he felt represented the value of the services he obtained from Carbexport, pointed out that, whereas heretofore the demands of N. G. P. A. on Carbexport had been negligible, they had as a result of the war become a considerable burden.

As early as 1937 N. G. P. A. began a continuous study of the operation of the hopper cars employed in carbon black service. This developed into an important activity after the outbreak of hostilities in 1941. From the beginning of the war until October 1943, when the "Carbon Black Pool Authority" established by O. D. T. special order R-6 took over this activity in its own name, the purpose of the association study and of the O. D. T. order was to bring to greater efficiency the employment of the limited number of hopper cars available for carbon black service. This and other studies by N. G. P. A. have been referred to in the record.

From February 3, 1943, no meeting of the association was held until December 19, 1945, at which time the association accepted the resignation of Mr. Kayser as assistant secretary, effective January 1, 1946, and adopted a resolution to the effect that the association should be removed from the quarters of Carbon Black Export, Inc., "promptly after January 1, 1946." At this time I was authorized to make arrangements for other office space and to employ such service as the association might need. On March 7, 1946, after considerable difficulty, I engaged the services of the law firm of Beer, Richards and Haller, 70 Pine Street, New York City, to take over the statistical work of the association. Mr. Richards of that firm on May 22, 1946, accepted the appointment as paid assistant secretary of the association. His offices at 70 Pine Street are now the offices of the association.

### *C. Exclusive contracts with nonstockholders*

#### *1. Ten percent purchases from outsiders*

The first specification in the bill of particulars reads as follows:

1. Contracts with manufacturers of carbon black, who are not stockholders of Carbexport, which require and cause them to sell carbon black for export exclusively to Carbexport, and to refuse to quote or sell, directly or indirectly, carbon black for export to other American exporters.

The sales contract hereinbefore referred to (exhibit 15 A-Q) provided for purchase by the association of not to exceed 10 percent of its requirements, in any year from nonstockholders. Mr. Cabot's testimony on this provision of the contract reads as follows:<sup>29</sup>

I believe the reason why the sales agreements permitted Carbon Black Export, Inc., to buy 10 percent of its requirements from nonmember producers was due to the desire of all members that those outside producers who were not original members, and who represented about 10 percent of production, accept the invitation to join.

It was obvious that the main consideration in connection with getting any nonmember to join would be the quota they would be assigned. Had we assigned all of the requirements of Carbon Black Export, Inc., to member producers, then

<sup>29</sup> T. 1080.

we could not have taken in any new member without unanimous consent that the quota assigned to the new member was a fair one (unless some members were willing to suffer more than their share of the cost in terms of quota).

Leaving 10 percent of the requirements free meant that by a majority vote we could appoint someone plenipotentiary to negotiate a quota arrangement with a new member.

Mr. Kayser testified that there never was a time when the stockholders did not have an ample supply to meet the association's requirements, but that from time to time "some odds and ends in the way of hundreds of thousands of pounds here and there" were purchased from nonmember producers. He testified further, as follows:<sup>30</sup>

The clause was never intended or used as a means of influencing the domestic market.

In fact, it was never employed to anything like 10 percent of our export requirements, as is shown by the following table of shipments:

| Year      | Total exports<br>of Carbexport<br>(pounds) | Total ship-<br>ments by Car-<br>bexport of Non-<br>member Black<br>(pounds) | Percent |
|-----------|--------------------------------------------|-----------------------------------------------------------------------------|---------|
| 1934..... | 87,748,210½                                | None                                                                        | None    |
| 1935..... | 103,610,487                                | 301,050                                                                     | 0.291   |
| 1936..... | 117,345,522                                | 880,387                                                                     | .750    |
| 1937..... | 142,786,515                                | 3,249,537                                                                   | 2.276   |
| 1938..... | 125,339,817                                | 9,433,862                                                                   | 7.527   |
| 1939..... | 156,698,268                                | 7,096,279                                                                   | 4.529   |
| 1940..... | 122,241,179                                | 6,098,225                                                                   | 4.989   |

At a subsequent hearing, Mr. Kayser testified as follows concerning the 10-percent clause:<sup>31</sup>

Q. What was the purpose of that 10-percent clause?

A. While I didn't write it, my understanding of the purpose of it was to permit the purchase of carbon black from nonmembers in order to demonstrate to them how they would be advantaged by joining Carbexport.

I am not hesitating to try to recall all of the purchases that were ever made in order to elaborate on my statement. The only purchases made that in the course of the years did not—say from nonmembers who did not become members—were from the Magnolia Petroleum Co. which eventually decided not to produce carbon black and from the Continental Carbon Co. which prior to January 1, 1946, was not a member, but which is now about to sign a contract as Mr. Wishnick testified yesterday to become a member.

\* \* \* \* \*

Q. Your statement, then, as I understand it, is that the purpose of the 10-percent clause was merely to give the export corporation an opportunity to demonstrate to nonmembers.

A. On any sale necessary up to 10 percent of its requirements.

Q. To demonstrate to them the advantages that would accrue to them by marketing under your methods and by adherence to your policy?

A. That's right. A particular advantage being which was in my estimation and probably in the estimation of those who wrote the clause that they could

<sup>30</sup> T. 229; 1701.

<sup>31</sup> T. 1823-1826.

net a greater price as members of the export corporation than they could as competitors using a lower price to compete.

Q. Now when you say that the clause was never intended or used as a means of influencing the domestic market, what is the basis for that statement?

A. I don't understand what you mean by the basis.

Q. You say it was never used. How do you know it was never used as a means of influencing the domestic market?

A. By carbexport which meant by its management which did the purchasing and by its board of directors as the directors of that management.

Q. If you had purchased 10 percent of your total export requirements from outsiders, would that not have approximately absorbed all of the production of nonmembers.

A. No.

## 2. Herkness negotiations

The association's first negotiations with a nonmember manufacturer were with Herkness Carbon Co., and commenced shortly after the association's organization. Contained in the record are photostatic copies of directors' minutes recording the passage of resolutions referring to the negotiations as follows:

### Meeting of June 7, 1933 (exhibit 78-C) :

On motion made and carried, Mr. Oscar Nelson was authorized to negotiate with the Herkness Carbon Co. with a view to reaching an agreement under which—

(1) United Carbon Co. will supply or cause to be supplied all the gas that said Herkness Carbon Co. may purchase for use in its present plant,

(2) Herkness Carbon Co. will undertake in the sale of export carbon black to adhere to such schedule of export prices as may from time to time be fixed by Carbon Black Export, Inc.,

(3) Carbon Black Export, Inc., will undertake to purchase at a stipulated price such surplus of carbon black as Herkness Carbon Co. may have for export but may not succeed in selling at the schedule of prices fixed by Carbon Black Export, Inc.

### Meeting of July 10, 1933 (exhibit 79 A-B) :

Mr. Nelson reported that he had entered into negotiations with Mr. Herkness in accordance with the authority conferred by resolution at the last meeting of the board of directors, and that negotiations had reached a point on which the only matter left open for argument was whether Mr. Herkness should market 3,000,000 or 4,000,000 pounds in the export trade. Upon motion made and carried, it was

RESOLVED. That Mr. Carr be made a committee with Mr. Nelson to complete said agreement and that the committee be authorized to enter into an agreement with Mr. Herkness on the basis of approximately 3,500,000 pounds per annum.

Also contained in the record are photostatic copies of correspondence of the initial negotiations, reading as follows: Exhibit 194, dated June 16, 1933. C. E. Kayser to Oscar Nelson :

In a letter from Mr. Cabot today, acknowledging receipt of the minutes of our last board of directors meeting, the following comment appears regarding the authority given United Carbon Co. to negotiate arrangements with the Herkness Carbon Co. :

"With regard to the agreement that we had suggested that the United Carbon Co. supply gas to the Herkness Carbon Co., it was further stipulated by myself and agreed to, I think, by the meeting, that the United Carbon Co. should stipulate that no gas should be bought by the Herkness Carbon Co., outside of the supply bought from the United Carbon Co., the idea being that in this way we would be reasonably sure that the output of the Herkness Carbon Co. wouldn't increase in the State of Louisiana."

It is my recollection that this stipulation was in the resolution presented by Mr. Cabot but, like him, I am not sure that it was in the motion as reread to the meeting by the secretary.

I forward to you this comment of Mr. Cabot, not to make the point which he raises, but so that you may be aware of the fact that it may be one of the necessary terms to obtain Mr. Cabot's vote to an arrangement.

Exhibit 196, dated July 21, 1933, C. E. Kayser to Osman E. Swartz:

Mr. Herkness is sailing without accepting either of the expressions of agreement between himself and Carbon Black Export, Inc., which you have presented. Mr. Carr voted, as you did, to deal on the basis of making his plant capacity the limit of his sales in exports and sent me a revision of the last page of the form you drew. I enclose a copy of this revision, together with Mr. Carr's letter to me. He felt, as I did, that under this choice of agreement the last sentence in paragraph 2 of your contract would have to be eliminated.

I called Mr. Herkness yesterday afternoon to express our choice and to obtain his consent to sign the agreement covering that choice. He refused to do this because he will not agree to the obligations expressed in clause 7, after the words "like period" in your draft, and restated, though changed, in Mr. Carr's draft. Mr. Herkness' position is that there is no mutuality in this contract; that he obligated himself to everything while we give nothing in return. He points out that—

1. He limits his sales to the production of the present size of his plant;
2. To deliver his trade information to a body in which he has no voice;
3. To submit his agents to that body's control;
4. To maintain the standard of his black.

In return for that the corporation obligates itself to nothing, except to let him continue as he is doing now in the event it chooses not to buy the black he had not been able to sell in competition with it. He states that if the agreement to help him sell his black at our price does not work, he wants to be free to cancel the whole arrangement and will not be restricted, as above pointed out, for 5 years. If we want to bind ourselves definitely to buy what he does not sell, that is something else again, and he is willing to operate under the other alternative with a 4,000,000 maximum.

Mr. Herkness repeated to me, over the telephone, voluntarily, that he is not willing to consider the gas contract under consideration between himself and United as a quid pro quo for the export sales contract we suggest. As an aside, he mentioned that he was returning the proposed gas contract to United as unsatisfactory also.

Mr. Herkness expects to meet Mr. Nelson in London. He feels that conclusion of both contracts can be left until his return.

Mr. Osman E. Swartz, counsel for the United Carbon Co., acting in the absence of Mr. Nelson, in July 1933, had two meetings with Mr. L. C. Herkness, vice president of Chas. Eneu Johnson & Co. Inc., concerning the sale of natural gas by United to the Johnson company.

The amount of gas to be supplied was 5,000,000 cubic feet daily, roughly equivalent to a carbon black production of 2,700,000 pounds annually. Mr. Swartz prepared a draft of a contract to carry out such purpose, a photostatic copy thereof appearing in the record as exhibit 413 A-F. The proposed contract was not acceptable to Mr. Herkness and no written contract for such gas sale was made. United company did, however, sell natural gas to the Johnson company pursuant to a verbal arrangement between Messrs. Nelson and Herkness. Sales under this arrangement commenced October 1, 1933, and were billed to J. S. Herkness Carbon Co. Exhibit 417 consists of a record of these sales between October 1, 1933, and June 30, 1936, totaling 3,226,559 M cubic feet for a cash consideration of \$58,460.80. Mr. Swartz testified further that he assumed that Mr. Herkness had other sources of supply of natural gas; that the verbal agreement placed no limitation on the amount of his production; and that such production "was not tied in with the export of carbon black."

Mr. Swartz testified further that he had no independent recollection of seeing the June 16, 1933, letter from Kayser to Nelson (exhibit 194, above), nor did he recall being present at the June 7, 1933, directors' meeting (exhibit 78) at which Mr. Nelson was authorized to negotiate with Mr. Herkness. He testified that he did not believe that he had discussed this matter with Mr. Carr; and that, likewise, Mr. Carr had not taken part in the negotiations with Mr. Herkness other than to suggest an amendment to a contract drawn for Mr. Herkness, in evidence as exhibit 414 A-D, a draft of which Mr. Kayser had mailed to Mr. Carr.<sup>32</sup>

This contract, like the proposed written contract for purchase of gas (exhibit 413 A-F), was never executed. Contained in the record are exhibits 413 A-F to 418 A-D relating to the two unexecuted contracts just mentioned, and in addition, exhibits 194 to 216, consisting of correspondence involving dealings with Mr. Herkness and the Johnson company. The proposed contract exhibit 414 A-D; also drafted by Mr. Swartz, between the association and Charles Eneu Johnson & Co., Inc., was to run 5 years from January 1, 1934, and contained, among others, the following provisions: That Johnson "maintain the uniform prices, conditions and practices" of the association with respect to sales of its export carbon black; that Johnson not sell more than 4,000,000 pounds of carbon black annually nor augment said quantity by any "increase in plant capacity or by the purchase of carbon black for export or for its own consumption;" that Johnson furnish the association information similar to that required by it from its members under its sales agreement with them; that Johnson con-

<sup>32</sup> T. 591-598.

form to the association's regulations and commission practices governing its distributors; and that the association would purchase from Johnson annually carbon black representing the difference between the amount sold by Johnson in export and 4,000,000 pounds. It was the last provision which Mr. Carr, upon receipt of the draft from Mr. Kayser, amended to provide that the association either purchase such difference or "notify Johnson of its election not to purchase said carbon black. In the latter case Johnson shall be free to sell at such price as Johnson may in its discretion see fit said amount of carbon black which Export elects not to purchase" (exhibits 415 A-B).

The relation between the two drafts is apparent in paragraph 10 of the gas sale contract (exhibit 413 A-F) which reads as follows:

10. The party of the third part has entered into an agreement in writing, bearing even date herewith, with Carbon Black Export, Inc., regarding the sale of its carbon black in the export trade. Should the party of the third part violate its said agreement with Carbon Black Export, Inc., or should Buyer violate any of its obligations hereunder, Seller shall have the right to terminate this contract and cease delivering gas after having given thirty (30) days notice in writing to Buyer, which notice may be mailed or delivered to him at his office, 10th and Lombard Streets, Philadelphia, Pennsylvania, in which notice the alleged violation shall be specified.

On July 20, 1933, Mr. Herkness wrote Mr. Swartz as follows (exhibit 416):

Mr. OSMAN E. SWARTZ,  
1002 Union Building,  
Charleston, W. Va.

DEAR MR. SWARTZ: I have your letter of July 15 inclosing copies of proposed contract for the purchase of gas.

The language in paragraph 10 is not satisfactory to us and in looking over my correspondence with Mr. Nelson and my memorandum of our conversation on the train I cannot find anything to indicate that such conditions were contemplated in our discussion.

The draft of the contract with the Export Association in its last paragraph is likewise not satisfactory and seems to me to differ considerably from the basis we discussed. I talked with Mr. Kayser over the telephone about this contract and explained my objections to him. He is going to discuss the matter with Mr. Carr and advise me how Mr. Carr feels about it in the morning.

I am sailing in the morning and it will be impossible to conclude these matters before I leave but this does not seem to me to be very important as the contracts are not to become effective until the end of the year in any event. Furthermore the contracts have become so involved and some of the conditions have departed so far from our original intentions I think perhaps it will be just as well to let the matter rest for a while and then try to see if we cannot get together on a simpler basis. I hope to see Mr. Nelson in London and I will discuss it with him then.

Very truly yours,

CHARLES ENEU JOHNSON & Co.,  
(Sgd.) L. C. HERKNESS, Vice President.

When the part the National Gas Products Association was called upon to play in the furtherance of successful prosecution of the war the load on this respondent stepped up; he had to lean on Carbexport personnel in the office which the association shared with Carbexport to a point beyond nominal. That fact was the occasion for the letter marked "Exhibit 178 (b)".

Carbon Black Export, Inc., and National Gas Products Association never were one and the same thing during my period as implied by Mr. Layton's question in lines 13 to 16 at page 566. The reason the latter was housed in the same office with Carbexport was that its activities were so limited that it was deemed an extravagance to stand the expense of housing it separately. National Gas Products Association never engaged in the widespread activities which are associated with the term "Trade Association," nor does it do so now. Since this joint domicile has become subject to attack by Mr. Layton it was decided in December 1945 to submit to the extravagance of separate housing. Since February 1946 the statistics have been farmed out to an individual with no connection with the carbon black industry. No reason for any being foreseeable at present, the association has no address.

\* \* \* \* \*

I don't think they (board of governors of N. G. P. A.) deemed the present investigation a pressure. They doubtless felt, as I have for some time, that it seemed inconsistent to those who were investigating the case that a domestic association regardless of its functions, and an export corporation under the Webb-Pomerene Act should be housed together.

Mr. Reid Carr testified that he was sure Mr. Kayser's recommendation contained in exhibit 178 B was carried out, and also gave the following additional testimony:<sup>27</sup>

A. Well, the National Gas Products Association was an organization of producers having no reference whatever to the export trade. It was a voluntary association, not a corporation. It was formed many years before Carbon Black Export was formed and there were members of the National Gas Products Association who were not members of Carbon Black Export, and the officers of the National Gas Products Association were not the same as the officers of Carbon Black Export, and I should say the functions of the two organizations were very different.

Q. Now, during this period they were domiciled in the same quarters, were they not?

A. Yes, they had the same offices.

Q. And according to these exhibits, all of the expenses incident to the handling of the domestic association's work, except very, very extraordinary ones, were paid by Carbon Export. I refer to exhibit 178-B.

A. Well, 178-B says in substance that in the early days the expenses of the National Gas Products Association were nominal and only the extraordinary expenses were paid for by the association. It says the arrangement meant little in the way of expense to Carbexport in the early years, but this letter indicates the time has come when the expense of the National Gas Products Association should be independently paid by the members.

Mr. Hans Huber, at the New York City hearing, held June 4, 1946, gave testimony concerning N. G. P. A. as follows. He had been its

<sup>27</sup> T. 566-567.

president since February 3, 1943. It was a voluntary association organized December 28, 1920, under New York law with stated purposes to extend markets for natural gas products; legitimately oppose unreasonable legislation; support conservation; maintain a credit information exchange; compile trade information concerning depletion, pipelines, and production problems; and to take concerted action in the matter of freight rates, classifications, and container requirements. A copy of its articles appears in the record as exhibit 500. He listed as members of N. G. P. A., the following: Cabot Carbon Co., Columbian Carbon Co., Coltexo Corp., Columbian-Phillips Co., Continental Carbon Co., J. J. Huber Corp., Crown Carbon Co., Imperial Oil & Gas Products Co., Panhandle Carbon Co., United Carbon Co., Kosmos Carbon Co., Eastern Carbon Co., and Charles Eneu Johnson Co. Of this group, he testified, Crown, Continental, and Imperial are not affiliated, directly or through parent companies, with Carbon Black Export, Inc. The witness made the following statement on the group's operations:<sup>28</sup>

It was not until 1927 that a salaried employee of the association undertook the statistical work. A so-called "statistical secretary" was engaged at that time and performed this work until September 6, 1933, when, by resolution of the members of the association, the statistical work was transferred to the office of C. E. Kayser who then was president of Carbon Black Export, Inc. This was a very natural action to take at that particular time: During the summer of 1933 the association was intent upon getting an N. R. A. code formulated and approved and there was little other association work of any continuing importance at that time. C. E. Kayser was engaged by the association at that time as its paid assistant secretary, chiefly for the purpose of assisting the industry to obtain a code of fair competition. Mr. Kayser was the logical choice since he knew the industry, had the office facilities to perform the other necessary association functions and was known to the industry members as being impartial. His office collected, compiled, and disseminated the statistics. He continued to perform that work even after the N. R. A. codes went out of existence.

Meetings of the association through 1933, 1934, and 1935 were, as might be expected, chiefly concerned with the formulation and operation of the code of fair competition under the N. R. A. Thereafter and until the recent war, the association was not very active. It sponsored a program for standardizing paper packages used in the industry, successfully opposed certain proposed excessive domestic freight rates before the Interstate Commerce Commission, and its traffic committee met fairly often for this purpose during this period. During the war, the association at the request of Government officials, made its services and its paid assistant secretary available to the War Production Board and to its industry advisory committee and throughout the war continued to cooperate fully with the Government. Mr. Kayser served on the industry advisory committee as a representative of N. G. P. A. and in that capacity was called upon for many kinds of unusual data. The extraordinary demands made on N. G. P. A. as a result of the requests of W. P. B. and its industry advisory committee required Mr. Kayser to make severe demands on the office personnel of Carbon Black Export, Inc. He informed the members of N. G. P. A. of this

<sup>28</sup> T. 1547-1556.

Mr. Carr testified that he had no recollection of a proposal which Mr. Kayser attributed to Mr. Thomas D. Cabot in exhibit 194, requiring Herkness to purchase all of his gas supplies from United, but that he stood on the minutes (exhibit 78) as correctly recording the directors' reference to the Herkness matter. Its inclusion in the minutes arose from the fact that United's sale of gas was an inducement to Herkness to join the association. He likewise recalled no meeting with Mr. Swartz (as referred to in exhibit 194) having dealt only with the Association-Herkness contract (exhibit 414 A-D) drafted by Mr. Swartz, which was submitted to him as the association counsel by Mr. Kayser. Respecting the proposed plant capacity limit on exports referred to in exhibit 196, Mr. Carr testified that at the time, July 1933, it was a legal proposal because under the N. R. A. limitations on production were encouraged. He continued that the limitation was on "the amount of export, it was not a limitation on production at all. It was a limit of what the company could export but he was perfectly free to produce as much as he wanted to on the domestic market."<sup>33</sup>

Mr. Kayser testified that he did not meet Mr. Herkness until the fall of 1933, and that "there never was any pressure brought to bear on him or his company to join Carbexport."

He cited article IV of the N. R. A. Code for the carbon black industry approved June 16, 1933, directing "each member to so regulate its current production as to prevent the same from exceeding its current deliveries." The board of directors, in its meeting of July 10, 1933 (exhibit 79), appointed a committee to investigate application of the code to export trade, he added. Referring to the word "voted" in exhibit 196, he testified as follows.<sup>34</sup>

I can and do state categorically that there was no such meeting. The first paragraph of my letter of July 21, 1933, which letter is exhibit 196 A-B, is a report to Mr. Swartz of a conference I had with Mr. Carr over the telephone after I had received from him the revision, also reported in that paragraph, of the contract draft which Mr. Swartz had sent me for submission to Mr. Carr. I used the suspect word "voted" as meaning "expressed himself to me as in favor of."

Mr. L. C. Herkness testified as follows: He is president of Charles Eneu Johnson & Co., Inc., a printer's ink manufacturer in existence since 1804. There is no Herkness Carbon Co., the Johnson company being sometimes referred to as "Herkness." Prior to 1926, it purchased carbon black used in ink manufacture from producers United, Columbian, Palmer, Keystone, and Magnolia. In 1926, it commenced manufacture of carbon black, producing about 1 million pounds a year. It did not engage in sale of carbon black in the domestic market until 1940, but prior to 1933 was selling carbon black in export through foreign agents. It purchased up to a million pounds of carbon black

<sup>33</sup> T. 481; 501.

<sup>34</sup> T. 1716; 1765..

from other producers, but this amount added to its own production did not make the company an important factor and it did not join either of the export associations. Between 1933 and 1936, the company purchased carbon black from the Cabot, Keystone, and Magnolia companies. Natural gas was purchased from the United company following June 7, 1933, for 2 or three years, first at  $1\frac{1}{2}$  cents per thousand cubic feet and toward the end at 2 cents per thousand cubic feet, when the purchases were stopped. He was "very firm" about such gas purchases being free from any conditions involving the association. There was no provision requiring all such purchases exclusively from United. Referring to exhibits 194 to 216, Mr. Herkness testified:

No, I have no recollection of it at all. I saw those letters but I have no knowledge of that at the present time. As you see, they are somebody else's letters, not mine, I have no knowledge of that at all.

Mr. Herkness examined the Kayser-Swartz letter (exhibit 196) in which Kayser mentions telephoning Herkness, but could not recall any conversions with Kayser at about that time, July 21, 1933. His testimony reads that he "was negotiating with Carbexport with the thought of maintaining Carbexport prices. I had been selling and continued to sell for a certain length of time below Carbexport prices." He testified that he had an agreement with Carbon Black Export that they should buy black from him to the extent that he did not sell abroad under their prices. He did have conversations with Mr. Swartz relating to purchase of gas from United and concluded his first testimony, in hearing held February 8, 1945, when asked if he had any additional statement, as follows: "No, except to emphasize again that there was no connection between the purchases of gas from United Carbon and my agreeing to maintain Carbon Black Export prices."<sup>35</sup>

At a subsequent hearing held January 15, 1946, Mr. Herkness further testified as follows: In the period between formation of the association, 1933, and the date of his acquisition of membership, June 18, 1936 (exhibits 215, 6), he purchased carbon black from Binney & Smith, United, Wishnick-Tumpeer, and Cabot. A search of his files disclosed "no evidence of any refusal on the part of any concern to sell us carbon black during that period, nor any other period." Gas purchases from United were discontinued in June 1936, because of an increase in price to  $2\frac{1}{4}$  cents per thousand cubic feet, and at that time a switch was made to Farrell & Co., who charged 2 cents per thousand cubic feet. In reference to his earlier testimony of an agreement by the association to purchase from him carbon black which he did not succeed in selling in export, his testimony reads as follows:<sup>36</sup>

Upon looking over my files, I find that my memory was at fault. The time referred to was 12 years ago. The correspondence indicates that when offered

<sup>35</sup> T. 289; 298.

<sup>36</sup> T. 838-839.

such an agreement, I declined to accept it. It appears, however, that I did undertake to go along in an effort to maintain Carbexport's prices, reserving the right to myself to depart from this policy at any time. It also appears that at my request Carbexport did buy 600,000 pounds of black from me in October 1934.

I have nothing to add to my testimony beyond a repetition of a fact that I have already tried to make clear, namely that insofar as Charles Eneu Johnson was concerned, there was no coercion or intimidation involved in our joining Carbon Black Export, Inc., but on the other hand, we joined it solely because it appeared to be a profitable undertaking and it has proved such. By becoming a member of Carbexport we were sure of disposing of our entire export quota at full prices with a consequent improvement in profit. Moreover once our contracts were at full market prices, we could afford to buy additional black and resell. This was important to us since our export quota was in excess of our total production.

During the period 1929 to 1940, the Charles Eneu Johnson Co. sold no carbon black in the domestic market for the reason that "we got more money for it abroad," he continued. Referring to the proposed contracts, exhibits 413 and 414, he testified that he never became "a party to any contract either oral or written, that in substance was the same, or that covered the points mentioned in those contracts." He recalled no discussions with Messrs. Carr, Nelson, or Kayser about these contracts. He recalled the meetings with Mr. Swartz and discussions with Mr. Kayser about joining the association. On his London visit in the fall of 1933, he met Mr. Nelson and discussed adherence to the association's prices by the Johnson company's London agent. Upon being shown exhibit 78 C, the directors' minute for June 7, 1933, Mr. Herkness testified: "I know nothing at all about it. I wasn't a member. I wasn't present. The first time I ever knew anything about that was when it came up at the hearing in Washington." His testimony on these particulars reads as follows: <sup>37</sup>

Q. Although you entered into none of these contracts, I'd like to have you confirm these things if they are so. Nevertheless, immediately after this time, beginning somewhat in 1932, did you purchase gas from Nelson, didn't you?

A. Yes, for 3 years.

Q. And you did adhere to Carbexport's prices, did you not?

A. Yes.

Q. And Carbexport did purchase at least one amount of 600,000 pounds of black from you, did they not?

A. Correct.

Q. But those three things that you have just confirmed have no relationship to each other, weren't contingent upon each other, weren't tied up with each other, is that correct?

A. Yes, it is correct. Of course, when you say no relationship to each other, they were all carbon black.

Q. Let's put it this way. When you purchased gas from United Carbon Co., that was not contingent upon your contract, Carbon Black Export's agreement to purchase black from you?

<sup>37</sup> T. 847; 852.

A. It definitely was not, and I ceased to purchase gas from the United Carbon Co. when I was able to make a more advantageous arrangement elsewhere, and I kept on adhering to Carbexport's prices, after I ceased buying gas. The two were not connected in any way.

Q. Was it a condition of the gas agreement—you must have had an agreement with Nelson at some time, that you not purchase gas from any other source.

A. It was not.

Q. Was that subject approached to you?

A. No. You see, the question of purchasing gas, the problem involved in purchasing gas was to find someone who had gas that was accessible to my plant, which was low pressure gas that I could buy cheap enough and use for carbon black. The reason United Carbon sold it to me was because they had sold this plant, and had that low pressure gas for which they had no other use.

The quota under which his company joined the association in 1936 was a percentage of 3.880 and worked out roughly to about  $4\frac{1}{2}$  or 5 million pounds of export carbon black. The plant capacity at that time was 5 million pounds, all of which, after using up to a million pounds for ink manufacture, was exported. The company's plant capacity was  $2\frac{1}{2}$  million pounds from 1924 to 1927; 5 million pounds from 1927 to 1940; and 13 million pounds since 1940.

Mr. Oscar Nelson recalled seeing Mr. Herkness in London in the fall of 1933, but on a social basis and not for discussion of business. He denied the making of any arrangement, contract or understanding with Mr. Herkness linking the gas transaction with any association program, testifying that the amount of gas purchased from United by Herkness was but "a drop in the bucket" and necessarily indicating gas purchases from other sources.<sup>38</sup>

There follows a brief description of exhibits not heretofore described in the group numbered 194 to 216. Nos. 197 A-B and 198 A-G, dating from August 25 to October 16, 1933, are copies of correspondence between the association and member Cabot relative to certain Herkness business in Calcutta and the granting to Herkness benefit of the lower of two freight rates in computing Cabot's c. i. f. price to Herkness. Nos. 199 A-B to 201 A-B concern requests to the association for price information made by Herkness between January 9 and May 21, 1934. Nos. 202A-B to 214 E-F dating from April 20, 1934, to June 25, 1935, consist of correspondence reciting Herkness' difficulty in holding business in England as the result of maintenance by his agents, Typke & King, of the association's prices. Exhibit 215 A-E consists of photostat copy of a letter from the association to Mr. Herkness dated March 27, 1936, and a statistical comparison of export prices of both. This indicated a \$2,700 advantage to Herkness if he joined the association as a producer coupled with the additional incentive of procuring a distributor's contract. Returning to the preceding group, the follow-

<sup>38</sup> T. 734.

ing excerpts are reproduced from exhibit 207 B-C, photostat of a letter dated July 6, 1934, from Kayser to all association members:

After some discussion, the directors determined that the only positive assistance Carbexport could give Mr. Herkness was to undertake to buy some black from him and permitted me to approach him with an offer to do so. It was the opinion, and I believe correctly so, that assistance to the firm of Typke & King could come only from our distributors. I called on Mr. Herkness and laid our point of view before him, emphasizing my own curiosity as to why he should be so insistent on pulling the coals out of the fire for an agent who insisted that he could not sell a standard product except at a cut price. Herkness' agent in France maintains the price and gets his share of the business. Mr. Herkness, while admitting the inconsistency of his support of such an agent, insists that, as long as distribution of black remains on such a highly competitive basis, he must support even a poor distributor who is responsible for developing the market for the Herkness brands, at least until he can get another one more satisfactory. In other words, concern for his own distribution ranks, to say the least, equally with his concern for price. Consequently, Mr. Herkness feels that the solution of the problem which he needs would not occur by selling black to the Corporation. That point of view appears also in his reaction to my invitation to him to join Carbexport. He is willing to be a member beginning 1935, agreement on quota being taken for granted, if Carbexport's existence beyond 1938 is assured and if either distribution is made less competitive or his agents are taken over.

With respect of the present problem, Mr. Herkness asked me to reconsider his request that room be made in the United Kingdom program for Typke & King to sell a reasonable amount over the balance of this year. His request is in the best of temper, even when he asks for promptness of action on the ground that selling for 1934 will soon be spent.

It seems to me that the Corporation should take some definite action to help Mr. Herkness out. His point of view with regard to his problem is in line with that of most members of the Corporation on questions of distribution. There can be no virtue in insisting that that point of view is wrong until the Corporation conducts its affairs according to the contrary view. Besides, we and our distributors have gained what Herkness has lost; consequently, to make it possible for Typke & King to recover Herkness' customers entails no sacrifice on our part. Finally Mr. Herkness is both an able and a fair man, who should, in my opinion, be drawn closer to us.

The association did purchase 600,000 pounds of carbon black from Mr. Herkness on October 25, 1934, photostat of letter confirming this purchase is exhibit 212 A-B in aforesaid group. Relative to the Typke & King matter, Mr. Huber, questioned for explanation of the phrase in exhibit 207 B-C (quoted above) about the association's distributors gaining what Herkness had lost, testified as follows:<sup>39</sup>

There, of course, was no legal obligation on Herkness to observe Carbexport prices. If he had not observed Carbexport prices, it would have certainly been better for him to have had Carbexport in existence, having a definitely known price level, than competing against a number of larger competitors with unknown price levels, unknown terms, and so on. This merely says that when Herkness brought his price up to Carbexport price that then he lost the business which he had gained during the period when he did not observe Carbexport prices.

<sup>39</sup> T. 768.

Now, why he lost it, I don't know. It may have been quality; it may have been lackadaisical agents. I don't know the reason why he lost it. I don't see any inconsistency.

Mr. Thomas D. Cabot explained the same phrase as follows:<sup>40</sup>

In 1934 Mr. Herkness, who was then principal owner of Charles Eneu Johnson Co., was a very small producer of carbon black and had no adequate technical facilities for either controlling the quality of his product or giving service to his customers, and I think it probable that on an equal price basis Carbexport (i. e., Carbexport's distributors) would take business away from Charles Eneu Johnson Co.

The concluding testimony on the Herkness episode was that of Mr. C. E. Kayser, reading as follows:<sup>41</sup>

I know that Mr. Herkness made no contract with Carbexport at any time prior to June 18, 1936. I know that from the time Mr. Herkness returned from Europe in the fall of 1933, when I met him for the first time personally, there was never any pressure brought to bear on him or his company to join Carbexport. Exhibits 199-a to and including 215-e clearly show that Carbexport conducted itself in a manner to demonstrate to Mr. Herkness that Carbexport's operations were in no way hostile to the interests of nonmembers and to bring to his notice the benefits his company would obtain from membership in Carbexport. I know these things because from October 1933 to June 1936 I carried on all negotiations and contacts with Mr. Herkness in regard to exports alone and personally.

Mr. Herkness stated to me at the time his company became a member of Carbexport, and has repeated the statement on occasion since, that the only reason Chas. Eneu Johnson & Co. became a member was that it was convinced that it could export more carbon black and make more money as a member than as a nonmember.

### 3. Invitation of October 24, 1935

The question of nonmember producers next came to the foreground as the result of a trip to Europe taken by Mr. Kayser in the summer of 1935. He testified that he made the trip "to inform myself how the sales in the export market were being conducted and what problems the agents and distributors had." His original purpose was to determine how to "meet the problem of blocked currencies and how to take care of our largest customers in Germany and in the blocked currency countries." In the course of his travels in Europe, he observed the "growing inroads of outsiders" upon the export business of the association. Upon his return to the United States in the fall of 1935, he prepared a document recording certain observations made and conclusions reached in the course of the travel. Copies of this document were circulated "among all the directors in preparation for a meeting, for a discussion to take place several days later than the date of this." A photostatic copy of the document is in the record

<sup>40</sup> T. 1137.

<sup>41</sup> T. 1717.

as exhibit 193 A-T. At its submission, Mr. Kayser testified that in view of impending purchase by United, the Combined Carbon Co. and Texas-Louisiana Producing & Carbon Co., the last two of seven firms listed in exhibit 193 B (p. 2 of the memorandum) could be eliminated from consideration. This left as outsiders the following: Herkness Carbon Co.; Crescent Carbon Co.; Imperial Oil & Gas Products Co.; Keystone Carbon Co.; and Magnolia Petroleum Co. Officers of these companies known to Mr. Kayser were Mr. L. C. Herkness, Mr. F. W. Ingraham of Crescent; Mr. Robert Hartman and Mr. Joseph Hartman of Imperial; Mr. C. K. Williams of Keystone; and Mr. Farnham and Mr. West of Magnolia.<sup>42</sup>

The first five pages of the report (193 A-E) are devoted to description of the seven outsiders above named, the quality of their products, their sales methods, and a recital of their "inroads" on Engelbert of Belgium, Bata of Czechoslovakia and Michelin of France, association customers. The remaining pages recite: 193 F, that outsiders sold 2 million more pounds in 1935 over 1934, increasing their percentage of the market from 9.42 to 14.64 percent. 193 G, increased exports will lead outsiders to expand their production. 193 H, a price war would be costly and could not be confined to the export market. A 1-cent per pound price reduction would cost the membership \$2,750,000. 193 I, sketches "control of outsiders" by contracts with Herkness and Magnolia and negotiation with Crescent and Imperial. 193 J, Keystone quota is dependent on their tie-up with Imperial. "As to DeSmet, the more outside producers we tie up the less necessary it will be to consider him." 193 K, exchange problems discussed. 193 L, exchange problems in Italy. 193 M and N suggestion of 5 percent price increase and adoption of 5 percent cash discount. 193 O and P, conditions in Italy and Germany are going from bad to worse. 193 Q, six new plants in Germany and order requiring German customers to purchase 20 percent of home production. 193 R, in view of policy giving eight distributors the world market, restriction in number of agents is not advisable.

193 S-T, consist of "Agenda-Directors' Meeting Scheduled October 24, 1935," in which item II reads as follows:

#### ITEM II

#### PRESENT CARBON BLACK PRODUCERS WHO ARE NOT MEMBERS OF CARBON BLACK EXPORT, INC.

With respect to this topic I request that the following resolution be offered and adopted:

*Resolved*, That the president be and is herewith authorized to invite Herkness Carbon Company, Crescent Carbon Company, Imperial Oil & Gas Products Com-

<sup>42</sup> T. 273; 277; 1924.

pany, Keystone Carbon Company and Magnolia Petroleum Company to take out full membership in this corporation under the same terms and conditions enjoyed by present members and, in case of acceptance of said invitation by any or all of said companies, in his sole discretion to allot quotas and close all necessary contracts requiring no changes in the standard contract forms of the Corporation without previous reference to this board for approval.

For discussion of this topic please refer to my letter of October 21st to all directors, under subject "Outsiders."

The directors held a meeting on October 24, 1935, at which the following resolution was adopted (exhibit 98 B) :

*Resolved*, That the president be and he is hereby authorized to invite Herkness Carbon Company, Crescent Carbon Company, Imperial Oil & Gas Products Company, Keystone Carbon Company and Magnolia Petroleum Company to become stockholders in this corporation, under the same terms and conditions as its present stockholders, and, in case of acceptance of said invitation, by any or all of said companies, to negotiate with such companies sales agreements for the term of ten years from January 1, 1936, such agreements to be identical in form one with another and with the agreements negotiated with the present stockholders and to be subject to approval by the board of directors of this corporation, and be it

*Further resolved*, That in case such agreements shall be negotiated with any or all of said companies, the quota of the present stockholders under their sales agreements be reduced pro rata.

Mr. Reid L. Carr, Secretary of the association at the date of the foregoing episode, testified that he had prepared and signed the minutes recording the October 24, 1935, directors' meeting (exhibit 98 A-B), his testimony on this matter reading as follows:<sup>43</sup>

At the directors' meeting on October 24, 1935, when Mr. Kayser brought up item II of the agenda alluding to his letter (exhibit 193 A), I objected to consideration of the letter by the board because it contained a discussion of policy in respect of matters which it was obviously improper for Carbexport to discuss or consider. However, I advised the board not only that it was perfectly lawful and proper to invite all nonmember producers to join, but that in my judgment it was good policy to do so. Accordingly, no consideration was given to the letter, and no action taken thereon, but a resolution was adopted inviting nonmembers to join, which resolution was differently phrased than that proposed by Mr. Kayser in the agenda. In this disposition of the matter, Mr. Kayser acquiesced.

To the best of my knowledge no further consideration was ever given by the board to Mr. Kayser's letter at any subsequent time.

\* \* \* \* \*

A. I thought that letter, particularly the portion beginning on page 7 and running onto the top of page 11, contained many features that were not proper for the board of directors of Carbexport to consider. For example—

Q. Let me interrupt, if I may there. You are citing the language beginning "should anything be done about that? If so, what?"

A. Yes.

<sup>43</sup> T. 381; 472; 479.

Q. All right. Continue. I just wanted to be sure we knew where you are.

A. Particularly the reference to taking action that would affect the domestic price and particularly the statements about acquiring control of these companies or aiding Imperial to purchase Crescent. In short I felt that and advised the board that it would be perfectly lawful and proper to invite all nonmembers to become members of the association, and in fact it was our moral duty to do so, but that would be the point where we would better stop.

Q. You have a firm recollection of having made a somewhat similar statement you have just made to the board?

A. Yes. I cannot recall the exact words I used but that was the substance of my position, that the letter contained objectionable features that I did not think they ought to consider.

Q. Upon your so stating, what then occurred, if anything?

A. The board adopted a resolution which I think is already in evidence, if I remember correctly it is exhibit 98 B.

\* \* \* \* \*

Q. You felt, I take it, it was your duty as counsel to call to the attention of your conferees any legal matters, any illegal action they might get into and warn them against it, is that right?

A. Yes, I thought that they were matters in this letter they ought not to consider.

Q. You gave us a legal opinion this morning. I wonder if you will give us one this afternoon. In what respect would you think the recommendations of Mr. Kayser were illegal?

A. I told you I thought we ought not to consider domestic price and I thought that we ought not to consider obtaining control of those companies insofar as he spoke of obtaining control or assisting other people in obtaining control. I did not think that was a matter for the Export corporation to have anything to do with. The farthest I thought we had the right to go would be to deal with them in respect of the purchase of some of their black possibly or making them members of the corporation for export purposes.

Q. In other words, you thought, if I understand you correctly, that the contemplated action might violate the antitrust laws, is that right?

A. It would certainly be outside the scope of anything that an export corporation had the right to do.

Mr. Nelson testified, by way of a written statement, as follows: <sup>44</sup>

I have been asked to comment on exhibit 193 A to T, which is a report by Mr. Kayser to the board of directors of Carbexport dated October 21, 1935. There is a copy of this letter in our files but I cannot recall ever reading it. I attended the meeting on October 24, 1935, and according to my records had left for New York on October 21 before this letter reached Charleston. I recall Mr. Carr making pointed objections to this report and I gave the matter no further thought and have not to this day. I had nothing to do with getting these small companies to join Carbexport, except that I have on occasion talked to my friend Ingraham about it.

Mr. Kayser, also in a written statement, testified as follows: <sup>45</sup>

I testified, as shown in lines 11-14 on page 275 of the record, that exhibits 193 (s) and (t) represented announcements of agenda to be discussed at a

<sup>44</sup> T. 643.

<sup>45</sup> T. 1712.

meeting of the board of directors of Carbexport called for October 24, 1935. At the close of item II on this agenda report (exhibit 193 (s) recipients thereof, namely, directors, are referred to in a report of mine dated October 21 as a background for discussion of the recommendation made in agenda item II. Exhibits 193 (a)-(r) inclusive are copies of the report referred to.

Exhibit 98 (a)-(c) shows that a meeting of the board of directors took place on October 24, 1935. The said exhibit is a copy of the minutes of that meeting.

When in the course of the meeting I as chairman, brought up item II of the agenda for discussion Mr. Reid L. Carr, a director of Carbexport, promptly expressed his disapproval of my report as the basis of a policy to be adopted by Carbexport and recommended that the board decline to discuss or give consideration to anything therein which was of the nature of a proposal of policy for Carbexport.

Several board members present indicated that they had not read the report but all, including myself, accepted Mr. Carr's opinion and recommendation.

Thereupon I asked if there could be any objection to the resolution which I proposed under item II of agenda, exhibit 193 (s), suggesting that, while it had been continuous policy of Carbexport's directors to hold membership open to nonmembers, it might aid in obtaining more favorable reception of renewed invitations to join if it could be brought out that the board had again gone on record as extending such invitations.

None objected to the board again going on record as holding membership in Carbexport open to any and every nonmember. Therefore a resolution expressing this sentiment was drawn to conform to the ideas of the board. It was offered for vote and was passed without dissent as recorded in exhibit 98 (b).

#### 4. Magnolia correspondence

There were introduced into the record during the investigation 41 photostats of correspondence between the association and Magnolia Petroleum Co., of Dallas, Tex., or between others on behalf of Magnolia. These are identified as exhibits 230 A-B to 247 and 590 A-W. These consist of transmittals of export price lists, references on foreign agents, a sale of 700,000 pounds of carbon black, and discussion of possible membership by Magnolia. Exhibit 590 E, dated September 5, 1934, from the association to Magnolia, contained an invitation to join in the following language:

At the time of our meeting I informed you that it was my intention to invite Magnolia Petroleum Company to become a stockholder in Carbon Black Export, Inc. and to ship black for export thru it. That invitation is herewith cordially extended. Although Magnolia Petroleum Company has never exported black, the members of Carbexport will be glad to "move over" and make room for Magnolia, so that the Corporation can assign it a representative quota of the total export requirements.

Magnolia, by its officer C. E. Farnum, on September 21, 1934, replied to the association as follows (exhibit 590 G):

Mr. Miller has asked the writer to express to you his appreciation of your letter of September 5th sending us the documents covering Carbon Black Export, Inc. We feel that it would be to the advantage of our Company to participate in this Corporation and are very much interested, but in presenting the matter

to the management for final approval and authorization there seem to be several things that are not quite clear, and we are taking the liberty of asking you for a little additional information. How many shares would we be required to purchase, and how much per share will have to be paid at time of purchase?

The invitation was not accepted, Magnolia on October 29, 1934, writing the association as follows (exhibit 590 K) :

Your letter of October 3d, in reference to participating in Carbon Black Export, Inc., is received and, after consideration of the matter, wish to state we believe that we will not take advantage of your kind invitation at this time.

Assuring you of our desire to continue to cooperate with you for the best interests of all concerned, and with kind personal regards, beg to remain, \* \* \*

Correspondence on the association's purchase of carbon black from Magnolia, is as follows:

Magnolia to association, January 31, 1936 (exhibit 590 L) :

We have at our Magic City and Faulkner, Texas, plants between 800,000 and 1,000,000 pounds of black produced under the old grinder process of bolting; May we inquire if the Export corporation would be interested in purchasing any of this black?

Association to United Carbon Co. February 27, 1936 (exhibit 230 A) :

Magnolia Petroleum Company have inquired whether or not we would be interested in buying between 800,000 and 1,000,000 lbs. of black produced under the old grinder process of bolting, and in their stock at Magic City and Faulkner, Texas. The purchase does not sound very inviting but it will be to our interest, until the outsider situation is cleared up, to keep Magnolia well disposed toward Carbexport. Therefore, altho it does not occur to us to buy this material, we would prefer keeping the question of purchase in a friendly status of negotiation to making a final refusal now. With this intention, we have asked Magnolia to permit us to take samples and test the black in question, and they have advised us that Mr. C. V. Edwards, Superintendent of Carbon Black Plants, Magnolia Petroleum Company, Pampa, Tex., has been instructed to make available whatever samples your representatives might want.

We address you to enlist your aid. We would appreciate it if you would have your producing division take samples, test them thoroughly and send us a full report of the findings, together with an opinion as to the type of customer to whom we could afford to deliver the goods if we should buy it. We will, of course, expect to reimburse you for whatever costs such services will involve. Please advise us if you can and will accommodate us. If so, will you also instruct your plants to do the necessary.

United to Association, February 29, 1936 (exhibit 230 B) :

I have your letter of the 27th inst. and I am entirely in accord with you on the purchase of black from Magnolia Petroleum Company, as long as they are willing to cooperate with the Export Corporation. Naturally we want to purchase little black as possible, but I presume you know what stock they have on hand and therefore, it would be satisfactory with us for you to handle as you think best at this time. If this black is not up to the standard specifications of the Export Corporation it is, of course, a very difficult matter to handle. I am turning the matter of samples over to our Mr. A. G. Treadgold for handling, and you will hear from him in due time.

Association to Magnolia, July 9, 1936 (exhibit 590 R) :

We have completed our tests of the samples of black you sent us from the 700,000 lbs. previously made up by you for, but not accepted by, Firestone. We find that they satisfy our minimum requirements for export and I am, therefore, now glad to formally make the purchase of this material from you.

Magnolia acknowledged, and in its reply, dated July 17, 1936, wrote (exhibit 590 U) :

It is also our desire that this material be *not* subject to rejection after shipment from our plant at Magic City. The export market has never been attractive to us because of the methods employed at times by customers to secure reduction in price, and we therefore wish to make this plain to you.

Another purchase transaction is indicated in the following year, 1937, in the following correspondence involving Magnolia's inquiry about agents located in England and Germany. Under date August 17, 1937, Magnolia wrote the Association (exhibit 243) :

Lind, Mayer & Company of 110 Fenchurch Street, London, have addressed inquiry to us, requesting permission to represent us in the sale of Carbon Black in England.

No doubt you are familiar with this concern, and we ask your advice whether or not you think they would make good representatives.

The association's reply, dated August 27, 1937, reads as follows (exhibit 244) :

Unfortunately I am not acquainted thru personal contact or by report with the firm Lind, Mayer & Company of 110 Fenchurch Street, London, and can, therefore, not give you an offhand estimate of them. However, I have initiated inquiries with instructions that they be discreet.

It will not surprise you that I wonder over your inquiry. You have repeatedly given me to understand that Magnolia Petroleum Company had no desire to go into the export market. Altho you have never stated so, I had felt sure that whenever you determined to do so you would consider joining the Export Corporation, since you have been repeatedly assured that you would have a quota which would represent a fair share of the market and relieve you of the necessity of troubling with distribution. Would you mind informing me whether or not there is a change of policy with regard to exporting in your company.

This was followed by the association's letter of October 4, 1937, in which is indicated the purchase of 250,000 pounds of carbon black. The letter reads as follows (exhibit 246) :

As your letter of October 1st states, we are a long time getting around to the purchase of 250,000 lbs. of carbon black. You will see by the order enclosed that we have finally gotten to it. It is a small quantity we are discussing but, under present conditions, it hasn't been the easiest thing for us to handle.

In an earlier reference to the proposed purchase, you asked us what we might know about Lind, Mayer & Co. of London, who had solicited an agency from you. My reply was that we would make inquiries regarding them. We now have a report from London, copy of which I am pleased to enclose.

Your letter of October 1st states that you have a similar inquiry from Wilhelm Priem & Company, Magdeburg, Germany. This concern used to be an agent of one of our distributors. The agency arrangement was cancelled after a couple of years because of continuous evidence that Priem & Company operated entirely in its sole interest and without consideration for its supplier. When you seriously want to take a flier in exporting carbon black directly, I have in mind recommending that you tie up with Priem to get a taste of what difficulties and costs there are connected with selling this commodity outside of our fair land.

The last dated correspondence, Magnolia's letter of July 29, 1938, indicating their desire to sell additional black, is here reproduced in full (Example 590 W) :

MAGNOLIA PETROLEUM COMPANY

A Socony-Vacuum Company

DISTRIBUTION DEPARTMENT

DALLAS, TEXAS, *July 29, 1938.*

CARBON BLACK EXPORT, INC.,  
500 Fifth Ave.,  
New York City, N. Y.

GENTLEMEN: This is to acknowledge Mr. Villareal's letter of July 22d attaching copies of price schedule No. 2 for various countries, for which we thank you.

If you find it possible to order any black from us to fill commitments for shipment abroad, we should be very pleased to receive any orders you can consistently place with us.

Thanking you, we are,

Yours very truly,

(Signed) C. E. FARNUM.

Mr. Kayser testified that with the permission of the association's directors, he had invited Magnolia to take membership in the association as early as 1934. From time to time, purchases of carbon black were made from Magnolia and he was positive that there was no arrangement with Magnolia "that they should not operate in foreign fields for export." He thought they ceased carbon black operations in 1938 and knew nothing of their acquisition by Phillips Petroleum Co. He testified further by way of written statement, as follows: <sup>46</sup>

I should like to add to the record additional copies of correspondence between Magnolia Petroleum Co. and Carbexport which clarify and support my statements on pages 336-338 of the record and which throw more light than the said statements on the relationships between the two companies. I have numbered these exhibits 590 a through w. The first carbon black which Carbexport purchased from Magnolia was in July 1936 and the purchase was initiated by Magnolia's own inquiry of January 31, 1936, marked "Exhibit 590 L," as to whether or not Carbexport cared to buy. You will note that the black finally offered to and purchased by Carbexport was a lot which a domestic customer of Magnolia had rejected because it did not fit the customer's specifications. Carbexport was able to find export buyers whose specifications the black did fit and

<sup>46</sup> T. 336; 1720.

helped Magnolia get it out of stock at the best price. Please note in the last paragraph of Magnolia's letter of July 17, 1937, marked "Exhibit 590 T," a reference to the habit of customers in the export market of using the threat of rejection as means of getting price reduction. I quote the reference:

"It is also our desire that this material be not subject to rejection after shipment from our plant at Magic City. The export market has never been attractive to us because of the methods employed at times by customers to secure reduction in price, and we therefore wish to make this plain to you."

Magnolia's experience as a nonmember of an effective Webb-Pomerene Association was apparently the same as that of Carbexport members prior to May 1933, the date Carbexport came into being.

An earlier letter dated December 30, 1936, from Phillips Petroleum Co. to United Carbon Co. (Exhibit 231) reads as follows:

I have your recent letter asking for information concerning the Magnolia's carbon black operations.

When we took over Magnolia's equipment we did not include one small plant which they had south of Pampa in the Bowers Pool Texas. This plant is capable of burning up to 10 million feet per day, although apparently it is not doing this good at this time as their use for carbon black in November was 4,880,000 cubic feet of gas per day. The gas supply is being depleted around this plant.

This is the only carbon black operation which the Magnolia have. As far as I know, they have practically withdrawn from the carbon black business. I believe this will answer your inquiry.

Although Magnolia's letterhead (exhibit 590 W) indicates affiliation with a large Petroleum organization, Socony-Vacuum, the investigation resulted in no further information on its last operations. Mr. Hans Huber testifying at the June 22, 1945, hearing, gave only the following information:<sup>47</sup>

Immediately prior to 1933 Magnolia Petroleum Co. owned three or four carbon black plants. In late 1933 or early in 1934 we leased a carbon black plant from the Magnolia Petroleum Co. located at Skellyton, Tex. After about 3 years of operation, the lease was canceled and we understand that they sold the plant, dismantled and moved it elsewhere.

##### 5. Continental quota

Mr. Robert I. Wishnick testified that he is the president of the following four corporations: Panhandle Carbon Co., a producer of carbon black and member of the association since 1933, selling its export black through the association; Continental Carbon Co., a producer which in early 1937 became the successor of Witco Carbon Co.; Crown Carbon Co., a producer which sells its production through a distributor in Canada known as Canada Carbon Black Co.; and Witco Chemical Co., successor to Wishnick-Tumpeer Co., which is a distributor for Carbon Black Export, Inc., the association herein. Phillips Petroleum Co., about 3 or 4 years after 1933, became owners

<sup>47</sup> T. 757.

of a half interest in Panhandle Carbon Co. There is no interownership of each other's stock among the four corporations.

Continental's plant was constructed in 1936 but he could not recall whether it had any production in 1936. In 1937, it may have produced up to its capacity which was 33,000,000 pounds of carbon black per year. Continental entered into a contract to export exclusively through the association, Mr. Wishnick's testimony on this particular reading as follow.<sup>48</sup>

Q. As a part of Continental's agreement with Carbexport, did Continental agree not to export through the Crown Carbon Co. and Canada Carbon Co.?

A. Well, we had an exclusive agreement with Carbexport which we certainly intended to live up to and restricted our exports through that agreement.

Q. Did your understanding of that contract mean that Continental was not to export through Crown Carbon Co.?

A. Yes, sir.

Q. Was it also true that you were not to export through Witco Chemical Co.?

A. Excepting as a distributor for Carbexport.

The contract referred to, its modification and extension is contained in the record in the form of photostatic copies identified as exhibits 218 A-B to 229; 436; 570 and 589. It will be noted that only exhibit 218 A-B refers to Continental as Witco Carbon Co. Exhibit 570 consists of a folder containing 20 photostat copies of Continental's file copies of the contract. In this group, a letter dated February 15, 1937, appears to be the last use of the Witco Carbon Co. letterhead and a letter dated March 23, 1937, is the first use of the Continental Carbon Co. letterhead and designation. Mr. Wishnick testified that Witco Carbon Co. and Continental Carbon Co., "for all intents and purposes," are one and the same. A summary of the exhibits follows:

Exhibit 589, photostat copy of Wishnick telegram to Kayser dated February 9, 1937, and reading as follows:

Directors have authorized me to accept for Witco Carbon your offer to purchase five million pounds delivery this year accordance our conversations stop desire however go on record in stating this quantity not to set precedent for future quota negotiations as we feel it too small for our plant however are accepting for this year to show willingness cooperate with industry all directors joins me in wishing you bon voyage safe return regards.

Exhibit 218 A-B is a photostat of the first contract of purchase. It is in the form of a letter from the association dated February 9, 1937, signed by Mr. Kayser, addressed to Mr. R. I. Wishnick, Witco Carbon Co., and on its second page bearing the caption "accepted February 11, 1937, Robert Wishnick, President, Witco Carbon Company." The first two and last two paragraphs are here set out in full, the intervening five paragraphs relating to quality standards and packaging requirements. The four paragraphs read as follows:

<sup>48</sup> T. 304; 314.

Thanks for your telegram of today advising me that Witco Carbon Company accepts the offer of Carbon Black Export, Inc., which I made you to purchase five million pounds of carbon black for delivery during this year, in accordance with the terms discussed by us. The offer which is now to be formalized as an agreement is as follows:

Carbon Black Export, Inc., agrees to purchase from you and Witco Carbon Company agrees to sell to it, 5,000,000 lbs. of heavy compressed ordinary carbon black in 12½ lb. plain bags sealed with plain tape, packed 4 each in heavy standard paper bags; price to be the same as paid by Carbon Black Export, Inc., to its member producers, f. a. s. Gulf ports, less 10% commission.

\* \* \* \* \*

Carbon Black Export, Inc., will attempt to call for delivery by you to Gulf ports at the rate of 500,000 lbs. per month beginning with the month of March 1937. You agree to hold any balance not taken under the above monthly rate without storage charges and at your risk until you make delivery to us at Gulf ports. In April, May, and June we will pay you at the price due for the 500,000 lbs. contracted to be taken in each of the preceding months, the portion of such payment not representing actual deliveries to you to be an advance on account. Beginning with July we shall pay you in each month for the actual quantities taken in the preceding month. In consideration of our undertaking to purchase, you agree that for the year 1937 none of the carbon black produced by Witco Carbon Company will move into the markets outside of the United States, Mexico and Canada directly or indirectly otherwise than thru Carbon Black Export, Inc.

If you find that the above is a correct statement of our agreement, will you kindly indicate your approval thereof by affixing your signature and the date thereof on one of the two copies herewith and return it to me. Of course, if it does not state the agreement correctly, I shall expect you to point out the error so that it may be corrected on my return.

Exhibit 220, dated April 19, 1937, addressed to Continental Carbon Co., consists of a modification of the contract (exhibit 218 A-B), under which "any portion of the 5 million pounds remaining untaken by us as of December 31, 1937, to be billed to us and held for our account without storage charges and at your risk until we call for it to be delivered to us at Gulf ports."

Exhibit 221 A-C, addressed to Continental and dated September 29, 1937, is a similar contract for the purchase of 7 million pounds of carbon black in 1938, and bearing quotation "accepted: September 30, 1937, Continental Carbon Company, by Robert Wishnick, Pres." This contract, after detailing quality, packing, payment and warranty provisions, contained three paragraphs reading as follows:

(5) During the term of this agreement Continental shall not directly or indirectly sell or deliver any carbon black for export except thru Carbexport.

(6) Throughout the term of this agreement Continental shall take all reasonable precautions to prevent carbon black sold by it in the United States, Canada and/or Mexico from being exported except thru Carbexport.

(7) The restrictions under (5) and (6) above on the sale of carbon black by Continental for export are the same restrictions binding the member suppliers of Carbexport and shall be interpreted and applied in the case of Continental exactly as they are interpreted and applied in the cases of Carbexport's member suppliers.

Exhibit 223, is an extension, date June 27, 1938, and duly accepted, of the 1938 contract for the year 1939, on the same terms and conditions.

Exhibit 224, letter dated May 26, 1939, from Mr. Kayser to Mr. Nelson of United, revealing Continental's overtures to take membership in the association, reads as follows:

Sales Agreements with Continental Carbon Company have heretofore been concluded approximately six months prior to their effective date. Such early agreement has been reached in order to prevent the disturbance in our distribution which would be created by preparations for eventual separate marketing Continental might think it necessary to make, if uncertainty as to their relationship to us after the expiry of an existing contract should exist any longer.

The subject of a Sales Agreement with us for 1940 has now been broached by Continental. They have notified us of their willingness to extend the contract in effect for this year to cover 1940 or to become a stockholder of Carbexport if granted a quota of 7%.

The present contract bars Continental from selling carbon black for export except thru Carbexport. We are committed to purchase from them an amount of black which figures 5.58% of our requirements at the price allowed and the discount charged our stockholders.

I believe it to be Carbexport's best interest to extend the present contract thru 1940. However, in view of market and other conditions, I do not consider it to Carbexport's best interest that I take any action without benefit of the views of its directors. Will you please write me the ideas on this subject of your company's representatives on the board.

Exhibit 224 B is Mr. Nelson's reply dated May 29, 1939, reading "It is satisfactory to us for you to extend the present contract with Continental to cover the year 1940."

Exhibit 225, dated July 11, 1939, records an interoffice memorandum of a telephone message, transmitted by Mr. N. L. Smith of Binney & Smith Co. to Mr. Reid L. Carr, and reads as follows:

Memorandum to Mr. Reid L. Carr:

At the export meeting last Friday, you, Mr. Cabot and Mr. Huber were appointed a committee of three to negotiate a new sales contract with the Continental Carbon Company.

Carl Kayser has requested me to ask you to *telephone him this morning, before the Columbian meeting*, to let him know if you would be willing to serve on this committee and attend a meeting this coming Thursday.

I understand that Mr. Wishnick is leaving town on Friday, to be absent for a week, and sails the following Friday for Europe, so that Thursday of this week is about the last day this meeting can be held.

Mr. Kayser of course wants to hear from you so that he can telephone the other two members.

Exhibit 226, July 13, 1939, Continental contract for the year 1940, in the customary letter form, embodying the same terms and conditions of the 1939 contract but with the addition of a 60-day cancellation clause. The whole contract is here set forth:

This is to confirm the understanding reached between us verbally today that Carbon Black Export, Inc., and Continental Carbon Company shall be and are

bound to each other for the purchase and sale of carbon black for export for the year 1940 under the same terms and conditions which bind them for the year of 1939, which conditions are set out in agreements dated September 29, 1937, and June 27, 1938, except that the following cancellation clause shall apply for the year 1940.

"Either party shall have the right to cancel this contract at any time on not less than sixty (60) days' previous written notice to the other, such cancellation to be effective on the date specified in said notice, and after such date each party shall be relieved of all further obligation hereunder."

Will you kindly affirm this as your understanding of the said arrangements between us by signing and dating the enclosed duplicate hereof in the space provided thereon, and by returning it to us promptly.

The foregoing contract was accepted on July 25, 1939, following acceptance by the association of an amendment suggested by Continental, reading as follows (Ex. 436) :

We are returning herewith original letter of July 13th from you to us confirming the verbal understanding arrived at covering the purchase and sale of carbon black for export for the year 1940.

We have signed the acceptance of the proposal as outlined in your letter, but in accordance with the conversation which Mr. Schwartz and the writer had with you yesterday, this acceptance is upon the understanding that in the event of a cancellation pursuant to the provision contained in your letter of July 13th you will purchase and we will sell such an amount of black as will bring the total sold by us to you for the period up to the effective date of the cancellation of the contract, to 5.58% of the total carbon black shipments for export by Carbon Black Export, Inc., to and including the effective date of the cancellation.

Mr. Kayser by letter dated July 20, 1939 (in the interim between the July 13 and 25 dates of the above contract), wrote Mr. Oscar Nelson as follows (Ex. 227) :

I have just awakened to the fact that I have not informed you what was arrived at between the committee and Continental Carbon. The present contract was renewed for 1940 with only one change. The latter was the addition of a 60-day cancellation clause. Mr. Wishnick left the meeting with the clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if present outside capacity were increased a pound.

Your letter giving your views did not reach me as early as I had wished. It was delivered to me at about 1:00 P. M. Thursday, just as the meeting came to a close. The committee did not meet with Continental, however, without knowing what you thought. I informed its members in a preliminary meeting.

In performance of the contract for the year 1939 (exhibit 223), the association, at the conclusion of that year, purchased an unshipped quantity of carbon black for \$74,133.11, as evidenced by exhibit 228, dated January 10, 1940, reading as follows:

In spite of strenuous efforts to move the percentage share of our total 1939 shipments due you under our contract of June 27th, 1938, we have failed to do so by 1,744,308½ lbs. Consequently we enclose our check in your favor for the sum of \$74,133.11 as the purchase price of that unshipped remainder, based on the price per pound f. a. s. Gulf ports of 4.25¢ for fully compressed black in

bags. Please confirm to us that you will hold this quantity of fully compressed or dustless in bags in warehouse to our order and subject to our shipping instructions.

The 1940 contract (exhibit 226) was extended 1 year to cover the year 1941 by two documents: November 22, 1940, letter to Continental of that date reading as follows (exhibit 229):

This is to confirm the verbal understanding previously reached by us that Carbon Black Export, Inc., and Continental Carbon Company shall be and are bound to each other for the purchase and sale of carbon black for export for the year 1941 under the same terms and conditions which bind them for the current year 1940, which conditions are set out in agreements dated September 29th, 1937, June 27th, 1938, and July 13th, 1939. Will you kindly affirm this as your understanding by signing and dating the enclosed duplicate herewith in the space provided thereon and by returning such executed duplicate to us promptly.

The second document, Continental's letter of November 27, 1940, to the association, relating to this extension, along with practically identical letters dated December 8, 1941 (for year 1942), and December 29, 1942 (for year 1943), is included in the group of 20 photostats comprising exhibit 570. It reads as follows:

We are returning herewith original letter of November 22, 1940, from you to us confirming the verbal understanding arrived at covering the purchase and sale of Carbon Black for export for the year 1941.

We have signed the acceptance of the proposal as outlined in your letter but in accordance with conversation between us, this acceptance is upon the understanding that in the event of a cancellation pursuant to the provision contained in your letter of July 13, 1939, you will purchase and we will sell such an amount of black as will bring the total sold by us to you for the period up to the effective date of the cancellation of the contract, to 5.58% of the total carbon black shipments for export by Carbon Black Export, Inc. to and including the effective date of the cancellation.

Testimony in explanation of the foregoing exhibits was given as follows: Mr. Robert I. Wishnick, at the February 8, 1945, hearing, questioned specifically about exhibit 226, dated July 25, 1938, for the reason why the cancellation clause was inserted, testified:<sup>49</sup>

A. Well, we had never been satisfied with the quota and had been negotiating for increased quota subsequent to the contract, when we constructed another plant which we had acquired from another company that closed down. We rebuilt it on our own location and we wanted to be in a position to demand an increased quota when that additional capacity was made available, and we therefore thought it advisable to have the right of cancellation on 60-days notice so we could renew negotiations for increased quotas.

Q. Where was this plant that was in the process of construction at this time?

A. It was a shut-down unit which we acquired.

Q. You mean Continental or this whole group?

A. I am talking about Continental.

Q. You acquired it from whom?

<sup>49</sup> T. 315; 323.

A. From a firm, Imperial Oil & Gas Products, and I believe they had originally purchased it from Magnolia corporation and it had been shut down due to lack of gas or some other reason and we acquired it and moved it to our plant site and reconstructed it.

Q. You have that date very firmly fixed in mind? That was sometime prior to July 13, 1939?

A. I would have to refresh my memory as to exact dates.

Q. Do you recall the extent to which you had proceeded with the development or opening up of this plant you refer to?

A. You mean the acquiring of the plant? I do not know at this time.

Q. Nevertheless, at this time you were not in the process, or were you in the process of putting that plant into commission?

A. I would really have to refresh my memory on exact dates of negotiations for the purpose of that plant.

Q. Well, then, do you withdraw your testimony as to whether or not this situation existed and was the reason for the insertion of the cancellation clause referred to?

A. Repeat that question.

Trial Examiner NORWOOD. Read the question.

(Question read by reporter.)

A. I would say in addition—

Q. Then you do not want to withdraw your testimony?

A. No, sir. I might add this, that not only were we interested in keeping the quota open from the viewpoint of further expansion in production of our plant, but also we were constantly negotiating for increasing our quota on our old production.

Q. By quota you refer to the amount covered by this contract between Continental and Carbexport?

A. That is right. Our directors were not satisfied with the quota we had and were constantly attempting to have it increased and we deemed it advisable to have that kind of cancellation clause inserted in all future contracts.

Q. In other words, you are definitely certain at this time that, namely, on or around or about July 13, 1939, that Continental Carbon Co. was in the process of growth and attempted growth, is that right?

A. That is right.

Q. You are positive about that?

A. Yes, sir.

Q. I hand you exhibit 227, in evidence, which is a letter from Mr. Kayser to Mr. Oscar Nelson, which refers to the transaction set forth in exhibit 226. Calling your attention to the first paragraph in letter 227, is Mr. Kayser correctly stating your understanding when he said that: "Mr. Wishnick left the meeting with a clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if Continental's present outside capacity were increased a pound?"

A. I think I expressed my understanding previously. What transpired between other companies I would not be familiar with.

Trial Examiner NORWOOD. I will ask the reporter to read the question and ask you to answer it, please, sir?

(Question read by reporter, as follows:)

"Q. I hand you exhibit 227, in evidence, which is a letter from Mr. Kayser to Mr. Oscar Nelson, which refers to the transaction set forth in exhibit 226. Calling your attention to the first paragraph in letter 227, is Mr. Kayser correctly stating your understanding when he said that 'Mr. Wishnick left the meeting

with a clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if Continental's present outside capacity were increased a pound?"

A. My answer to that is that my understanding was expressed in the contract which the Continental Carbon Co. entered into with Carbexport.

Trial Examiner NORWOOD. Does that answer the question?

Mr. LAYTON. No.

By Mr. LAYTON:

Q. Did you have a meeting with Mr. Kayser prior to the entering into of this contract referred to in exhibit 226?

A. We usually had meetings concerning our export quota for the succeeding year.

Trial Examiner NORWOOD. He did not ask you what was usual. Now, did you have this meeting or did you not, tell us?

The WITNESS. In order to arrive at a quota, Your Honor, you have to have some discussions about what the quota would be and we have had a number of meetings discussing it.

Trial Examiner NORWOOD. Do you recall a meeting?

The WITNESS. If you will ask me specifically what meeting we had—

By Mr. LAYTON:

Q. Mr. Wishnick, this is the first contract that you entered into with Carbexport that had this cancellation in it?

A. Yes, sir.

Q. And you have testified that you put that clause in there because you were attempting to expand. That ought to fix the meeting fairly well in your mind, the negotiations. Now, I am asking you if you had such a meeting with reference to this contract that contained the cancellation clause, exhibit 226?

A. We certainly had a meeting to fix our quota and at the same time, if the cancellation clause was part of the agreement it certainly was discussed at that meeting.

Q. Did Mr. Kayser at any time at which you had a meeting, if you did have one, prior to the entrance into the contract, exhibit 226, tell you by word or action or in any other way that Carbon Black Export would cancel its contract with you, Continental, if you increased the present outside capacity a pound?

A. I think we had discussed the quota not being satisfactory to Continental Carbon Co. and that we wanted to be free to extend that quota and my understanding was at that time, if we had that privilege, that Mr. Kayser on behalf of Carbexport would want the same privilege.

Q. I want to give you another opportunity to answer the question I asked.

Trial Examiner NORWOOD. Read the question.

(Question read by reporter, as above recorded.)

Trial Examiner NORWOOD. Is that true or not true?

The WITNESS. I tried to clear it up by indicating there was a mutual understanding that if Continental Carbon Co. increased its capacity we would be free to renew negotiations for the increased quota, and that was my understanding of the agreements we arrived at and it was so expressed in the contract which Continental Carbon subsequently drew with Carbexport.

By Mr. LAYTON:

Q. You will not state, then, whether or not it is true, the statement I made with reference to Mr. Kayser, is that right?

A. I am in no position to say that inasmuch as you are trying to tie me down to some correspondence I have no knowledge of.

Q. No, I am not trying to tie you down to any correspondence at all. I am just asking you a plain, simple question as to whether or not Mr. Kayser told you or brought home to you in any way at all that Carbexport would cancel the agreement without hesitation under the circumstances set forth.

A. I still say that my proper answer is that Carbexport, we each had the privilege of cancellation on 60 days notice for any reason.

Q. Will you answer that question, Mr. Wishnick, did Mr. Kayser do that or didn't he?

Mr. BEER. If Your Honor please——

Trial Examiner NORWOOD. Off the record.

(Discussion off the record.)

Trial Examiner NORWOOD. Read the question, and I will ask you to answer it.

Mr. LAYTON. Is it clear what I asked you?

Mr. BEER. May the last few questions and answers be read back?

Trial Examiner NORWOOD. No, sir. Please do not interfere until we see if he will answer this question.

By Mr. LAYTON:

Q. Do you understand the question I am asking you?

A. The difficulty I have in answering it is because you showed me a letter I had no knowledge of. If you had not shown me that, I would have been very clear about it.

Q. Ignore any letter you have seen and I ask you whether or not at the time that this cancellation clause was inserted into the Continental contract whether or not Mr. Kayser told you or made known to you, or brought home in any other way, the fact that Carbexport would exercise the right to cancel that contract without hesitation or discussion if Continental's present outside capacity were increased a pound?

A. My understanding was that Carbexport had that right if they elected to do so, that would be my answer.

Q. That is your understanding?

A. That is right, if they elected to cancel it when we expanded production, they had a right to.

Trial Examiner NORWOOD. Off the record.

(Discussion off the record.)

The WITNESS. I should like to add one explanation. Subsequently, the fact remains we did increase, that is, Continental's production did increase and Carbexport did not take advantage of the cancellation clause.

By Mr. LAYTON:

Q. When did it increase production?

A. At the time that we acquired that additional plant.

Q. When was that?

A. Well, the exact date I would like to refresh my memory on. It was subsequent to that agreement, however.

Trial Examiner NORWOOD. Was that after these meetings?

The WITNESS. Yes, sir.

Trial Examiner NORWOOD. Then his bark was worse than his bite?

The WITNESS. That is what I tried to explain.

At the January 18, 1946 hearing, Mr. Wishnick testified that he and his associates purchased the Panhandle Carbon Co. from Phillips Petroleum Corp. on May 1, 1933, and on October 1, 1936, resold to Phillips a one-half interest in the Panhandle company. The Con-

tinental Carbon Co. was organized November 5, 1936, and produced its first carbon black on February 15, 1937, producing in that year 23,800,000 pounds. Its greatest production was 32,400,000 pounds, made in 1940. An expansion took place in 1944 indicating an expected production of 36,000,000 pounds for 1945. Continental has sold all its export carbon black through the association. He testified further in explanation of exhibit 226, as follows:<sup>50</sup>

In the spring of 1939 the directors of Continental Carbon Co. agreed with me that the outlook for the carbon black business was improving and that, if it continued, some expansion of capacity by Continental would be warranted. I informed them that it might be possible to expand cheaply because there were some units lying around the Southwest which were idle on account of lack of gas and which I might be able to buy and remove to Continental's plant for relatively little money. I mentioned some old units in Louisiana and the shut-down Magnolia plant at Pampa, Tex. While I was watching developments and waiting for a right time to make an offer I lost the opportunity to purchase the Magnolia plant. Imperial Oil beat me to it and purchased the plant for its own account. Imperial did not operate or move the purchase to an available gas supply at any time. In December 1941 I succeeded in buying the Magnolia plant from Imperial at a price satisfactory to me and immediately moved it to the Continental site. It was added to the Continental plant and was operating in April 1942.

I approached Mr. Kayser about the 1940 contract in April 1939. I advised him against making the contract on his own responsibility. I advised him in that manner a number of times both before and after 1939. I gave him that advice because I did not feel that he ought to leave himself open to criticism for negotiating with me as a nonmember in the same manner he could negotiate with me as a member. I thought that Carbexport's directors should know our intentions before the 1940 contract was made. I urged Mr. Kayser to get the matter before his board of directors as early as possible and suggested settlement before June 30. I wanted to have plenty of time to make other distributing arrangements for 1940 if necessary. I remember that the matter was put before the board in July because I withdrew from the room to allow free discussion.

I don't have any clear recollection of the details of the meeting with the committee appointed by the board, even regarding all who might have been present. However, there were no threats from anyone nor any pressure brought on me about expansion. I do remember that the meeting was short and that the cancellation clause was mutually agreeable to all of us.

Referring to the letter, exhibit 227, from which Mr. Layton quoted on page 318, I cannot be responsible for the impression that others believed I might have at the time. As I stated in my testimony I wanted a cancellation clause and it was agreed to. My production increased after 1939 and I added capacity to both Continental and Crown later without losing my rights.

While I don't remember quantity being discussed with the committee, I have been reminded by a letter (exhibit 436) in my office contract files, that I called on Mr. Kayser accompanied by one of Continental's directors a short time after the committee meeting and called his attention to the fact that my proposition had been that quantity should be expressed in quota percentage instead of in a fixed number of pounds. He remembered that and we agreed on 5.58 percent.

In spite of increases in the capacity of Continental and of my other nonmember interest, Crown Carbon Co., since 1939 I have never heard a word from Carbexport or any of its members about cancellation of their arrangements with Continental.

<sup>50</sup> T. 987-989.

Referring to the modification of the contract (exhibit 436) which gave Continental a quota of 5.58 percent, he testified that such quota placed him in "substantially the same position as a producer member stockholder of Carbon Black Export," excepting that Continental had no investment in the association.

Mr. Kayser, in further explanation of the Continental contract, testified that in the spring of 1937, when Continental commercial production, Mr. Wishnick asked him if it were possible for Wishnick-Tumpeer Co., under its contract as distributor for the association, to sell the export carbon black of the Continental company. His testimony continues:<sup>51</sup>

A. \* \* \* to which I replied in effect that the distributor's agreement made Wishnick-Tumpeer the exclusive distributor of Carbexport, and that there was nothing to stand in the way, that if Wishnick-Tumpeer wished to give up its distributorship it was entitled to take a distributorship for Continental. Mr. Wishnick then felt that it would be necessary for him to establish a separate selling organization for Continental and he preferred not to do that and he wanted to know if there was not some way in which to bring Continental into the Carbexport picture and the first reply, of course, was there was a way, Continental could become a member of Carbexport by becoming a stockholder. The other possible way was for Continental Carbon Co. to make a contract with Carbexport, which would make Carbexport its exclusive agent.

At that time the matter of quota was simply one of what Mr. Wishnick thought he would like to have as an export volume and as one does, one bats things of that kind back and forth, and I do not recall that we arrived at anything, at any figure, either as a quota if Continental became a member of Carbexport or the equivalent of a quota if it became its sales agent by contract.

Mr. Wishnick thereupon went to what he said was a directors' meeting of Continental Carbon Co. in Chicago and he would let me know which of these two alternatives, if either, his board of directors would prefer. I think I received a telegram from Mr. Wishnick, although I cannot certify to that without finding it, in which he stated that he would prefer the contract for the time being.

Thereupon, we made, on his return we made a contract which I believe this to be.

Q. Will you read the number of that?

A. It is 218 A and B.

Q. That is the 1937 contract for 5,000,000 pounds?

A. That is right. Under this contract we agreed to purchase, the Witco Carbon Co., and I want to make a correction in Mr. Wishnick's statement here and now—the Continental Carbon Co. was first called Witco Carbon Co. and eventually it became Continental Carbon Co.

This contract by its terms stated that in consideration for this purchase Carbexport is to be the exclusive agent of Witco Carbon Co. for the year 1937.

Now, that made it possible then for the then Wishnick-Tumpeer, I believe, to distributed in the export market because Wishnick-Tumpeer had the distributor's contract.

One thing I want to call attention is that all these contracts are merely for a year's time, which made it necessary for either Mr. Wishnick or me to get together and I do not recall who brought the subject up as to next year, whether

<sup>51</sup> T. 326; 335.

or not this contract was to be renewed, a new one to be negotiated or what the situation might be.

\* \* \* \* \*

We now come to the year of 1939. After 1937 I renewed these contracts or rewrote them, whatever the proper expression is, without reference to my directors until after the event.

Q. And the minutes will show that?

A. I think they should say they confirmed. In the spring, and I am not going to attempt to fix the date, because I do not know whether it was January, February, or March, or whatever it may be, of 1939, Mr. Wishnick himself said to me he thought I was making a mistake doing these things on my own responsibility, that I should have the approval of the board of directors and the reason he gave for that was that he either was or had acquired or negotiated some additional units which he was going to do something with. I have no recollection as to whether I thought it was sound advice or poor advice, but I did that and Mr. Wishnick, being a member of the board through his Panhandle contract and his previous Century contract, withdrew from the room during the discussion of this matter. The only action taken by the board was to instruct the president to appoint a committee to discuss the matter with Mr. Wishnick. I see here more information than I have been able to recollect, on exhibit 225, and refreshing my memory from this number 225, I appointed Mr. Nelson, Mr. Carr, Mr. Huber, as a committee, and Mr. Cabot.

Now, I have no recollection of which Mr. Cabot I had appointed.

Up to my seeing this memorandum the only one whom I could identify as actually being on that committee was Mr. Nelson and I believe also that Mr. Carr was on it.

Now, this committee dealt with renewal of Mr. Wishnick's contract, with Mr. Wishnick. While I do not have to use an expression I heard this morning, an independent recollection of the thing, I believe that I probably was there or in and out of the meeting.

I do know this, that Mr. Wishnick is correct when he makes the statement that he repeated to this committee what I had probably told them before, that he felt that I should not renew the contract without calling attention to the fact that he either had or intended to, or was going to buy, or had bought, some extra production unit.

Now, what I recall that meeting to have done was simply this, when Mr. Wishnick stated that he did not want to have a full years' renewal without an ability to cancel, because if he canceled he would want more of a quota than the 7,000,000 pounds represented, as he would then have a larger production, no one could quarrel with him about that. However, it was the sentiment that if he should have that right to withdraw, it should be a mutual right and that it was quite probable, if he were going to add units yearly, we would much prefer to have him sell his own black rather than sell it through Carbexport.

Now, that is the whole story, and there is nothing more to the story, nothing less nor more to that story.

Now, as to this expression which you have read into the record and which appears in here, you force me to make a confession about the politics I play with my directors.

Q. That is the statement on 227 as to the impression you gave Mr. Wishnick?

A. I did not say in this letter I gave him the impression. The language of this thing states: "Mr. Wishnick left the meeting—." Now, I noticed that you attempted to say to Mr. Wishnick, or I think you did, that Mr. Kayser

had said to him, if you do not do this, we will do that, and certainly no such thing took place. What actually happened after this meeting, I am going to bring the story down to date so we will have it all on the record, is that without any reference to my directors again, I think within 2 or 3 months we amended this contract and instead of making it for 7,000,000 pounds, he and I agreed to put it on a percentage quota basis, our total requirements, which still exists, which is 5.58 or something of that kind. I may have the decimal fraction wrong, but it was something over 5½ percent.

That is the only conversation I can say we had and I do not remember whether that 5.58 was arrived at over the telephone or by personal meeting. I think that Mr. Wishnick felt at that time that 5.58 would give him a nicer break than a fixed quantity because as the total requirements of Carbexport would rise he would have more than 7,000,000 pounds.

These negotiations are all on a friendly, reasonable basis. It looked reasonable to me that he ought to have more, as our members did, of that quantity.

Q. Just to clarify, amended to 5.58 of what?

A. 5.58 percent of what our actual or total requirements were, that is what the market requires us to ship to it.

In 1939 it was renewed for the year 1940 by letter and for the year 1941—

Q. You referring to 229?

A. Yes. Although it does not appear here, I think there was a letter renewal for 1942. The contractors carried on without any renewals and it is still in force and effect, I do not know what you would call it, I suppose by common understanding without anything binding on either party, but it continues to operate.

Q. What is the essential difference, if any, between the arrangements here entered into with Continental and those entered into with the stockholder members?

A. It requires no investment on the part of Continental. The member contracts are binding for a long term and these letter agreements bind both parties only for a year. Now, there may be some other differences.

Q. So far as the control over his export activities is concerned, it is identical, you say, with the members, the stockholder members?

A. It has been, yes. I think the word "exclusively" is used in the language just as it is in the member contracts.

Q. How did you speak, or how did you act so that you were able to say that Mr. Wishnick left the meeting with a clear impression that Carbexport would exercise the right to cancel without limitation, and so forth?

A. I said to you a moment ago I made two statements, one of them was that the mutuality of this was agreed to, the right to cancel either way.

Q. That appears on the face of it?

A. Yes, and that it was more than likely that if Mr. Wishnick chose to increase his capacity and come back for an additional quota, that we should prefer to have him sell his own carbon black, have the Continental Carbon sell its own black.

Q. In other words, you told him Carbexport would cancel?

A. I do not recall anybody saying that, now, Mr. Wishnick, if you do so and so, we will do so and so. It probably had that effect.

Mr. Kayser in his testimony concerning Continental's production referred to N. G. P. A. production statistics contained in the record as exhibits 124 to 141. The statistics for the years 1938, 1939, and

1940 disclose Continental's carbon black production at 29,551,590, 32,116,798, and 32,476,625 pounds respectively (exhibit 128-30).

At the June 6, 1946, hearing, Mr. Kayser produced the telegram received from Mr. Wishnick on February 9, 1936 (exhibit 589), and testified further:<sup>52</sup>

The point I tried to emphasize and which I failed to make clear as I wished in my statements between line 12 of page 332 and line 15 of page 335 was that the right to cancel the Continental contract on 60 days notice for any reason whatever was a mutual right and that the exercise of that right by Carbexport would in no way interfere with the freedom of any nonmember interest of Mr. Wishnick to sell all the carbon black it was producing or might produce at any time in the export market or anywhere else. The exercise of the right by Carbexport would simply mean that Carbexport preferred to have Wishnick sell his nonmember black in export himself, independently of Carbexport, a procedure which would not handicap such interests at all.

The last extension of the contract between Continental Carbon and Carbexport was for the year 1943. Since that time the terms thereof have governed the relationship of the two companies by tacit consent except that it has been mutually understood that cancellation can be invoked by either party without prior notice.

The committee to deal with Mr. Wishnick referred to by Mr. Kayser, was appointed at the directors' meeting of the association held on July 7, 1939 (exhibit 105 A-B), but not designated by name. Mr. Carr, association secretary, who was not present at the meeting, testified as follows:<sup>53</sup>

Q. Again going to the authenticity and accuracy of the minutes.

You will find in there, nevertheless, and I wish you would refresh your recollection, that it was at that time that the Continental contract was discussed. Just read those minutes carefully.

A. "The president reviewed the relations between the Corporation and Continental Carbon Co. and recommended the present contract with the company be extended to the year 1940. Mr. Wishnick withdrew during the ensuing discussion and returned to vote on the following motion adopted:

"*Resolved*, That the president be and is hereby instructed to appoint a committee empowered to negotiate and conclude a sales agreement with Continental Carbon Co. covering the year 1940."

Q. Is there any record there that you see about your having been made again a committeeman to negotiate that contract?

A. There is nothing in the minutes of the meeting to that effect.

Q. Nevertheless, looking at exhibit 225, such was the fact, is that not so?

A. Yes, this memorandum states that Mr. Cabot and Mr. Huber and I were appointed a committee of three.

Q. Who was the sender of that memorandum, who was the author?

A. Norman Lee Smith.

Q. Who is he?

A. He is an officer of Binney & Smith Co.

\* \* \* \* \*

<sup>52</sup> T. 1719.

<sup>53</sup> T. 504-506.

Q. Did you undertake the duties of a committeeman, as pointed out there?

A. I have no recollection whatever of doing anything about the matter. At this time I was away on my vacation. That explains my absence from the meeting.

Mr. Huber, who is referred to in exhibit 225 as a member of the committee, testified on this particular and also with respect to exhibit 193 A-T (the subject of sec. IV-C-3 above), as follows:

Q. That is an interoffice memorandum in the Columbian Carbon Co. addressed to Mr. Carr informing him of his appointment. Your appointment does not appear in the minutes but it appears there on 225.

A. Exhibit 225 states that Mr. Carr, Mr. Cabot, and I were appointed a committee of three to negotiate a new sales contract with Continental Carbon Co. I neither remember the appointment to the committee, nor did I ever help to negotiate a new contract with the Continental Carbon Co.

Q. That is fairly definite, but let me make it a little more definite, after directing your attention to exhibit 227, a letter addressed from Mr. Kayser to Mr. Nelson.

Do you know to whom Mr. Kayser refers in 227, as the committee?

A. No.

Q. Didn't include you?

A. It did not include me, to my best knowledge.

Q. I now want to direct your attention to exhibit 193 A to R, which is a memorandum from Mr. Kayser, one that he wrote after returning from a trip to Europe, in which he makes an analysis of the problems confronting carbon export.

A. Do you want me to read it all?

Q. Do you know what it is about?

A. Generally, it seems to be a report on his trip, with recommendations.

Q. Were you one of the recipients of that memorandum?

A. I don't remember receiving the memorandum. It is very probable that we did.

Q. Did you attend the meeting for which exhibit 193 S is the agenda?

A. I very probably did. The minutes will show whether I was at the meeting.

Q. Do you remember if there was any discussion held concerning that memorandum and its recommendations at the meeting subsequent to its being sent to the directors?

A. I believe there was, and I believe that Mr. Carr stated that this was beyond the scope of the association.

Q. You have any independent recollection of that, Mr. Huber?

A. No. I remember comparatively little from 1935.

Q. What aided your recollection then that there was such a discussion?

Mr. BEER. You mean what refreshed his collection.

Mr. LAYTON. If you prefer.

By Mr. LAYTON:

Q. That Mr. Carr made the statement that you believed he made?

A. We have generally reviewed the minutes of Carbexport since this hearing has been inaugurated.

Q. And having made that review, it is based on the discussions you had with other people, is that correct?

A. Yes.

Contained in the record is exhibit 682 A-H, being a mimeographed copy of minutes of a directors' meeting of the association held May 29, 1946, from which the following is set forth:

The president stated that Imperial Oil & Gas Products Co. had expressed its readiness to accept a sales agreement quota of 1 percent and to subscribe to 82 shares of the capital stock of the corporation at said price of \$66.66 $\frac{2}{3}$  per share.

The President stated that Continental Carbon Company had expressed its readiness to accept a sales agreement quota of 7.190 percent and to subscribe to 589 shares of the capital stock of the Corporation at a price per share, to wit, \$66.66 $\frac{2}{3}$ , equal to the present cost per share of said stock to the existing stockholders of the Corporation. He pointed out that allocation of any quota percentage to a new stockholder of the Corporation would mean that all existing stockholders would be under the necessity of accepting a reduction in their present respective quotas.

Thereupon, upon motion duly made, seconded and carried, the following resolutions were unanimously adopted:

*Resolved*, That the President of the Corporation be and hereby is authorized and empowered, for it and on its behalf and under its corporate seal attested by its secretary, to enter into agreements with all existing stockholders of the Corporation amending their respective Sales Agreements, as heretofore amended, with the Corporation so that the respective export quotas now provided in such Sales Agreements, as so amended, shall be respectively as follows; effective on and from and after April 1, 1946:

| Stockholder:                   | <i>New quota<br/>(Percent)</i> |
|--------------------------------|--------------------------------|
| Godfrey L. Cabot, Inc.....     | 20.657                         |
| Columbian Carbon Co.....       | 27.618                         |
| J. M. Huber Corp.....          | 9.870                          |
| Charles Eneu Johnson & Co..... | 2.888                          |
| Panhandle Carbon Co., Inc..... | 2.137                          |
| United Carbon Co., Inc.....    | 28.645                         |

The association's report to the Commission filed on January 6, 1947, discloses among members as of January 1, 1947, Continental Carbon Co., 295 Madison Avenue, New York, N. Y., 589 shares of stock, and represented by Mr. R. I. Wishnick on the board of directors; and Imperial Oil & Gas Products Co., 330 Grant Street, Pittsburgh, Pa., 82 shares of stock, and represented on the board by Mr. Paul A. Hartman. At the concluding hearing, held August 20, 1946, the association's new president, Mr. H. L. Titus, testified on the foregoing new memberships, as follows:<sup>54</sup>

Q. How were their quotas arrived at, Mr. Titus?

A. The figure of 7.19 percent—

Q. For Continental?

A. Continental; was arrived at, as I understand it, by negotiation between the former president of Carbexport and Continental Carbon Co.; at least, I found that figure generally agreed upon, when I became president.

<sup>54</sup> T. 2034-2035.

The figure of 1 percent which has been agreed upon for Imperial was arrived at by negotiation between myself and the executives of Imperial.

Q. How did you fix upon that 1 percent?

\* \* \* \* \*

The WITNESS. After considerable discussion with the executives of the Imperial Oil & Gas Products Co., they believed that a 1 percent quota would be fair and reasonable for them, and Carbon Black Export, Inc., agreed.

By Mr. LAYTON:

Q. Could you tell me what factors were considered, what considerations guided you, or what considerations were mentioned?

A. Well, the only considerations that were mentioned were the long-standing friendly relationship between Imperial and Carbon Black Export; the number of years that Imperial had been in the carbon black business; the important position which they had at one time in the export market, several years prior to the war; the important position which they expected to assume in the years to come, in the carbon black industry.

Q. Was production considered?

A. Well, you are asking me, did Carbon Black Export consider production?

Q. Yes.

A. I am sure that the various directors did; I know that I did.

I do not know Imperial's production, but I believe it to be somewhat less than 1 percent of the total production of the carbon black industry.

If you are asking me whether it was considered by the Imperial company, I can say that it was mentioned by them, several times.

#### 6. Invitation of June 6, 1940

The board of directors in a meeting held June 5, 1940, again considered the question of outsiders, as evidenced by the following quotation from the minutes thereof (exhibit 108):

By motion duly made, seconded, and carried, the president was authorized to negotiate with Crescent Carbon Company, Crown Carbon Company, and Continental Carbon with a view to an arrangement under which each of the said companies shall become stockholders of Carbon Black Export, Inc., with obligations as to quota, etc., such that he can recommend their acceptance by this corporation.

The record contains no evidence of negotiations pursuant to this authorization other than those with Continental, above recorded. The record, however, contains additional testimony on the question of outsiders. Mr. Kayser, at the June 7, 1946, hearing, testified as follows:<sup>55</sup>

A. \* \* \* There were times when shipping space was scarce that buyers to whom sellers were to make shipments would go out and engage the space on a boat available for carbon black for themselves.

Carbexport was in the position to say meaning—intending thereby to see to it that their own individual shipment got to destination regardless of what might happen to either carbon black shipments.

<sup>55</sup> T. 1898-1900.

On occasions of that kind, we took the position that it was our function to engage the space because we were selling c. i. f. and that if we accept the proposition of the buyer that what we were shipping him should fill the space that he had engaged we would be doing an injury to everyone also who may have cargoes intended for that same general destination and thus we were able to see to it that all buyers got a proportionate share of the space that was available for carbon black.

Q. What about seeing to it that the nonmembers had a proportionate share of the space. Did you see about that, too?

A. Well, I have an illustration already in the record where on an occasion when space was available and where we thought that we had a stronger relationship with the buyer than they, we offered to take care of them proportionately.

Q. How many times did that occur?

A. I can't state because I didn't handle the shipment myself except in this particular instance where it was acute. But I can't recall a time when we did not undertake to limit the space available if space were short.

I mean if there wasn't room for anything, to a proportionate share of the outsiders shipments. That was a matter of policy, that is what I am trying to say, and the direction would have gone to our shipping department and then to forwarders if they had anything to do with the engaging of any particular space.

We not only are not interested in excluding outsiders but it is our definite policy not to do so wherever they need space and have difficulty.

Q. When was that policy developed, Mr. Kayser?

A. I can't make a categorical statement but from the very beginning of my management of Carbexport that was my policy and I didn't discuss it with directors. That is the way I operated Carbexport.

Mr. Thomas D. Cabot, at the January 23, 1946, hearing testified as follows:<sup>56</sup>

I see no fundamental difference between the admission of new stockholder members with a quota and contracting with a nonmember who is given a similar quota with similar limitations except that the latter arrangement does not require the producer to put up the funds necessary to become a stockholder, which in some cases has been a deterrent from accepting our invitation to join the association.

\* \* \* \* \*

Q. Again I am going to ask as a matter of opinion from you: Do you believe that any harm results to the domestic economy by the purchase of supplies from nonmembers by the Export association?

A. No. I should think it would help the domestic economy.

Q. You do not believe, however, that outsiders should be forced into an export association, do you?

A. No. I do not see how that could be except by legislation.

\* \* \* \* \*

Q. How would you support the statement that "Unquestionably nonmember producers have benefited the most?" How does that work out?

A. The nonmember producer is not limited in the amount of the black which he exports by any quota, and if Carbon Black Export, Inc., maintains a foreign price which is somewhat higher in net return to the producer than the domestic price, then the nonmember producer benefits by, to use a common

<sup>56</sup> T. 1084; 1134; 1139.

expression, standing under the umbrella. He can sell in the foreign market at a price below Carbon Black Export, but at a higher market price than he would get from selling in the domestic market, and there is no quota limitation to the amount that he sells in the foreign market and, therefore, he may sell up to his whole production in the foreign market and may thus perhaps sell his whole production at a higher net price than other member producers receive, and the member producers ordinarily cannot sell their whole production.

Q. You are familiar, are you not, with the efforts of Carbon Black Export to induce nonmembers' adherence to Carbon Black Export's prices, say with reference to Mr. Herkness, before he became a member?

A. I do not believe Carbon Black Export, Inc., had any means by which it could induce nonmembers to adhere to Carbon Black Export, Inc.'s prices.

I think Carbon Black Export, Inc., did make a practice of informing nonmembers as to the prices at which it sold.

\* \* \* \* \*

Q. In this problem of nonmembers going along with the association, one of our problems is how to handle that. I am merely asking you as a practical matter if they are in substantially the same relation and whether or not you as a member do not believe they should be reported as members, as a practical matter, not as a legal matter?

A. That would be telling a lie to report as a member a man who is not a member. I do not see why I should say they should be reported as members when they are not members. Mr. Beer is quite right. I have not familiarized myself with all of the rules of the Federal Trade Commission.

Q. I just wanted to get your reaction to it. Although you say they are substantially the same as members, still they are not members?

A. They are not members.

Q. So that if your advice were asked as a member of Carbon Black Export, as to whether they should be reported as members, you would express yourself in saying that you did not think they should be reported?

A. I should say they should not be reported as members, but if somebody were to ask a question in such form that it was quite evident that they wanted to know all who stood in the position of members and had any of the privileges of members I would then say that we should tell the whole story with respect to those people.

#### *D. Price Dealings With Nonstockholder Manufacturers*

The seventh specification in the bill of particulars reads as follows:

7. Contracts with American exporters who are manufacturers of carbon black but are not stockholders of Carbexport, which restrict the volume of their export sales of carbon black and which fix the minimum price and most favorable terms and conditions of such sales.

Evidence was introduced in support thereof in connection with three nonmember producers.

##### 1. Crescent correspondence

Exhibits 257 A-B to 267 and 592 to 603 in the record consist of 27 photostatic copies of correspondence with, or relating to, the

Crescent Carbon Co., Point Pleasant, W. Va., and its distributor, Canada Carbon Black Co., Ltd., Toronto, Canada. Mr. F. W. Ingraham handled correspondence for the former and Mr. A. C. Ransom for the latter. Only three of the exhibits are from the nonmember, two from Crescent (exhibits 592 and 600) and one from Canada (exhibit 259). Most of the remainder, particularly exhibits 260 A-B to 262, and 592 to 603 relate to transmittal of information on prices, terms, packaging, and ocean freight rates. Pertinent to the inquiry, the following are here set out:

Exhibit 258, letter dated February 15, 1934, Mr. Kayser to Mr. Nelson, reading as follows:

I acknowledge your request dated February 13th, that copy of our export price schedules be sent to Crescent Carbon Company. This request is in line with my own thought. Reports of the under-selling of our price by a large margin by both Crescent and Imperial have convinced me that the better course for Carbon Black Export, Inc. to pursue is to advise these people of what we are doing.

As soon as the schedules are mimeographed I shall also send Mr. Hartman a copy.

Exhibit 259, letter dated March 14, 1934, Mr. A. C. Ransom to Mr. Kayser:

I thank you very much for your favor of the 9th, inst., enclosing complete list of price schedules on Carbon Black and while we will follow these along very closely you understand that practically 60% of our output is taken up among our associates and, therefore, the amount of Black we have for export is a very small item, and the writer has no desire to build any larger Carbon Black business once he can dispose of the product we have for the Crescent Carbon Company, beyond this his ambitions cease.

Exhibit 265 A, letter dated March 29, 1935, from Mr. Kayser to Mr. Nelson, in which the second paragraph reads as follows:

I was in Toronto again last Monday. The idea of selling us black until the end of 1936 and withdrawing from the export market during that period did not appeal to Mr. Ransom at all. However, I have a very strong feeling that the idea of joining the export corporation as a full-fledged member with a quota of say 2½% has his strong sympathy. Mr. Ingraham and the other directors of Crescent were due to be present in Toronto yesterday for a meeting, and this idea was to be thoroughly discussed. I hope shortly to hear from either Mr. Ransom or Mr. Ingraham about the subject of their joining us, and will be disappointed in my own judgment if considerable progress in that direction did not result from yesterday's meeting. I sincerely believe that Mr. Ingraham is entirely in favor of Crescent taking a membership.

Exhibit 267, letter dated May 22, 1940, from Mr. Kayser to Mr. Ingraham, transmitting information about the association's net return from the sale of carbon black, the second paragraph reading as follows:

This kind of statement will make it possible for you to compare your net return over the same period of time with that of Carbexport's members. The

following figures are per pound and represent the average for all packings and qualities handled by Carbexport:

|           |          |
|-----------|----------|
| 1935_____ | \$0.0507 |
| 1936_____ | .0494    |
| 1937_____ | .0487    |
| 1938_____ | .0410    |
| 1939_____ | .0409    |

Exhibit 262, dated May 21, 1934, Carbon Black Export to Canada, is a letter of transmittal of price information, typical of the remaining exhibits, and reads as follows:

Exact copies of resale Price Schedules, as issued by Mr. Kayser, and referred to in our letter of May 19th, are enclosed as follows:

1. Germany.
2. Holland.
3. Poland, Lithuania, Latvia, Estonia, Roumania, Bulgaria, Turkey, Greece, Albania, Yugoslavia.
4. Czechoslovakia, Austria, Hungary, and Switzerland.
5. Belgium.
6. Norway, Sweden, Finland, and Denmark.

In the meantime, our action on May 18th reduced to 30 days the terms of 45 days stated in the first four (4) Schedules listed above.

Since there are now in each of the newly established resale Price Schedules, listed above, wide margins between shipments over 50 cases to one customer and shipments under 50 cases, the following rule has been added to all such Schedules:

"If shipments of 50 cases or more are made to merchants or nonconsumers of carbon black, the prices made shall be on the basis of less than 50 case lots."

This rule is made to prevent merchants and nonconsumers from competing under more favorable conditions than the agents in the respective markets are able to employ.

Mr. Ingraham's letters to the association read as follows: Exhibit 592, dated May 23, 1934:

If you have not already done so, we request that you please forward a copy of the price schedule mailed us on May 21st to the Canada Carbon Black Company at 82-90 Peter Street, Toronto 2, Ontario, Canada, addressed to the attention of Mr. A. C. Ransom, President.

The Canada Carbon Black Company are our sales agents, and in the future we would appreciate your sending copies of price schedules to them as well as to this office.

With our thanks for your cooperation in this matter, we are, \* \* \*

Exhibit 600, dated December 3, 1937:

Just prior to receipt of your wire with reference to ocean rates, we received a wire from our agents at New Orleans advising us that conference worked out a rate of 19¢ to Continental points, and 21¢ to the United Kingdom, to be effective from January through June 1938.

We appreciate your courtesy in advising us that rates are not yet agreed upon, and we request that you please advise us the outcome of the negotiation.

The Crescent Carbon Co. did not take membership in the association but was, on April 1, 1944, purchased by United Carbon Co., as appears from Mr. Oscar Nelson's testimony:<sup>57</sup>

The background of these letters lies in the fact that Crescent Carbon Co., and more especially, Canada Carbon Co., its export agent, had been at all times active in the export market, selling Crescent's product there under Carbexport's prices. It was my own desire and I believe of all concerned to secure Crescent as a member of Carbexport or make a purchase contract with it whereby Carbexport's (M. S. p. 7) prices would be maintained in the export market.

It so happened that Messrs. Ingraham and Weissenburger, principal officers and stockholders of Crescent, reside at Point Pleasant, W. Va., which is about 60 miles from Charleston. I have had a long and very pleasant business relationship with both of these gentlemen and have done a lot of business with another company which they operated under the name of Marietta Manufacturing Co. It was natural that efforts to bring Crescent into the Carbexport fold should be made through me. It was for that reason that correspondence on this subject has largely been between me and Mr. Kayser. I believe that if anyone could have brought this about, probably I could have done so.

After Carbexport was organized and we were functioning, we of course knew there were a number of people outside the association that were selling their black for less and obtaining orders that we could not obtain at the price we sought to sell it. On the other hand, if a small company such as Crescent felt that it would be to its advantage to become a member, we would welcome that membership. I knew these gentlemen who were operating the company. Not only did they operate a carbon black company, but they were also operating a company which furnished supplies to the carbon black industry generally, with which we also had a very friendly relationship.

About January 1, 1944, or possibly a little earlier, I was approached by Mr. Harold Woods of Monroe, La., who was a stockholder in Crescent Carbon Co., and asked to consider the purchase of its property, which at that time was more or less in ruins as the result of a fire and deterioration from sulphur corrosion. As a result of Mr. Wood's intervention, the officers of Crescent Carbon Co. visited me at my country home where we agreed upon terms. The purchase was consummated about April 1, 1944. The rehabilitation of the plant was completed in August 1944.

Mr. Kayser testified as follows:<sup>58</sup>

A. The only comment I have to make at this time is that the correspondence indicates that the relationship between Carbexport and Crescent Carbon Co. and its distributor, Canada Carbon Co., were very pleasant and agreeable. We supplied them with information about our activities for which they appeared to be very grateful.

Q. Did you enter into an agreement with them whereby they would maintain your prices and conditions of sale?

A. No, we did not.

Q. Did you make any effort to do so?

A. Yes, on numerous occasions we attempted to make an agreement or to bring Crescent Carbon Co. into membership of the Carbexport and to make Canada Carbon a distributor.

<sup>57</sup> T. 629-630.

<sup>58</sup> T. 346.

Q. Is Crescent Carbon Co. still outside of the Carbexport?

A. No; it is not. To my knowledge it has in the last several months been bought or there has been a merger with United Carbon Co.

## 2. Imperial Correspondence

Photostatic copies of 20 letters dating from September 8, 1937, to November 7, 1940, between the association and the Imperial Oil & Gas Products Co. of Pittsburgh, Pa., or relating to them, are contained in the record as exhibits 268 A-B to 283. Excepting for the last three (exhibits 281 A-B, 283 quoted below) the correspondence concerns prices and terms of export carbon black. Pertinent quotations follow:

Exhibit 268 A, dated September 8, 1937, Imperial to association:

From one of our agents in Poland we have information that the members of the Carbon Black Export, Inc., are underquoting us on the ordinary grades of Black. We do not understand how they can underquote us unless they are splitting their commission with the buyer.

We would be pleased to know if the Carbon Black Export, Inc., has increased the rate of commission to agents.

Exhibit 268 B, dated September 9, 1937, association's reply to foregoing:

Neither our price to Poland nor the rate of commission paid agents there has changed from what you last understood them to be. It seems unlikely to me that your agent is correctly informed when he charges ours with selling at less than our schedule. My belief is not based on any unshakable confidence in the virtue of our agents but on the knowledge that margins of profit in our commission are so low in Poland that no agent can afford to give away anything. Further, unless all of them were cutting exactly the same amount so as to equalize the effect we should have had complaints within our own organization about our own members. This has not occurred.

How much simpler the whole situation would be for you if you were in our group instead of outside. You would not have to be bothered with these complaints for you would consider them unimportant.

Exhibit 271 A, dated July 28, 1938, association to Imperial:

We have recently seen an invoice rendered by Mr. V. G. Martins, your agent in Sao Paulo, to a customer in Brazil on basis of \$5.95 per 100 pounds, no charge for consul fees.

The quantity involved in the above transaction, under our schedule, would call for a price of \$6.40 per 100 pounds, plus consul fees.

Price reductions of this kind tending to increase the difficulty of maintaining the present differential between the export and domestic price in which we are both equally interested, we wonder if price cutting to this extent, or any price cutting at all is necessary to obtain business.

Exhibit 271 B, dated August 4, 1938, Imperial's reply to foregoing:

In answer to your letter of July 28 with regard to sales of Carbon Black made by Mr. V. G. Martins, we might mention that Mr. Martins is a new agent of ours and that shipments made so far have been principally for trial purposes.

We believe that the low price charged by Mr. Martins can be accounted for by the fact that he was not thoroughly familiar with our price lists, particularly where it refers to prices for small lots.

Our prices for Brazil are practically the same as Carbon Black Export's and we feel sure that such sales as the one you refer to will not be made in the future.

Exhibit 272, dated September 15, 1938, Imperial to association:

We have information from three sources that the agents of Carbon Black Export in Brazil and Argentina are absorbing consular fees and not charging these to the customer.

Information has been received from Argentina that certain competition is allowing 5 percent to one of our customers in order to help make up for the exchange loss encountered by the necessity for purchasing exchange at the free market rate, the premium for which we understand is now approximately 21½ percent.

These matters are being called to your attention in a friendly way and we would like to have word from you, if we may, as to whether or not you are aware of these allowances.

Exhibit 273 A, dated November 2, 1938, Cabot company to association:

I am enclosing a copy of a letter just received from Mr. Reinaldo Graupner dated October 17 which indicates that price cutting by Imperial Oil & Gas Products in Brazil continues to threaten that market seriously.

I know there is not much you can do but I thought you would be interested in having this letter since your earlier conversations with Imperial seemed to result in an implied agreement on the part of Imperial to attempt to stabilize prices and conditions there.

Exhibit 274, dated November 7, 1938, association's reply to the foregoing:

Thank you for passing on to us with your letter of November 2 a copy of communication to you from your agent in Brazil dated October 17. As you point out, there isn't much we can do about the complaint registered other than to recall to Imperial previous undertakings to slow down the pace of their representative. We are doing that.

Exhibit 276, dated November 5, 1938, association to Imperial:

One of our agents in Brazil complains that your agent there is doing a job of price cutting right and left that is extremely disturbing. It is a relatively small market where any reduction below our prices is particularly noticeable and disturbing. We realize that it is not your policy to maintain our prices anywhere, but we would appreciate whatever you can do to hold your agent in Brazil down to a moderate tempo with respect of prices.

Exhibit 277 A, dated November 9, 1938, Imperial's reply to the foregoing, after stating that "our sales in this market are made at prices very close to yours," concludes:

We feel that our price policy in the export trade at the present time is very little different from yours and that we have given you little, if any, trouble recently in the foreign markets. It is our intention to cooperate with you as well as possible on all export business, and as regards the subject of this letter

we might mention that, if any price cutting is to be done, it is not our desire to do it in Brazil.

It is difficult for us to determine what business you are referring to in your complaint regarding our prices in Brazil and we can therefore hardly explain the situation to you any better than we have above. If you are able to give us more definite information with regard to the alleged price cutting, together with names of customers, perhaps something could be done to rectify any violations of our price policy by our agent in Brazil.

Exhibit 278, dated November 17, 1938, association to Imperial:

My very best thanks for your letter of November 9, in reply to mine of the 5th, which covered so completely your selling policy with the Brazilian market.

Please don't understand from my comments that I am being critical of the fact that you find it desirable to underquote us. Nor do I, when writing you, mean for a moment to imply that you have ever agreed to quote our prices, terms and conditions. I have always felt that you accept at face value my assurance that Carbexport has no desire to interfere with your market position anywhere, just as I have always accepted your assurance, repeated in your letter of November 9, that it is your intention to cooperate with us as well as possible on all export business. All my letter of November 5 wished to do was to suggest that you check into the activities of your Brazilian agent and see to it that he doesn't jeopardize the price structure by offering more than is necessary to get a reasonable share of the business.

Exhibit 281 A, dated February 13, 1940, association to Imperial, after detailing certain ships and their sailing dates:

At this writing the allotments arranged for you are S. S. *Orion* 150 tons and S. S. *Georgis Kyriakides* 30 tons.

We wish to emphasize that shipping programs should not be definitely laid out in the expectation either that the sailings will take place as announced or that the space notified will actually be available. Our experience has been that no ship can be counted on until it is in port. Furthermore space definitely promised can be and is frequently withdrawn in favor of some other commodity.

We pass this information on to you as prelude to a suggestion with respect of the allocation of shipments in which we have been cooperating, as well as to keep you informed. The suggestion is that you now notify us of the quantities you desire to ship in this month (February) with the names of the consignees; furthermore that hereafter you send on to us similar information early in each subsequent month. We are very anxious to handle this shipping business so that you shall always have proportionate access to the same facilities as we and that you shall always have your share of allotments at times no less favorable than our assignments secure. Without knowing definitely in advance what you want and need to move we will find it difficult to take care of you properly in the constant juggling of lots and orders which the schedule and space revisions necessitate.

Exhibit 282, dated February 15, 1940, Imperial's acknowledgment of the foregoing:

We have your letter of February 13 and wish to thank you for the information given us with regard to the French situation and the schedule of steamships for France to go forward within the near future.

We have made particular note of your comments in the latter part of your letter, and at this time can confirm that we do have special confidence in your

fairness, and we know you would not undertake such a program with regard to arrangements for shipments to France unless you felt that it would be of equal benefit to all parties concerned. We therefore have no hesitancy in reporting to you the quantities we expect to ship to France in the near future.

Exhibit 283, photostat of telegram dated November 7, 1940, Imperial to C. E. Kayser:

WE HAVE BEEN EXPECTING TO HEAR FROM YOU REGARDING CONTRACT WITH CARBEXPORT ON YEAR TO YEAR BASIS. OUR QUOTA BASED UPON FIGURES YOU GIVE US OF TOTAL EXPORTS FOR FIVE CALENDAR YEARS ENDING DECEMBER 31, 1939, IS 4.14 EXCLUDING HIGH GRADES FROM TOTALS.

Upon the introduction of exhibits 268 A-B to 283 at the February 8, 1945, hearing, Mr. Kayser testified as follows:<sup>59</sup>

Q. The exhibits just received in evidence I hand to you, Mr. Kayser. Mr. Kayser, the Imperial company is another one of the so-called outsiders that you referred to in your memorandum that you wrote after you got back from Europe, in evidence as exhibits 193-A to R?

A. Yes.

Q. Did you answer that?

A. Yes.

Q. Did you have an agreement or an understanding with Imperial company that they should adhere to the Carbon Export prices in terms of sale and their export business?

A. We did not.

Q. Of no kind?

A. Of no kind.

Q. I am calling your attention, Mr. Kayser, especially to exhibit 283, and I ask you if the Imperial company has become a member of Carbon Export?

A. No; it has not. We have negotiated with them a number of times, but up to this time they have not become a member.

Q. What was your arrangement, if any, with Imperial in connection with securing shipping space for them?

A. When the war broke out we had difficulty in getting space, anybody shipping anything, and we being the largest shipper in export of carbon black, the French shipping control offered us space more frequently than we thought they might offer to Imperial and we undertook to protect them in securing their share of the space if they would let us know what space they needed in time to make such arrangements.

Q. Did you operate on behalf of any other outsider in such way?

A. My belief is that we made the same offer to everyone, to let them get the advantage of our better position to deal—because of the quantities of goods we had—with shipping companies. They were more or less controlled by their own War Shipping Administration.

\* \* \* \* \*

We conscientiously attempted to help all of the outsiders to make all they could out of the business, make it unnecessary for them to cut each other's throats or to go too far under our prices by giving them our schedules regularly and discussing mutual irritations, with the idea of ironing them out to their advantage.

<sup>59</sup> T. 348; 352.

By Mr. LAYTON:

Q. Attempting to work as closely with them as you could, is that correct?

A. That is right.

At the June 6, 1946, hearing, Mr. Kayser testified as follows:<sup>60</sup>

I want to emphasize here that all of the exhibits already in the record from No. 258 to and including 283, and the 12 additional exhibits 592-603, demonstrate that Carbexport policy has consistently been friendly and as cooperative as legitimately possible.

One such legitimate of means of cooperation has been to keep nonmembers posted on all negotiations with steamship conferences. Another has been to post them on such measures as Carbexport took to protect its export business against the extraordinary risks lurking in all export business because of war scares, of exchange, currency, import and other controls which foreign governments established as hurdles to normal transactions as far back as 1934.

Information which was common knowledge, because available to all foreign buyers of carbon black, was freely distributed to our competitors in the interest of accuracy. Price schedules, conditions of sale and terms of sale fell in that category of information.

With our large background of experience with the demoralization buyers abroad could create among American exporters and with our extensive facilities for analyzing the conditions abroad which could be used to advantage for a renewed demoralization we felt that the information we could supply for their use to protect themselves would bring to their attention the advantages and benefits they would automatically enjoy if they became members of Carbexport.

### 3. Keystone contract

On April 17, 1936, Keystone Carbon Co., a Louisiana corporation, entered into a contract (in the record as exhibit 284 A-N) with the association for a term running from January 1, 1937, to December 31, 1945, for the sale of 3½ million pounds of carbon black annually. The relevant terms are:

Paragraph THIRD requires that—

the Producer shall not directly or indirectly sell or deliver any export carbon black except to the Corporation as hereinafter provided. The Producer further agrees throughout the term of this agreement to use reasonable care that exports made by the Producer to Canada or Mexico are intended for use and consumption in those countries and shall not be diverted to other foreign countries, and also that carbon black sold by the Producer in the United States shall be exported only through the Corporation.

FIFTH. The price hereunder shall be f. a. s. Gulf Ports and the price for each month's shipments shall be the same as the price f. a. s. Gulf Ports at which the Corporation shall settle with producers who are Stockholders of the Corporation for export carbon black of standard quality shipped during such month, subject, however, to the deductions provided in paragraph NINTH hereof.

TWENTY-THIRD. The Corporation hereby grants to the Producer the option exercisable as hereinafter provided, to enter into a "Sales Agreement" with the Corporation, substantially identical in form with the sales agreements now

<sup>60</sup> T. 1724-1725.

existing between the Corporation and its Stockholders, which sales agreement shall provide for a contract quota of three (3) percent, effective from January 1, 1937, or from such earlier date as the Producer shall have performed or discharged its export commitments to other parties so as to enable Producer thereafter to make all sales of export carbon black through the Corporation, and continuing to the thirty-first day of December 1945. In case the Producer shall exercise said option, it shall subscribe for and purchase two hundred and sixteen (216) shares of the capital stock of the Corporation and pay for the same in cash at the rate of One Hundred Dollars (\$100) per share, as and when payment shall be demanded by the Corporation. Such option shall be exercisable by the Producer at any time on or before October 1, 1936, by notice in writing to the Corporation of its election to exercise said option and to subscribe for said stock, and if not so exercised on or before said date said option shall be void. In case the Producer shall exercise said option, the new sales agreement executed pursuant thereto shall supersede and take the place of the present agreement, and the present agreement shall thereupon become void.

The association notified one of its distributors, R. W. Greeff & Co., of this contract in a letter dated July 22, 1936, as follows (exhibit 285) :

We advise you formally herewith that Chas. Eneu Johnson & Company (Herkness), producer of the brands of carbon black sold in the export markets as "Atlantic" and "Special X" has joined Carbexport and that we shall purchase all of its carbon black for export from the United States beginning October 1st, 1936.

Furthermore, we have made a contract with Keystone Carbon Company (AAA and No. 216 brands) to purchase from it beginning October 1st, 1936, all of its carbon black for export. Our control over this black in export will continue until December 31, 1945, at least.

Exhibit 286 is a photostatic copy of letter dated December 14, 1936, from Columbian's counsel to the association recording fact of that member's acquisition of Keystone Carbon Co. It reads as follows:

Will you kindly sign as president and return to me the enclosed Carbexport stock certificate No. 48 for 216 shares in the name of Columbian Carbon Company issued on transfer of Certificate No. 46 for an equal number of shares in the name of Keystone Carbon Company, Inc.

Mr. Kayser testified as follows in reference to the Keystone contract: <sup>61</sup>

Q. Prior to the time that it did become a member, you entered into a contract with Keystone, in evidence now as exhibit 284-A to N, did you not?

A. Yes.

Q. What is it—if I am correct, I believe 9 years is the term of that contract, is it not?

A. I will have to look and see. Yes, 9 years.

Q. Was that a bit unusual for a term on a contract to purchase for Carbon Export?

A. No. Because early in 1936 or late in 1935, I don't remember which, the sales agreements binding producers and Carbon Export together, which then had a terminating date in 1938, were extended to December 31, 1945.

<sup>61</sup> T. 353-355.

Q. And you looked upon them as analogous to a sales agreement with one of your members; is that correct?

A. I do not know as we did as with one of the members, except that I would rather say it was a similar contract to that made later with Continental Carbon Co. That was the attitude. Except that there is an option in this contract we are now discussing which allows Keystone, before the contract actually went into effect, to choose to become a stockholder on a regular sales agreement.

Q. And did Keystone elect under that option to become a member?

A. It did.

Q. I do not know whether the record as we now have it will show, but do you recall how soon after the date of this contract, April 17, 1936, it became a member?

A. Either in September or October or November of that year.

Q. In the fall?

A. In the fall of the year; yes.

Q. And do you recall when it, Keystone, was acquired by Columbian? If not, does 286 refresh your recollection as to it, approximately?

A. Well, before the end of the year of 1936 they became a member.

Q. So that, to summarize, between April 17, 1936, when you entered into contract, exhibit No. 285, you entered into a contract for a period of 9 years for the quantity therein specified. Within a short time they had elected to become a member and shortly after it elected to become a member, it was acquired by Columbian Carbon.

A. That is correct.

Q. And when Keystone did become a member you entered into the uniform contract with it?

A. Yes.

Q. The uniform sales agreement with it, as introduced?

A. Right.

#### *E. Control of Distribution*

The fourth specification in the bill of particulars reads as follows:

4. Contracts with the few vendees to whom it chooses to sell carbon black for export directly, known as "distributors," some of whom are American exporters, which require and cause them not to resell to other exporters, including other American exporters, known as "agents," unless such "agents" are first listed with and approved by Carbexport.

Distributors, as the first factor of distribution, are the immediate sales contact exercised by the association. A number of considerations enter into the qualifications of a distributor. Mr. Reid L. Carr testified that from long experience at least three things were found essential: First, financial responsibility, the association requiring adequate assurance of a distributor's solvency since sales are made to him on a c. i. f. basis foreign ports located at distant points. Second, willingness to conform to the association's price regulations and terms of sale to avoid the abuses of "rebating, price discrimination, and commission-splitting which formerly cursed the export trade." Third, he must have the technical equipment and personnel to merchandise the black properly and to render adequate consumer service. Illustrative of the facilities and type of service rendered by one association dis-

tributor, Binney & Smith Co., Mr. Carr outlined its history. It was organized in 1932 to succeed a 25-year-old partnership which had engaged in domestic and export trade in carbon black and chemicals. It has agents in about 45 cities in as many countries, and maintains offices in Paris, Copenhagen, and London, the latter known as Binney & Smith and Ashby, Ltd. Laboratories and technical staffs for customer service are maintained in New York City and London. Chemists are employed to furnish information to rubber, ink, and paint manufacturer users of carbon black. In addition to problems presented by the many grades of channel black, the advent of furnace black posed entirely new problems in connection with its adaptability to synthetic rubber. Binney & Smith regularly supply customers with reports and publications explaining new uses and techniques, 14 specimen copies of which are contained in the record as exhibits 381 A-G to 394.

He concluded his testimony as follows:<sup>62</sup>

Now unless a distributor is thoroughly conversant with these and many other similar technical questions, cognizant up to the minute of the progress made in their solution, capable of recommending the particular types of black best adapted for specific uses, equipped to answer consumers' questions and furnish intelligent guidance in the use of the product, he is simply not in a position to render adequate service to his principals or to do his part in establishing and maintaining the foreign market for American carbon black upon a secure foundation.

Mr. Thomas D. Cabot testified that export trade in carbon black prior to formation of the association was unprofitable principally because of bad selling conditions. These he enumerated: The practice of a few large buyers acting individually and through intermediaries in shifting their business from supplier to supplier; commission-splitting and customers on the part of agents; growth of more liberal credit terms in a time of financial stringency; unscrupulous use of the right of rejection for quality reasons; and operation of black markets to the detriment of American exporters. His company joined the present association because it appeared to promise restoration of the export business to a profitable basis. Mr. Cabot concluded that "unless the association has the power to limit the channels through which its goods reach customers, its agents or distributors are not likely to extend themselves to secure markets. Their profit will be insecure because the association will be unable to enforce its rules.

Mr. C. E. Kayser testified that seven large buyers in the export market (three of them affiliates of American rubber manufacturers) were able, prior to formation of the association, to cause carbon black exporters "to succumb easily to unreasonable demands as to prices and terms and to be uncommonly fearful of rumors as to their going

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<sup>62</sup> T. 383; 388.

into carbon black production on their own." He referred to exhibit 574, in the record, which is a tabulation of export carbon black deliveries to the seven customers made by the association for the years 1934 to 1939. The customers named are: Continental Gunwerke (Germany and Spain); Dunlop Rubber Co. (Australia, France, Germany, India, Japan, South Africa, and United Kingdom); Michelin Tire Co. (France, Germany, Italy, Spain, Czechoslovakia, and United Kingdom); Pirelli (Argentina, Belgium, Brazil, France, Italy, Spain, and United Kingdom); Firestone (Argentina, India, South Africa, Spain, Switzerland, and United Kingdom); Goodrich (France and Japan); and Goodyear (Argentina, Australia, Brazil, Java, Sweden, and United Kingdom). The tabulation includes the purchases during the period 1934-39 by 10 smaller unnamed customers, and discloses that the purchases of the 17 customers for the 6-year period annually accounted for the following percentages of the association's exports: 64, 58, 63, 70, 67, and 63 percent. The balance of the association's exports went to a yearly average total of 4,000 small customers around the world. He described the mechanics of the association's distribution as follows:

(1) Manufacturers produced carbon black and supplied it upon the order of Carbexport for shipment abroad;

(2) Carbexport, the exclusive agent, requisitioned the manufacturers for carbon black to fill the export orders it received from its contract distributors. It took delivery from the manufacturers at seaports where, when necessary, it packaged the shipments in wood cases. Through its own forwarding agents it assembled lots according to distributors' instructions, arranged and contracted for ship space and supervised the loading and stowage aboard ship. It negotiated all ocean freight rates with steamship conferences and with nonconference lines. It attended to all shipping documents and other requirements to make the transfer of title complete. It made delivery of documents to its distributors and invoiced them for all shipments. It determined all prices involved in the export transactions, from the prices to be charged distributors and agents down to the prices to be collected from customers, in many instances as to every type of sales. It compiled all statistics with regard to exports for its membership, for United States Government offices and for such other persons as might be interested.

(3) The distributors contacted the markets and made the sales to consumers abroad. They did so either directly or through agents and their subagents. Customers' orders were upon the distributors' organizations and not upon Carbexport. The distributors requisitioned Carbexport for black to fill the said orders. The number of distributors through whom Carbexport sold in the export market was never less than eight. All markets were open to all distributors. All of them competed with each other in all of the large markets, in most of the medium-size markets and in some of the smaller markets. The term "markets" as used here means countries. The distributors billed and collected from either their agents or their customers located in the individual markets, depending upon the arrangements they had with their agents.

Distributors' contracts, following organization of the association, were entered into with the following: Godfrey L. Cabot, Inc.; J. M.

Huber, Inc.; Binney & Smith Co.; R. W. Greeff & Co. Inc.; Palmer Gas Products Corp.; Wishnick-Tumpeer, Inc.; Chance & Hunt; and United Oil & Natural Gas Products Corp. Ltd. The first six named are American concerns and the last two are English concerns. Exhibits 555 to 564, contained in the record, consist of folders containing photostatic copies of all association contracts to date with its distributors. Exhibits 19 A-I is a photostat of the contract with Binney & Smith Co. dated January 1, 1934, and Exhibit 20 A-J, the photostat of their distributors' contract dated January 2, 1940.

The contract provisions (exhibit 19 A-I) are briefly digested by sections as follows: (1) Vendor to sell purchaser all of its actual commitments for resale; (2) purchaser shall purchase only the carbon black of vendor for resale in the territory contracted; (3) territory: "All countries of the world except Belgium, Canada, Mexico, and the United States of America and its possessions, and shall not sell same for delivery outside the territory"; (4) "vendor will from time to time as it thinks fit fix the minimum prices, terms and conditions" of resale; (5) purchaser, upon payment for black invoiced to receive discount of 8 percent computed against vendor's f. a. s. Gulf price. This discount available only on aggregate delivery of 29,000,000 pounds in 1934; (6) payments to be made within 90 days, with a 1 percent cash discount for certain earlier payments; (7) vendor to make prompt shipment; (8) black to be of merchantable quality and vendor assume freight in event of rejection; (9) on deliveries outside the United Kingdom, purchaser agrees to pay agent who guarantees credit not in excess of 5 percent of f. a. s. price and not exceeding 3 percent otherwise; (10) vendor may refuse to make delivery or further sales and require offender's dismissal in case of rebate or split discount which reduces minimum price to consumer; (11) purchaser's records open to vendor's inspection; (12) purchaser may sell at any price but not below the minimum price; (13) purchaser to have sole right to certain brand names, 75 detailed; (14) vendor to see that black under any of the special brand names is not "sold outside the territory for reshipment into the territory" and "purchaser will use its best endeavor to see that carbon black purchased by it is not sold outside the territory"; (15) term, January 1, 1934, to December 31, 1934, but deemed renewable for calendar year 1935 unless either party gives termination notice by October 31, 1934; (16) notices to be in writing, served by registered post or cable; (17) contract, other than payment requirement, subject to "Force Majeure"; (18) "carbon black means hydrocarbon gas black made by the impingement process, other than high grade carbon black"; (19) contract not assignable without written consent of other party.

The terms of the January 2, 1940, contract (exhibit 20 A-J) are practically identical excepting for 49,000,000-pound aggregate antic-

ipated (sec. 5) and vendor's right to insist on cash payment less discount, against delivery of documents (sec. 6). The first two photostats in the folder identified in the record as 562, dated January 7 and 31, 1941, validate extension of this contract for the year 1941.

In connection with brand names, Mr. Kayser testified that the brand names are the identification of the distributor rather than the producer; that distributors who had sold certain producers' black prior to formation of the association, continued to do so thereafter under the distributors' agreements, but that every distributor at one time or another "distributes the product of various plants." This occurred when it was desirable to keep distributors' aggregate annual quotas in balance. The association maintained a record of brands identified by its own code number. Explaining procedure for supplying other producer's black under a given brand name, Mr. Kayser testified:<sup>63</sup>

Our requisition upon the producer might not have this name at all, it might have a number like 1722, which identified to the factory or the producer what kind of black was called for. Then we supplied that kind of black.

Let us assume that was a black that Columbian Carbon Co. was able to supply and we wanted them to supply it and we gave them that identification number. If that identification number did not mean anything to another producer and we wanted to supply another producer's carbon black against it, we would ask Binney & Smith for a sample of what they considered, let us take any name, Dustless Micronex, for example, then we would pass that sample on to the other producer, that is, other than Columbian, from whom we wanted to get the black, and we would say: We want that sample matched, and if he could match that sample to the satisfaction of Binney & Smith Co., then we would requisition that non-Columbian producer to supply that quantity of carbon black.

Then Binney & Smith would pass it into the market under its own brand name, Dustless Micronex.

The association's directors, at their February 7, 1934, meeting adopted the following resolution (exhibit 86-A):

*Resolved*, That the appointment of the Amtorg Trading Corp., as agent by any distributor or the granting by any distributor to said company of any discount, commission, or concession from the usual price to consumers shall be deemed conduct hostile to the interests of Carbon Black Export, Inc.

Thereafter, in a letter dated February 13, 1935, Oscar Nelson wrote Mr. Kayser in part as follows (exhibit 26 C-D):

I have noted your letter to Mr. Chance with reference to restriction on sales to Amtorg Trading Corp., and inasmuch as the members of the Export corporation have practically discontinued selling to this country the attitude of the sellers has probably changed since the restriction was placed and some of the producers were making sales to Amtorg Trading Corp.

I believe that J. M. Huber, Inc., and our Mr. Higgins could be helpful in approaching the Amtorg Trading if you consider it inadvisable to do so yourself.

<sup>63</sup> T. 91; 96.

We want to secure some of this business if it is there for the corporation and we should take advantage of the fellow having the best connection for such approach.

Mr. Kayser's reply, dated February 18, 1935, reads as follows (exhibit 26 E) :

My letter to Mr. Chance did not mean to convey the idea that selling Amtorg Trading Corp. was forbidden, but merely to inform him that by directors' instructions no distributor could employ Amtorg as an agent. I shall discuss with Mr. Higgins and with Huber how Amtorg can be approached on the question of how sales to Russia can be effected.

Mr. R. H. Eagles, assistant secretary of J. M. Huber Corp., testified to his company's experience with appointment of agents and particularly on the foregoing Amtorg matter, as follows:<sup>64</sup>

For years prior to the formation of the original association two of our strongest export agents were American Trading Co. of New York, who handled our sales in Japan and China, and the firm of Whitney & Oettler of Savannah, Ga., who handled our sales in Australia.

Carbexport permitted us to continue these agents without question and although the American Trading Co.'s business vanished with the United States embargo on carbon black to Japan considerably prior to Pearl Harbor, Whitney & Oettler continue to represent us in Australia.

In addition we have from time to time listed with Carbexport American firms located in New York and with connections in less important foreign markets. Carbexport never raised any objection to the appointment or dismissal of any such agents.

Amtorg Trading Co. was for many years the official, or semiofficial, purchasing agent for the Russian Government with offices in New York City. We sold them substantial quantities of black for several years, ending with 1931, at which time we believe they completed their own carbon black plants and discontinued all purchases of American black. Mr. Chance had evidently written Mr. Nelson about 3 years later, as to why these purchases had been discontinued and how they might be restored, and Mr. Nelson, probably recalling our previous dealings with Amtorg, suggested our name as possible contact. I have absolutely no recollection of having been approached by Mr. Kayser, along the lines suggested by Mr. Nelson. To the best of our knowledge, we have never sold Amtorg since 1931, although we have made some shipments recently via lend-lease.

Mr. Kayser testified that a consumer may not be an agent and referred to exhibit 37 A-B, a letter from Binney & Smith to Mr. Kayser, dated August 4, 1937, as illustrative. After referring to a sale made by the consumer, N. V. Java Straits Trading Co., on June 2, 1937, the letter goes on as follows (exhibit 37 A-B) :

I presume this sale has been questioned because we have since appointed the N. V. Straits Java Trading Co. as our agents in the Malaya States. I am therefore pleased to give you the full particulars, which I believe will exonerate our agents and also us of any blame.

According to our records, our agency agreement with the N. V. Straits Java Trading Co. is dated June 4, 1937 (incidentally, they have not returned their

<sup>64</sup> T. 803-804.

signed copy), and on that date we mailed them copy of Carbexport's price schedule and basic selling policy.

\* \* \* \* \*

This order you will appreciate was taken several months before we had any thought of appointing the N. V. Straits Java Trading Co. as our agents, and therefore at that time we had no control over their resale price.

Exhibit 39 is a photostatic copy of the appointment by distributor Chance & Hunt, Ltd., of United Carbon Co. as their agent, dated February 12, 1934, and reading as follows:

You are hereby appointed as agent for the undersigned in the sale in the United States, for export to foreign countries, other than Canada, of the carbon black which we, as distributors, will purchase from Carbon Black Export, Inc., under an agreement effective January 1, 1934, with which you are familiar.

You will receive a commission of 3 percent of the price f. a. s. Gulf Ports, and you will have no responsibility in making collections, other than to exercise reasonable prudence in extending credit where you have no specific instructions from us as to credit.

In carrying out this agency, you will be bound by the provisions of the distributor's agreement with Carbon Black Export, Inc., and by our instructions. The agency hereby created may be terminated by either party upon 30 days' notice, either by letter or cablegram.

If the terms hereof are acceptable to you, please indicate so by affixing your signature to a duplicate hereof.

Mr. Kayser testified that the association could have objected to the appointment. He explained this particular appointment as being necessitated because of the distributor's domicile in England placing it at a disadvantage in dealing with U. S. Rubber Manufacturer customers.<sup>65</sup> Mr. Oscar Nelson testified that "some of the rubber companies here insist on buying on this side and other people have distributors in this country and, therefore, we are giving Chance & Hunt that service."

Mr. Kayser referred to exhibit 44, photostatic copy of a letter dated July 12, 1939, from General Chemicals, Ltd., to the association, as compliance with the requirement that the association approve assignment of a distributor's contract. The letter reads as follows:

I am instructed by my Board to refer to the correspondence which has taken place between Mr. C. E. Kayser, the president of your corporation, and Mr. Edgar Chance of the London Office of Chance & Hunt Limited, in regard to the status of the distributors contract of the 30th December 1938, between your corporation and Chance & Hunt Limited consequent on the proposal that Chance & Hunt Limited should be placed in voluntary liquidation and the contract assigned to I. C. I. (General Chemicals) Limited.

First, I would like to state that Chance & Hunt Limited was placed in voluntary liquidation on the 30th June 1939. Secondly, I have pleasure in confirming that I. C. I. (General Chemicals) Limited will assume full liability in respect

<sup>65</sup> T. 187; 709; 1695.

of the obligations of Chance & Hunt Limited under the said distributors contract of the 30th December 1938, and will carry out all matters arising out of that contract in the same way as Chance & Hunt Limited has done in the past.

Mr. Kayser testified that it was the association's policy to refer all purchase inquiries to its distributors. He pointed to 16 photostatic copies of correspondence dating from October 26, 1933, to December 7, 1940 (exhibits 48-55 B) in support thereof—quotation from several of these follows:

Exhibit 50 A, letter dated December 11, 1933, association to Boler Petroleum Co., Philadelphia, Pa., after giving names and addresses of eight distributors, closes as follows:

If you will be good enough to inquire with any one of these distributors we know that you will find them glad to supply your friends in France with their requirements.

Exhibit 50 C, Boler Co.'s reply dated December 18, 1933:

We want to again refer to your letter of the 11th inst, in reference to our selling your carbon black in France.

As requested we have written to the different companies you mentioned were handling your material in France and so far we have received negative answers, inasmuch as they all seem to have their own conselling arrangements there.

Isn't it possible for you to put us on the same basis as these other companies as we believe we could get you some business if we put in the same position?

Exhibit 50 B, association's further letter dated December 21, 1933:

Unfortunately for the suggestion you made in the last paragraph of your letter of December 18, our arrangements with producers and distributors of carbon black for export make it impossible for us, at this time, to negotiate with you for the sale of carbon black abroad on the same basis by which we have contracted with our present distributors.

In the event we are able to take a different position we shall be very glad to open this subject ourselves.

Exhibit 51 A, letter, Illinois Bronze Powder Co. to association, dated September 11, 1934:

We are in the market for Carbon Black Elf-Brand or Carbon Black Kalista Brand, or an equal quality, suitable for the manufacture of printing ink, for export to concerns with whom we are affiliated in Germany, and would be pleased to have your rock-bottom quotations, very best discounts, and deliveries, with prices based CIF Hamburg or Bremen, Germany. All bills to be rendered to us and payable in Chicago Exchange, by us.

Your name and address was given to us by Mr. C. M. Baldwin, Chicago representative of the United Carbon Co., Chicago.

Exhibit 51 B, association's reply, dated September 15, 1934:

We are pleased to have your letter of September 11, asking quotations on certain brands of carbon black, for export.

Elf Brand and Kalista Brand are products manufactured by Godfrey L. Cabot, Inc., 77 Franklin Street, Boston, Mass. That concern is, at the same time, one of the distributors in export for Carbon Black Export, Inc. We have,

therefore, taken the liberty to pass on to them copy of your letter, together with a request that they communicate with you direct.

Our reason for handling the matter in this way, instead of quoting you directly, is that it is not our policy to quote customers directly and independent of the distributors with whom we have contracted to sell our products.

Exhibit 52 A, letter dated October 18, 1938, E. Billings of Cabot Co. to the association:

We recently received an inquiry from the Hess Oil Co., 106 West Eleventh Street, Kansas City, for quotations on half million pound lots of carbon black more or less. On further investigation, we found that their interest was solely in carbon black for export and we accordingly declined to quote, explaining that all of our export sales must be made to you.

They now write asking whether there isn't some arrangement which could be made between yourselves, ourselves, and themselves whereby they could get what they needed. Their question is so generally worded that it isn't necessary to reply but I thought you would be interested in knowing of their curiosity because it may possibly result in business moving through them from some nonmember.

Exhibit 52 B, association's reply, dated October 19, 1938:

Thank you for yours of the 18th instant informing us of the request of the Hess Oil Co. of Kansas City, Mo., for a supply of carbon black for export. We shall try to keep an eye on their activities.

Exhibit 53, letter dated December 3, 1938, Mr. Billings of Cabot Co. to Mr. C. E. Kayser:

With further reference to my letter of November 28 concerning the inquiry from the S. S. Berger Co., I have had our agent on the west coast call on these people and I quote a paragraph from his letter:

"Mr. Berger is in the Export business, and tells me that he operates for the most part, in New Zealand, Australia, South Africa, and Latin America. He has no specific quantities in mind, rather he wants prices on our various grades of paint black, so that he, in turn, can offer the black to consuming trades in the countries named above. In fact, he does not know what, if any, blacks he can sell. He does not know that the paint companies in those countries use black and his idea is for us to give him prices on all of our various blacks, f. a. s. steamer for both carload and l. c. l. quantities, then to those prices to him, he will add on his profit and attempt to sell the blacks."

We have written Berger that, in view of our obligations to Carbexport, we could not quote him.

Exhibit 62 A-B is the photostatic copy of a letter dated March 14, 1935, from the association to Binney & Smith commenting on a rule of the United Kingdom Carbon Black Association giving distributors the option to absorb duty charges on black sales, and continuing as follows:

You will understand Carbexport's attitude when we say that it is a debatable question whether or not such special arrangements as recited above do not modify the meaning of a c. i. f. character sale. We simply want distributors to know that we will not undertake the risks of being party to the debate and that our responsibility—not necessarily our assistance—ceases with a legally

correct c. i. f. delivery. We may make an occasional exception to this policy, but the exception will have to be at our option and on our judgment.

It may be unnecessary to do so but distributors, including yourselves, might like to be reminded of the kind of extra undertakings beyond c. i. f. with which a distributor assumes to accommodate his customer which may change the character of the sale they appear to have made to the customers. Such instance would be when a distributor selling c. i. f. agrees to deliver the goods involved to an interior point, or when he sells c. i. f. subject to approval of goods on arrival.

Mr. Kayser testified that the British group, comprised of distributors and agents fixed rates of exchange and warehousing charges, but subject to the approval of the association, which considered the British group "in the nature of an advisory committee."

Exhibit 66 A-B, photostat of a letter dated June 18, 1937, from the association to Binney & Smith reported the establishment of a single distributor in Belgium as follows:

Carbexport is entering into a contract with African Metals Corporation of New York and Sepulchre Freres, Liege, Belgium, under which they jointly will be its sole representative selling for delivery in Belgium and Luxembourg all brands of carbon black under Carbexport jurisdiction. One of the provisions of the new arrangement is that Afrimet/Sepulchre will take over saleable stocks in the hands of present distributors and their representatives in Belgium and Luxembourg, afloat to or located in those countries at June 30th, 1937, which it can obtain at cost to the holders thereof plus legitimate charges. We required this provision so that none of our present representatives need find themselves embarrassed with stocks on hand after June 30th. Mr. Etienne Sepulchre will be pleased to negotiate the transfer which any distributor or agent under existing contracts may wish to make.

Mr. Kayser testified that prior to this centralization there had been five or six agents in Belgium. At the June 6, 1946, hearing, his attention was directed to exhibit 254, photostat of a letter dated March 17, 1938, Mr. E. Billings of the Cabot Co. to Mr. Kayser which reads (in last paragraph) as follows:

I am delighted to see that the percentage of outsiders' business done in Belgium has declined markedly because this furnishes about the best possible test of the soundness of the experiment of appointing one general agent for Carbexport in that country.

He testified on this as follows:<sup>66</sup>

Then there is a discussion by Mr. Billings to the effect that in his estimation it is a delightful consequence or a satisfactory consequence of the establishment of a single agent in Belgium, that outsiders apparently don't have as much business there as they had before.

And my letter goes on to tell him that he is mistaken and that that is not the fact and that before we can determine whether or not our United Export position in Belgium is adversely affected by this appointment of a single agent instead of the numerous cats and dogs we had there, speaking in a fighting sense, we will have to watch the picture some time longer.

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<sup>66</sup> T. 215; 1850.

Q. Was the establishment of the single distributor in Belgium a device for fighting nonmember competitors in Belgium?

A. The answer to that is no, and in addition to that I might say that the effect of preventing our own agent from cutting prices was an advantage to the outsider. It held an umbrella over him in that market.

Mr. Kayser's reply to Mr. Billings' letter to which he refers in his testimony, was dated April 5, 1938, and is in the record by way of photostatic copy as exhibit 591 A-B, the reference to Belgium reading as follows:

Altho the percentage of outsider business done in Belgium in 1937 declined markedly, no test of the soundness of our experiment with a single agent in a market is furnished by last year's figures. Far more than half of the total sales to Belgium for the year were made in the first half of it when the old system was in operation. In the month's interval between our announcement that our distribution would henceforth be carried on by a single agent and the effective date of the change two agents loaded several of the intermediate customers up with supplies which, in some instances, will carry them thru the year 1938. This operated to reduce the market of our single representative very materially. Experience with the new system is far too young to permit of a categorical statement that it is better or worse than the old one. While that indisposes me to discuss the relative merits of the two systems at this time, I do not want to let you draw false conclusions from a lack of facts.

Mr. Kayser testified that all markets of the world excepting Belgium were open to distributors. Exhibits 555 to 564, distributors' contracts referred to above, each contain a territory provision identical to the section from the Binney & Smith contract (exhibit 20 A-J) above reviewed.

Mr. Allan F. Kitchell, president of Binney & Smith Co., testified that his company is the domestic distributor for Columbian Carbon Co. of whose stock it owns a proportion under 2 percent. He stated that his company's research division is constantly at work solving its customers' technical problems and that such technical information is available for use of the association. Under its distributors' contract, it normally sells Columbian black in export, but on several occasions it has sold other member producer's black upon order of the association. Mr. Kitchell was familiar with the association's policy requiring its members to report sales to nonmembers as expressed in the resolution adopted May 25, 1937, exhibit 102 B discussed in paragraph IV B herein. Certain dealings with Mr. L. C. Herkness of the Chas. Eneu Johnson Co. had taken place several years earlier and Mr. Kitchell agreed that his arrangement with the association would not permit sales for export to Mr. Herkness. His prepared statement on this particular reads as follows:<sup>67</sup>

I would like to state, however, that in years gone by we have often sold Charles Eneu Johnson Co. various quantities of carbon blacks, high-grade materials

<sup>67</sup> T. 925 ; 1605.

as well as ordinary ink grades. From the best recollection of those in the department here handling such business our sales during that period were limited to high-grade materials which are not under the jurisdiction of Carbon Black Export Corp.

However, we might well have accepted an order for ordinary black from them since that would only have been of a nature for domestic shipment and packed in the regular domestic bags. If such an order had been accepted we would have expected them to use it in their own manufacture here and that it would not have been exported. If we had had any idea that such black was to be moved into the export trade we would not have accepted the order.

Mr. D. H. Robinot of New York City, testified that he has been an exporter of steel and some chemicals since 1932. About a year before passage of the Lend-Lease Act, he attempted to purchase carbon black for export and made written inquiry of manufacturers Imperial, Cabot, Huber, and Columbian. They replied that they had local agents for the particular countries he inquired about or referred him to Carbon Black Export, Inc. The latter told him they had coverage in France. He reported a telephone conversation with United's New York City agent as follows:

I told them that the Carbon Black Export, Inc., being in the same game as mine naturally wouldn't be able to pay me the full amount of commissions that the manufacturer generally allows an agent. I asked him, "What do you think they will give me?"

He said, "1 percent."

I said, "I don't work on that basis."

He testified further that the Lend-Lease Act passed in the meantime and that only one of the manufacturers, Imperial, offered to sell him carbon black for delivery to Spain, which offer the war forced him to decline. He learned of Phillips' entry into carbon black production from the War Production Board. After less than a year of negotiation with the Phillips company, Mr. Robinot wrote the Secretary of Commerce (exhibit 430) on October 16, 1945. Thereafter on October 30, 1945, he addressed a letter to the Commission's Director of the Export Trade Office (exhibit 431) and on November 1, 1945, to the Phillips company (exhibit 432 A-B). At the latter date, Mr. Robinot had an inquiry from Greece for 20 tons of carbon black, for which, shortly after November 1, 1945, Phillips Petroleum Co. made him a quotation. At the date of his testimony, January 16, 1946, Mr. Robinot had completed arrangements with the Phillips company to sell their product, Philblack, in five small countries at a 5 percent commission. He plans to sell the product to the paint and ink industries in these countries because they have no rubber industry. His knowledge of Philblack is that it "is being made by a different process than ordinary carbon black is made."<sup>68</sup>

<sup>68</sup> T. 869; 880.

Mr. W. H. Grote, of Phillips Petroleum Co., testified that he assumed the position of Export manager and established an export office for the company on December 1, 1945. He testified that the home office made all price arrangements and he did not know the relation of C. K. Williams & Co. to Phillips, but he was familiar with the territory assigned to Mr. Robinot, testifying as follows:<sup>60</sup>

Q. In the assignment of territory, to Mr. Robinot, is there any particular reason why you, if you did, restrict the territories to those in which there was no rubber manufacturing potential?

A. I think you must be laboring under a misapprehension.

Q. I may be.

A. Because there is no restriction. On the contrary, I told Mr. Robinot that unless he could sell to the rubber industries in those countries, his volume wouldn't be very big. There is no restriction.

Q. I might have misunderstood him, then.

A. You must have, because we would rather have him sell to the rubber industry than to the ink industry.

Q. Let's just have it so that we may have it by way of contrast—I am not trying to trip you up or him up. What is the nature of your arrangement? Is there any limitation as to destination, as to industry destination?

A. No limitation whatsoever.

Q. There are limitations, though, as to countries?

A. Well, I wouldn't say limitations.

Q. Certain ones have been specified?

A. He was interested in certain countries which I granted to him.

Q. Is there a so-called rubber potential in those countries which he was assigned?

A. Yes, all those countries have rubber-manufacturing establishments.

Mr. Robinot's letters to the Phillips company relative to his request for an agency are not in the record, although two of Phillips' replies appear as exhibits 444 A-B and 445. Exhibit 444 A-B, from Phillips to Mr. Robinot, dated October 29, 1945, contains a paragraph reading as follows:

As we advised you some time ago we are withholding all commitments on export sales and shipments until we have established our export office in New York. Present indications are that this office will be inaugurated shortly after the first of December, and no final arrangements will be made except through the director of export sales.

If you are in position to have carbon black crated we will be happy to complete this order for any domestic point you might designate, and the price will be in accordance with our current price schedules, and no discounts will be allowed for agency fees. At the present time it is impossible for us to crate it as we do not have the equipment or manpower available to handle this work. We also wish to mention in this respect that we give no assurance that we will continue to accept orders as all later requests for foreign shipments must go through our export office as soon as it is in full operation.

We wired you today as follows: "Relet impossible to quote at this time on 20 tons of Philblack for Mediterranean area." We did not receive your letter

<sup>60</sup> T. 892; 894.

in time to wire you Saturday as requested, and sincerely hope that receiving it today has not caused you any undue inconvenience. We are also returning the correspondence you forwarded on your request to C. K. Williams & Co., and we wish to thank you for forwarding this to us. We have passed this on to our main office for their further information.

Their letter to Robinot dated October 19, 1945, refers to the Williams company as follows (exhibit 445) :

Our relations with C. K. Williams & Co. were established some little time ago, and we can make no exceptions in regard to selling our product to others where its ultimate use is in the coloring, or ink field. We regret that this is necessary but we are sure that you appreciate that agreements cannot be violated. We would suggest that you contact C. K. Williams and see if they are not interested in selling you.

Mr. Frank Andrews, sales manager of the Philblack Division of Phillips Petroleum Co., testified that he never discussed carbon black prices with Carbon Black Export, Inc., officers but assumed Phillips' prices were "close to them." He was familiar with the quotation made to Mr. D. H. Robinot and after testifying that the quotation was made on an f. a. s. basis because the company wanted to avoid paying insurance and freight as entailed in the c. i. f. basis, his testimony continues:<sup>70</sup>

Q. Do you intend to have such a person, say, as Robinot competing as to price in such a market as Greece, say, with another person to whom you sell such as Robinot?

A. I wouldn't plan to.

Q. How would you avoid that?

A. I would set up territories in which agents were given definite territory in which to sell.

Q. In other words, you would avoid competition among, we will call them "agents" abroad by limiting and restricting the territory which they serve so that they would not overlap?

A. Yes.

Q. How would that work out? You have no control over the product when it is shipped f. a. s., do you, Mr. Andrews?

A. We would probably enter into some kind of contractual arrangement with our agents.

Q. In other words, do you have such an arrangement with Mr. Robinot?

A. We have no contracts at the present time.

Q. But you do anticipate in a general way to enter into contracts whereby the independent exporter through whom you operate shall restrict his activities to certain fields?

A. That's right.

Q. The purpose of that is to avoid price competition between those men abroad?

A. No, to make it possible for each dealer to operate.

Mr. Louis A. De Smet testified that he operates as an individual trader under the name De Smet & Co. from his home at 6417 Wayne Avenue, Chicago, Ill. He is engaged in exporting Gilsonite and

<sup>70</sup> T. 1168-1169.

Bentonite. The main business was, prior to his father's death in 1938, the export of carbon black. The witness joined his father in 1923, though his father had operated since 1917 under the name George W. De Smet. Sales of carbon black were principally of the rubber black type and were made direct to consumers and in some instances to agents who resold to consumers. "In all cases we purchased and we sold the carbon black on our own account," he testified. His records disclosed dollar volume of export sales of carbon black for the years 1929-35 as follows: 1929—\$123,454; 1930—\$65,147; 1931—\$66,236; 1932—\$69,306; 1933—\$45,312; 1934—\$114,175; and 1935—\$157,887. The 1935 exports went to France, England, Japan, Poland, Germany, and Holland. Supplies of black had been purchased from Cabot, United, Keystone, Palmer, and Wishnick-Tumpeer. Keystone, after joining the association, on October 3, 1936, wrote him that all their export business would thereafter be handled through the association (exhibit 454). Thereafter, until 1945, he canvassed the industry but could not procure supplies. Contained in the record are a total of 37 items of correspondence relating principally to efforts of the witness and his father to affiliate with the association. These are identified in the record as exhibits 287-91 A-B, 421-3, 454-9, and 604-22. Representative of these are the following:

Exhibit 613, dated May 24, 1934, George W. De Smet to association:

We acknowledge receipt of your telegram of the 18th inst, and your letter of the 19th, confirming this telegram.

Since then we have received your letter of the 21st inst, in which you enclose the copy of the resale price schedule for various states in Europe for which we thank you but we are sorry that you did not send us a copy of the schedule for France. We have always done a fairly good business in France and would like to receive the schedule.

Please let us know when you expect your Mr. Kayser in New York. In his last letter your Mr. Kayser advised us that on his return from Europe he would be able to give us a definite answer in reference to securing a full agency from your company.

Exhibit 617 (also in record as exhibit 455) dated July 12, 1934, association to De Smet:

On June 5th I advised you that I would later again refer to your inquiry regarding agency arrangements.

At a recent meeting of the directors of the Corporation, I brought the matter up in connection with a discussion of our general representation. As a result of that discussion, I must now write you that the directors asked me to express to you their regret that, because of many problems not yet completely solved within our present distributing organization, they feel it necessary to take the position that they cannot make any other arrangements for the balance of this year.

I should like to have you understand that, although the matter is as I have now explained it, I should be very pleased to receive a call from you on the occasion of one of your visits in New York, to discuss the question of export in general and any means we can develop of cooperating together along other lines.

Exhibit 622, dated January 27, 1936, association to George W. De Smet:

Since my letter to you in July 1934 our distribution in export has been so organized as to be thoroughly adequate for our needs. Consequently I am compelled to reply to your courteous letter of January 21st last that we are unable to grant you an agency. Nor are we able to release any of our producing members from their contracts to sell us exclusively all of their black which goes into export. I can advise you, however, that our agents in the various markets are permitted to sell black to jobbers at our regular schedule prices without discount or commission allowance.

Continuing his testimony, Mr. De Smet said that in certain years the bulk of his export sales of carbon black were made to Michelin Tire Co. of France through a Paris agent named J. Bugnet who later transferred his agency to Mr. W. Van Lede. At times Mr. Van Lede, as De Smet's agent, sold Michelin, sometimes De Smet sold Michelin direct, reserving a commission for Van Lede and "at other times it was sold to Mr. Van Lede at a net price, and he sold it to them at a higher price." 1927 sales to Michelin exceeded 2½ million pounds. Since 1936, he has had offers from Mr. Van Lede on behalf of Michelin and others. One such inquiry, in 1938, was substantial. In connection with this inquiry, Mr. De Smet testified that Texas-Elf Carbon Co., an affiliate of the Cabot company, and the Imperial Oil & Gas Products Co., refused to sell him, the latter's letter of November 5, 1938, reading as follows (exhibit 457):

We have your letter of November 3 in which you inform us that the 700,000 lbs. order was offered to you by your French agent and that the material would go to France and Belgium.

Our arrangements in France and Belgium are such that at the present time we could hardly offer this in these markets. We therefore feel that we cannot quote on this business.

He testified that his company had purchased carbon black from Canada Carbon Black Co. at one time but that it advised him that they could not supply him. This was by letters, photostatic copies in the record as exhibits 458 and 459, dated January 28 and February 1, 1938. Exhibit 458 reads as follows: "We regret very much that we are not in a position to offer you any black at this time either for England or the Continent."

In May 1945 the witness was offered a proposition by Mr. R. L. Wishnick to act as his subagent in France at a commission of 5 percent. This he refused because "it was an entirely different way of handling it than I had done it before." He continued, "If I was to handle it for this company I would have to pay that 5 percent commission to an agent there to handle the business. Now, the only way that could be worked would have been to do away with the agent in France, and for me to go there myself and handle the business there myself."

Mr. Wishnick suggested that De Smet see Mr. Kayser. Mr. De Smet testified that in October or November 1945, he conversed with Mr. Kayser who told him that under the present set-up of Carbon Black Export, Inc., "it was impossible for them to appoint another agent," but that Mr. De Smet's application would be taken under advisement and if something could be done he would be notified. Nothing had materialized to the date of the testimony (February 4, 1946). He testified that Mr. Kayser had informed him of Columbian's acquisition of Keystone Carbon Co. and closing of that plant because of inferior quality of the product. To this, he said he told Mr. Kayser that he thought the quality of Keystone's product was excellent and that in the years when he handled it he had never had a complaint from an agent or customer.

Mr. De Smet testified that his company had sold carbon black under three brand names: "Stygian," "Jetta," and "Croak." Producers, including Keystone, had cooperated when questions of quality arose, but it was "never a question that made or broke a sale." The Stygian brand was sold to Michelin in competition with brands of other American suppliers and was well known throughout England and Europe, and it had a "marked brand preference," he added. He never had credit difficulties with his suppliers, and in selling he netted 10 percent profit after agent's commission, purchase cost, and other expenses. The only competition encountered was that of other American producers and he could not recall an instance of bad faith rejection to create a distress sale. He testified that since 1935, he has not been able to procure supplies of carbon black because Carbon Black Export, Inc., controls the export of carbon black to foreign countries; that it was his regular business which was terminated at quite a financial loss; and that the members of the association were nice people to do business with and men of their word but that nobody could break in "and those who were not in on it before were definitely out."<sup>71</sup>

Upon the suggestion of respondents' counsel made to the investigating attorney, Mr. De Smet gave the following additional testimony: Since 1938, sales of envelopes and domestic and export sales of Gilsonite has been his means of livelihood. From 1925 to 1938, witness and his father were importers and sellers of crude rubber, mushrooms, and canned fish. From 1925 to 1927, his father was president of De Smet Quartz Tile Co., Wauconda, Ill., which either went bankrupt or made a settlement with creditors. Witness has no knowledge of whether the Colored Cement Co. controlled by his father was able to pay its debts and judgments obtained against it. The importing of

<sup>71</sup> T. 1308; 1336.

mushrooms was discontinued because of a tariff which added \$5 to the cost of a case. He knew the following carbon black manufacturers who were not members of the association between 1933 and 1938: Crescent Carbon Co., Canada Carbon Co., Imperial Oil & Gas Products Co., Keystone Carbon Co., C. E. Johnson Co., Magnolia Carbon Co., General Atlas Carbon Co., and Thermatonic Carbon Co. He had done business with all but the four last named. From 1933 to 1938, witness was Imperial's exclusive agent in France. He knew William Priem, Magdeburg, Germany, was Imperial's German Agent and that they had an exclusive agent in England whose name he could not recall. Witness testified that he would expect a manufacturer who had a foreign agent to protect such agent and not compete with him. Witness believed the association had a right in the sale of its own brands to expect an applicant for an agency to wait until a vacancy arose but that it had no right to exclude an agent possessing his own brand. Witness agreed that he would not expect Ford Motor Co. to sell him cars for resale in Chicago in competition with an appointed Ford agency. Witness was not familiar with producers' practice of selling their brands through specially selected distributors. If such producer received an order for one of the trade-marked brands, witness would expect the producer to fill the order through his agent located at the place of origin of the order. In their dealings with Imperial, witness testified their territory was limited to France, Belgium, Holland, Spain, and the Scandanavian countries, and when they found they could sell Keystone's product in an unlimited territory "we changed from Imperial to Keystone." At the date of testimony (February 4, 1946), Mr. De Smet recalled Imperial and Canada as nonmembers of the association. The De Smets never maintained a laboratory for giving technical service on carbon black problems but relied on their producer-suppliers. Their agents Van Lede in Paris and Alfred Smith, Ltd., Manchester, England, are large outfits and have technical staffs. The De Smets, likewise, never called for the technical services of any independent laboratories. He concluded by expressing his desire to get back into the business with his brands which are still known.<sup>72</sup>

Mr. R. I. Wishnick testified that he had dealings with De Smet but had no recollection of a discussion of those dealings in any association directors' meeting, particularly the meeting of November 1, 1933, exhibit 83 A-B. (The minutes make no reference to De Smet or Wishnick.)

Mr. Oscar Nelson of United Carbon Co. was favorable to grant of an agency to the elder De Smet as evidenced by the following correspond-

<sup>72</sup> T. 1342; 1363.

ence. Exhibit 288 A-B, dated November 7, 1933, photostat copy of letter from Mr. Nelson to Mr. Kayser reading as follows:

Chance & Hunt, Ltd., have sent us the following copy of letter from Kurt Rasmus & Company of Hamburg:

"We have learned by accident that a certain firm: Messrs. De Smet & Co. of Chicago have sent a sample packet of Carbon Black to a German firm. This packet was sent through Paris and not direct to the Hamburg firm.

"Do you know of Messrs. De Smet & Co., of Chicago being sellers of black?"

With the following transmitting letter:

"We enclose translation of a letter from Rasmus dated the 16th and we are sorry to note the signs of activity by De Smet in the German market.

"We sincerely hope that this outsider will not prove such a thorn in the side in the German market as he has done in France."

The De Smet matter was discussed at the last meeting of Carbon Black Export, Inc., and it was revealed that one of the members of the Corporation was selling De Smet, namely, Wishnick. The above does not complain of any price cutting, but in my conversation with Mr. De Smet I made it plain that the country the Export Corporation would consider for him was delivery to France, and if you in future decide to make sale of any Black to De Smet I would suggest that he be restricted to the territory in which he has been so active and not allowed to enter any new market. He has some connections in France which he has maintained for a number of years, but I do not know of any activities he has had in Germany.

On January 21, 1936, the elder De Smet addressed letters of like tenor to the association and to Mr. Nelson (exhibits 421 and 422), the former containing a paragraph reading as follows:

We are now approaching again to see if in case you cannot grant us an agency if you could permit some of your members to sell us some black so that we could supply same to our agents who are handling our other products and are also anxious to offer their customers carbon black. Our agents are selling our products to the rubber, paint, and ink trades and would also like to be able to offer them carbon black. It is understood that any sales they make would be at the prices of the Carbon Black Export, Inc.

Mr. Nelson's reply to Mr. George W. De Smet, dated January 23, 1936, reads as follows:

I have your letter of the 21st enclosing copy of letter you have written to Carbon Black Export, Inc., relative to securing some black or securing an agency. I appreciate your writing me in this instance and I would like to see something worked out for you.

Mr. Nelson testified, by means of prepared statement, in relation to these exhibits, as follows:<sup>73</sup>

I refer now to exhibit 288-A and B, which is a letter from me to Kayser dated November 7, 1933, with which I transmitted to him two letters regarding the activities of De Smet & Co. of Chicago; one of said letters being from Rasmus & Co., Hamburg, to Chance & Hunt, and the other being a letter from Chance & Hunt to me transmitting the Rasmus letter, or a translation thereof. I had known De Smet for many years prior to the formation of Carbexport and had

<sup>73</sup> T. 631; 715-717.

done some business with him. Our relations were always friendly. I had known of his business connections in France. At this period in the business of Carbexport the association was having a good deal of trouble educating its foreign agents to carry out its rules and policies.

It occurred to me that De Smet would fit into our picture very nicely in France, since he had connections there over a period of years and I believed that it would be all right for him to take that agency and confine his activities to that country. However, it was only a thought on my part and nothing was ever done that I know of to persuade De Smet to do this. The fact as I understood it is that he preferred to stay outside.

He continued his testimony under questioning, testifying that he had suggested an agency in France for De Smet because he knew that De Smet "used to sell a little black occasionally in France." Mr. Nelson had no recollection of any directors' meeting at which Mr. Wishnick's sales to De Smet were discussed. He recalled knowing the elder De Smet, saying "He had had a lot of financial trouble and was rather hard up. He was a nice old gentleman and I tried to help him if I could."

Mr. Kayser identified Mr. George W. De Smet as one of the firms referred to in the memorandum reporting his 1935 European trip, exhibit 193 A-T. He knew De Smet was not a producer of carbon black and he was never "what I would consider a distributor or exporter of carbon black"; that "De Smet purchased carbon black wherever he could and he sold it wherever he could."

By way of a prepared statement, Mr. Kayser testified as follows:<sup>74</sup>

Exhibits 604-622, inclusive, represent all the correspondence with De Smet & Co. outside that already in the record as evidence I can find in Carbexport files. My recollection is that Carbexport declined to give De Smet & Co. the distributorship it sought because it was the consensus that the said firm was not an exporter in the essential sense that applied to the distributors whom Carbexport employed.

The said firm had been a trader in carbon black. It had never been equipped with a technical staff, as were all Carbexport's distributors, to do independent research in the uses and applications of carbon black and to help consumers abroad in the problems of compounding rubber or pigments.

It was also felt that De Smet & Co. acted largely as shopper in the United States for concerns abroad, principally French concerns, who were seeking price concessions. It will be noted in exhibit 291 A that De Smet is reported to have stated in his inquiry to Texas-Elf Carbon Co. that he had been offered an order for compressed carbon black of 700,000 pounds monthly.

He had never been a producer of carbon black nor an agent of any producer.

My reaction, as expressed in 291 B, was that De Smet was being used by a foreign buyer as a shopper. My suspicion expressed in my pencil note on exhibit 291 A and my stated belief in 291 B is advisedly pointed at Michelin, France.

In pre-Carbexport days Michelin was most active in the use of tactics against which American exporters of carbon black could produce no defense, even when joined in the earlier Carbon Black Export Association.

<sup>74</sup> T. 1731; 1779.

During the early years of Carbexport's operation Michelin attempted several times to undermine the stability and orderliness of Carbexport operation. This was without success, although the efforts contributed in so small measure to the consideration that was given in 1937 (see exhibit 102 C) to the advisability of consolidating distribution in France in the hands of a single agent.

The offer of an order which De Smet announced to Texas-Elf looked to me like another such attempt by Michelin. I regarded it as either an attempt by Michelin to jar out of Carbexport a forward price announcement which we were not yet ready to make or even as an attempt to break the export price.

The use by me of the words "shopper" and "to shop" does not imply that either Carbexport or I hold shopping for the lowest price or being a shopper for a foreign buyer to be either odious or not legitimate. The use of these terms is meant to bring out that it would be senseless on the part of Carbexport to come to the assistance of anyone whose free activities resulted in nullifying the very benefits which the Webb Act permitted us to enjoy.

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Mr. De Smet states that 5 percent is the usual commission paid to a sub-agent. It may have been his own usual commission to subagents but in the case of subagents in Carbexport's organization the commission for subagents has been 3 percent. There are many instances where an agent, which is what Mr. Wishnick offered to make Mr. De Smet, sells through a subagent and allows him only 3 percent. Mr. De Smet undoubtedly preferred to work under conditions where he could have kept the full 5 percent, which is the maximum a Carbexport distributor may allow an agent, but, considering the many examples (R. 72) in Carbexport's organization of agents successfully and profitably selling in countries outside their own through subagents who receive only 3 percent, there can be no other reason for Mr. De Smet's refusal of Mr. Wishnick's proposition other than his own preference or his unwillingness to seek subagents who would represent him for 3 percent.

Mr. De Smet quotes me at line 11-13 of page 1329 as stating that it was impossible for Carbexport to appoint another agent. Not for the purpose of impugning Mr. De Smet's veracity but in order to get the record straight I wish to bring out that Mr. De Smet could not have recollected what he terms my explanation of "the present set-up of Carbon Black Export, Inc." Under that "set-up" Carbexport can only appoint general distributors. The right to appoint agents is reserved to the general distributors, with Carbexport's approval. When Mr. Wishnick, acting on behalf of Witco Chemical Co. a distributor for Carbexport, offered Mr. De Smet a vacant agency he did so with Carbexport's approval.

Under questioning, Mr. Kayser later testified that his refusal to consider Mr. De Smet an exporter in the essential sense that applied to the association's distributors was due to De Smet's lack of a technical staff and "no personal ability to solve purchaser's compounding problems." He added that it was not a question of De Smet having to start at the top but "If Mr. De Smet had ever presented himself as wanting a subagency or perhaps even an agency from a distributor, we would not have objected if the distributor wanted to employ him." He further testified that the association was in existence for only 2 years of the period 1929 to 1935 for which De Smet offered dollar volume statistics, but that if the statistics had recorded the price per pound at which sales were made it would have demonstrated that De Smet's

sales resulted from under-cutting his competitors and not because of the Stygian brand name of his product.<sup>75</sup> He concluded that the point of his comment on De Smet was—

not that Mr. De Smet was not within his rights to buy at any price and resell at any price he chose to. Those rights were absolutely his. The point of the said comment is that Mr. De Smet doubtless lost supplies of carbon black for export because the nonmembers of Carbexport found that they could themselves sell all the black they wished to put into the export markets at higher prices than if they furnished Mr. De Smet a portion of such total quantity for export by him.

Mr. Kayser expressed a similar attitude with respect to the agency application of Mr. D. H. Robinot, above set out, testifying: "I hope that he succeeds in becoming a large and profit-making exporter.

\* \* \* But he has got to start able in the sense in which I have repeatedly described it here in the record"—principally with a technical organization. Contained in the record are exhibits 661 A-B to 664 A-B, photostatic copies of Mr. Robinot's correspondence with the French Board of Import Control, dated August 10 and November 5, 1945, in which Mr. Robinot wrote that he would shortly be charged by "a very substantial firm in the United States with its foreign sales." Late that fall (1945) Mr. Le Person, head of the Carbon Black Section of the French Import Control Board visited the United States as an advisor to the French Purchasing Commission. On one of his numerous visits to the association's offices, he inquired about Mr. Robinot, who was not known to the association's office personnel. The telephone switchboard operator traced the only Robinot address Mr. Le Person had, "Office and Warehouse, 323-27 West Sixteenth Street, New York City." The operator made telephone contact with that address, was told that Mr. Robinot was out, and that he had no organization or individual who might speak for him, he simply having desk space at that address.<sup>76</sup>

#### *F. Exclusive Contracts With Distributors*

The fifth specification in the bill of particulars reads as follows:

5. Contracts with all "distributors" and "agents," some of whom are American exporters, which require and cause them to deal only in carbon black sold to them by Carbexport and not to deal in any other carbon black, including the carbon black of other American manufacturers and exporters.

The distributors' contract referred to in the preceding section (exhibits 19 A-I and 20 A-J), contains the following agreement:

SECOND: Purchaser shall not during the subsistence of this agreement purchase any carbon black for resale in the territory from any person, firm, or cor-

<sup>75</sup> T. 1861; 1949.

<sup>76</sup> T. 1778; 1943.

poration other than Vendor, or as principal or agent sell or distribute any carbon black in the territory except carbon black purchased from the Vendor; but nothing in this agreement contained shall restrict or limit the right of the Purchaser to purchase carbon black or to act as agent for any person, firm, or corporation in the sale of carbon black, provided that all such black shall be sold only to customers for consumption in the United States, Canada, or Mexico, and not for export to any other country (or under circumstances in which Purchaser shall have reason to believe the same is intended for export).

Mr. Reid L. Carr, who drafted the contracts, was questioned about the purpose of the exclusive clause above quoted, and testified as follows:<sup>77</sup>

A. I would say that it was deemed very unwise that a distributor for Carbexport should be in a position where it could take black from nonmember producers and sell it at a lower price than the carbon black which it handled for the association. It could not. It did not seem practicable to have an arrangement whereby the same distributor or agent could handle the identical material at two different prices.

Q. It was a control device you thought essential?

A. To the proper functioning—

Q. Of Carbexport?

A. Yes.

Q. Would you say the same thing is true with reference to the power which the corporation exerts in the distributors' contracts to fix the minimum prices and the most favorable terms and conditions of sale?

A. I should say those powers would be essential to the functioning of the Export association. Otherwise, we would have a return to the chaotic conditions that prevailed before the association was formed and which it was one of the chief purposes of the association to remedy.

Q. Now, in drafting these amendments, not only as to the sales contract, but distributors' contract, and in general setting up the organization, were you guided or governed by other forms or organizations, perhaps operating in other fields?

A. I should say generally, yes.

Q. Well, I would like to have you enlarge upon that, if you care to or will.

A. Well, I had understood that in the debates of Congress with reference to the adoption of the Webb Act, there was matter indicating a recognition that exclusive contracts were permissible under the Webb Act, and I had also understood that it was the long-conducted practice of the Federal Trade Commission to accept for filing contracts containing such terms, and in fact while the Federal Trade Commission did make some specific criticisms of our sales agreement and required us to change certain features of it, that particular feature with reference to exclusiveness was not challenged by the Commission and so I assumed that it was in accord with their departmental practice.

In section IV B, footnote 16 and 19 above, reference will be recalled to exhibits 40 and 41 A, identical letters mailed to producer-members and to association distributors, on the question of sales of carbon black to nonmembers. Exhibit 40 was addressed to Binney & Smith, distributors. Mr. Kayser's testimony relative thereto included the state-

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<sup>77</sup> T. 139.

ment that "This was a warning that that was contrary to the contract. That letter was probably circulated to everybody in the organization or connected with the organization in any way." At the June 6, 1946, hearing, Mr. Kayser testified as follows:<sup>78</sup>

The notices involved in these exhibits, 40, 41 (a) and (b) referred to on page 188, were to remind producers and their domestic selling agents, the latter in many cases also Carbexport distributors, of the last sentence of the THIRD CLAUSE of the producers' SALES AGREEMENTS which requires that all reasonable precautions be taken by the producers to prevent carbon black sold by them in the United States, Canada, and Mexico from being exported except through Carbexport. Crescent Carbon Co. and Canada Carbon Black Co. were apparently buying carbon black from Carbexport members for resale within the United States, Canada, and Mexico.

Mr. Oscar Nelson's testimony on these exhibits included the statement that "It is my judgment that if Carbexport as the selling agent for the producers does not have authority that makes its agency exclusive, the Export association cannot succeed."

Mr. A. F. Kitchell, an officer of Binney & Smith, was questioned about that distributor's sale of 82,000 pounds of black to the C. E. Johnson Co. between May 1933 and June 1936, as follows:<sup>79</sup>

Q. And you don't recall whether he represented it was for export or whether it was or not?

A. Of course there was no call for him to declare the use of the material because of the fact that it was high grade black and under no restrictions whatsoever.

Q. You do not want this to appear in the record as an exception to the policy of Carbon Black Export or yourself with reference to your mutual arrangement to be solely a distributor for Carbon Black Export and not to sell for export in any other way?

A. We would certainly want to uphold that obligation in every other way.

Mr. Thomas D. Cabot testified as follows in reference to the exclusive provision of the contract:<sup>80</sup>

Nor is it to the interest of a principal to permit his agent to distribute the product of others. Unless the association can grant an exclusive agency for some brand or territory and can require that agent to handle only his line of goods of a given kind or type, I consider that any agency or distributor arrangement would be practically impossible and that it would be necessary for the association to deal directly with consumers through salaried employees. This would be a revolutionary and costly change in the export field and would undoubtedly provoke competition from new producing enterprises in foreign countries.

Contained in the record is the photostatic copy of a letter dated July 21, 1938, from Mr. Kayser to Mr. Godfrey L. Cabot, with notation that

<sup>78</sup> T. 1695.

<sup>79</sup> T. 1619.

<sup>80</sup> T. 1083-1084.

a copy thereof was sent to all the association directors. It is identified as exhibit 42 A-B, and reads as follows:

The progressive realization of reports current during the last three years about proposed carbon black production outside the United States intrigues our distributors' agents more and more. Lately we have had a number of appeals for modification of the provision in our distributors' contracts obliging our representatives to sell Carbexport black exclusively. The Roumanian producer is looking for export markets and is making agency offers which interest some of our agents.

The precedent regarding the "exclusive" contract provision established by the decision of Carbexport's directors in October 1935 to allow German agents to handle German, Czecho, and Hungarian production in Germany together with ours makes us uncertain how to answer the aforesaid appeals. Our policy with respect of the "exclusive" provision needs clear definition. If our directors will express their views in reply to this letter, the guidance we will be able to draw from the consensus of opinion will make it necessary to call a meeting for the purpose of such definition.

The principal argument advanced in support of allowing our agents to handle a competitive black together with ours is that less damage will be done if the former is in friendly hands. That argument appears to assume that the agent will, in loyalty and friendship, take care that we lose little or no business to the competitor regardless of how he, the agent, may see his own interests.

We consider the assumption dangerous in our type of distributing organization. Our agents, tho "under the same flag," are first of all competitors with each other. It would be too much to expect that those handling a cheaper black together with ours would refrain from using the former as a competitive weapon. Carbexport would be the injured innocent bystander. Furthermore, such dual representation would interfere with the effective carrying out of protective measures against the outside producer we might decide upon because of the divided loyalty under which the "polygamous" agents would find themselves. Eventually each would be forced back into a single loyalty. If Carbexport should be the divorcee it will have simply furnished the cushion on which the agent rested while establishing himself against us. What is more, the competing producer has had the benefit of all the information in our possession and has been saved many of the obstacles to establishing himself. Not the least of the latter would be his agent's lack of sufficient supplies to attract the business of the larger customers.

In October 1935 we opposed the relaxation of the obligation to represent us exclusively, even tho the situation in favor of which this was done appeared unimportant. The time will come when it will be wise to arrive at some understanding with foreign producers of carbon black, but the proper approach to that time is not over a route which gives our competitor a control over our salesmen. We reaffirm that objection now and recommend that we be authorized to enforce the exclusive representation requirement in our distributors contracts literally and without exception.

The record contains no testimony concerning this subject and but one reply, Mr. Oscar Nelson's, reading, under date August 8, 1938 (exhibit 43): "I have your letter of July 21 and am in accord with your recommendation that the exclusive contract provision of the distributors' contracts should be enforced."

Exhibit 98 A-C in the record is the photostatic copy of minutes of a directors' meeting held on October 24, 1935, referred to in section

IV-C above. These record the adoption of a resolution authorizing renewal of all distributors' contracts for the calendar year 1936, but contain nothing resembling the subject matter of exhibit 42 A-B.

Reference was made in the preceding section to exhibits 555 to 564, the association's distributors' contracts extant as of the date of their introduction in evidence at the June 5, 1946, hearing, and to the fact of their extension in January 1941 subject to termination "by either party by at least 10 days' written or telegraphic notice to the other."

The exhibits consist of copies of distributors' contracts with the following concerns:

- Exhibit 555, Godfrey I. Cabot, Inc., Boston, Mass.
- Exhibit 556, African Metals Corp., New York, N. Y.
- Exhibit 557, J. M. Huber, Inc., New York, N. Y.
- Exhibit 558, United Oil & Natural Gas Products Corp. Ltd., Manchester, England.
- Exhibit 559, William Somerville's Sons Rubber Co., Ltd., London, England.
- Exhibit 560, Chas. Eneu Johnson & Co., Philadelphia, Pa.
- Exhibit 561, Wishnick-Tumpeer, Inc., New York, N. Y.
- Exhibit 562, Binney & Smith Co., New York, N. Y.
- Exhibit 563, Chance & Hunt, London, England.
- Exhibit 564, R. W. Greeff & Co., Inc., New York, N. Y.

#### *G. Control of Resale Prices and Terms*

The sixth specification in the bill of particulars reads as follows:

6. Contracts with "distributors" and "agents," some of whom are American exporters, which (a) fix the price, terms, and conditions of sale of carbon black manufactured by its stockholders and others which it sells to such "distributors" for resale to "agents" or consumers in export trade; (b) fix the minimum price and most favorable terms and conditions of such resale of such carbon black by "distributors" to "agents;" and (c) fix the minimum price and most favorable terms and conditions of resale of such carbon black by all such "distributors" and "agents" to consumers located abroad.

Mr. Kayser gave the following testimony describing the association's export price policy. The base price is the price which the association pays to producers. This is fixed by the directors at a rate "to give more net to the producer than he received from other sales." This enables producers to pay the association a "charge-back" to cover the association's deficit from operations—it never operating at a profit. The association settles with the producers on the basis of f. a. s. Gulf port, meaning the price agreed to be paid to producers plus the cost of freight to Gulf port. The association then computes a c. i. f. price by adding to the base f. a. s. price, crating, insurance, freight, and 8 percent for selling costs. The c. i. f. price thus determined is

the price or cost to the distributor and is the minimum price at which the distributor may resell. Mr. Kayser explained it thus:

Well, they buy at a c. i. f. price. Now, they may sell at a c. i. f. price and do in large quantities, which is a minimum of that price which we have sold them, or it may be more. Our control is only over the minimum price that may be charged. They may sell, and frequently do, also delivered at the customer's door. In the event they sell delivered at the customer's door, the additions to the price, covering the additional cost, and so on, are also determined by the Carbon Black Export, Inc. In other words, the distributor may not sell at less than the price determined in the schedules.

He has observed that some dealers in South America have made "surprisingly more than our minimum schedule." The distributor for his services receives a discount of 8 percent.<sup>81</sup> Mr. Carr explained use of the term "discount" rather than "commission" in referring to the distributor's compensation, as follows:<sup>82</sup>

We were advised that under the provisions of British law an American manufacturer who employs an agent for the sale in the United Kingdom of goods manufactured in the United States would become liable to pay British income tax on the entire profit resulting from the sale of those goods, representing the difference between the cost of manufacture and expenses of sale, and the selling price. For that reason it was necessary, unless the member companies were to be subjected to extremely heavy tax liabilities, to draw the distributors' contracts in the form of sales, c. i. f., and instead of allowing the distributors an 8 percent selling commission, to put that distributor's compensation in the form of a discount.

I might add that this feature of the distributor's agreement was submitted to British counsel in London for approval and was approved as forming such a contract, would not subject the original producers of the black to the British income tax liability.

Mr. Kayser identified exhibit 24 A-L, consisting of price lists as follows:

For Norway, Sweden, Finland, and Denmark, November 30, 1934, exhibit 24 A-B.

For Norway, Sweden, Finland, and Denmark, June 3, 1935, exhibit 24 C.

For Holland, Sweden, Finland, and Denmark, February 1, 1938, exhibit 24 D-F.

For Finland and Sweden, March 7, 1940, exhibit 24 G-I.

For Sweden, July 16, 1941, exhibit 24 J-L.

Packaging is described in the lists as "uncompressed in 150-pound cases, quarter-compressed in 187½-pound cases, half compressed in 225 cases, fully compressed in 312½-pound cases, and fully compressed and dustless in 50-pound bags." Mr. Kayser testified that in course of time carbon black was shipped in paper packages, a latex type of

<sup>81</sup> T. 101; 115.

<sup>82</sup> T. 141-142.

bag, 50-pound size, or in overslips containing two or four small bags 2 feet in length and 6 inches in width and height. Price on the lists are specified in United States currency and are applicable to 100-kilo and 100-pound units. A factor not appearing on the price lists but implicit in the prices themselves is that of ocean freights. In order to make a uniform price announcement to some 170 distributors located all around the world, it was found impractical to quote prices and exact freight rate to the numerous destination points involved. A system of average freight rates weighted by tonnage to certain areas of the world was devised. Mr. Kayser described it as follows:

We will assume that on the continent of Europe, or that the freight rates to the continent of Europe were within the range of 10 cents a cubic foot to 20 cents a cubic foot. From records we had in our possession, we knew approximately what each one of the countries whose freight rates fell into that zone, took in volume, so we weighted each one of these freights by tonnage that it covered, and divided by the total tonnage and arrived at an average weighted freight factor.

Now, it so happened that areas in Europe and areas in North Africa, and perhaps areas in South America, that their freight rates fell within that 10- to 20-cent range, so that the price to a dock in South America in that range would be the same price as to France, for instance. Then the rest of the world was divided or fell into a range, say from 20 to 30 cents, so that the freight factors we used or we devised was by dividing the world into two zones and that cannot be marked by a line through the globe or anything like that, or a straight line. The location of any market in a zone depended upon the range of its freight rates. Additional price schedules, similar in form to the foregoing, for Austria, Hungary, and Switzerland, dated February 1, 1938, and for British Malaya, same date, appear in the record as exhibits 575 and 576.

Mr. Kayser testified that exhibits 22, 23 A-D, and 586 A-G, represent the "complete statement of the basic selling policy." Exhibit 586 A-G consists of four such statements, two of which duplicate exhibits 22 and 23, which are briefly described as follows: Exhibit 586 A, dated November 30, 1934, is entitled "Basic Selling Policy" and consists of 11 sections lettered (A) to (L). (A) "No price decline guarantees shall be given on any sales." (B) All contracts to be in writing and "requirement" contracts not permitted. (C) Long-term contract to contain privilege by seller to prorate deliveries. (D) Contract to grant seller cancellation option in event of governmental interference with payment or delivery. (E) No firm offers—all prices subject to change without notice. (F) All annual contracts to be terminated within the calendar year. (G) 1935 contracts to specify termination date. (H) All prices will be based upon shipment from Gulf ports. (J) Actual consular fees paid chargeable to buyer. (K) Moisture guarantee to be 2½ percent at shipment from plant. (L) Sales price in effect in country of consumption shall apply as minimum

regardless of point of shipment. Exhibit 586 B-C, dated July 1, 1937, exhibit 586 D-E, dated February 1, 1938, and exhibit 586 F-G, dated March 7, 1940, are entitled "Standard Conditions and Terms of Sale." These are similar in substance to exhibit 586 A, except that the 1937 issue added 3 new sections and the 1938 and 1940 added an additional 2 sections, containing all told 17 lettered A to Q. The 1938 and 1940 additions concerned ocean freights and war-risk insurance. The three sections added to the 1937 issue, and repeated in the last two are: (F) Maximum payment terms, 30 days from date of delivery; (G) 1 percent cash discount allowed for cash payment against documents in New York; and (H) "The prices in Carbon Black Export, Inc.'s price schedules are net prices for resale by distributors, agents, and subagents. No discount, other than that authorized in the previous regulation (G), may be allowed customers for prompt payment." The price decline clause (A) was slightly modified to read "No price decline guarantee (Fall Clause) shall be given on any sales."

Mr. Kayser described a basis of control over distributors and agents consisting of a system of reports as follows:<sup>83</sup>

The reports covered two types of transactions. The first type of transaction was that one which required the direct shipment of the goods from the United States to the consumer.

The second type of transactions were the contract sales as well as spot sales for less than 50 cases or equivalent lots. I believe. What was required in either report, whether I have covered the matter completely or not, was the name of the customer and his address, the quantity involved, the price at which it was sold, the terms allowed, the full description of the types of packages required, and details of that kind.

\* \* \* \* \*

That was the basis of the control. In the event there was any question about adherence to the numerous regulations we made from time to time with regard to the rate of exchange, for instance, at which the dollar price was allowed to be converted to the price of the market in which the goods were being delivered, we would require the original contracts or copies thereof for examination.

These records not only furnished the basis for our control, but also furnished the information from which we drew up statistics, statistical reports as to the relative position of distributors in any given market, and total sales in the market, and so on.

Another method of control was to issue these basic selling policies which represented the major items of the code of conduct, and to issue amendments either by letter in special cases or by new issues of the basic selling policy keeping agents and distributors informed of what was required everywhere.

Now getting to the question of discipline. There have been a few cases where the distributor or agent has had to be what you term as "disciplined." I think I probably used that term myself.

Mr. Kayser pointed to exhibit 27 A as illustrating association procedure in checking deviation from sales policy. This exhibit, dated

<sup>83</sup> T. 174-177.

June 23, 1933, is the photostat of a telegram to the Cabot company, which he termed "an admonition to please behave." It reads as follows:

PLEASE CABLE YOUR ITALIAN AGENT NOT TO QUOTE AEROPLANO MILAN ITALY SPHERON LESS THAN FAS BASIS THREE SEVENTY FIVE STOP AMOUNT INVOLVED IS TWENTY CASES STOP THIS BY REQUEST.

Exhibits 29 A-i to 30 consist of 11 photostats of correspondence passing between the association and Binney & Smith, distributor, between January 18 and August 31, 1937, relative to an infraction by the latter's Belgian agent, Peter Freres. Mr. Kayser referred to this group as a "detailed account of how we proceed in matters of that kind." The correspondence indicates that the agent made two deliveries to a customer on a purported single c. i. f. invoice. The distributor eventually agreed with the penalty imposed, a 2-month suspension of the agent, which is set out in exhibit 29-D as follows:

We have decided to suspend the privilege of Peter Freres to sell for you in Belgium for 2 months. Please cable them this information, advising them that the suspension goes into effect immediately on receipt of your cable, and that they are barred from making any forward or spot sales during the 2 months' period beginning with such receipt, whether it be for delivery by direct shipment or ex warehouse.

Mr. Kayser cited as an illustration of protection given distributors against arbitrary deduction of discounts by customers, the case of Semperit, appearing in exhibit 31 A, photostat of a letter dated February 6, 1937, association to Binney & Smith, and reading as follows:

During the past year the firm of Semperit, with branches in Austria, Poland, and Czechoslovakia, has on various occasions paid each of its suppliers in advance of 30 days from steamer arrival and has arbitrarily deducted a discount. Protests by distributors and their agents at this unprivileged practice have not consistently succeeded in recovering the discounts taken.

In consequence of Semperit's arbitrary position in this regard we find it necessary to require that no further sales be made by any distributor or agent to this customer unless there is a prior definite understanding that invoice amounts are net under all circumstances except when cash is paid by the buyer in New York against delivery of documents. The exception carries the privilege of deducting 1 percent discount. Any variation to the foregoing requirement shall mean no sale. This notice is being sent to all distributors. Please promptly instruct your agent accordingly.

Mr. Kayser testified that on two occasions fines have been imposed on distributors, once in the case of Cabot and once against Binney & Smith. The latter is evidenced by photostat of the association's letter of February 9, 1937, to that distributor, reading as follows (exhibit 32 A):

From the time when Carbon Black Export, Inc., made the regulation that a customer must make cash payment in New York against presentation of docu-

ments in order to enjoy the 1% discount privilege and up to November 13th, 1936, your company has admittedly allowed the discount to Goodrich Rubber Company and Goodyear Tire & Rubber Company on more generous terms. The infraction is subject to penalty under the Distributors Contract between your company and Carbon Black Export, Inc.

Of the penalties provided by the contract the one most justly fitting the character of the offense is unavailable. Therefore it has been agreed with you that a cash fine shall satisfy the requirements in this one case.

Consequently I herewith impose a fine on your company of \$1,500.00 and request that you make arrangements for its prompt remittance to Carbon Black Export, Inc. I must advise you further that a recurrence of this violation of regulations will call for prescription of one of the more severe penalties under the contract.

Exhibit 33 A-B, photostat of letter from the association to Binney & Smith dated April 14, 1937, lists sales to four subagents, and refers to the report Forms II A as follows:

We require, as you know, the name of the ultimate consumer of all black under our jurisdiction and the listing of a sub-agent's name by an agent, on its Form II A to us, does not meet our regulations. Further, although your sub-agent may buy, with or without your permission, a supply of black from another distributor, the responsibility of the agent involved is still binding to the extent of furnishing as usual information on Forms II A, concerning the ultimate disposal of such material.

The association's control over distributor's advertising is evidenced by exhibit 35, photostat of a letter from the association to Columbian, dated January 8, 1938, in which is quoted the opinion of counsel reading as follows:

(2) The Distributor may advertise in his own name and at his own expnese, but he certainly has no right to advertise himself as agent for any Producer, since that would be a misrepresentation of fact and a repudiation of the obligations assumed by paragraph Second of the Distributor's Agreement. There is nothing to prevent him from advertising (1) brands which he has the right to use, or (2) high-grade blacks. In the latter case, it would seem that he would also have the right to use the Producer's name, provided it is so used as to be confined exclusively to such high-grade blacks.

Referring to exhibit 45 B, photostat of a letter from the association to Cabot, dated July 16, 1937, and stating that a disclosed consumer must be quoted the minimum price but that "a jobber wishing to purchase for resale purposes must be quoted the highest price regardless of quantity," Mr. Kayser testified as follows:<sup>84</sup>

Q. In other words, then, a jobber in the United States desiring to purchase carbon black from a distributor and that being his only source, he couldn't buy it directly from the Carbon Export Co?

A. That is correct.

Q. He would have to pay what?

A. The highest schedule price.

<sup>84</sup> T. 192.

Q. For export?

A. For export.

Q. No matter what quantity was involved?

A. That is correct.

It will be recalled that in section IV-E above, with reference to exhibits 49 to 55, Mr. Kayser testified that it was the association's policy to refer all inquiries for carbon black to distributors. He also testified that from 1933 to 1940 there was a substantial increase in the number of inquiries from miscellaneous persons, firms, and corporations for carbon black for export.

Exhibits 46 A-C are photostats of correspondence between the association and distributor Cabot, dated in early February 1938, concerning Cabot's plea that a Boston exporter-customer be allowed freight on a 50-pound shipment to South America. The association computed the amount of freight and permitted its allowance, writing "considering the small quantity of black involved in the present instance, we are willing to make an exception."

The omission of the so-called "Fall Clause" from long-term contracts, was the subject of Mr. Kayser's letter of March 12, 1938, to Mr. Van Valkenburgh of Dunlop Rubber Co., Ltd., Buffalo, N. Y. The latter states that the explanation is made because the association's distributors are unable to make a full explanation. The pertinent portions of the letter, being the first five paragraphs, read as follows (exhibit 70 B) :

Please pardon the delay in replying to your letter of March 7th. It is due to the fact that I have been out of the office continually since your communication reached me.

The absence of the so-called Fall Clause from the contracts which are offered carbon black buyers in the export markets is not the result of an attitude taken by our distributors and agents on their own initiative. Under our arrangements with them our representatives are obliged to refuse it.

Unfortunately I cannot agree with your opinion that there is no reason for us to refuse the Fall Clause in foreign contracts. Our industry had an illustration of the sad state of affairs it can bring about in the free-for-all period which existed prior to 1934. You will recall that period as the unhappy time for the producer when the said stipulation played such a large part in wrecking prices abroad, as well as the time when the export consumer was without protest obtaining his carbon black at a materially lower price than that at which the American consumer could acquire it. When Carbexport was formed by those who were suffering the consequences of the wreck, one of its first actions was to bar the further use of the sales condition which so thoroughly implemented it.

In my opinion the conditions now prevailing in the American market prove the action of Carbexport with respect of this insidious contract stipulation to have been most sound. If I have observed those conditions correctly, the Fall Clause in domestic contracts has contributed its full share to the debacle.

With the best of will I am unable to understand why Mr. McDowell, at Fort Dunlop, should feel greatly disturbed over being unable to obtain any price

protection clause in his carbon black contracts. He cannot be fearful that we completely reject the principle of price protection to the customer. On each of the two occasions in our history when we have reduced sales prices, namely effective December 1st, 1934 and February 1st, 1938, we have specifically stated the reductions to be applicable to all balances on customers' contracts which had not been shipped from the American seaboard prior to those dates.

Mr. Kayser testified that distributors chose their own agents and, except in one or two inconsequential instances, the association had nothing to do with their approval. In referring to exhibit 73 A to 73-Z-35, a 59-page list of distributor's agents and subagents, he testified that on account of wartime conditions, it would be impossible to determine which of these are authorized to do business in the United States.

Mr. Norman L. Smith, president of Binney & Smith, on a visit to his firm's customers in France, wrote Mr. Kayser on May 25, 1935 (exhibit 588 A-B) that he had encountered pressure to sell below the association's price list and to allow a 1-percent discount for 30-day payments, concluding his letter with the suggestions:

1. For the Export corporation to discharge all distributors' agents in France and simply appoint one agent for all the corporation.
2. To pay every agent a fixed commission, but of course by that I do not mean the same amount to each agent.

Mr. Kayser's reply to the foregoing is in the record as photostat exhibit 179, dated June 11, 1935, and reads, in part, as follows:

I am not certain that it is yet the proper time to propose discharging present agents and establishing a single one responsible directly to Carbexport. I doubt it. The overthrow of the Codes by the Supreme Court decision leaves only the sketchiest instruments for controlling the domestic situation. I imagine that producers will want to take a fair look at the ultimate effect on the industry before further concentrating control in Carbexport hands.

There is nothing further in the record as to any action about agents in France. Mr. Kayser testified that Mr. Smith's reference to the codes meant the N. R. A. and that his own phrase "sketchiest of controls" meant the Trade Practice procedure of the Federal Trade Commission for dealing in the United States with "unfair practices similar to those in France about which Mr. Smith complains."<sup>85</sup>

Mr. A. F. Kitchell, of Binney & Smith, gave testimony concerning contract procedure covering their domestic business which permitted upward adjustment of prices every 3 months, and as to fall clauses as follows:<sup>86</sup>

A. I mean that 100 percent of our contracts never carried the fall clause. When markets were weak or the customer thought that prices might go down, they were very apt to insist upon a fall clause and we felt obliged to put it in.

<sup>85</sup> T. 1711.

<sup>86</sup> T. 1628-1630.

On the other hand due to our general policies which have grown up over the years, we have had a mutual understanding with practically all of our accounts that if conditions change materially during a period of any contract and the customer was faced with the position where the contract named a price and he could get a better offering, and we know darn well he could, we never fell back upon the legal rights in the contract but tried to do what we thought was the fair thing, looking toward his protection and our protection later on.

Q. You say these fall clauses were not universal. I would guess, and correct me if I am wrong, in connection with this sort of thing that probably it was the big customer who was always successful in getting the fall clause to operate.

A. He may have led the way, sir, but in our position within our own organization, we have never tried to draw the line between the big man and the little man. We felt that each was entitled to a fair deal.

Q. I have another question here and I think probably you have covered it, but I will ask you this: What was the purpose of these clauses, namely, the escalator and fall clauses?

\* \* \* \* \*

A. And in the purpose of these clauses, which I give, it is easy to get one kind when the market is weak and going down and it is easy to get another kind when it is the reverse. But we have tried not to play the thing unfairly one way or the other, but to get a good average—fair experience with our trade that would in turn protect us in the long run.

Q. You were successful, were you not, in eliminating the fall clause from export trade, were you not?

A. I don't have anything to do with that.

When the association commenced operating in May 1933, it required distributors to file with it the details surrounding all contracts running for the calendar year in question. Exhibits 297 and 623 are photostat copies of such requests, which Mr. Kayser testified formed the basis of the association's control of export transactions. Exhibit 297 is dated October 17, 1933, notes a price advance, and requests data on all contracts entered into immediately before and after the price increase. Exhibit 623, dated July 24, 1933, requests filing of five specific contracts with firms named Lorilleux, Goodyear (England), Neumaticos Goodyear, Goodyear (Australia), and B. F. Goodrich, the request being prefaced as follows:

Because of the number of important requirements contracts and option contracts which appear in the lists given on Forms 1 and 2, on the statistics we called for immediately after May 24, we find it necessary to require the filing of all such contracts by all companies.

The Forms 1 and 2 are the report forms described above by Mr. Kayser. Photostat copies of the report forms appear in the record as exhibits 584 and 585. Exhibit 584 is known as "Form II," is for the use of distributors, and calls for information on contract, customer, amount, price, terms, place of delivery, packaging, and name of agent. It carries a notation that the form be filed "immediately after contracts are obtained." Exhibit 585 known as "Form II A," is designed for the use of agents and calls for information on delivery date, cus-

tomers, quantity, spot or contract sale, price, packaging, type of black, terms, and name of subagent. It carries a notation "Listings on this form mailed monthly, not later than the 10th of the month following."

At the June 6, 1946, hearing, Mr. Kayser read into the record a prepared statement summarizing the association's pricing policy as follows:<sup>87</sup>

Distributors paid Carbexport the c. i. f. prices thus devised less 8 percent discount (their commission) on the f. a. s. base factor, regardless of quantity. The commissions which distributors paid out of their own allowance to their agents were, of course, less and were made uniform depending on the type arrangement in effect.

D. PRICES AT WHICH CARBEXPORT'S CONTRACT DISTRIBUTORS RESOLD TO THEIR  
CUSTOMERS ABROAD

All prices under this title were set by schedules issued by Carbexport. The schedule resale prices governed sales by distributors and/or agents to customers.

While schedule-making policy has tended toward uniform programing, complete uniformity has never been achieved. The aspects of uniformity to which scheduling successfully clung were the following:

*(1) A division of the export world into two zones according to the value of the freight factor in c. i. f. price structure*

One zone, termed "low zone," comprised essentially markets to which ocean freight rates from Houston, Tex. ranged between 10 and 25 cents per cubic foot. The other zone, termed "high zone," comprised essentially those to which the ocean freight rates ranged over 25 cents. The original freight factor used in making c. i. f. prices to destinations in the first zone, for instance, was the calculated average of all the separate rates to destinations within the 10-25 cents range weighted by the estimated tonnage moving to each. The factor arrived at was 15 cents per cubic foot. The like original factor arrived at for the second zone was 32 cents per cubic foot.

The low and high zone factors were checked several times between 1933, when Carbexport began to operate, and the outbreak of war in September 1939. The first recheck showed that failure to take into account that the largest markets were uniformly those with the lowest freight rates within a range and that any disproportionate increase in volume in those markets would create an unintended increment for the manufacturer in over-all net return from exports. Such an increase in volume was in process at the time of that recheck. The freight factors were not changed, however. A compensating reduction in the uniform c. i. f. prices for each zone was made instead. From that action the policy developed of leaving the original factor unchanged and of compensating for increments and decrements respectively by reductions or increases in c. i. f. prices.

The effect of this procedure was to make the c. i. f. price to every market within a zone uniform and to make only two different basic c. i. f. prices in the world. The fact that it was at times necessary to modify the uniform c. i. f. price for some particular market in a zone for some special reason, such as compensation for the high cost of providing exchange due to regulations by the government of that market, did not alter the effect generally.

<sup>87</sup> T. 1678; 1682.

(2) *A minimum number of resale price schedule patterns*

The most detailed pattern—the one employed in markets where the use of carbon black was extensive and varied as to type, size, and number of customers—recognized the need for quantity differentials because of the extra costs attaching to handling many orders for small quantities. This pattern set the prices for every type of sale from c. i. f. to delivery from an inland warehouse. The least detailed schedules were for the simpler markets where quantity differentials were unnecessary. They set the c. i. f. prices only; they indicated by regulations the procedure for adding charges for extra costs where necessary. A sample of each of these two patterns is attached (Australia 1938, as exhibit 575, a-d, and British Malaya 1938 as exhibit 576). Between these extremes there were a few intermediate patterns which represented such modifications of the most detailed one as the characteristics of the markets covered thereby dictated.

Resale prices fixed by Carbexport were minimum prices. Since, however, practically every market was served by from two to all of Carbexport's contract distributors (a distributor's territory was world-wide) and their agents (an agent's territory was local), these minimum prices were, with exceptions occurring in isolated spots, the actual prices of resale. Since Carbexport collected from its contract distributors no more than the lowest prices of a schedule regardless of quantity of a schedule for which a price was made (which is the c. i. f. price described under subsection B above), all schedule increments over said lowest scheduled c. i. f. prices went to distributors and/or their agents to reimburse them for the extra service costs involved in small quantity sales and deliveries and in deliveries beyond c. i. f. The amount of the increments allowed from time to time was arrived at through examination of the showings made by groups of agents resident in the markets where increments were granted.

The inauguration, in 1937, by the Cabot company of a system of bulk delivery of carbon black to domestic users at an economy variously estimated from an eighth to a quarter of a cent per pound, precipitated a price war in the domestic market, in the course of which, following November 1, 1937, the price of carbon black fell from 4 to 2¼ cents per pound. This resulted in demands for a reduction in the export price. On January 14, 1938, Mr. Kitchell of Binney & Smith wrote Mr. Kayser as follows (exhibit 306):

I have discussed with you on the telephone some of the situations which have arisen in connection with our relations with important consumers abroad.

Speaking solely as a distributor, I feel that the matter of good-will is of sufficient importance to every producer member of the corporation to consider the situation very promptly, and to give immediate indication to the trade of their intention to make some change in the schedule of prices.

Fortunately, it does not seem necessary to go to any drastic limits, as I believe that a reduction of ½ to ¾ cent per pound in the export schedules would rebound to the benefit of the corporation, and be worthwhile for the future. I hope, accordingly, that your members will consider these matters promptly, and release their intentions without loss of time. In doing so I recommend that the announcement be cabled as soon as possible to the effect that the new price schedules will be effective until further notice on shipments clearing the port on and after February 1, 1938.

Mr. Kitchell, questioned about this letter, testified as follows:<sup>88</sup>

Q. Why did you emphasize "solely"? You say "Speaking solely as a distributor."

A. Mr. Smith had taken it up with me for the reason that he was concerned on account of the pressure brought by certain foreign buyers for a lower price in the export market, knowing that he was on the firing line with direct responsibility—

Q. (Interposing.) To stockholders?

A. No; direct responsibility of taking care of those customers, they looked to him.

Q. Oh, I see.

A. He naturally felt the pressure more than anybody else, and I could sympathize with him as a seller of the effect.

Q. Was it also the pressure from buyers that had a dual capacity? I mean the larger rubber companies who had plants both here and abroad?

A. That was a combination of both.

Q. Yes.

A. However, looking at it from the standpoint of the carbon black itself I could not wholeheartedly recommend a lowering of the export price, because I saw no reason for it.

Q. I think it is in exhibit 305, which—just preceding 306, where there is a memorandum from Mr. Kayser setting forth certain aspects of the relationship between those prices. Wasn't one of them, as I read it, that there was a likelihood of what we might call an arbitrage taking place between those large customers—that is, buying the rubber in this market and sending it to their foreign plants if that margin was too wide?

A. I heard that suggestion. I never knew of its being carried out.

Q. You did not have that fear on your own account of that kind of arbitrage between those two markets?

A. The difficulties in so doing are rather great. The products that we furnish to customers in domestic markets are in either bulk hopper cars or in bag form; neither of that can be exported. If they are going to export it they have got to take and put it in containers of some kind, ship it to the seaboard at considerable expense, which, I gather, in most cases would more than offset any difference in prices.

Q. There would be another limitation on arbitrage of that sort insofar as the carbon black export rules would have prohibited it if they knew—that is, from selling for export in this market; isn't that correct?

A. That is right.

Mr. Norman L. Smith, of Binney & Smith, wrote Mr. Kayser on January 16, 1938, the first three paragraphs of his letter reading as follows (exhibit 307 A):

I have been asking myself what the carbon black producers would do if the present price situation was reversed, that is to say, if the price to the domestic manufacturer was 1¾ cents per pound more than the price to the foreign manufacturer. The large consumers here would certainly resent having to pay more than their affiliates abroad, and I am wondering if the producers would be deaf to their appeals to be placed on a parity with their foreign competitors. Would the producers not be afraid of incurring the domestic manufacturers'

<sup>88</sup> T. 941.

displeasure and fearful lest they might take some steps to protect themselves?

Should we therefore allow geographical locations to penalize certain customers? Is it good policy, simply because we have the legal machinery to maintain the present differential between the export and domestic price to do so? I do not believe the Export corporation was created with this idea in view, but rather to maintain a stabilized market. The Export corporation, like any other supplier, exists on the goodwill of its customers. It is of course a fact that irresponsible competition has reduced the price for the domestic market far below a reasonable basis, and naturally I do not advocate an equal reduction for export, but some consideration should be shown to the foreign buyer. The corporation has proven its power to maintain prices—now it should display its magnanimity.

Further, we have to remember that a great many concerns who resent the maintenance of the present export prices are branches or affiliates of some of the largest consumers in this country, and the parent companies here I understand are greatly resenting the fact that their branches have to pay so large a premium.

Mr. Kitchell testified further in respect to the foregoing exhibit, as follows:

A. \* \* \* That there was no reason in the world for lowering the export price as such. The domestic price here was purely an abnormal situation, brought about by this competitive fight. Those conditions did not apply in any way in the export trade. No bulk black was shipped abroad. There was no question of a differential. The price in the export field was on a normal basis. Just because we were fighting here—I think Mr. Smith will agree with me—we saw no real reason to wreck the export price at all.

Mr. Reid L. Carr was questioned on this exhibit as follows:<sup>89</sup>

Q. Do you agree with Mr. Normal Lee Smith's statement in 307 A and B, that Carbexport was created to maintain a stabilized market?

A. Well, I would say that the stabilization of export markets was certainly one of its main objectives. But I would not say that it was created for the purpose of stabilizing the domestic market and I don't understand that that is what the letter means.

Mr. Billings of the Cabot company, on January 21, 1938, forwarded to Mr. Kayser a letter of Dunlop Rubber Co., Birmingham, England, to Cabot's agents, Hughes & Hughes, London, England, dated January 10, 1938, which reads as follows (exhibit 309 B):

Now that the domestic price of gas carbon black is 2½ cents per pound in bulk f. o. b. plant, we consider a reduction in the export price to use is overdue and we wish you to advise your principals that the position created by the wide differential now existing in the domestic and export prices is unjustifiable.

We want you to press very strongly for an immediate adjustment to the basis of the domestic price, after allowing for any increases in inland and ocean freights. Failing this it is our intention to take immediate steps to protect our interests in this market.

Yours faithfully,

(Signed) J. McDowell,  
Chief Purchasing Agent.

<sup>89</sup> T. 552.

Mr. Kayser, as president of the association, in the face of this pressure, prepared an agenda for the December 10, 1937, meeting, photostat exhibit 305 A-D, the relevant portions of which read as follows:

This is the first time in its history that Carbexport has to consider price policy in face of a declining domestic market. The unanimity of opinion on export price policy which has been natural during the period of unchanged price in the domestic market will no longer exist. The principal division of opinion will arise over the question of whether or not export prices should automatically follow the course of domestic prices.

The main reasons which will be offered in support of the contention that they should do so will be that a differential between the two in excess of the sum of calculable and estimable transportation costs from the U. S. will (1) invite an increased movement of nonmember black into the exports markets, will (2) encourage international customers and merchants to buy in the domestic market and ship abroad against us, and will (3) induce large foreign buyers to encourage to the utmost a greater production of carbon black outside the U. S.

It is the management's opinion that at this time these reasons are not operative and that, therefore, they do not offer sufficient grounds for a change in Carbexport's present schedules. The outsiders, with the exception of Magnolia Petroleum Co., have been moving approximately 90% of their production into export right along. The total quantity which they could shift from the domestic into the export market in the next three months would not be more than one and one-half million pounds. International buyers and merchants are not likely to go to the trouble and expense of equipping themselves to take black in domestic bags at U. S. seaports, package them and arrange transportation until domestic prices and transportation costs are stabilized. Neither of these factors is stable now and both of them are likely to continue in a state of confusion for the next two or three months. As for the third reason, its force is only likely to exert itself if an excessive differential is maintained continually after the factors which make up the price are stable.

In addition to the foregoing negative argument, there are, in the estimation of the management, the following positive reasons for not changing export prices at this time merely because domestic prices have changed. They are:

(1) That Carbexport was formed, in part, for the purpose of making the export and domestic markets independent of each other, as is the situation in the case of all important articles in international commerce. If this were not so it would follow that whenever the Export Corporation might find it necessary to lower prices to meet competition in one or more foreign countries, the domestic price would have to decline immediately and in like amount even though there were no competitive pressure on it.

(2) That Carbexport is a Corporation in which its stockholders have important investments. It is reasonable of any investor to expect his Corporation to make money for him as long as it can do so competitively. In addition to having invested thus, Carbexport's stockholders pay it a fee for moving their black at a profit. If the profit were given up except under competitive pressure Carbexport's members would have reason to be skeptical of the advisability of contributing a neat sum monthly to the maintenance of an institution which fails to provide the market stability which will assure the profit.

(3) That Carbexport should act when it can in such a way as to prove that its policy is not dependent on what happens in the domestic market, lest members come to feel that they are entitled to exercise their right to freedom of action in

the domestic market as a means of dominating and affecting the export market to the disadvantage of the Corporation.

The President presented his recommendation as to export prices of carbon to continue present c. i. f. prices to customers in effect on all sailings from U. S. ports up to and including, say, March 31st, 1938, unless otherwise instructed before that date.

The directors met on December 10, 1937. Photostat copy of the minutes, exhibit 103 A-B, discloses the following action taken on prices:

It was moved and seconded that the President be authorized and instructed forthwith to announce to the trade that present c. i. f. prices will be reduced one cent per pound for the period from April 1st, 1938, to July 1st, 1938. This motion was lost.

The President presented his recommendation as to export prices of carbon black for the first quarter of 1938.

Upon motion duly made, seconded and carried, the following resolution was adopted:

*"Resolved*, That the President be and he hereby is instructed and empowered to continue the present c. i. f. prices for sales made for shipment from U. S. ports up to and including March 31st, 1938."

Thereafter, on January 22, 1938, Mr. Kayser addressed a letter to all members reading as follows (exhibit 310 A-B):

When on last December 10th the Corporation announced unchanged forward export prices for the first quarter of 1938 a number of factors bearing on price determination were seriously unsettled. An important one of these, namely ocean freights, has lately been put in order and at a lower level than seemed probable in December. It does not seem too hazardous to estimate the status of another, namely domestic rail freights, for the next several months.

Observation of the activities in export of nonmembers of the Corporation indicates strongly that at least one of them is quoting in some important markets from 7% to 11% lower than our schedules. The differential between the domestic and export base prices has increased  $\frac{3}{4}\text{¢}$  since our December 10th announcement. Its size is now such as to give restive large customers strong inducement to consider long term arrangements with our competitors.

In the circumstance I consider it advisable to reduce both our purchase and sales schedules for the balance of the previously announced selling period, and therefore recommend the following:

(1) That our c. i. f. prices be reduced 75¢ per 100 lbs. for sales made for shipment from U. S. ports from February 1st, 1938, to and including March 31st, 1938.

(2) That our f. a. s. Gulf ports prices for settlement with producers on all sailings on and after February 1st, 1938, and until further notice be reduced 75¢ per 100 lbs.

The by-laws of the Corporation provide that export prices may be changed without a meeting of stockholders by the written consent of the holders of a majority of the total number of shares outstanding. I herewith request your consent to price changes as above recommended and would appreciate a reply by return mail.

All members appear to have concurred in the price decrease, two of them in writing. United, by letter dated January 31, 1938 (exhibit

311-C), and Cabot, by telegram dated January 24, 1938. Member Panhandle dissented, its letter dated January 25, 1938 (exhibit 313), reading as follows:

Your letter dated January 22 addressed to Mr. Wishnick received in his absence.

We wish to advise that we see no reason for reducing the export price at this time, and cannot agree that the present domestic price has any bearing whatsoever on what the export price should be, and we definitely vote "no" against making a lower price at this time.

Some foreign buyers were not satisfied with the reduction. Mr. Gundry of Binney & Smith's London, England, office, in a letter to Mr. Kayser dated March 3, 1938, wrote as follows (exhibit 319 C-D):

You will remember that you tried to prove that the reduction of 0.75 cent per pound in the export price of Carbon Black resulted in a net reduction of the price to the producers of one and a quarter cents per pound.

\* \* \* \* \*

As I understand it, the price of Carbon Black in the United States has been reduced since the 1st November last by one and three-quarter cents per pound, and I believe that the present price is two and a quarter cents per pound. The price c. i. f. U. K. for the 50-pound bag packing which, after all, is the most important, is 5.21 cents per pound. At current rates I calculated that freight and insurance costs 0.76 cents per pound, which brings us to a f. a. s. figure of 4.45 cents per pound.

Mr. Kayser's answer to Mr. Gundry's argument is contained in his letter dated March 19, 1938, to the Cabot company, reading as follows (exhibit 320):

In support of my argument that during the period January 1, 1934, to November 1, 1937, the net price received by our producers from sales in export were reduced approximately  $\frac{1}{2}$  cent because of benefits passed on to buyers, whereas during the same period there was no reduction in the net price received from domestic buyers for like reason, I submit the following:

|                                                  |      |      |      |      |      |
|--------------------------------------------------|------|------|------|------|------|
| Our export prices prior to Dec. 1, 1934.....     | 7.90 | 7.53 | 7.28 | 6.43 | 6.43 |
| Our export prices thereafter through period..... | 7.43 | 7.15 | 6.97 | 6.21 | 6.21 |
| Actual price reduction.....                      | .47  | .38  | .31  | .22  | .22  |
| Increased freight absorbed.....                  | .38  | .30  | .25  | .18  | .16  |
| Total diminishment of net price received.....    | .85  | .68  | .56  | .40  | .38  |

Mr. Kayser testified, by means of a prepared statement, that exhibits 306 and 309 (Binney & Smith and Dunlop letters) "are typical of the pressures the few buyers who purchase more than 60 percent of the carbon black consumed are able to bring on American producers" through distributors. There were many such appeals by letter and by telephone in the period between December 10, 1937, and January 27, 1939. His statement further reads:<sup>90</sup>

I have only two other comments to make on Carbexport's export prices. Each statement is made explicitly.

<sup>90</sup> T. 1744.

The first is that Carbexport has never used price competitively against nonmembers. The export prices of nonmembers have been lower than Carbexport's prices, regularly and continuously. Carbexport's prices have never been lowered even to the point of equality to meet competition.

The second categorical statement I have to make is that the export price of carbon black has no effect on the volume of carbon black exported. The reason is wrapped in two facts. Carbon black has a very low density, and a very small quantity by weight serves its purpose in about 85 percent of its use in a manner all out of proportion to its weight. It is economically impractical to store appreciable quantities of it, both because of the amount of space required and because the stock has to be warehoused, the latter because carbon black absorbs moisture in the air like a sponge absorbs water. The cost of that kind of storage space, assuming its availability, is all out of proportion to the savings that can be effected by buying against the narrow range of price increase possible in such a low-priced commodity. The heavy movement of carbon black into export in 1939 had nothing to do with the price. It was due to the fact that expectant belligerents and countries which could look forward to being cut off from supplies of carbon black with the outbreak of war began feverishly stockpiling finished rubber goods, such as tires.

It has been an exceedingly difficult problem for the United Kingdom to stockpile even sufficient carbon black during the war to prevent the shortage which as little as a 2 or 3 months interruption of ocean transport would create.

I call attention to exhibits 310 a-b, 311 a-b-c, and 312 to bring out that only the association of carbon black exporters as permitted by the Webb-Pomerene Act made it possible to effectively limit the extent of the yielding to pressure and made it possible to retreat from a previously taken position in such good order as to prevent the damaging chaos into which pressures in pre-Carbexport days had thrown exporters' interests. The orderly retreat to a line which could be held served nonmember interests to the same degree as it served member interests.

Under questioning, Mr. Kayser explained the phrase "orderly retreat" appearing in his letter of January 22, 1938 (exhibit 310 A-B), as follows: <sup>91</sup>

A. The orderly retreat, and I now quote from my statement, "To a line which could be held," served to hold a stable umbrella over the nonmembers and made it unnecessary for them to lower prices to an unprofitable basis.

Q. Now we are talking about export prices now?

A. That is what I am talking about, export prices.

Q. I thought your orderly retreat was so that you would have a defense against those outsiders who wanted to reflect the domestic situation in the export market?

A. You did think so?

Q. Is that erroneous?

A. I don't recall any such purpose, and I don't know any such stated purpose—or I haven't noticed any such stated purpose in these exhibits.

Q. Well, I wanted to just call your attention that I had that inference in mind so that you could make any statement that you wanted to. I had this in mind, that nonmember producers would find with the discontent that was apparent in the foreign market—because of your maintenance of the higher price because of the calamity in the domestic market—would find that export market attractive and they would say we will go under Carbexport's prices because they are apparently not willing to reflect that situation in the export market. I just wanted to warn you that I had that in back of my mind.

<sup>91</sup> T. 1874.

A. I don't mind helping clarify this situation to the extent that I could, but it seems to me that you have a misconception of the carbon black industry's problems. I don't mean to say as an industry, but as the individual members.

In 1938 there were still such outsiders as Crescent Carbon Co. and Crown Carbon Co., just to take a couple of examples. Both of these companies, if my recollection is correct, were sellers in the domestic market as well as in the export market.

Now, you simply cannot—because for the moment it looks like a more attractive move—desert customers who are depending on you here, because you will never get them back, or if you do get them back it will be over a long pull. Mr. Herkness, I think, testified that he picked a market and stayed in that market for a good many years. He did not have the same problem. It would apparently not have come back into the domestic market if the reverse had been true.

Mr. Kayser testified that his letter to the Cabot company, dated March 19, 1938 (exhibit 320), was an explanation to distributors for use with their customers of the manner in which the association had absorbed freight increases. Questioned whether he knew “any instance when export prices influenced or affected the domestic competitive price,” he replied as follows:<sup>92</sup>

A. The only thing I can answer is that I do not know an instance where export prices were made with the idea of affecting it. Now the word “affect” has a broad a meaning as reasonable in my estimation but if there is any idea to determine intent through that question, I will categorically say there was never a price made that was even thought as being parallel or related to the domestic price in that sense.

A tabulation of the association's export price changes for the period from May 25, 1933, to June 5, 1940, 21 in all, with reference, by exhibit number, to the directors' meeting at which authorized, is in the record as exhibit 665. Corollary to this tabulation is the following tabulation appearing at page 1739 of the transcript, which, after showing deduction of the association deficit charged back to members, gives the members' average net return per pound.

| Year      | Average gross price f. a. s. received per pound (cents) | Average deficit per pound charged back (cents) | Average net price f. a. s. received per pounds (cents) |
|-----------|---------------------------------------------------------|------------------------------------------------|--------------------------------------------------------|
| 1935..... | 5.48                                                    | 0.41                                           | 5.07                                                   |
| 1936..... | 5.40                                                    | .46                                            | 4.94                                                   |
| 1937..... | 5.37                                                    | .50                                            | 4.87                                                   |
| 1938..... | 4.41                                                    | .31                                            | 4.10                                                   |
| 1939..... | 4.36                                                    | .27                                            | 4.09                                                   |
| 1940..... | 4.42                                                    | .31                                            | 4.11                                                   |
| 1941..... | 4.56                                                    | .33                                            | 4.23                                                   |

Exhibit 679, contained in the record is a photostatic copy of a price chart submitted to the OPA in May 1942 in support of the association's application for an export price premium. This chart depicts tonnage and price information from January 1, 1939, to February 28,

<sup>92</sup> T. 1896.

1942. Tabulations are made of gross price per pound received by the producer, and tabulations of deductions for association deficit, and cost between plant and Gulf port leaving a final tabulation of net return per pound to the producer. This, in comparison with a tabulation of "f. o. b. plant price of domestic black," establishes the fact of a differential in favor of export black. On this exhibit the average differential commences with 1.022 cents, and decreases as follows: 0.833, 0.683, 0.367, 0.360, 0.110, 0.232 and for the last period, January and February, 1942, 0.129 cent.

Mr. Kayser explained the decrease to two reasons, first that the export black price "moved in a different pattern than the domestic price," and second, due to a great decline in volume of exports over which the association had control between 1939 and 1942, the cost per pound increased, thus reducing the net to the producer.

It appears from exhibit 680 B, copy of a filing made with the OPA on May 6, 1946, to establish an export premium for furnace black, that filings of price information were made by the association on March 31, 1945, and April 7, 1945. This exhibit discloses use of a premium of 0.8060 cent per pound on black in bags and 0.8726 cent per pound on black in 300-pound cases. Exhibit 683, copy of an OPA letter dated May 17, 1946, heretofore quoted, indicates that the premiums appearing in exhibit 680 B, are those which were established for channel black, in view of the statement in the letter:

Inasmuch as your new items are merely variations of carbon black upon which a premium is allowable this office has no objection to your applying to these new items those premiums which have been approved for your other types of carbon black.

The J. M. Huber, Inc., by its vice president, R. H. Eagles, on November 14, 1939, wrote identical letters to Pennsylvania Rubber Co., Jeannette, Pa., and Dunlop Tire & Rubber Co. (Mr. H. F. Van Valkenburgh), Buffalo, N. Y., the first two paragraphs of which read as follows (exhibit 487-488):

About this time of year the air begins to fill with rumors that the price of carbon black will go up or down. This is just a line to let you know that I have heard no rumors worth mentioning as yet with regard to 1940 prices, and to the best of my knowledge contracts are not yet being offered by anyone.

As you may know, our Export corporation extended current prices without change through the first quarter of 1940, but your guess is as good as mine whether this is any indicator, because the Export corporation has always functioned entirely independently of domestic conditions.

#### V. RESULTS OF OPERATIONS

The record contains evidence and statistical information which, though not directly connected with the seven specifications of the bill

of particulars, throws additional light on the operations of Carbon Black Export, Inc.

Mr. Hans B. Huber, president of the three Huber companies, testified that his company commenced export operations in 1923, did considerable export business in the late 1920's, and against a production ratio of 10 percent had 15 to 16 percent of total export trade when the present association was organized. Prior to formation of the association, export prices were lower than domestic prices and since then they have "been as good or better." The new group has eliminated the old evils of excessive discounts and bad credits. His company built plants in this country for five or more domestic producers and in the late 1920's negotiated for such constructions abroad for Amtorg (Russia), Sonemetan (Romania), and Comodora Rivadavia (Argentina), and is currently interested in such projects in Venezuela and Iran because of the availability of gas in those countries. By way of a prepared statement, he added the following:<sup>83</sup>

Carbexport has operated from 1933 to procure for the American producers a fair price for their product and has more or less effectively defeated the unfair attempts of foreign purchasers to secure an American product at distress prices and frequently at less than domestic prices.

Nonmembers of Carbexport have benefited by the stabilizing influence of Carbexport even when they sold under the established prices. Foreign consumers of carbon black, both for rubber and ink products, have been put on a more fairly competitive basis with American producers for such products in foreign markets where the finished products have been sold competitively, because Carbexport has operated to keep the carbon black export price at least as high as the domestic price. Transportation rates for carbon black have been kept down by the activities of Carbexport whose weight was felt at the shipping conferences since it represented a volume of traffic having a real value to steamship lines. Carbexport has operated to permit small business to participate in export trade—a field not usually accessible to any but the larger producers in an industry. The participation of J. M. Huber Corp. to the extent of about 10 percent of the United States exports of carbon black and our enthusiastic interest in that participation are proof of this point.

The postwar period will be a trying time for the American carbon black industry. When crude rubber again becomes available, it is probable that it will replace a considerable quantity of the synthetic rubber now in use and crude requires much less carbon black. American production has been greatly expanded during the war through private as well as Government financing. Although figures are not available, it may be assumed that Russian production has also greatly expanded and that as soon as Russia can put its house in order it will make every effort to utilize its vast reserves of natural gas to satisfy its own large demand for carbon black and to capture some of the foreign carbon black market. Russia will have an added incentive in order to provide foreign exchange quickly for its rehabilitation requirements. It is known that Canada has been contemplating carbon black production. Projects for production in Venezuela and Mexico are under consideration. The large gas resources of the Middle East will undoubtedly be exploited for this purpose before long.

<sup>83</sup> T. 162; 750.

These conditions mean a greatly increased supply of carbon black and a much more competitive international market. But the expansion of production is not the only threat for we hear constantly of the probabilities of foreign combinations or cartels dominating the postwar markets and we have ample evidence of the tendencies of this sort in the prewar period. If American industry is to maintain its position in postwar international trade, it must be able to organize itself for the purpose and to present a unified front to the strong competitive and potentially competitive export organizations of foreign countries. Under these circumstances, it is evident that American interests will not be served and the American carbon black industry cannot hope to enjoy the position and prosperity in world markets which it has a right to, unless it is permitted to continue its present export organization and to operate with reasonable freedom in the complex and severely competitive foreign field.

Mr. Oscar Nelson, of the United company, by way of prepared statement, submitted the following information: <sup>94</sup>

It is my opinion that in the postwar period the carbon black industry in the United States is likely to meet serious competition in the export market from carbon black manufactured elsewhere. Before the war there was carbon black production in Formosa and in Russia and plans were under way for such production in Rumania. Russia, especially, may well become an important competitor after the war, as the industry there has had some twelve years of growth. More particularly, I anticipate competition in the export market from companies operating in Venezuela, Colombia, Brazil, Arabia, the islands of the Persian Gulf, and Iran. In all these localities there are large quantities of natural gas now going to waste with no local industrial market. Most of these fields are reasonably close to seaports, thus permitting ocean transportation, whereas most of the carbon black industry in the United States has a long and expensive rail haul to seaboard. Since the shortage of carbon black became acute, particularly in the last few months, there have been discussions in governmental circles of the advisability of building channel plants in these foreign countries (M. S. p. 17). Thus the attention of the oil companies, both American and British and Dutch, has been focused on this situation. With very cheap labor costs in these foreign areas and no market value for the gas going to waste, it is evident that the export market can only be retained by American companies through the exercise of superior service and marketing practices. Carbexport is the only agency large enough and strong enough to do this.

Mr. Thomas D. Cabot, of the Cabot company, submitted a prepared statement reading, in part, as follows: <sup>95</sup>

The effect of the formation of Carbon Black Export, Inc., has been to stabilize export prices at levels which have changed less frequently and have averaged somewhat higher in net return to the producer than domestic prices. This has benefited both member and nonmember producers. Unquestionably, nonmember producers have benefited the most because being free to cut the Carbexport prices they have increased their share of the profitable export business.

As a director of Carbon Black Export, Inc., I have consistently voted for the maintenance of export prices which were a little, but not much higher than the domestic prices prevailing from time to time, believing that the maintenance of too high a price would encourage foreign competition. I think the best evidence of effectiveness of Carbon Black Export, Inc., in benefiting American producers

<sup>94</sup> T. 643.

<sup>95</sup> T. 1082; 1098.

is the small amount of growth in foreign production. The gas reserves of the United States are usually estimated at slightly over 100 trillion cubic feet, whereas there is considerably more than 100 trillion cubic feet estimated in the known gas fields outside of the United States. Nevertheless, according to the best available estimates I have of foreign production, something over 98 percent of all carbon black made from natural gas is produced in this country.

After making reference to Russian, German, Rumanian, and Japanese production of carbon black, and the tremendous reserves in Iran, he was questioned as follows:

Q. Well, now, Mr. Cabot, connect what you have been saying, if you will, please, concerning this competition and potential competition and potential postwar competition with the continued existence of Carbon Black Export, Inc.

A. It is my opinion that by having a central agency for the sale of carbon black, the American manufacturers can be more alert to the potentialities of foreign competition and more alert in meeting potential competition before it gets developed and takes away the markets now supplied by American manufacturers.

\* \* \* \* \*

Q. If a policy is pursued of eliminating industries with a so-called war potential do you believe that the carbon black would be one of the industries that wouldn't be permitted, say in Germany and in Japan?

A. I don't know the meaning of the word "war potential." If you mean that the aggressive nations must have carbon black in order to pursue a military policy, my answer is "Yes," they must have carbon black in order to fight a good land war. And if we permit potential aggressor nations to build up a large carbon black producing capacity, they are more dangerous antagonists than if they haven't that industry already built up and must build it up after war is declared.

Q. As a matter of fact, your illustration of the destruction and rebuilding and destruction of the plant in Russia as between the Germans and the Russians is illustrative of the importance that they apparently attached to a plant of that sort?

A. Yes, that is true. I might say with respect to Japan that Japan probably accumulated about 15 million pounds of carbon black in storage before it attacked us at Pearl Harbor.

\* \* \* \* \*

Q. Well, now, let's shift to the other type of buying that I believe you suggested yourself, the cooperative buying or governmental buying through purchasing missions in this country. To what extent do you believe that that growing practice calls for continuation of Carbon Black Export?

A. I think it doesn't need demonstration that collective bargaining is an advantage. The buying countries have now adopted collective buying as a technique. They have appointed government purchasing commissions to buy the whole requirements of some consuming country.

Were we to be denied the right to collective bargaining, we would have to bargain individually, and the collective buyers would deal with individual sellers and play one off against the other, and thus get a lower price than if he had to deal with a collective bargaining seller—with a cooperative seller such as Carbon Black Export, Inc.

Q. Thus, for example, if France decides to purchase the entire requirements of French consumers of carbon black as a unit, you want to be in a position to sell them their requirements as a unit?

A. That is right.

Mr. Kayser testified to the fact that German manufacture of carbon black which, in 1937, he estimated at 3,500 tons annually, grew to a 6,000-ton rate by 1939 (exhibit 681 A-F). Statistics of exports compiled by the Department of Commerce (exhibits 153-157) showed exports to Germany between 1935 and 1939 ranging 8,175 to 12,000 tons, which, he testified, indicated that the Germans were building up for war. Germany represented one of the association's three or four major markets. After stating that Russia has 22 available gas fields, his testimony continues:<sup>96</sup>

The record is also full of references to Iran, Saudi Arabia, Venezuela, and other spots in the world that have abundant gas supplies; up to this date, as far as I know, no carbon black plants have been built.

However, with the peculiar relationship of those countries to each other—the inability of certain countries to obtain the dollars with which to buy American goods—well, there is an urgency, there is a pressure on them to produce commodities of their own to replace those that they cannot buy.

It is not at all unlikely that a number of these areas will go into the carbon black business or will, at least, find it attractive.

I know that during the war period, my own Government thought seriously of helping some of them go into the carbon black business, with good American money and good American plants.

The thing I want to get into the record is the seriousness of it, as a concern to the carbon black manufacturers, the potentiality of competition. It is more difficult for the individual operator in the industry to meet competition than if he is a member of a group. They can do it in a big way.

One of the big ways that I brought out is this idea of bulk shipping in export, which requires installations abroad that an individual operator would hesitate to make because of the expense, relative to its position in the trade.

In 1935, the German Import Control Board undertook to place all German imports on a barter basis. Mr. Kayser made a study of this question as well as the related question of blocked marks, submitting a 13-page report to his distributors, exhibit 64 A-N, dated April 18, 1935. On May 25, 1935, he wrote Binney & Smith as follows, in part (exhibit 65):

We advise our distributors that there is nothing in the regulations or in the attitude of Carbexport to prevent any of them from entering into barter transactions on their own account, and at their own risk. However, since the technique of barter, as that type of trade progresses, may lead over paths of such variety as to greatly increase the probability of digression from Corporation price schedules and regulations, it is necessary to effective maintenance of prices and trade rules that the Corporation have full knowledge of all barter trades made.

He testified that the association never imported commodities into the United States and that he knew of no distributor of the association engaging in barter.

<sup>96</sup> T. 1990 ; 1999.

Mr. Reid L. Carr, at the June 19, 1945, hearing read into the record a statement from which the following quotations are made:<sup>97</sup>

The effect of the war upon normal export trade has been threefold: (1) Exports to enemy and enemy-occupied countries have been completely cut off, (2) lack of shipping has reduced exports to neutral countries to a mere trickle, (3) lend-lease shipments have replaced normal exports to our Allies.

The effect is graphically shown by the following export statistics as to channel black:

|           | <i>Export</i> | <i>Lend-lease</i> |
|-----------|---------------|-------------------|
| 1939..... | 153, 800, 000 | -----             |
| 1940..... | 121, 100, 000 | -----             |
| 1941..... | 69, 400, 000  | 23, 535, 000      |
| 1942..... | 13, 900, 000  | 37, 344, 000      |
| 1943..... | 10, 700, 000  | 36, 021, 000      |
| 1944..... | 10, 700, 000  | 70, 317, 000      |

Lend-lease sales are made at the domestic price plus cost of export packing. In connection with such sales Carbon Black Export has rendered a material service and saving to the Government, by casing black at the pier for foreign shipment at a cost materially lower than the same service could have been performed by the several producers at their respective plants.

Since January 1, 1945, the British Raw Materials Commission has taken over the purchase of all black for the United Kingdom, but lend-lease shipments to Russia, India, New Zealand, and Australia will presumably continue until the expiration of the Lend-Lease Act. Shipments to France are entirely made to the United States Army Ordnance.

\* \* \* \* \*

When the Export corporation was organized, the production of black by the furnace process or by thermal decomposition was small, and the black was very different in quality and uses from channel black. Consequently it was not a competitor of channel black in the export trade.

During the war, the furnace process has undergone great development, and furnace blacks of the HMF and FT types are now produced which in synthetic rubber tires approach channel black in reinforcing quality and excel it in cool running properties. These blacks are being constantly improved and will undoubtedly prove serious rivals of channel black for many purposes in the postwar period, particularly in synthetic rubber compounds. The production of HMF and FT furnace blacks is now at the rate of 20 million pounds per annum, and will exceed 275 million pounds by the end of 1945.

The new problems confronting the industry in the postwar period from a volume standpoint are indicated by the following comparative figures:

|                                        | <i>Production (pounds)</i>         |                            |
|----------------------------------------|------------------------------------|----------------------------|
|                                        | <i>1941 (the peak prewar year)</i> | <i>Postwar capacity</i>    |
| Channel.....                           | 487, 967, 000                      | <sup>1</sup> 675, 000, 000 |
| HMF furnace.....                       | 0                                  | 275, 000, 000              |
| Other furnace (including Thermal)..... | 106, 098, 000                      | 450, 000, 000              |
| Total.....                             | 594, 065, 000                      | 1, 400, 000, 000           |

<sup>1</sup> Including 177,000,000 from D. P. C. plants.

\* \* \* \* \*

<sup>97</sup> T. 389; 397.

Another condition which the industry must face is the virtual certainty that various foreign nations will unify their purchasing power under a governmental agency, as the British have already done by means of their Raw Materials Commission. It is rumored that France will soon establish a similar national purchasing agency. Russia also has its Amtorg. Individual producers or exporters would be at a hopeless disadvantage in bargaining separately with such foreign agencies, which would have power to promise or deny to a producer the business of an entire nation. It is not difficult to foresee what would happen to export prices in such an unequal contest. Only a strong organization representing the collective judgment of the industry, functioning under Governmental supervision, can assure a profitable export market for American carbon black.

\* \* \* \* \*

Another uncertainty that beclouds the export market at the present time is the availability in the various countries of natural and synthetic rubber. It is estimated that from 2 to 4 years will elapse after the termination of the war against Japan before a normal supply of natural rubber will be available in the world markets. Synthetic rubber requires on the average approximately 50 percent more carbon black per pound than natural rubber, and also a different proportion between channel and furnace blacks. Thus the volumes and types of black that will be required by the export market in the immediate postwar years are extremely problematical.

Supplementing the testimony about potential foreign production referred to above, is exhibit 577 A-F, photostat copy of a report on Romanian carbon black production, submitted to the Association on February 19, 1939, by Ralph E. Davis, Inc., engineers, Pittsburgh, Pa. Mr. Kayser testified that the association paid part of the cost of this report. Mr. Billings of the Cabot company had made a survey in Romania in 1938 in which year the association commenced to receive reports from its agents of Romanian black shipments to the Continental Gummiwerke, Pirelli, Semperit, and Beta companies, its customers in Germany, Italy, and Czechoslovakia, respectively. The Davis report (exhibit 577 A-F) states that a pilot plant operated by a government-controlled corporation, "Sonemetan," using a process patented in Poland, can manufacture 10 pounds of furnace black per thousand cubic feet of gas, or about the equivalent of American methods. The report estimates Romanian gas potential at 5 trillion cubic feet.

Evidence in the record on the reaction of customers to the price of carbon black appears in the questioning of Mr. A. D. Moss, director of purchases for B. F. Goodrich Co.<sup>98</sup>

Q. Having in mind the statement that you have made that the existing export association has proved more effective, especially in price, do you have any objection to doing business in the export market through the Webb-Pomerene Export Association which the Carbon Black Export is?

A. I might say that I don't like to pay twice as much in the export market as I pay in the domestic market, but other than that I have no objections to

<sup>98</sup> T. 1189-1190.

doing business with them; it is the same personnel we contact in one case as the other.

Q. Let's dwell on that price differential a minute. Why do you, if you have, pay, say, twice as much in the foreign market as you have in the domestic market?

A. We haven't found a way to negotiate at all effectively with respect to export prices. They are fixed in a central point and all of the major companies apparently are in the export corporation, and that's about all there is to it.

Mr. D. B. Max, Binney & Smith's London agent, wrote Mr. Kayser, on November 29, 1937, as follows (exhibit 304):

It has occurred to the writer that possibly the Export corporation should consider filing a brief with the Department of State, to be used in conjunction with the Reciprocity Treaty under consideration between the United States and England.

It does not seem logical to the writer that such a high rate of duty should be charged on carbon black in England, in view of the fact that that material must be imported from the United States. You are no doubt familiar with the fact that within certain limits the consumption of carbon black is adversely affected by the high delivered cost at any plant; in other words, there is a tendency to increase the dosage of carbon black in any formula when carbon black is cheap in comparison with other materials going into the formulation of rubber goods, ink, etc.

Will you please be good enough to give this matter your prompt attention, because a brief if filed must be received in Washington within the next few weeks.

Mr. Kayser testified as follows on this matter:<sup>90</sup>

Exhibit 304 is a letter from Mr. D. B. Max of Binney & Smith Co., one of our distributors, to me suggesting the filing of a brief with the State Department in connection with a Reciprocity Treaty between the United States and England. Among other things Mr. Max says: "You are familiar with the fact that within certain limits the consumption of carbon blacks is adversely affected by the high delivered cost at any plant; in other words, there is a tendency to increase the dosage of carbon black in any formula when carbon black is cheap in comparison with other materials going into the formulation of rubber goods, ink, etc." I was not familiar with "the fact," nor do I believe it to be a fact—certainly not in the compounding of rubber goods, which represents 85 percent of the use of carbon black, because the cost of the total carbon black used in any rubber compound is such a minuscule item in the cost of the rubber product. I am equally sure that it is not a fact in ink manufacture, where the printing inks consume perhaps half of the balance of carbon black sold.

The association's statistical service to its members and distributors included annual summaries of export sales which carried some information about the volume of outsiders' export business. These are described as follows: Exhibits 110 A-D consist of statistical records of actual annual export shipments and destinations by the association's eight distributors in the period 1935-39, and designated as "Reference 105." Exhibits 111 A-I depict sales (as distinguished

<sup>90</sup> T. 1741.

from calendar year shipments) by the distributors during the period 1934-41, and designated "Reference 100." Exhibits 142-146, are designated "Reference 102," are titled "Comparative analysis of shipments by Carbon Black Export, Inc., and by outsiders \* \* \*," and give shipment totals of both groups by destination for the years 1936 to 1940 (first 6 months). Exhibits 148-151, designated "Reference 103," depict comparisons of outsiders' and members' shipments for the years 1935-36, 1936-37, 1937-38, and 1938-39. Exhibits 152 to 157, designated "Reference 101-9," depict the shipments recorded in exhibits 142-146 as contrasted to Department of Commerce statistics for the comparable years under the title "Reconciliation of actual shipments by Carbexport and Outsiders \* \* \* with total exports announced by United States Department of Commerce." Exhibit 147 is the photostat copy of a letter from Mr. Kayser to all distributors, dated February 5, 1941, and reading as follows:

Reference No. 102, one of our regular annual statistical reports, is herewith enclosed. It is a comparative analysis of Exports by Carbexport and by outsiders to all markets for the year 1939 and for the first six months of 1940. The first half of 1940 is covered in place of the whole year because the shorter period is the only one for which we consider our information as reliable as formerly.

While this statistical report does not have the usual value, it demonstrates that outsiders are able to dispose of their portion of export black under the difficult conditions today. It is possible that they have been doing even better, percentage-wise, since July 1, 1940, than their performance for the first half-year indicates. To be on the safe side on that point whenever we are making a study of the export markets in which outsider performance must be taken into consideration, we allow them a 12% percentage for safety's sake.

Mr. Kayser testified that forwarders employed to handle goods at various ports furnished the data about outsiders' shipments without charge. This information is available from port newspapers, shipping journals, and ship manifests which are public records and is accessible to any outsider if he desires it.

Mr. Kayser made reference to exhibits 641-647 being photostats of correspondence occurring between August 17 and December 9, 1938, relative to standard shipping containers. These indicate the establishment by the association of a standard 1.95 cubic foot capacity for latex and paper bags which had been used as containers since 1934. In 1937, he testified, the French steamship lines sought to bar these containers but that he fought this proposal, his testimony reading as follows:<sup>1</sup>

Carbexport resisted this move, because this type of packing meant a saving to buyers abroad of about 30 cents per 100 pounds. Through its unique ability to survey and develop the handling experience with respect of so large a volume at the world's principal ports of both embarkation and discharge, Carbexport was able to prove that the fault lay less in the packages themselves than in

<sup>1</sup> T. 1726-1728; 1754.

careless stowage and handling by the ships of the complaining lines and to defeat this move. While the Conference Lines found it necessary to withdraw on the question of barring these packages, they undertook to offset the set-back by imposing a special and higher rate on bag shipments than on shipments in wood cases. It took negotiations over an extended period to defeat that move. The outcome of this controversy was that Carbexport saved to foreign buyers, whether they purchased from members or non-members of Carbexport, all the economies they had enjoyed through the use of shipment of carbon black to them in bags.

Along these lines, he described action taken on ocean freights as follows:

A steamship conference is a combination of steamship lines whose vessels ply competitively between the same port or ports in certain areas that are close to each other. Under the Shipping Act of 1916 such lines are given the right to combine and agree on rates, types of cargo, uniform contracts with shippers, etc. There are many steamship conferences. For instance, the Gulf-Mediterranean Conference, the Gulf-United Kingdom Conference, the Gulf-French Atlantic Hamburg Range Freight Conference, etc. A copy of a typical conference contract, attached as exhibit 625, is offered as an example and lists the steamship lines which were members of the two last-named conferences in 1934. Clauses 1 and 7 of this contract should be particularly noted as indicating the type conditions the Shipping Act permitted steamship lines in combination to make.

When the individual shippers made their individual arrangements for ocean rates, etc., with conference lines few had enough cargo to demand close attention to their interests of conference rate-making bodies. Nor were they individually able to insist effectively on equal treatment in times of tight or scarce space.

In the late fall of 1933 Carbexport let it be known to the conferences that the bulk of export carbon black would thereafter be shipped by it and that thereafter it, and not its members, would negotiate shipping contracts. The Gulf-United Kingdom Conference and Gulf-French Atlantic Hamburg Range Freight Conference had previously decided on a freight rate increase of 4 cents per cubic foot of ship space for carbon black cargo, and to limit the application of the rate to shipments made in the first three months of 1934, as revealed by exhibit 626 A and B, herewith submitted. When the conferences learned of the handling of so large a volume of exports by Carbexport they acknowledged the trading power thus represented by lowering their demand for increased rates to 3 cents. On the other hand they thought to save themselves the opportunity to raise at an early date by limiting the lower rate to January shipments. Exhibits 627 to and including 639 are copies of correspondence which show the course and length of negotiations through which Carbexport, as a combination of interests allowed by the Webb-Pomerene Act, saved buyers of carbon black abroad 1 cent per cubic foot for at least 6 months in its first negotiation with the conference lines. This saving was subsequently extended for the full year of 1934.

Until the outbreak of war in Europe, when steamship conferences dissolved as a matter of necessity, all ocean rates applying to carbon black were always carefully and thoroughly negotiated, with consequent benefits to buyers in the export markets.

The exhibits referred to, 625-640, are photostats of the correspondence and contracts with "Members of the Gulf-United Kingdom Con-

ference and Gulf-French Atlantic Hamburg Range Freight Conference." Under the paragraphs referred to by Mr. Kayser, the first requires exporter to ship all his exports by the conference line, and the seventh provides for increase in freight rate to prevailing schedule in case of shipper's violation of paragraph one. Exhibit 625 is the contract for the year 1934, and exhibit 640 covers the year 1939. Mr. Kayser expressed his belief that rates thus established were available to nonmembers of the association.

Mr. Kayser gave the following testimony describing the latest development in the shipment of black:

In brief, this project contemplates moving black in bulk by covered hopper cars—instead of in small packages as has always been customary—from producing plant to seaboard, to be unloaded there into barge storage or into stationary silos similar to grain elevators. The next step contemplates loading from storage by air-lift or otherwise into a canvas bag tailored to line a lower hold of a ship for overseas transportation in bulk. Overseas the ship would be unloaded by air-lift or otherwise into stationary waterfront storage, from which it could be transported to consumers in bulk in covered hopper cars—or at which it could be packaged for customers unable to take in bulk. The saving in export transportation and handling costs were and are still expected to be of such magnitude as to keep American carbon black competitive, at least in the large export markets, with any foreseen foreign production. The savings in bulk handling from inland American carbon black plants to Gulf ports were carefully investigated and reported on by me. They were found to be considerable. A crude experimental job of handling from hopper car into ship's hold, of transport from Corpus Christi, Tex., to Boston and of unloading there from ship to hopper cars on barges alongside was actually carried out. Pictures of this operation are attached as exhibits 583 B through J. The outbreak of war made it necessary to abandon further experiment and the study of the foreign end of the scheme until a later date, which has of course not yet arrived.

The matter of packaging black for export played an important part during the war as the following further testimony of Mr. Kayser shows:

By the fall of 1939 the bulk of carbon black was being exported in paper and asphalt-impregnated jute bags, packed at the manufacturing plants of Carbexport members. With the outbreak of war in Europe at that time steamship agencies transporting to the United Kingdom and some other countries refused to take bag shipments and required packing of the bags in wooden cases.

By the spring of 1940 Carbexport members, particularly those supplying the largest quantities of carbon black for export, began to find the packing in wood at their plants a burden on their operations and a strain on their facilities. Carbexport then experimented with taking delivery at Houston, Tex., its principal shipping port, in the domestic paper bag and doing the packing itself. This experiment proved not only that handling in that fashion was practical but also that it produced a considerable saving in the cost of delivery of wood-packed black f. a. s. the port. By late summer 1940 the packing operation at Houston was operating continuously. Photographs of this operation, namely exhibits 648 a through g, as well as photographs of another operation established at Savannah, Ga., in 1941, namely exhibits 649 a through h, are attached.

The existence of the packing operation at Houston, Tex., and the experience gained from it, turned out to the advantage of our Government when, in the summer of 1941, it began to purchase carbon black for export shipment via lend-lease.

*Lend-lease exports*

In the summer of 1941 the Procurement Division of the Treasury Department began making purchases of carbon black for lend-lease export to Great Britain. In subsequent years it added Australia, New Zealand, India, French North Africa, and Russia as countries to which it would supply carbon black under lend-lease.

Every inquiry Treasury Procurement has issued for carbon black to be supplied to the above-named countries has carried the name of the country to be supplied and has carried a notation that the material was to be packaged for export. Every quotation Carbexport has submitted in reply to the said inquiries and every purchase made by Treasury has been on an f. a. s. or "within reach of ship's tackle" basis.

In July 1941 I personally applied to Mr. Freeman, then Chief of Contract and Purchase Branch, for an opportunity to bid on Treasury's requirements of carbon black for lend-lease shipment. At a conference, attended also by a Treasury official named Mr. Landick, Mr. Freeman stated that he had been advised that a Webb-Pomerene association had the privilege of fixing its export prices and that Treasury was unwilling to buy on a fixed price base. In reply to my inquiry, Mr. Freeman stated that Treasury felt its duty to be to buy at domestic prices.

I pointed out to Mr. Freeman (1) that carbon black could only be exported in packages, (2) that British War Transport would not accept the only type of package used on at least 90 percent of domestic package business, namely carbon black in paper bags, unless they were covered with wood cases, and (3) that the manufacturer would naturally have to add the cost of packaging in wood to his domestic price for carbon black in paper bags in order to quote on what Treasury would need. I furthermore stated that I felt certain that every member of Carbon Black Export, Inc., would be willing to renounce the right to a controlled export price which his contract with Carbexport gave him, as far as carbon black to be furnished the United States Government for lend-lease export was concerned, in order that the Treasury might not be denied the same advantages from Carbexport's ability to do a turnkey job which they themselves enjoyed in direct export. Mr. Freeman wanted to know what those advantages might be. The advantages I explained to him were in the main:

(1) A saving of freight cost on at least 18 pounds of wood for every 100 pounds of carbon black;

(2) The saving accruing from a lower wage rate for labor at seaboard than at inland factory locations;

(3) The probability that such savings could be made on Treasury requirements of carbon black which were outside Carbexport's control for export, such as high-grade channel blacks, furnace blacks and thermal blacks, as well as on those that were. There appeared no good reason why the producers of such "outside" blacks, whether they were members of Carbexport or not, should refuse to sell them to Carbexport in their domestic paper bags at their domestic prices in order to assure their delivery to Treasury Procurement for lend-lease export at the cheapest cost possible;

(4) The savings accruing from the purchase of case shooks in a volume large enough to take care of the total quantity of an order as against purchase thereof

by individual shippers to cover whatever share of the said total which might be awarded to them;

(5) An expert knowledge of equivalents of grades which would be called for but which it might be impossible to obtain in time to make shipping schedules;

(6) A complete job, at cost, of assembly and delivery to shipside from more than thirty carbon black plants located principally in Texas, Louisiana, New Mexico, and Oklahoma but also as far away as California and Washington, thus freeing the Treasury personnel, except those which would in any case have to keep records, for the many other difficult tasks which were the responsibility of Treasury Procurement.

On the basis of the statements above recited, Mr. Freeman agreed that Treasury Procurement would entertain Carbexport's bids.

All members of Carbexport did renounce those rights, as I believed they would. All members offered to sell such carbon black as Carbexport might buy from them for delivery to Treasury Procurement at their domestic prices. All nonmember producers of carbon black in the country, with the exception of one, likewise undertook to sell to Carbexport at their domestic prices such carbon black as Carbexport might offer to buy from them for lend-lease export.

Mr. H. L. Titus, who succeeded Mr. Kayser as president, at the last hearing, August 20, 1946, testified with respect to the OPA export price differential referred to in exhibit 680 A-B, that such differential (0.8060 and 0.8726 cent per pound on bag and case containers) "reflected what had been the custom of the trade in 1942—Carbon Black Export, Inc., in 1942 exported probably 85 percent of all carbon black that left the United States." He outlined a program authorized by the directors in a meeting held May 29, 1946, to facilitate movement of the association's exports to the United Kingdom in the face of currency exchange problems. The plan, worked out by agreement with the Guaranty Trust Co. of New York City, consists simply of an understanding that British purchaser transmit with his order an authenticated import permit. The seller (association), upon filing this permit with shipping documents at the bank, is paid in American dollars, and the buyer, upon receipt of the shipment pays the London branch of the bank in pounds sterling.

Mr. Titus characterized this program as follows:<sup>2</sup>

I do not claim that this problem could only have been solved by a Webb Act association. I do think, however, that a great many American exporters cannot afford to maintain a staff, trained and competent, to meet such situations, while it is a fundamental purpose of a Webb Act association to provide exactly that service and skill to its members.

This investigation was closed at the conclusion of the last hearing held on August 20, 1946. Thereafter, on October 20, 1948, it was reopened for the purpose of adding to the record a stipulation bearing the same date and signed by attorneys for all parties containing relevant information bringing the file up to date. The stipulation is

<sup>2</sup> T. 2008; 2020.

a 21-page document accompanied by 9 photostatic exhibits and the whole is included in the exhibit file numbered 1-9 and identified as exhibit No. 686 A to Z-4. Contained therein is the following information supplementary to facts now in the record:

The mode of purchasing gas on a royalty contract basis described in section IV-A herein has been discontinued in favor of a cash-per-unit-of-gas basis.

The royalty contracts with Phillips Petroleum Co. were discontinued by respondents Cabot (on the part of its subsidiary Texas-Elf Carbon Co.), Panhandle, Columbian, and United in the period between April 1, 1945, and July 16, 1947.

Respondent Panhandle Carbon Co., Inc., had its name changed to Witco Carbon Co., by corporate amendment on July 31, 1948.

The admission to membership in the association by manufacturers Imperial Oil & Gas Products Co. and Continental Carbon Co., referred to in section IV-C herein, actually was consummated on the dates August 26, 1946, and September 3, 1946, respectively.

The old association, Carbon Black Export Association, Inc., referred to in section III-B herein, was formally dissolved on December 1, 1933.

The governmental control on export of channel carbon black, referred to in section III-A herein limiting such exports to 9,000,000 pounds per month, has been twice modified. First, the original order (exhibit 686 Z-2) known as Priorities Decision No. 100, was in effect rescinded by removal of channel carbon black from the so-called "restricted" list under the terms of Current Export Bulletin No. 404 issued by the Office of International Trade of the United States Department of Commerce on May 27, 1947 (exhibit 686 Z-3). Subsequently, and effective at the date of the stipulation, channel carbon black exports are subject to the terms of the aforementioned Department's Current Export Bulletin No. 434, which requires a special license for export shipments valued in excess of \$100 to Europe and adjacent territory known as the "R" countries (exhibit 686 Z-4).

Supplementary to the evidence reported in section V relative to the British and French Purchasing Missions and the association's cooperation with that effort through the Lend-Lease Administration, the stipulation recites that from early 1946 similar purchasing missions operated in this country for Belgium, Norway, Denmark, Italy, Australia, New Zealand, India, British Colonies, Union of South Africa, and Portugal. These missions, upon the termination of the Lend-Lease Administration, have not completely disbanded, but continue to function for their respective governments in the administration of import controls necessitated by monetary and trade balance considerations. Private trading for a short interval operated in trade with

Czechoslovakia and Yugoslavia but recent information discloses the existence and operation of state corporations known, respectively in the two countries as "Kotva" and "Hempro" for the handling of all imports. Sales of carbon black to Japan are made to an agency called "Boeki Cho" subject to approval of the Occupation Authority. Export sales to Germany may be made direct to consumers upon approval of the Joint Export Import Agency.

Membership affiliation by the Continental and Imperial companies in August and September 1946, left but one competing nonmember of channel carbon black, the Crown Carbon Co., a company organized by Mr. R. I. Wishnick, an executive officer of association members Continental and Witco (ex-Panhandle). Two new competitors are currently preparing for production: The Sid Richardson Carbon Co., which took over a Defense Plant Corporation plant at Odessa, Tex., in early 1948, with an estimated annual production capacity of 60,000,000 pounds. Witco Hydrocarbon Co., another interest of Mr. R. I. Wishnick, is completing construction of a plant with an estimated annual production capacity of 11,000,000 pounds.

Further supplementing section III-A of this report, there has been no addition to the four nonmember producers of furnace carbon black there named—the Crown, Phillips, Thermatonic, and Jefferson Lake companies. This type of carbon black is viewed by the association as a potentially serious competitor of its product, the stipulation referring to exhibit 686 W, a specimen of Phillips Petroleum Co. advertising representing its product as "proving daily that it gives lower heat build up—long flexible life and high tensile strength and gives tires strong resistance to cuts, cracks, and abrasion."

Facts set forth in the stipulation corroborate the testimony of association officers contained in section V herein relative to the imminence of competition from carbon black production in Germany, Romania, Russia, and Venezuela, but with no tangible evidence of specific development. However, the production of carbon black in Russia can be assumed to be substantial when measured by the amounts necessarily incorporated in tires and other rubber products produced and used in Russia and neighboring countries under its aegis. Carbon black production in the Middle East has apparently passed from the potential to the planning stage, the stipulation referring to exhibit 686 X, which discloses that the British House of Commons has designated the "Interdepartmental Committee on the Production of Carbon Black" to discuss with the Anglo-Iranian Oil Co., "regarding the erection of a plant in Persia for the manufacture of carbon black suitable for tire production." This exhibit, together with exhibits 686 Y-Z and 686 Z-1, all of them copies of articles from the trade periodical "India Rubber Journal," point up the fact spurring British action to be the

spending (in 1946 alone) of five and a quarter million dollars for carbon black in the face of a scarcity of dollars. The latter two exhibits refer to two seemingly advanced developments: A project by the United Chemical Co. Ltd., to construct a plant in England for manufacture of carbon black under the Phillips Petroleum Co. process with annual production of 50,000,000 pounds. This plant would use as raw material liquid hydrocarbons instead of gas. The second project contemplates erection of a plant in Wales, using coal as the raw material. The formidable nature of this competition is emphasized by the fact that the association's exports to the United Kingdom in 1947 amounted to 80,000,000 pounds, or approximately 40 percent of its total exports. This information has alerted the association to the danger of losing its place in this market unless it can be maintained by providing superior quality standards and services.

The stipulation also recites facts relating to the divestiture of comingling interests in four plants between the Phillips Petroleum Co. and four of the association members, Cabot, Columbian, United, and Panhandle (now Witco). Phillips and Cabot still jointly own the Texas-Elf Carbon Co. plant. However, Phillips has no say in the management, having granted to Cabot all right and power to vote its stock, name officers and directors who are not Phillips officers or employees and to operate this plant entirely independent of Phillips (exhibit 686 H). Included as exhibit 686 V is a report of the disposal by the War Assets Administration of surplus carbon black producing plants. These matters are hereinafter referred to in consideration of the domestic angle of the investigation, this report being here concluded as to the export matters embodied in the first seven specifications of the bill of particulars.

#### VI. CONTRACTS AFFECTING DOMESTIC COMMERCE

##### A. *Restriction of Production*

Paragraph 1 of section B of the bill of particulars consists of the following specification:

1. Contracts with manufacturers of carbon black which limit and restrict their production and sale of carbon black within the United States.

The evidence procured in the investigation under this specification consists of the overtures to restrict production of carbon black which were made to nonmember producers Chas. Eneu Johnson & Co., and the Continental Carbon Co. in the years 1933 and 1936, respectively. The nonmembers in each case denied any agreement and actually increased their production. The evidence on these episodes is reported hereinabove under the first specification of the bill of particulars referring to exclusive dealing with nonmember producers. The first

incident is reported at pages 40 to 52 hereof, titled "Herkness Negotiations," and the second at pages 62-78 under the heading "Continental Quota."

Two years later, in the midst of the bulk price differential war hereafter referred to, there passed the following correspondence, which is included herein because relevant to this general subject. However, no evidence was adduced showing that the export association was involved in the matters hereafter detailed in this section of the report.

Exhibit 337 A-B. Photostat of letter dated February 18, 1938, from Godfrey L. Cabot to Oscar Nelson of United. After comment about excess stocks of carbon black due to over-production at the rate of 16,000,000 pounds per month, the fifth and sixth paragraphs of the letter suggest curtailment of production, in the following language:

With regard to the United Carbon Company, are they not in a rather strong position relative to certain other producers and would it not be possible in case of curtailment by the United Carbon Company to have a gentlemen's agreement with those with whom you are most closely in touch that they should curtail in the same ratio as the United Carbon Company.

Of course, I recognize that any such agreement wouldn't be binding at law and ought not to be put into writing, because otherwise it might be embarrassing, due to the inquisitorial policy of the present Administration, although I believe it is perfectly legal and defensible in any criminal proceedings in case any attempt is made to penalize it, and for the reason that I think it would be clear to any competent judge and unprejudiced jury that such an arrangement, under present conditions, would be primarily and essentially a conservation action and not an action in restraint of trade, for, of course, there would be no penalty attached to its breach and it very distinctly would tend to diminish the proportion of natural gas that was sold at a price below  $1\frac{1}{2}\epsilon$  a thousand.

Mr. Reid Carr of Columbian, questioned with respect to the curtailment suggestions contained in the foregoing exhibit, testified that no one had approached him on that subject and that "no one made any such agreement" (Tr. 560).

Mr. Oscar Nelson, to whom the letter was directed, testified that curtailment was never practiced by any common consent because, excepting Huber, none of the producers own their own gas wells, so that curtailment would require dealing with gasoline refinery owners of gas wells, and in addition conflict with state laws prohibiting gas to be blown into the air. He did not believe there was any over-production at that time (Tr. 637). He further testified that he did not undertake to carry out Mr. Cabot's suggestion (Tr. 701).

Exhibit 324 A is the photostat of a letter dated April 10, 1939, from Mr. C. E. Kayser to Mr. Oscar Nelson, in which the last three paragraphs read as follows:

The Royalty Owners Association for the Texas Panhandle held a well attended meeting in Amarillo on March 8th. Ernest Thompson, Railroad Commissioner,

and Senator C. C. Small were present. Much of the meeting was taken up in blaming the carbon black manufacturers for the low returns Royalty Owners receive on natural gas produced from their properties. The Amarillo News-Globe on the 9th reports on Senator Small's contribution to the meeting as follows:

"The Senator (Small) also took a rather significant fling at the carbon black companies, who he said were in a big way responsible for the low returns on gas royalty being paid for gas processed for carbon black, by holding the price to such a low level. He intimated clearly that a law shutting off carbon black manufacture might be a real remedy until such time that it became scarce enough to command a reasonable price."

Mr. Oscar Nelson's testimony on this subject reads as follows (Tr. 634-635):

Quite generally the gas companies received 30 percent of the gross carbon-black sales as payment for the residue gas delivered to the carbon companies. After all the expenses of transportation and treatment of the gas in gasoline plants and the burning of the same in the carbon plants, the one-eighth of the net proceeds remaining was a very small sum indeed; probably less than 1 mill per thousand cubic feet. The landowners were much discontented with this situation, particularly after the price of carbon black had fallen to 2¼ cents per pound f. o. b. plant. This discontent was reflected by concerted action taken by an association of royalty owners which comprised the landowners from whose farms the gas was taken and, in some instances, smaller oil and gas companies who produced the gas and sold it to the distributing company, and other landowners throughout Texas. Demands were made upon their representatives in the Texas Legislature for legislation adverse to the carbon industry. Another form of their activity was their appeal or demand for an increase in the price paid them for their gas. I felt at the time that if the market price of carbon black did not improve so that these Texas landowners would derive a better return from their interest in the natural gas, we would have legislation in Texas certainly restricting and perhaps abolishing the manufacture of carbon black in that State.

#### *B. Preventing Diversion of Domestic Sales Into Export*

Paragraph 2 of section B of the bill of particulars consists of the following specification:

2. Contracts with its stockholders, other manufacturers of carbon black and other owners which require and cause them to use care that domestic sales made by them are not for export and to take precautions to prevent the export of carbon black sold by them for use or consumption within the United States.

The investigation produced no evidence of such contracts with nonmembers or other owners of carbon black, except one contract with a nonmember on February 9, 1937; said nonmember is now a member. (See p. 77 of this report.) There was, however, such agreement to prevent diversion among the members of the association. That evidence is reported hereinabove at pages 23 to 42, under the heading "Exclusive Contracts With Stockholders." Reference is directed to

page 24 hereof, setting out the provisions of the Association's "Members Sales Agreement" (exhibits 12 and 16) in which—

The producer further agrees throughout the term of this agreement to use reasonable care that exports made by the producer to Canada or Mexico are intended for use and consumption in those countries and shall not be diverted to other foreign countries, and also that carbon black sold by the producer in the United States shall be exported only through the corporation.

And further, at page 25:

All the obligations of this agreement on the part of the producer are undertaken on behalf of the producer and of any and all subsidiary or controlled corporations in which the producer may now or hereafter directly or indirectly own or control 50 percent or more of the stock.

Correspondence concerning this provision, represented by exhibits 41 A and 185 A, and testimony thereon, is reported at pages 26 and 32 hereof. The testimony of officers of association members (Oscar Nelson, Tr. 627; Hans Huber, Tr. 752; and Thomas D. Cabot, Tr. 1083) was to the effect that such restriction was essential to preservation of the cooperative effort.

Evidence of possible restraint of domestic trade by the association touched upon some other points, including the following:

#### 1. National Gas Products Association

In section IV-B hereof, titled "Exclusive Contracts With Stockholders," at pages 23 to 42, inclusive, is contained a report of the activities of the National Gas Products Association, known as the "domestic trade association" for the carbon black industry (Tr. 240). There is summarized the testimony of its president, Hans Huber, its secretary, C. E. Kayser, and Mr. Reid L. Carr, officer of a member, with reference to exhibits 124-41 (statistical charts); 120, 177, 178, and 185 (joint office expense); and 180 (membership list). Contained in the file as exhibit 500 is a copy of this group's articles of association. It is a voluntary association organized December 28, 1920, under New York law with stated purposes to extend markets for natural gas products; legitimately oppose unreasonable legislation; support conservation; maintain a credit information exchange; compile trade information concerning depletion, pipelines, and production problems; and to take concerted action in the matter of freight rates, classifications, and container requirements. As of the date of testimony, all but two of its members, Crown Carbon Co. and Continental Carbon Co., were also members of the Export association (Tr. 614).

Excepting for an engineering study, the investigation developed no further correspondence of this association nor any minutes of its proceedings.

## 2. Bulk differential price war and the Cabot price differential

At page 126 hereof, in the consideration of export prices, mention was made of "The inauguration, in 1937, by the Cabot company of a system of bulk delivery of carbon black to domestic users at an economy variously estimated from an eighth to a quarter of a cent per pound, precipitated a price war in the domestic market, in the course of which, following November 1, 1937, the price of carbon black fell from 5 to  $2\frac{1}{4}$  cents per pound." This subject was rather extensively investigated, but inasmuch as the evidence fails to disclose that the association participated in, or was a party to, any dealings or arrangements which may have been made in this connection, the material is not germane to this report and hence is not included.

## 3. Commingling of interest

The Phillips Petroleum Co. is a large supplier of gas used in the manufacture of carbon black. Mr. F. E. Rice, its vice president, testified (at Transcript 1467-1473) that he had been with the company over 27 years and was familiar with the practices surrounding gas supplies to carbon black plants, giving the following additional facts. Oil or gas leases with landowners provide for a royalty of one-eighth of the proceeds from sale of gas or oil. His company pays the landowner royalty for the amount of natural gasoline which they extract, and if it utilizes the butanes and propanes (which are referred to as "heavier fractions") it pays a higher price. The gas which remains is called residue gas, which may be used for fuel and light or for carbon black production. A royalty of one-eighth of the proceeds of such sales must be paid the landowner. Residue gas from which the heavier fractions have been extracted furnishes a decreased production of carbon black. He testified further that Phillips company in 1944 sold 232 million cubic feet or 25 percent of the 910 million cubic feet of gas consumed by the carbon black industry; in addition it furnished  $66\frac{1}{2}$  million cubic feet to plants in which it held a half interest, making the total of gas furnished to the industry by Phillips, 33 percent. Total production of carbon black in 1944 was 431,721,000 pounds; its 30 percent royalty share of this amounted to 28,850,000 pounds, or 7 percent of the total; its share of production in half-owned plants was 27,500,000 pounds, or 6.6 percent, making its proportion of total carbon black production in 1944, 13.6 percent. These proportions had not varied substantially during the 10 or 12 years preceding 1944. Most of the major oil companies, including Skelly, Shell, Magnolia, Shamrock, Gulf, and Cities Service furnish gas to the carbon black industry.

Phillips sold gas to producers Cabot Co. . . .

Phillips would receive 30 percent of the value of the black made from the gas when sold, and in one case, namely, the Cabot contract, it was provided that payment for the gas would be based upon 30 percent of the average price obtained for carbon black during the month in which the gas was consumed. These contracts were terminated between April 1, 1945, and July 16, 1947, and all of its gas sales are now on a cost per thousand cubic feet basis (exhibit 686 B-F). The Phillips company has never engaged in the sale of channel black but has become a competitor in the manufacture and sale of carbon black made from oil by a furnace process, which it claims to be superior to channel gas black. (See exhibit 686 O-P.)

In addition to the foregoing, the Phillips Petroleum Co. owned interests in carbon black producing companies as follows: Texas-Elf Carbon Co., Phillips, 50 percent; Godfrey L. Cabot, Inc., 50 percent (Tr. 1107). On September 19, 1947, Phillips gave up its voting rights so that Texas-Elf production and management is in the hands of Godfrey L. Cabot, Inc. (exhibit 686-G).

Panhandle Carbon Co., Phillips, 50 percent; R. I. Wishnick interests, 50 percent (Tr. 306). On September 8, 1947, Phillips sold its interest to Mr. R. I. Wishnick (exhibit 686 H).

Columbian-Phillips Co., Phillips, 50 percent; Columbian Carbon Co., 50 percent (Tr. 534). In July 1947, Phillips sold its interest to Columbian Carbon Co. (exhibit 686 H).

#### CONCLUSIONS

##### *In General*

Carbon black is the commercial name for the soot of gas. Though its exact chemical formula is not known, it is comprised of carbon, hydrogen, oxygen, and other elements, with the carbon content ranging from 84 to 96 percent. It is soluble only in molten iron and has no competitor in conferring tensile strength and abrasion resistance to rubber. Intense color is its marked characteristic and since 1870 it has been used as an important ingredient in paint, ink, varnish, stove polish, and carbon paper. These uses accounted for its annual production volume range from one million pounds in 1887 to 25 million pounds in 1914. Discovery of its adaptability to rubber with the advent of the automobile since the turn of the century has resulted in raising its annual production to 700 million pounds in 1944, of which 90 percent is utilized in the rubber industry.

Natural gas, from which carbon black is manufactured, has become an important fuel commodity for domestic use. When it contains sulphur and other chemicals, it is referred to as "sour gas," and is not desirable for domestic use but its usefulness for manufacture of carbon black is not impaired. Concurrent with increased use and deple-

tion of older natural gas fields, the industry has moved from West Virginia and Pennsylvania to Louisiana, Texas, Oklahoma, and New Mexico, where it is now located.

Carbon black was manufactured in the early seventies by a process involving impingement of natural gas flame upon soapstone plates. After some years, there was developed an improved process consisting of 24-foot circular iron plates revolving over such flame. A further improvement took place in 1900 with invention of the channel method, in which channel iron beams of 6- to 8-inch widths are moved back and forth over gas burners. This method, with improvements, and possessing simple construction and ease of maintenance, was the manufacturing process in use during the major portion of the time period covering this investigation. The product is referred to as "channel black." The extremely dusty character of the product has constituted a problem in its packaging for marketing. During the past 20 years, a process has come into general use of moulding it into small, grain-size pellets. This has permitted use of smaller containers, which, in general, are 50-pound paper and latex bags and 300-pound wooden cases.

Some time before the late war, the Cottrell or "retort" method was invented. This process consists of burning gas in a retort with an inadequate supply of air to create a smudge, from which the carbon black is chemically extracted. A variation of this process is called the "Thermatonic Method." Under this process, as high as 18 percent of the weight of gas burned is recovered as carbon black, against a 3-percent proportion in the channel methods. The resultant product is called "furnace black," and is classified as Semi Reinforcing (S. R. F.) and High Modulus (H. M. F.).

There is a difference in the composition and quality of furnace black so that for use in natural rubber it did not seriously compete with channel black. Furnace black experienced a great development during the war, however, it being found equal to channel black in reinforcing quality and superior in heat resisting properties in the manufacture of synthetic rubber. A 50-percent larger proportion of furnace black is required in synthetic rubber manufacture. The result, at the date of closing of this investigation, places channel black in the position of supplying less than half of carbon black requirements, as indicated by the following statistics:

| <i>Production (pounds)</i>             |                                        |                            |
|----------------------------------------|----------------------------------------|----------------------------|
|                                        | <i>1941 (the peak<br/>prewar year)</i> | <i>Postwar capacity</i>    |
| Channel.....                           | 487, 967, 000                          | <sup>1</sup> 675, 000, 000 |
| HMF furnace.....                       | 0                                      | 275, 000, 000              |
| Other furnace (including Thermal)..... | 109, 098, 000                          | 450, 000, 000              |
| Total.....                             | 594, 065, 000                          | 1, 400, 000, 000           |

<sup>1</sup> Including 177,000,000 from D. P. C. plants

The record discloses the following eight manufacturers of furnace black in the United States at this time, the first four named being members of the association here under consideration: United Carbon Co., Columbian Carbon Co., Godfrey L. Cabot, Inc., J. M. Huber Corp., Phillips Petroleum Co., Thermatonic Carbon Co., Jefferson Lake Sulphur Co., and Crown Carbon Co.

Statistics compiled by the Bureau of Mines record total domestic and export sales of carbon black, in pounds, for the years 1925 to 1941, the period since 1933 appearing as follows:

| Year      | Domestic                 | Export                   | Total       |
|-----------|--------------------------|--------------------------|-------------|
| 1933..... | 222,182,000              | 152,286,000              | 374,468,000 |
| 1934..... | 191,992,000              | 120,620,000              | 312,612,000 |
| 1935..... | 245,351,000              | 142,185,000              | 387,536,000 |
| 1936..... | 313,018,000              | 154,718,000              | 467,736,000 |
| 1937..... | 305,362,000              | 184,253,000              | 489,615,000 |
| 1938..... | 243,474,000              | 167,968,000              | 411,442,000 |
| 1939..... | 356,705,000              | 203,828,000              | 560,533,000 |
| 1940..... | 352,156,000              | 177,618,000              | 529,774,000 |
| 1941..... | <sup>1</sup> 532,009,000 | <sup>2</sup> 112,735,000 | 644,744,000 |

<sup>1</sup> Exports for October to December 1941 included under "Domestic" to avoid disclosing export figures.

<sup>2</sup> Figures cover January to September, inclusive.

Members of the association supplied 85 percent of the exports recorded. The same Bureau's statistics of stocks on hand for the 1933 to 1941 period are:

| Stocks    |             |           |             |
|-----------|-------------|-----------|-------------|
| 1933..... | 155,969,000 | 1938..... | 166,159,000 |
| 1934..... | 171,799,000 | 1939..... | 130,792,000 |
| 1935..... | 136,086,000 | 1940..... | 169,587,000 |
| 1936..... | 79,582,000  | 1941..... | 118,847,000 |
| 1937..... | 100,497,000 |           |             |

During the war period, exports to enemy countries stopped entirely, and lack of shipping space greatly reduced exports to neutral countries with the result that the preponderant portion of exports was made under lend-lease and not by the association here under consideration, as revealed by the following statistics:

|           | Export      | Lend-lease |
|-----------|-------------|------------|
| 1939..... | 153,800,000 | -----      |
| 1940..... | 121,100,000 | -----      |
| 1941..... | 69,400,000  | 23,535,000 |
| 1942..... | 13,900,000  | 37,344,000 |
| 1943..... | 10,700,000  | 36,021,000 |
| 1944..... | 10,700,000  | 70,317,000 |

The association, however, assisted the lend-lease Administration by performing the packaging, crating, and loading requirements of all lend-lease shipments.

On November 21, 1929, three carbon black manufacturers, Godfrey L. Cabot, Inc., United Carbon Co., and J. M. Huber, Inc., and three distributors of the product: The Palmer Gas Products Corp., Binney

& Smith Co., and H. W. Greeff & Co., Inc., organized a corporation under Delaware law to engage solely in export trade, known as "Carbon Black Export Association, Inc." It filed requisite statements with the Commission under the Webb-Pomerene law, and went out of existence after filing annual reports at January dates of the years 1931, 1932, and 1933. This was not a so-called full-functioning association, each member selling carbon black in export trade on its own account at prices determined from time to time by the association. It was testified that the membership found this type of association impractical and it was formally dissolved on December 1, 1933.

Mr. Carl E. Kayser, who had been employed for more than 20 years in the gas and oil business in the Southwest, made a survey of this association's operations and demise, for the use of several carbon black manufacturers. He reported that the failure of the association was due to two factors, first, it was comprised of diversified interests (manufacturers and distributors); and, second, it operated as a purely advisory body and had no enforcement authority with which to regulate dealings with foreign purchasers. He testified that the practices of foreign purchasers, some 10 or 12 of whom accounted for 80 per cent of all carbon black exported, consisted of insistence on liberal credit terms, bad faith rejection of merchandise, demand for excessive discounts, and a price decline clause in contracts which enabled purchasers, upon the allegation of a lower offer, to procure more favorable terms.

On May 16, 1933, there was organized by the respondents herein a new association, under Delaware law, bearing the name "Carbon Black Export, Inc." Its shares of stock were owned wholly by manufacturers, the first stockholders being the following: United Carbon Co.; Columbian Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber of La., Inc.; Century Carbon Co.; Panhandle Carbon Co.; Texas Carbon Industries, Inc.; and the Palmer Carbon Co., the first three named being by far the larger producers. This association, under its charter, was vested with full power to deal in carbon black in export trade on its own account or for the account of others. The stockholders entered into contracts to sell carbon black in export exclusively through the association. Each member's stock participation was based upon a proportion of export business allotted to him as his so-called quota. At the time of the organization of the corporation, a quota was assigned to and agreed to by each stockholder. The amount of the individual quotas was determined by negotiation among the prospective members and the negotiations were difficult. Agreement was finally reached when the stockholders decided to divide themselves into two groups; the three larger stockholders to

reach an agreement among themselves as to individual quotas which would total 75 percent of the corporation's requirements and the remaining stockholders to reach an agreement among themselves as to individual quotas which would total 25 percent of the corporation's requirements. Since that time there have been a number of changes in the quotas—upon the entrance of new members, upon the building of new plant capacity of individual members and by virtue of the discontinuation of production of some of the plants of some of the members.

The contracts implementing the foregoing exclusive agency arrangement specifically designate the commodity as carbon black made by "the impingement of a flame upon a metallic surface," indicating channel black as distinguished from furnace black. Four members of the association, Cabot, Columbian, United, and Huber, respondents herein, also manufacture furnace black. This is not sold for export through the association on any exclusive contract or quota plan, but rather upon a straight sales agency at a commission of 0.15 cent per pound payable to the association as agent. There are four manufacturers of furnace black who are not members of the association, to wit: Phillips Petroleum Co., Thermatonic Carbon Co., Jefferson Lake Sulphur Co., and Crown Carbon Co. The association has been authorized to make similar agency contracts with these manufacturers, but at date of this investigation's conclusion none had offered such agency nor had any of them requested membership in the association. There is no testimony or evidence in the record supporting specifications in the bill of particulars with reference to furnace black, which became a commodity of export trade in 1946.

#### I. THE ASSOCIATION-PHILLIPS PETROLEUM CO. CONTRACT

The Phillips Petroleum Co., in the course of its business of extracting gasoline from natural gas, following such extraction, becomes the possessor of large stocks of residue gas, which it sells for domestic use and for carbon black manufacture. During the period 1933 to 1944, it supplied one-third of the natural gas used in manufacture of channel black. Except for a small amount supplied to plants in which it owns a half interest, the major portion of this supply consisted of gas sold on a 30 percent royalty basis. This gas was originally sold at an agreed price per thousand cubic feet basis, but the 30 percent royalty provision became common following 1928, because, so it was testified, of the advantage to gas purchasers in not having to pay for the gas until the carbon black made from the gas was sold. Under royalty contracts, the purchaser stores and sells the manufactured carbon black, agreeing to sell the royalty black in amounts proportional to

his own black, and deducting up to 5 percent commission for selling expense. The royalty black is referred to in these contracts as "seller's carbon black," "seller's stock," "seller's share," and "seller's share of the production." Under the contracts, the purchaser may insure stored stocks of the production and bill the gas seller for his pro rata (30 percent) part of the insurance cost, or the seller may "carry its own risk as to its share of the said production." The 30 percent royalty was described as a "device for determining the price" of the gas. There is no contract requirement for segregation of the royalty black nor any evidence that segregation was ever made. The selling price against which the royalty is computed has been the price received on domestic sales of black, and in periods of high export price, on both the domestic and export price, the gas seller seeking to procure the highest return for the gas sold. All manufacturer respondents herein, excepting Cabot and Huber, purchase natural gas from the Phillips Petroleum Co. on a royalty basis. Phillips did not market the royalty black, but agreed on May 2, 1933, not to export any such royalty black during the 5-year period from January 1, 1934. This period was subsequently extended to December 31, 1945. Its officers construed this agreement as not applicable to royalty black involved in gas contracts with carbon black manufacturers not members of the association, which black was sold in export by such manufacturers. The investigation disclosed no evidence that the Phillips Petroleum Co. had ever sold or offered to sell channel carbon black or in any way held itself out as a dealer or prospective seller of such commodity. It cannot be said to have been independently engaged in the production, manufacture, or selling for consumption or for resale within the United States of channel carbon black, and there is no evidence of offers to sell or sales of such commodity in export trade. Under the royalty contracts with the manufacturer respondents, it may be said to have had an equitable interest in royalty black in which the right of possession, storage and sale, was specifically contracted to the purchaser of the gas. The contingency of possession of and trafficking in royalty carbon black in commerce on the part of Phillips Petroleum Co. never arose nor is it to be anticipated in any of the contracts in evidence.

It is concluded from this evidence that the contracts in question, as they were carried out by the respective parties, amounted to a sale of natural gas by Phillips to the carbon black producer and payment of the purchase price therefor by the latter in cash, the amount of such purchase price in dollars being computed as stipulated in the contract, i. e., on the basis of the average price received by the manufacturer for the black sold by him, originally in the domestic market and later in the domestic and foreign market both. In other words, the 30 percent Phillips' share and the prices agreed upon for such share were

the measure of the amount of money to be paid as the purchase price for the gas. This being the case, Phillips' share of the black itself was actually handled by the manufacturer and Phillips was not engaged in trading therein. The agreements themselves were between individual member-producers and Phillips and not between the association and Phillips. Regardless of Phillips' assurance in 1933 that it would export no black, the evidence indicates that it would not have exported any anyway, because it was not then a producer of any kind of black. It does not appear therefore that there is anything in the situation disclosed that could or did restrain the export trade of independent competitors or effect any of the other restraints excepted in the provisos of section 2 of the Webb-Pomerene law.

## II. DEALINGS WITH NONMEMBER PRODUCERS

The association, under the terms of the contract with its members, was authorized to purchase not more than 10 percent of its annual export requirements from nonmembers. Two officers testified that the purpose of this provision was to invite participation in the association's advantages. Such purchases commenced in 1934, aggregating 0.291 percent of that year's requirements, and 0.75, 2.276, 7.527, 4.529, and 4.989 percent for the years 1936 to 1940, respectively, thereafter. These purchases were made from the following nonmembers: Charles Eneu Johnson & Co., Inc.; Magnolia Petroleum Co.; and Continental Carbon Co.

On June 7, 1933, at one of the first directors' meetings following its organization, one of the directors was authorized to negotiate with the "Herkness Carbon Co.," meaning Charles Eneu Johnson & Co., Inc., for an agreement whereby: (1) The Johnson company would purchase all its gas requirements from United Carbon Co.; (2) would adhere to the export price schedule of the association; and (3) would sell to the association such surplus of export carbon black which it did not succeed in selling at the "schedule of prices fixed" by the association. One purpose of this program was expressed by the association's president to insure certainty that Herkness "would not increase his output in the State of Louisiana." These objectives never became the substance of a formal agreement. The Johnson company purchased gas from United Carbon Co. for about 3 years "free from conditions," according to Mr. Herkness, and then changed its source of supply because of a more favorable price quotation. Association officers explained the attempt to control the Johnson company's gas supply to a provision of the NRA Code for the industry directing relation of production to current deliveries.

Charles Eneu Johnson & Co., Inc., became a member of the association on June 18, 1936, almost 3 years to the day from inception of the negotiations. This company had been in the ink business since 1804, consuming since 1924 about a million pounds of carbon black annually. It commenced manufacture of carbon black in 1926, at about 1 million pounds per year, attaining a production of 5 million pounds before 1933. Shortly before 1933, it began selling carbon black in export, and in the domestic trade in 1940. It was given a quota of 3.88 percent of the association's exports, equivalent to 4½ million pounds, all of it sold in export trade. This amount, along with the million pounds used for ink manufacture, was in excess of the firm's entire production. Mr. Herkness, its principal officer, testified that prior to 1933 he had been selling in export below the association's prices but "was negotiating with the thought of maintaining Carbexport prices." He also testified that he found the export market profitable enabling his firm to purchase carbon black beyond their own production capacity for sale in export trade. He admitted that he did "undertake to go along in an effort to maintain Carbexport's prices" and that in 1934, at his request, the association purchased 600,000 pounds of carbon black from the Johnson company.

The record discloses that on at least two occasions Magnolia Petroleum Co., operating four carbon black plants in Texas, sold carbon black to the association for export. The first of these, occurring on July 9, 1936, involved 700,000 pounds of carbon black which had not met the quality requirements of a domestic user. The second sale involved 250,000 pounds and took place on October 1, 1937. In the course of these transactions, the Magnolia company rejected the association's invitation to membership, writing that "the export market has never been attractive to us because of the methods employed at times by customers to secure reduction in price." On another occasion, in response to an inquiry by the Magnolia company about a certain foreign agent, the association's president replied: "When you seriously want to take a flier in exporting carbon black directly, I have in mind recommending that you tie up with Priem to get a taste of what difficulties and costs there are connected with selling this commodity outside of our fair land."

The Continental Carbon Co., successor in early 1937 to the Witco Carbon Co., on February 9, 1937, entered into an agreement with the association to sell to the latter 5 million pounds of carbon black during the calendar year 1937. The price to be paid was specified as the "same as paid by Carbon Black Export, Inc., to its member producers, less 10 percent commission." This contract was renewed for the year 1938, the quantity being increased to 7 million pounds and the exclusive agency feature delineated as follows: "During the term of this agree-

ment Continental shall not directly or indirectly sell or deliver any carbon black for export except through Carbexport." The contract was renewed for the year 1939, the quantity specified at 7 million pounds or a figure representing 5.58 percent of the association's export requirements. This quantity goal was not attained during 1939 so that the association at the close of the year purchased 1,744,308½ pounds for \$74,133.11 to be stored by Continental subject to the association's call. The contract was renewed annually through 1943 and then continued in effect by mutual assent. On May 29, 1946, Continental Carbon Co. became a member of the association, subscribing for 589 shares, and being assigned a quota of 7.190 percent of the group's total export requirements.

The renewal for the year 1940 contained a clause granting each party the right of cancellation of the contract upon 60 days' written notice to the other. Mr. R. I. Wishnick, president of the Continental company, testified that the company was increasing its production and that his officers considered a cancellation clause advisable "so we could renew negotiations for increased quotas." The association's president, in turn, testified that the association preferred the cancellation clause because "if Mr. Wishnick chose to increase his capacity and come back for an additional quota, that we should prefer to have him sell his own carbon black." He had, however, at the time the extension clause was negotiated, written to one of the association members that "Wishnick \* \* \* had the clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if present outside capacity were increased a pound." The record discloses that the Continental Carbon Co. did in fact increase its production during the period involved, as shown by these statistics:

|            | <i>Pounds</i> |
|------------|---------------|
| 1937 ----- | 23, 800, 000  |
| 1938 ----- | 29, 551, 590  |
| 1939 ----- | 32, 116, 798  |
| 1940 ----- | 32, 476, 625  |

The association's president testified that there were two ways to bring the Continental Carbon Co. into the Carbexport picture, one by stockholder membership, and the other by way of an exclusive agency contract. He admitted that under the latter plan the Continental company enjoyed all the advantages of membership without the necessity of making a stockholder's investment. Mr. Wishnick testified that operations under a quota contract placed him "in substantially the same position as a producer member stockholder" excepting that Continental was not required to make an investment in the association.

The Canada Carbon Co., Ltd., of Toronto, Canada, referred to as the sales agent of Crescent Carbon Co., Point Pleasant, W. Va., by

letter dated March 14, 1934, acknowledged to the association receipt of the latter's export price lists on March 9, 1934. The letter went on to state that their interest in export trade was small and confined to the product of the Crescent Carbon Co. but that "we will follow these (the export price schedules) very closely." In March of the following year, 1935, the association's president sought to interest the Canada company in membership on a 2½ percent quota, but nothing came of the negotiations. The association, from time to time, on its own initiative, and sometimes at their request, furnished both companies with price lists and conference shipping rate information. Respondent United Carbon Co. purchased the plant and equipment of Crescent Carbon Co. on April 1, 1944, following its damage by fire in January 1944.

Exchange of export price information was the subject matter of some 20 letters passing between the association and the Imperial Oil & Gas Products Co. of Pittsburgh, Pa., during the years 1937 to 1940. One letter of Imperial's dated August 4, 1938, in reply to the association's query about a low price quotation in Brazil, reads: "Our prices for Brazil are practically the same as Carbon Black Export's and we feel sure that such sales as the one you refer to will not be made in the future." In November of 1938, Imperial again wrote the association as follows:

We feel that our price policy in the export trade at the present time is very little different from yours and that we have given you little, if any, trouble recently in foreign markets. It is our intention to cooperate with you as well as possible on all export business, and as regards the subject of this letter we might mention that, if any price cutting is to be done, it is not our desire to do it in Brazil.

It is difficult for us to determine what business you are referring to in your complaint regarding our prices in Brazil and we can therefore hardly explain the situation to you any better than we have done above. If you are able to give us more definite information with regard to the alleged price cutting, together with names of customers, perhaps something could be done to rectify any violations of our price policy by our agent in Brazil.

The association's president testified that during the wartime shipping stringency the association assisted Imperial as well as other outsiders in procuring shipping space. He added that he negotiated with Imperial "a number of times" to procure their membership in the association but did not have any agreement with them for adherence to the association's export prices. Imperial Oil & Gas Products Co. became a member of the association on May 29, 1946, receiving a 1 percent quota of the association's export requirements.

The Keystone Carbon Co. of Louisiana entered into a contract with the association on April 17, 1936, making the latter its exclusive sales agent for the sale of 3½ million pounds of carbon black annually

during a term running from January 1, 1937, to December 31, 1945. The contract contained an option granting Keystone the right before October 1, 1936, to subscribe to 216 shares of the association's stock and to sign a member's sales agreement on the basis of a 3 percent quota, or portion of the association's annual export requirements. Keystone exercised the option and on December 14, 1936, its assets and association membership were acquired by respondent Columbian Carbon Co.

The association's maintenance of a price policy for its products was a legitimate objective, but extension of this policy to nonmember competitors by way of procuring "intention to cooperate," and assurances "to follow association prices closely," was not in conformity with the principle of the Export Trade Act. Likewise, membership invitation overtures to prospective new stockholders which resulted in trial operations extending from 3 to 9 years, resulting in enjoyment of "all the advantages of membership without the necessity of making an investment," conferred on such nonmembers benefits which were lawfully attainable only by compliance with the Export Trade Act.

It is concluded that while the association's maintenance of a price policy for its products was a legitimate objective and that membership invitations may be extended by the association to prospective new stockholders, the association may not, however, extend its price maintenance policy to nonmember competitors by way of procuring from them agreements to cooperate with assurances to follow the association's prices and it may not make membership overtures to prospective new stockholders conditioned upon trial operations. Likewise the association may not make agreements with nonmembers whereby they stipulate that they will follow or adhere to the export prices of the association; nor may the association grant any export quota to any nonmember. It is also concluded that the association may not impose or attempt to impose any restrictions upon the volume of exports of nonmembers, or upon their volume of production, or upon the source or quantity of their supply of raw materials, i. e., gas.

### III. CONTROL OF DISTRIBUTION

The basic agreement among the members of Carbexport bound each one to confine its exports of black to foreign countries to those made through the Association, except in the cases of Mexico and Canada. As to the latter the producer agreed to use reasonable care to see that exports made to those countries were for use and consumption therein and to prevent their diversion to other foreign countries. Each member agreed that the association should act as its exclusive agent for

the sale of all its export carbon black and that it would export only through Carbexport.

This agreement obviously enabled the association to control the channels of distribution for all the export carbon black originating with the stockholder-members. The volume of each member's exports was determined by his quota as fixed under the quota arrangement agreed upon. The agreement on quotas was said to have been arrived at by negotiation and compromise.

At the time of Carbexport's formation its members represented about 85 percent of this country's carbon black exports. There have always been nonmember producers, but the association membership has always represented the bulk of the production and most of the exports.

Administrative action involving questions raised by Carbexport's set-up and operations under these arrangements has been based upon a determination of factual situations as they relate to the imposition of restraints upon bona fide American exporters who procure and resell the commodity, as distinguished from agents or brokers working on a commission. Evidence was taken as to the effect of conduct of Carbexport in relation to such American exporters.

The association performs its selling function through ten distributors, three of them English firms and the remainder from this country. These in turn operate through more than 170 agents and sub-agents in all export markets, excepting Canada, Mexico, and Belgium, the latter of which is reserved to one distributor. Sales in the export market are made to seven large foreign rubber products manufacturers (accounting for 60 to 70 percent of sales volume) and to some 4,000 small customers engaged in the rubber, ink, and paint industries. This distribution organization operates under contracts requiring handling of the association's product on exclusive terms, at its suggested prices and a uniform basic selling policy which calls for detailed monthly reports of all sales. Distributors may advertise their own brand names. The association refers all purchase inquiries to its distributors. Most of the distributors have been in business in excess of 25 years. The principal requirements in the selection of distributors have been their financial responsibility, their willingness to adhere to suggested prices, and their technical skill and facilities. These have been found requisite in coping with certain practices traceable to large foreign buyers: Commission splitting, liberal credit terms, unwarranted rejection of shipments, and black-market operations.

The association has operated on a nonprofit basis, from time to time being required to call for pro rata assessments from its stockholders. From the date of its organization, its prices for carbon black have been higher than those prevailing in the domestic market. Its application

for an export price premium from the Office of Price Administration in 1942 disclosed a range of 0.232 to 1.022 cents per pound differential in the export price over the domestic price of carbon black. The investigation disclosed no evidence of price changes in the export market in any relation to domestic price changes.

It was the association's practice to approve assignment of distributor's contracts and the appointment of agents. Careful investigation was made of the dealings with two applicants for agency to sell its carbon black in export trade. The first of these, an individual located in New York, N. Y., was engaged as an exporter of steel and chemicals since 1932. He sought to purchase carbon black for export from three of the respondent manufacturers and one nonmember manufacturer, sometime following the year 1940. He made no direct application to the association because he was told it would offer him only a 1-percent commission. Following our entry into the war, he was offered carbon black for shipment to Spain by one nonmember manufacturer, but was forced to reject the offer because of war-time conditions. Thereafter, in late 1945, he was given an exclusive agency by the Phillips Petroleum Co. to sell its furnace black in five Mediterranean countries at a 5-percent commission. These countries have paint, ink, and rubber manufacturing industries as potential consumers of furnace carbon black.

The other request for an export sales agency was that of Louis A. De Smet who operates as an individual trader from his residence in Chicago, Ill., in the domestic and export sale of Gilsonite, Bentonite, and stationery envelopes under the firm name of "De Smet & Company." From 1917 until his death in 1938, this applicant's father, George W. De Smet, engaged in export and import business as a sole trader under the name "George W. De Smet." The applicant became associated with his father in 1923 and during the period before his father's death in 1938, their main business was the export of carbon black, which "we purchased and we sold \* \* \* on our own account." During the period 1929 to 1935, their dollar volume of sales ranged from \$45,312 to \$157,887. The 1935 export sales were made to customers in France, England, Japan, Poland, Germany, and Holland. In some years, their principal customer was the Michelin Tire Co. of France, to whom sales were made through a Paris agent. Some sales were made direct, in which event the agent was compensated, and at other times sales were made to the agent on a net basis, he in turn reselling to Michelin. They sold their carbon black under three brand names, "Stygian," "Jetta," and "Croak," the first name having a "marked brand preference" and being frequently sold to Michelin in competition with other brands.

Mr. De Smet knew the following carbon black manufacturers who were not members of the association: Crescent Carbon Co.; Canada Carbon Co.; Imperial Oil and Gas Products Co.; Keystone Carbon Co.; C. E. Johnson Co.; Magnolia Carbon Co.; General Atlas Carbon Co.; and Thermatonic Carbon Co. The firm had done business with the first four named and in the period 1933-38, it acted as Imperial's exclusive agent in France. Under this agency, the firm was permitted to do business also in Belgium, Holland, and Spain. Imperial, they knew, had exclusive agents in Germany and England. Upon learning that they could sell for Keystone Carbon Co. in an unlimited territory, they gave up their agency for the Imperial company. The Keystone company, on October 3, 1936, notified the firm that all their export business would be handled through the association and denied the firm any further supplies. Thereafter, the firm "canvassed the industry until 1945" but could not procure supplies. The firm, at one time or another, had purchased carbon black from the following members of the association: Cabot, United, and Keystone, and members Palmer and Wishnick-Tumpeer of the first export association. The firm never maintained a technical laboratory, but their agents, Van Lede in Paris and Alfred Smith, Ltd., in London, were so equipped.

In 1936, the senior De Smet wrote the association and one of its members requesting "if you cannot grant us an agency." In 1938, the firm received an inquiry from Michelin Tire Co. for 700,000 pounds of carbon black and sought to procure supplies for this order from respondent Cabot's subsidiary Texas-Elf Carbon Co. and from the Imperial Oil & Gas Products Co., but were not given a quotation. In May 1945, the firm was offered a proposition by Mr. R. I. Wishnick of the Panhandle Carbon Co., to act as its subagent in France at a commission of 5 percent. This was refused because it was an "entire different way of handling" and would leave no profit after paying a 5 percent commission to a French agent. (Mr. De Smet testified that on sales of carbon black he had netted 10 percent above expenses.)

The association's president testified that the De Smet firm was denied a distributorship by the association because of a consensus of opinion that the firm "was not an exporter in the essential sense that applied to the distributors whom Carbexport employed." He listed as further objections that firm's failure to maintain a technical staff and the known fact that it acted as a shopper for foreign concerns, principally French, seeking price concessions. This officer testified that many subagents operate on a 3 percent commission and that the De Smet firm could have contracted with such subagents.

The firm was engaged as importers of mushrooms, canned fish, and crude rubber from 1925 to 1938, the business declining following the Tariff Act of 1930. The senior De Smet was also engaged in the fol-

lowing domestic activities in the period following 1925; De Smet Quartz Tile Co. and the "Colored Cement Co." both of which ventures were not financially successful. It would appear from the activities of the De Smet firm that they served as buying agents dealing in a number of widely disparate commodities, of which carbon black was one side line. These activities cannot be said to identify them as American exporters buying and reselling on their own account. In fact, from the evidence it is difficult to discover just what selling services De Smet was prepared to or did render to American producers, either Association members or independents.

The investigation of operations under the association's contracts with its members and its control over the distribution of its members' product disclosed no evidence that the trade of bona fide American exporters, buying and reselling in export trade, was restrained. In the cases developed by the testimony, the weight of the evidence indicates that the applicants involved were seeking to represent the association either as agents or brokers or that they were in fact acting or seeking to act as purchasing agents for foreign buyers. The association was not obligated to employ sales agents in this country to sell its black in foreign countries in which it already had agents rendering sales services or to quote to agents in this country for foreign buyers who were being serviced by its foreign agents; neither was it obligated to designate distributors who lacked the technical skill or facilities required of those whom it did appoint for this service.

The above conclusion to the effect that the facts disclosed by this investigation fall short of establishing that Carbexport has illegally restrained the trade of American intermediaries is drawn from the record herein, and does not constitute a ruling or determination of the question of the validity of practices or contractual arrangements similar to those used by Carbexport, which, under other factual situations or circumstances, might contravene the law. As hereinabove stated, Carbexport represented about 85 percent of the carbon black exports from the United States, but the record discloses that there were always independent producers to whom intermediaries could turn for a supply to fill foreign orders. In addition, the record indicates that two nonmember producers have recently entered the export field in a substantial way which materially changes the competitive situation from that which existed when the testimony was taken. The record as a whole does not disclose any of the effects prohibited by the provisos of the Webb Act in this connection and therefore does not afford a basis for any recommendation to the Association relative thereto. However, this determination is provisional, and the Commission retains jurisdiction to take appropriate action should

judicial authority with final jurisdiction hereafter hold that exclusive dealing contracts or arrangements, such as have been shown to be present here, are illegal per se.

#### IV. RELATION TO DOMESTIC TRADE ASSOCIATION

The National Gas Products Association is known as the domestic trade association for the carbon black industry. It is a voluntary association organized December 28, 1930. Its membership as of June 4, 1946, consisted of the following: Cabot Carbon Co.; Columbian Carbon Co.; Coltex Corp.; Columbian-Phillips Co.; Continental Carbon Co.; J. J. Huber Corp.; Crown Carbon Co.; Imperial Oil & Gas Products Co.; Panhandle Carbon Co.; United Carbon Co.; Kosmos Carbon Co.; Eastern Carbon Co.; and Chas. Eneu Johnson Co.

As of that date, the Crown, Continental, and Imperial companies were not members of the respondent association herein. The charter purposes of the domestic association are to extend markets for natural gas products; legitimately oppose unreasonable legislation; support conservation; maintain a credit information exchange; compile trade information concerning depletion, pipelines, and production problems; and to take concerted action in the matter of freight rates, classifications, and container requirements. Monthly statistics of production, shipments, and stocks are compiled and circulated among members. In the summer of 1933, during the preparation of codes under the National Recovery Administration, Mr. C. E. Kayser, then president of the respondent association, was retained as assistant secretary-treasurer of the domestic group. Both associations were housed in the same office. The domestic group was concerned with administration of the NRA Code until May 28, 1935. Until the date of this investigation's conclusion, the group was active in standardization problems, rail freight rates, industry investigations for the War Production Board, and in the operation of a car pool under the Office of Defense Transportation. These activities made severe demands on the office personnel of the respondent association creating problems of allocating personnel time and telephone expense and cost of supplies and equipment. In December 1943 the value of these services was agreed by both associations to be \$100 per month. Mr. Kayser testified that the domestic association's board of governors for some time felt, as did he himself, "that it seemed inconsistent" that a domestic association and an export association should be housed together. Accordingly, on December 19, 1945, Mr. Kayser resigned from his position as assistant secretary-treasurer, and the statistical work was removed to another office. The described activities of the domestic group are concerned so closely with the domestic trade which the export association's statute enjoined not to restrain, that it would

appear to be bad policy to house, officer, or administer the two types of association with the same personnel under one roof.

It is concluded that the facts justify a recommendation that the respondent association conduct its office activities with personnel who have no official affiliation or employment with domestic trade groups, and that it should not permit itself to be jointly housed with such groups.

#### V. GENERAL SUMMARY

The major portion of the entire world production of carbon black is produced in the United States, although the exact percentage of this proportion is unknown. There was, prior to the war, some production in Russia, Romania, Germany, and Japanese-held Formosa, but this was not of great volume.

There was no evidence of any agreements between Carbon Black Export, Inc., or its stockholders and any foreign producers of carbon black.

The record contains information indicating the imminence of considerable competition from production potential located propitiously near seaboard in the following gas and oil areas: Russian, Romania, Iran, Iraq, Venezuela, Colombia, Mexico, Canada, and Formosa. The record was brought up to date by a stipulation between counsel dated October 20, 1948.

It appears that the British Government has commenced a program for carbon black production in Iran, in association with the Anglo-Iranian Oil Co., as well as two similar projects in England itself, one of which is expected to utilize Welch coal as a raw material and the other to manufacture furnace carbon black by the Phillips Petroleum Co. process from imported liquid hydrocarbons. The British program apparently stems from a scarcity of dollar exchange in the face of annual carbon black requirements in excess of 5 million dollars. This represents 40 percent of the association's export market. The association is thus confronted with the prospect of the first sizable competition from foreign production.

At the date of the stipulation herein, the activities of six new producers indicated that competition to Carbexport may soon assume considerable proportions. The output of the Sid Richardson plant at Odessa is estimated at 60 million pounds annually, all of which is a potential source for shipment abroad. It is known that the Phillips company in December 1945 had set up an export office to take care of shipments abroad and in that time had licensed one distributor to sell its black in five foreign countries. Phillips is also carrying on trade journal advertising extolling the merits of its product in order to assist its distributors and agents in the marketing of Philblack abroad.

It represents that its carbon black is superior in quality to other types of black heretofore used in tire manufacture.

During World War II 10 nations established in Washington missions or agencies for the purpose of presenting their requirements to the United States Government who did the actual purchasing. Immediately upon the termination of the war, lend-lease came to an end and these agencies immediately began direct procurement. One by one of these listed agencies have abandoned direct procurements so that American sellers are now selling directly to consumers in these 10 nations. However, such purchasing agencies continue to exist in Washington mainly in an advisory capacity for furthering the economic interests of their countries in home buying and for dealing with the Economic Cooperation Administration. It is to be noted that the record indicates that the stockholders of Carbexport are firmly convinced, as a result of their experience in export trade, that an association such as Carbon Black Export, Inc., is the best, if not the only, practicable means of dealing with such foreign nationals' groups, and meeting them on equal terms.

The United States, through the Office of International Trade of the Department of Commerce, maintained a quantity restriction on carbon black exports during the period April 1, 1946, to May 27, 1947. Such exports, since January 28, 1948, are subject to license requirements only in the case of shipments to Europe and adjacent territory.

RECOMMENDATIONS FOR THE READJUSTMENT OF THE BUSINESS OF  
CARBON BLACK EXPORT, INC.

To: Carbon Black Export, Inc., an export trade association, its officers, directors and stockholders:

The Federal Trade Commission, having had reason to believe that Carbon Black Export, Inc., an association engaged in export trade (as "association" and "export trade" are defined in the act of Congress known as the Export Trade Act, approved April 10, 1918), and certain of its agreements and acts were in restraint of trade within the United States or in restraint of export trade of domestic competitors of said association or that they substantially lessened competition within the United States and otherwise restrained trade therein, summoned said association, its officers, directors, and stockholders, to appear before it on the 30th day of November 1944, as provided by section 5 of said Export Trade Act. Said association having duly appeared before the Commission pursuant to such summons, and a formal investigation into the alleged violations of law having been made, in the course of which testimony and evidence was taken and incorporated into the record, and the Commission having examined

the record and made a report thereon, and concluded therefrom that certain agreements made and acts done by such association have been in violation of law;

Now, therefore, pursuant to the provisions of said Export Trade Act and by virtue of the authority conferred upon it by said act, the Federal Trade Commission hereby makes to said Carbon Black Export, Inc., its officers, directors, and stockholders, the following recommendations for the readjustment of said association's business:

1. That Carbon Black Export, Inc., in the future refrain from adhering to, maintaining, or entering into any understanding, agreement, or arrangement with American producers of carbon black who are not regularly admitted and recognized members of said association, including producers whose membership in the association is in process of solicitation, where said producers agree to sell only at fixed prices and terms, or in apportioned quantities.

2. That Carbon Black Export, Inc., cease and desist in the future from discussing, negotiating concerning, or seeking an agreement upon any plan, arrangement, scheme, understanding or agreement whereby the production of any American producer or potential producer of carbon black is affected, deterred, forestalled, limited or prevented, or where the purpose or intent is to accomplish any of said results.

3. That Carbon Black Export, Inc., conduct its office activities on a basis wherein it shall not permit itself to be quartered in joint offices with any domestic trade association or statistical and advisory group; and further, that it manage and retain office personnel which shall have no affiliation by way of employment, membership or honorarium with any domestic trade association or statistical and advisory group.

It is ordered by the Commission that Carbon Black Export, Inc., file with the Commission within 30 days hereof a report stating whether it has elected to comply with the above recommendations, and if so, the manner in which it has so complied.

## DECISIONS OF THE COURTS

IN CASES INSTITUTED AGAINST OR BY THE COMMISSION

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BOND CROWN & CORK CO. v. FEDERAL TRADE COMMISSION. CROWN MFRS. ASS'N OF AMERICA ET AL. v. SAME. ARMSTRONG CORK CO. ET AL. v. SAME<sup>1</sup>

Nos. 5813, 5814, 5817—F. T. C. Docket 4602

(Circuit Court of Appeals, Fourth Circuit. August 22, 1949)

EVIDENCE—CONCERT OF ACTION—IF NO DIRECT EVIDENCE, AND CONSPIRACY DENIED

Direct evidence to establish a conspiracy to restrain trade and destroy competition is not required nor is the Federal Trade Commission required to accept the denial of those charged with conspiracy merely because there is not direct evidence to establish it, since essential combination or conspiracy may be found in force of dealings or other circumstances as well as in any exchange of words.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUPPORTED BY EVIDENCE—INFERENCES OR CONCLUSIONS

Where the evidence is sufficient to support the findings of the Federal Trade Commission finding that petitioners have been parties to a conspiracy and combination in restraint of trade constituting unfair method of competition, it is for the Commission and not the courts to say what conclusions are to be drawn from the evidence.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUPPORTED BY EVIDENCE—THAT DIFFERENT CONCLUSION REACHED BY TRIAL EXAMINER

On petitions to set aside an order of the Federal Trade Commission finding that petitioners were parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition, that the trial examiner reached a conclusion different from that of the Commission did not affect the conclusiveness of the findings of the Commission supported by the evidence, since it is the Commission and not the trial examiner that is charged with ultimate responsibility for the finding of facts, and it is the Commission's findings and orders that the Court of Appeals is authorized to review.

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<sup>1</sup> Reported in 176 F. (2d) 974. For case before Commission see 45 F. T. C. 89.

METHODS, ACTS AND PRACTICES—CONCERT OF ACTION—RESTRAINT OF TRADE—  
ESTABLISHMENT OF—FREIGHT EQUALIZATION

On petitions to set aside an order of the Federal Trade Commission finding that petitioners were parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition through a practice of freight equalization, such practice could be considered along with other facts as tending to establish a conspiracy and combination in restraint of trade, which was the only charge of the complaint.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—CONCERT OF ACTION—  
RESTRAINT OF TRADE—IF FREIGHT EQUALIZATION AND NO PRICE CHANGE IN 10  
YEARS, AND NO PRICE COMPETITION IN 85 PERCENT CONTROLLED INDUSTRY

Evidence sustained order of the Federal Trade Commission that petitioners were parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition and ordering them to desist therefrom, where petitioners were manufacturers of crown bottle caps and through a practice of equalizing the freight on shipments in an industry in which they controlled 85 percent of the business, there had been no price change in 10 years and no price competition whatever.

CEASE AND DESIST ORDERS—SCOPE—CONCERT OF ACTION—FREIGHT EQUALIZATION—  
IF INDEPENDENT USE NOT BARRED THEREBY

Paragraph of order of the Federal Trade Commission finding that petitioners were parties to a combination in restraint of trade constituting unfair method of competition, which related to practice of freight equalization would not be stricken on the ground that it would interfere with the independent use or the practice of equalization by petitioners individually, where prohibitions of the paragraph applied only to acts done in carrying out the combination or conspiracy.

CEASE AND DESIST ORDERS—SCOPE—CONCERT OF ACTION—RESTRAINT OF TRADE—  
IF PRODUCT (AMONG OTHERS) INCLUDED WITHOUT SUPPORTING EVIDENCE

An order of the Federal Trade Commission that petitioners were parties to a combination in restraint of trade constituting unfair method of competition would be modified to eliminate its application to cork discs where petitioners were manufacturers of crown bottle caps and manufactured the discs which they used so that the inclusion of the latter commodity in the order was of no practical significance.

(The syllabus, with substituted captions, is taken from 176 F.  
(2d) 974)

On petitions to review and set aside an order of the Commission, order affirmed and enforced as modified.

**[976]** *Mr. Roger A. Clapp*, Baltimore, Md. (*Mr. Albert E. Donaldson* and *Hershey, Donaldson, Williams & Stanley*, Baltimore, Md., on the brief), for petitioners in No. 5814.

*Mr. H. Bartow Farr*, New York City (*Wilkie, Owen, Farr, Gallagher & Walton*, New York City, *Mr. Helmer R. Johnson*, New York

City, and *Semmes, Bowen & Semmes*, Baltimore, Md., on the brief), for petitioner in No. 5813.

*Mr. Frank B. Ingersoll*, Pittsburgh, Pa. (*Mr. Rex Rowland*, New Castle, Pa., and *Smith, Buchanan & Ingersoll*, Pittsburgh, Pa., on the brief), for petitioners in No. 5817.

*Mr. Donovan R. Divet*, Special Attorney, Federal Trade Commission, Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, *Mr. Walter B. Wooden*, Associate General Counsel, and *Mr. James W. Cassedy*, Associate General Counsel, Federal Trade Commission, Washington, D. C., on the brief), for respondent.

Before PARKER, *Chief Judge*, and SOPER and DOBIE, *Circuit Judges*.  
PARKER, *Circuit Judge*:

These are petitions to review and set aside an order of the Federal Trade Commission finding that the petitioners have been parties to a conspiracy and combination in restraint of trade constituting an unfair method of competition in violation of section 5 of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. sec. 45) and commanding them to cease and desist from carrying out any "planned common course of action" with respect to certain acts and practices found to be involved in the conspiracy. The petitioners are corporations engaged in manufacturing crown bottle caps, a trade association of these manufacturers and certain individuals holding office either in the corporations or the association. The commission in its brief filed in this court consents that its order be vacated as to the individual petitioners, and no further attention need be given to them. The manufacturing corporations and the association ask that the order be vacated because not based on sufficient findings and because the findings are not supported by substantial evidence.

The case was heard before a trial examiner, who filed a report recommending that the commission find that there had been no conspiracy in restraint of trade or unfair trade practice in violation of the Trade Commission Act and that it dismiss the petition. Exceptions were filed to this report, and the commission made a complete finding of facts covering every aspect of the case and reached the conclusion that a combination and conspiracy in restraint of trade did exist and that a cease and desist order should issue. The findings of the commission are that the manufacturing petitioners control 85% of the business in question, that there is no price competition of any sort among them, but that absolute uniformity of prices and discounts has prevailed since 1938; that, through their association they considered uniform pricing techniques and a uniform contract in the year 1928, and that, although this uniform contract was not adopted, its provisions have been followed by petitioners; that through the

association petitioners have worked out a standardization of product so that even in the matter of decoration the product of all petitioners is precisely the same; that in connection with patent licensing agreements the petitioner Crown Cork & Seal Company, which was the largest manufacturer of crown bottle caps, furnished lists of its prices to all the other petitioners for a period of many years and ceased only a short while before the institution of this proceeding; that such license agreements provided that the licensees should not sell at prices lower than those of Crown Cork & Seal; and that all of the manufacturing petitioners follow the uniform practice of equalizing the freight on shipments, with the result that the cost of goods plus freight is the same at any given point anywhere in the United States, no matter from which of petitioners the purchase is made. Upon these facts the commission found the existence of the conspiracy charged in the following language (13th finding): "The commission is of the opinion that in the circumstances shown to exist an understanding or agreement under which the respondents acted and still act in concert may be inferred. The intention [977] of the parties participating in the meeting of respondent association, held on July 24, 1928, for all members of the association to sell their products at one and the same price and under identical terms and conditions is clearly evident from the minutes of that meeting. The subsequent use by all such parties of the general pricing plan then formulated, including the schedules of deductions, additions, and differentials, and the adoption of such plan by all of the other respondent manufacturers, with the resulting uniformity in prices, terms and conditions of sale as among all such manufacturers, indicates just as clearly an intention of all of the parties to continue in effect the original understanding. In the opinion of the commission, there is a direct connection between this understanding and the admitted efforts of the respondents to standardize their products to such an extent that a prospective purchaser would have no choice in the realm of coloring, lettering, and decorations as between the products of any two manufacturers; and the concurrent use by all of the respondent manufacturers of the freight-equalization plan serving to maintain identical delivered prices for all purchasers at any given destination, adds materially to the combination of circumstances showing a deliberate and concerted effort on the part of the respondents to completely remove effective competition as among the sellers of crown bottle caps and discs used in connection therewith. Considering, in addition, the price-fixing provisions of the various license agreements, all of which exceeded the legitimate rights of the licensors to protect themselves in the enjoyment of the fruits of their inventions, the sum of all the other incidents referred to in the foregoing paragraphs, the commission has no diffi-

culty in concluding, and therefore finds, that the respondents have in fact entered into and have engaged in and carried out an understanding, agreement, combination or conspiracy among themselves to restrain and suppress competition in the sale of their products. While the record does not show that each of said respondents has participated in all of the activities relied on to establish said understanding, or agreement, each has acted in concert and cooperation with one or more of the others in doing and carrying out some of the acts and practices herein set forth in furtherance of the understanding or agreement common to them all."

We think there can be no question but that this finding supports the order of the commission and we think it equally clear that it, in turn, is supported by the findings as to evidentiary facts which precede it and by the evidence in the case.

Crown bottle caps are the closures for bottles used by the brewing and bottling industry. They consist of metal shells enclosing cork discs and have long been substantially identical in construction and dimension. The Crown Cork & Seal Company, one of the petitioners, manufactures approximately 50% of those produced in this country and the other petitioners approximately 35%. In 1925 the trade association was organized and most of the petitioners were members of it. One of the first things that it did was to bring about more complete standardization of product in that, by agreement of the manufacturers, the decoration of the caps was made uniform, so that those sold by all manufacturers were identically the same. Another matter discussed at an early meeting of the association was the technique of arriving at prices with a view of having uniformity throughout the industry in the schedules of deductions, additions and differentials from base prices. This was to be incorporated in a standard form of contract; and, while the standard form was never adopted, the evidence is that throughout the industry there is as much uniformity in the deductions, additions and differentials allowed from base prices as if it had been adopted. No form of contract of any sort is used, but sales are made informally by correspondence or oral negotiation; and it appears that no written contract is needed, in view of the uniformity that has been attained throughout the industry with respect to matters which a contract would ordinarily embrace within its terms.

There is no proof of any express agreement to charge uniform base prices; but the evidence shows that since 1928 the prices of all the manufacturing petitioners have been the same. Prior to 1938, there were but few changes, the same price, with minor variations, was charged by all, and, when changes in prices were made, they were made by all at about the same time. In 1933 Crown Cork & Seal granted licenses under patents which it held to most of the other manu-

facturing petitioners; and in connection with these licenses they agreed not to sell at a less price than that which Crown Cork & Seal established. It is significant that, in connection with these licenses, Crown Cork & Seal furnished a list of its prices to the licensees, who were under agreement not to sell for less. In the case of petitioner Gutman, where mutual licensing followed the adjustment of patent litigation, there was an exchange of prices, although neither party used the patents of the other. Not until 1941, shortly before the institution of the proceeding before the commission, was this furnishing of prices discontinued. Its continuance over so long a period of time furnishes adequate explanation of the uniformity of prices attained. The commission has found that, when it was discontinued, it was no longer necessary to maintain uniformity. Certainly, there have been no changes in prices of bottle caps since that time, notwithstanding the fluctuations in the prices of all other commodities. The question which arises with respect to these patent agreements is not whether a patentee may exact an agreement as to prices from a licensee who uses the patent, but whether such agreements under the circumstances here appearing support the charge of conspiracy to destroy competition and fix prices throughout the industry. See *United States v. U. S. Gypsum Co.*, 333 U. S. 364.

The freight equalization practice to which reference has been made goes back at least as far as 1921. That practice is to sell the bottle caps f. o. b. the plant of the manufacturer with an agreement that the purchaser shall be credited with the difference between freight actually paid and that which would have been paid if purchase had been made from the nearest manufacturer. This practice has all the vice of the basing point system in that the purchaser pays the same delivered price, whatever manufacturer he purchases from, and the manufacturer must absorb the freight differential, so that the net selling price which he receives is different for different customers, depending upon their location. The effect of this practice in destroying competition and its importance in establishing the existence of the conspiracy charged is well stated by the commission in its ninth finding, from which we quote as follows: "This uniformity in base prices, together with the concurrent use by all the respondent manufacturers of the freight-equalization plan, inevitably means that a purchaser at any given locality will be required to pay exactly the same delivered price for crown bottle caps regardless of the manufacturer from which he purchases. It is undisputed that since 1938, at least, it has been impossible for any purchaser at any location to obtain crowns from any respondent manufacturer for a less price or on better terms than the prices charged or the terms imposed by any other respondent manufacturer. Even on privately decorated

crowns the extra charges made by all of the respondent manufacturers have been the same. \* \* \* Thus every respondent manufacturer is informed at all times of both the prices and the terms of sale quoted and offered by all of the others. In addition to knowledge of the base prices of all of the other respondent manufacturers, each such respondent manufacturer knows that every other respondent manufacturer uses the plan of equalizing freight with the location of the manufacturer nearest the purchaser. It knows, too, that by the use of this plan each will be able to deliver its products to every purchaser at any given destination for exactly the same delivered price as others using the plan, and thus all users of the plan will be able to present to a prospective purchaser a condition of matched prices in which such purchaser is deprived of any choice on the basis of price. \* \* \* In order to produce such matched prices sellers of crowns must, at numerous destinations, accept net receipts for their products varying in amount according to the freight absorbed [979] as a result of the closer proximity to the purchaser of some other seller. Each participant in the use of the plan consciously intends that no attempt be made to exclude any seller of crowns from the natural freight-advantage territory of another, and by the use of the plan invites other sellers to share the available business in his natural market in return for similar treatment for itself in the trade territories of all other participating sellers. The price rigidity existing in the crown bottle cap industry since 1938, and the failure of prices of crown bottle caps to respond in any way to changing conditions of supply and demand are not consistent with the existence of effective competition. The complete standardization of crowns as a result of the admitted efforts made by respondents, and other circumstances showing an overriding desire on the part of the respondents to present to a prospective customer a completely united front insofar as products, prices, and terms of sale are concerned, indicate the total absence of such competition. When, as in this industry, the price of the seller nearest the purchaser is always accepted by other sellers and there is no bargaining on any basis between buyers and sellers, fundamental requirements of a true competitive market are lacking and prices are not the result of market action in the economic sense, but are mere expressions of an artificial and monopolistic price structure.

Innocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the commission. The standardization of products, for

example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere. The practice of freight equalization might be all right if used by the manufacturers individually, but not when used in connection with standardization of product, patent control, price publication and uniformity of discounts and trade practices in such way as to destroy price competition. As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that "The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words". *Fort Howard Paper Co. v. Federal Trade Com'n*, 7 Cir. 156 F. (2d) 899, 905 [43 F. T. C. 1087, 4 S. & D. 496]. Where, as here, the evidence is sufficient to support the findings of the commission, it is for that body, and not the courts, to say what conclusions are to be drawn from it. *Federal Trade Com'n v. Standard Education Society*, 302 U. S. 112, 117 [25 F. T. C. 1715, 2 S. & D. 429]; *Federal Trade Com'n v. Algoma Lumber Co.*, 291 U. S. 67, 73 [18 F. T. C. 669, 2 S. & D. 247].

And the rule just stated is no different, as some of the petitioners seem to think, because the trial examiner reached a conclusion different from that of the commission. *N. L. R. B. v. Laister Kauffmann A. Corp.*, 8 Cir. 144 F. (2d) 9, 16-17. It is the commission, not the trial examiner, that is charged with ultimate responsibility for finding the facts; and it is the commission's findings and order that we are authorized to review under the express limitation that "the findings of the commission as to the facts if supported by evidence shall be conclusive". 15 U. S. C. 45 (d). In point is *Beard-Laney Co. v. United States*, 73 F. Supp. 27, 33. In that case, it appeared that the order of a hearing division of the Interstate [980] Commerce Commission had been reversed on rehearing and it was argued that the usual rules for review of orders of the commission should not be applied for that reason. In answering this contention, the special statutory court of three judges said: "The rules to be applied in reviewing the order of the commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of

the division, which received the approval of the commission, was the final and definitive action of the commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed. *Lang Transp. Co. v. United States*, D. C., 75 F. Supp. 915, 925."

There has been a great deal of argument with regard to the practice of freight equalization. It should be noted in this connection, however, that the question in this case is, not whether such practice may be enjoined as constituting of itself an unfair trade practice, but whether it may be considered along with the other facts and circumstances to which we have adverted as tending to establish the conspiracy and combination in restraint of trade, which is the only charge of the complaint. We think that it was properly considered for that purpose. *Federal Trade Com'n v. Cement Institute*, 333 U. S. 683 [44 F. T. C. 1460, 4 S. & D. 676]; *Triangle Conduit & Cable Co. v. Federal Trade Com'n*, 7 Cir. 168 F. (2d) 175 [44 F. T. C. 1522, 4 S. & D. 741]; *Milk & Ice Cream Can Institute v. Federal Trade Com'n*, 152 F. (2d) 478 [42 F. T. C. 867, 4 S. & D. 440]. As was well said by Judge Major of a similar freight equalization plan in the case last cited: "It is argued, perhaps correctly, that such a freight system had long been employed by industry so that members thereof might deliver their product at the same price. In fact, the commission recognizes that this freight equalization plan was used by petitioners prior to the organization of the Institute. Such being the case, the fact still remains that it was employed by petitioners for the purpose of fixing the delivered price of their product and by such use price competition was eliminated or at any rate seriously impaired. On the face of the situation, it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves. \* \* \*"

Whether viewed as an unfair labor practice in itself, or as evidence of the existence of a conspiracy, we see no practical distinction between the freight equalization practice here involved and the multiple basing point system before the Supreme Court in *Federal Trade Commission v. Cement Institute*, *supra*, 333 U. S. 684 [44 F. T. C. 1460, 4 S. & D. 676]. Both result in "identity of prices and diversity of net returns." In speaking of the single basing point system, which had been condemned in *Corn Products Co. v. Federal Trade Com'n*, 324 U. S. 726 [40 F. T. C. 892, 4 S. & D. 331], and *Federal Trade Com'n v. Staley Co.*, 324 U. S. 746 [40 F. T. C. 906, 4 S. & D. 346], the Supreme Court, in the Cement Institute case, pointed out the results that flow from that system, saying: "One is that the 'delivered

prices' of all producers in every locality where deliveries are made are always the same regardless of the producers' different freight costs. Another is that sales made by a non-base mill for delivery at different localities result in net receipts to the seller which vary in amounts equivalent to the 'phantom freight' included in, or the 'freight absorption' taken from the 'delivered price.' The court then pointed out that "the multiple and single systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns. Such differences as there are in matters here pertinent are therefore differences of degree only." The same is true of the freight equalization practice here under consideration.

[981] It is argued that the case here is distinguishable from the Cement Institute case because no "phantom freight" is involved; but there is involved freight absorption, resulting in equal delivered prices by all manufacturers selling in a given locality and unequal net returns to the manufacturers from sales to customers in different localities. So far as the questions before us are concerned, there can be no difference between phantom freight and freight absorption. See 333 U. S. at 725. Another argument is that the case here is distinguishable because there is no prohibition of the purchaser's taking delivery at the point of manufacture and thus eliminating freight altogether; but, so far as appears, no one has ever availed himself of this right, and the distinction does not seem to be one of any practical value. We need not decide, however, whether the freight equalization practice here involved constitutes of itself an unfair trade practice or whether it may be condemned as systematic price discrimination in violation of sec. 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, as was held of the multiple basing point system in the Cement Institute case, as those questions are not before us. The practice unquestionably constitutes evidence to be considered, along with other facts and circumstances, as tending to establish the conspiracy charged; and that was the only purpose for which it was considered by the commission.

We conclude the discussion on the sufficiency of the evidence by adverting again to the indisputable fact that through the business practices followed by petitioners it has resulted that in an industry of which they control 85% there has been no price change in ten years and absolutely no price competition whatever. The product has been so standardized that there is no choice of any sort between the products of different producers, and a purchaser anywhere in the country can purchase at the same price including freight from any producer. It is argued that all this is the result of the free play of economic forces, but the commission did not think so; and this is just the sort of question that Congress intended the commission to decide. As was said by the Supreme Court of a similar argument in the Cement Institute

case: "The commission did not adopt the views of the economists produced by the respondents. It decided that even though competition might tend to drive the price of standardized products to a uniform level, such a tendency alone could not account for the almost perfect identity in prices, discounts, and cement containers which had prevailed for so long a time in the cement industry. The commission held that the uniformity and absence of competition in the industry were the results of understandings or agreements entered into or carried out by concert of the Institute and the other respondents. It may possibly be true, as respondents' economists testified, that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times (for such has been substantially the case here) charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed, namely, that without agreement, prices will vary—that the desire to sell will sometimes be so strong that a seller will be willing to lower his prices and take his chances. We therefore hold that the commission was not compelled to accept the views of respondents' economist-witnesses that active competition was bound to produce uniform cement prices."

Petitioners contend that even though the order of the commission be upheld, the fifth paragraph, which relates to the practice of freight equalization should be stricken therefrom on the ground that it will interfere with the independent use of the practice of freight equalization by petitioners individually. The prohibitions of paragraph 5 have application, however, only to acts done in carrying out a "planned common course of action, understanding, agreement, combination or conspiracy." We dealt with the question here involved in *American Chain & Cable Co. [982] v. Federal Trade Com'n*, 4 Cir. 139 F. (2d) 622 [38 F. T. C. 825, 4 S. & D. 99], where petitioner had suggested to the commission, without success, that it clarify a similar order by inserting a declaration that nothing therein was intended to prevent a manufacturer from independently continuing to engage in a given course of action. In affirming the action of the commission, this court, speaking through Judge Soper, after pointing out the history of the present form of the order and the fears of arbitrary action entertained by the petitioner, said: "It does not seem to us that the order needs further clarification. It is of course true that a cease and desist order must be certain and unambiguous in its prohibitive terms because businessmen must operate under it at their peril. \* \* \* But, there can be no doubt that to sustain a charge of violation of the order in this case it must be shown that the prohibited acts have been performed as the result of an agreement or conspiracy, or as the result of a common course of action, that has

been agreed upon or planned between two or more persons. If, as the result of such agreement or plan, the petitioners continue to cooperate in a common course of action which has been found to violate the statute, they make themselves liable to the prescribed penalties; and they have no just cause for complaint if in appraising the evidence in any case the triers of fact seek to determine whether there is any relation or connection between their past illegal acts and the conduct under examination. If such a relation or connection is found it may properly be condemned as a continuance of an unlawful conspiracy. Of course the influence of changed business conditions must be taken into account in reaching a decision; but there is no reason to believe that the Federal Trade Commission will fail in its duty in this respect or that the courts will hesitate to modify or reverse an order that is based on inferences not supported by the evidence."

As we have already indicated, the commission consents that its order be modified so as to eliminate the individual petitioners. We think it should be modified, also, to eliminate its application to cork discs. There is no sufficient evidence of any conspiracy or combination in restraint of trade with respect to cork discs, and no finding sufficient to support the application of the order to dealings therein. The evidence discloses that most of the manufacturers of crown bottle caps manufacture the cork discs which they use; and the inclusion of the latter commodity in the order does not seem to have any practical significance.

The order of the commission will be modified by striking therefrom the names of L. C. McAuliffe, E. J. Costa, Joseph C. Feagley and Benno Cohn and by striking the words "or cork discs" from the main body of the order and from the paragraph numbered one; and, as so modified, the order of the commission will be affirmed and enforced.

Modified and as so modified affirmed and enforced.

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ARTRA COSMETICS, INC. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 9763—F. T. C. Docket 4930

(Circuit Court of Appeals, Third Circuit. December 1, 1949)

Order dismissing, on stipulation of the parties, petition for review of order of the Commission of May 26, 1948, 44 F. T. C. 883, at 891, requiring respondents, their representatives, etc., in connection with the offer, etc., of their depilatory cosmetic product "Imra," to cease and desist from disseminating, etc., any advertisement which represents, directly or by implication, that said product is safe for use or that its use will not irritate a normal skin.

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*Mr. Fred A. Klein* of New York City, for petitioner.

*Mr. James W. Cassedy*, Associate General Counsel, of Washington, D. C., for Federal Trade Commission.

STIPULATION AND ORDER DISMISSING PETITION TO REVIEW

It appearing that petitioner has filed with this Court a petition to review and set aside a certain order to cease and desist issued against petitioner by the Federal Trade Commission, respondent herein, on May 26, 1948, in a proceeding designated "In the Matter of ARTRA COSMETICS, INC., a corporation, Federal Trade Commission Docket No. 4930"; that on July 7, 1948, petitioner filed with the Federal Trade Commission a motion to vacate the said order to cease and desist; that on November 8, 1949, the Federal Trade Commission granted the said motion and vacated and set aside the said order to cease and desist; and that the controversy which gave rise to this cause has subsequently become moot;

Now, therefore, subject to the approval of the Court, it is hereby stipulated and agreed by and between counsel for petitioner and counsel for respondent that petitioner's said petition to review filed herein on July 26, 1948, be, and it hereby is, dismissed.

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[789] GOODYEAR TIRE & RUBBER CO., INC. ET AL. v.  
FEDERAL TRADE COMMISSION<sup>1</sup>

Civ. A. No. 5455-49—F. T. C. File 203-1

(United States District Court, District of Columbia. January 18,  
1950)

ADMINISTRATIVE PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—IN GENERAL

Ordinarily, relief by judicial action may not be had until administrative remedies have been exhausted.

ADMINISTRATIVE PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—IF PROCEEDING  
UNDER CLAYTON ACT BEING CONDUCTED BY COMMISSION UNDER ITS PUBLISHED  
RULES OF PRACTICE AND PROCEDURE—THAT PROCEDURE ALLEGEDLY NOT IN CON-  
FORMANCE WITH REQUIREMENTS OF ADMINISTRATIVE PROCEDURE ACT AND  
INCONVENIENCE AND COST INVOLVED IN PLAINTIFF'S PARTICIPATION

Where Federal Trade Commission was conducting proceeding under the Clayton Act in accordance with its published rules of practice and procedure, and proceedings were pending and had not been completed, and party to proceeding claimed it would suffer through inconvenience and cost of participating and alleged that commission was not acting as required by the Administrative Procedure Act, administrative remedy was not exhausted, and no irreparable injury was shown, and hence court had no authority to grant injunctive relief.

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<sup>1</sup> Reported in 88 F. Supp. 789.

## ADMINISTRATIVE PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—EXHAUSTION OF ADMINISTRATIVE REMEDIES AS PREREQUISITE TO—THAT SOME INJURY THEREBY ENTAILED TO LITIGANT

That some injury might result when a litigant is forced to await entry of a final order by an administrative tribunal before securing judicial review does not entitle litigant to injunctive relief on ground that litigant will suffer irreparable injury if resort to judicial remedy is delayed.

(The syllabus, with substituted captions, is taken from  
88 F. Supp. 789)

*Cahill, Gordon, Zachry & Reindel*, Washington, D. C., by *Mr. Robert G. Zeller*, Washington, D. C., for plaintiff.

*Mr. W. T. Kelley, Mr. Joseph S. Wright, Mr. James B. Truly, Mr. Phillip R. Layton*, Washington, D. C., *Mr. George Morris Fay*, United States Attorney for District of Columbia, Washington, D. C., for defendants.

MATTHEWS, *District Judge*:

This is an action brought by the Goodyear Tire & Rubber Company against the Federal Trade Commission and its members seeking to restrain defendants in the conduct of a pending administrative proceeding entitled "File 203-1, In the Matter of the Rubber Tire Industry," and having for its purpose the determining of whether there should be fixed and established a quantity limit for replacement rubber tires and tubes. The applicable statute (U. S. C., Title 15, sec. 13) prohibits price discrimination but permits price differentials which make only due allowance for cost differences resulting from differing methods or quantities in which commodities are sold or delivered to purchasers, and provides that the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix quantity limits as to particular commodities where the Commission finds that available purchasers in greater quantities are so few as to render price differentials on account thereof unjustly discriminatory or promotive of monopoly. The Commission published Rules of Practice and Procedure to govern the proceeding. Thereafter the plaintiff, a corporation engaged in the sale of replacement tires and tubes throughout the United States, petitioned the Commission, as an interested party, to amend said Rules for the conduct of the proceeding, contending that these rules will not afford plaintiff the "hearing" required by the cited statute, but only an opportunity to submit [790] "data views and argument." The petition was denied, and plaintiff contends that such denial is a final agency action and subject to judicial review under section 10 of the Administrative Procedure Act.

The Complaint in this Court seeks a judgment (1) declaring that the Federal Trade Commission in fixing quantity limits under U. S.

C., Title 15, sec. 13, is subject to sections 4, 7, and 8 of the Administrative Procedure Act, in the conduct of hearings which the Commission proposes to hold in respect to the rubber tire industry; and (2) enjoining defendants pending trial and perpetually from further proceedings under Rules 2.30 and 7.11 of the Commission's Published Rules of Practice and Procedure. The matter now before this Court is a motion by plaintiff for a preliminary injunction and a motion by defendants to dismiss. For the purposes of these motions and by consent of the parties this action and similar actions brought by the B. F. Goodrich Company, The Firestone Tire and Rubber Company and United States Rubber Company are consolidated.

The time for judicial review of the administrative proceeding in the Federal Trade Commission is not ripe. It is well settled that ordinarily relief by judicial action may not be had until administrative remedies have been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

Of the rule requiring the exhaustion of administrative remedies the Court said in *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752:

"The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and correlatively, of awaiting their final outcome before seeking judicial intervention.

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision, or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination."

Plaintiff contends that it will suffer irreparable injury if resort to a judicial remedy is delayed until after the pending administrative proceeding and stresses the inconvenience and cost of participating in said proceeding. Of such a contention the Court said in *Utah Fuel Co. v. Nat. Bituminous Coal Commission*, 69 App. D. C. 333, 339:

"That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regret-

table but not controlling factor under such circumstances. Injury may result also from judicial determinations and from direct legislative action. The expense and annoyance of litigation is part of the social burden of living under government."

The motion to dismiss must be sustained.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on to be heard upon plaintiff's motion for preliminary injunction and defendants' motion to dismiss, and the Court having considered the pleadings and affidavits, together with memoranda of points and authorities filed by the respective parties, and having heard argument of counsel, the Court makes the following findings of fact and conclusions of law:

#### [791]

#### FINDINGS OF FACT

1. The Federal Trade Commission, an administrative agency, is now and since October 4, 1949, has been conducting a proceeding entitled File 203-1, In the Matter of the Rubber Tire Industry, to determine whether there should be fixed and established a quantity limit for replacement rubber tires and tubes, under the provisions of Section 2 (a) of the Clayton Act as amended, 15 U. S. C. A. § 13, and in accordance with its published Rules of Practice and Procedure, 16 CFR, Ch. I, Parts 2 and 7, Rules of Practice 2.30, General Procedures 7.11, and such administrative proceedings are now pending and have not been completed.

2. On December 5, 1949, plaintiff, a Delaware corporation engaged in the sale of replacement rubber tires and tubes throughout the United States, petitioned the Commission, as an interested party, to amend its Rules of Practice and Procedure for the conduct of said proceeding, which petition was denied by the Commission on December 7, 1949.

3. Thereafter, on December 29, 1949, plaintiff brought this action against the Federal Trade Commission and its members, seeking a judgment (1) declaring that the proceeding to fix quantity limits was subject to the provisions of Sections 4, 7, and 8 of the Administrative Procedure Act; (2) perpetually enjoining defendants from further proceedings under or pursuant to its published Rules of Practice; and (3) an interlocutory injunction restraining defendants from proceeding further in File 203-1, In the Matter of the Rubber Tire Industry.

4. On January 6, 1950, plaintiff moved for preliminary injunction enjoining defendants from proceeding further in File 203-1, In the

Matter of Rubber Tire Industry, on the ground that such proceeding would result in irreparable injury to plaintiff. Said motion was accompanied by affidavit of counsel and memorandum of points and authorities with respect to the merits, the jurisdiction of the Court and irreparable injury.

5. On January 11, 1950, defendants filed motion to dismiss this action on the ground that the Court did not have jurisdiction, and submitted therewith a memorandum of points and authorities addressed to the jurisdiction of the Court and to the lack of irreparable injury to plaintiff.

6. On January 12, 1950, counsel for plaintiff and defendants were heard on plaintiff's motion for preliminary injunction and defendants' motion to dismiss.

CONCLUSIONS OF LAW

1. This Court lacks jurisdiction to interfere with the conduct of pending administrative proceedings.
2. The Court lacks jurisdiction over the subject matter of this action.

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AMERICANA CORPORATION v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 21109—F. T. C. Docket 5085

(Circuit Court of Appeals, Second Circuit. January 20, 1950)

Order dismissing, on stipulation of parties, and following the Commission's modification of its order, petition to review order of Commission of July 14, 1948, 45 F. T. C. 32, at 46, requiring respondent corporation, its agents, etc., in connection with the offer, etc., of its encyclopedia designated "Americana" or "Encyclopedia Americana" and material supplementary thereto, or any other publication, to cease and desist from representing among other things,—

That said publication is the only national American encyclopedia, is the best known or most authoritative encyclopedia published in the United States or is America's supreme authority, contains more articles than any other encyclopedia, presents more information than any other set of books, is the choice of all Government departments, educational institutions, boards of education, or public libraries as the official reference work;

That it is available only to selected individuals under special conditions; that individuals employed by respondent to sell its publication are anything other than salesmen soliciting prospects to purchase said publication at prices regularly established by respondent; or

That any issue of said publication, prepared through the use of old plates which have been merely revised, with new articles inserted, is a new edition, etc.

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<sup>1</sup> Not reported in Federal Reporter. For case before the Commission see 45 F. T. C. 32.

*Mr. J. Raymond Tiffany*, of Hoboken, N. J., and *Mr. Benjamin Werne*, of New York City, for petitioner.

*Mr. James W. Cassidy*, Assistant General Counsel, of Washington, D. C., for Federal Trade Commission.

#### ORDER DISMISSING PETITION TO REVIEW

It appearing that petitioner has filed with this Court a petition to review and set aside a certain order to cease and desist issued against petitioner by the Federal Trade Commission, respondent herein, on July 28, 1948, in a proceeding designated "In the Matter of AMERICANA CORPORATION, Federal Trade Commission Docket No. 5085"; that on October 22, 1948, petitioner filed with said Commission a motion to review and modify the said order to cease and desist; that on December 8, 1949, the said Commission granted to said motion in part and modified the said order in certain respects; that the controversy giving rise to this cause has consequently become moot; and that the parties hereto have jointly stipulated that the petition filed herein be dismissed:

Now, therefore, it is ordered that the petitioner's said petition to review be, and it hereby is, dismissed.

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#### UNITED STATES v. MORTON SALT CO.; SAME v. INTERNATIONAL SALT CO.<sup>1</sup>

Nos. 273 and 274—F. T. C. Docket 4319

(United States Supreme Court. February 6, 1950)

#### FEDERAL TRADE COMMISSION—DUTIES—PREVENTION OF UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS, ETC.

The Federal Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce.

#### APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—IF COMMISSION CHARGED WITH RESPONSIBILITY FOR COMPLIANCE REPORTS AND CONTEMPT PROCEEDINGS—WHETHER COMMISSION THEREBY RELIEVED OF RESPONSIBILITY INCIDENT TO DECREE'S ENFORCEMENT.

Court of Appeals decree affirming with modifications a cease and desist order of the Federal Trade Commission, directing that reports showing manner of compliance be filed with commission, and giving commission responsibility to initiate contempt proceedings for violation of decree did

<sup>1</sup> Reported in 338 U. S. 632, 70 S. Ct. 357. Judgments of the District Court for the Northern District of Illinois, Eastern Division, granting defendants' motion for summary judgments and dismissing the complaints are reported in 80 F. Supp. 419, and affirmance by the Court of Appeals for the Seventh Circuit in 174 F. (2d) 703.

not wholly relieve commission of responsibility for enforcement, and contemplated that commission could obtain accurate information from time to time on which to base a responsible conclusion as to whether there was a cause for contempt proceeding.

APPELLATE PROCEDURE AND PROCEEDINGS—JUDICIAL REVIEW—IN GENERAL

The function of judicial review of administrative orders is dispassionate and disinterested adjudication, unmixed with any concern as to success of either prosecution or defense.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—WHETHER COMMISSION APPROPRIATELY CHARGED WITH RESPONSIBILITY FOR COMPLIANCE REPORTS AND CONTEMPT PROCEEDINGS

[358] Decree enforcing cease and desist order of Federal Trade Commission appropriately permitted commission to receive reports of compliance and to institute contempt proceedings in case of violations.

JUDGMENTS—ENFORCEMENT—WHETHER STEPS IN AID OF BY LITIGANT OR DEPARTMENT, USURPATION OF COURT'S POWER

Steps which a litigant or executive department lawfully takes for enforcement of a judgment are a vindication rather than a usurpation of the court's power.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—WHERE ORDER, AS MODIFIED, INCORPORATED IN LATTER—WHETHER COMMISSION'S DUTY TO INFORM ITSELF AND PROTECT COMMERCE, THEREBY AFFECTED

Although cease and desist order of Federal Trade Commission was merged in enforcement decree, the court by its decree neither assumed to itself nor denied to commission that agency's duty to inform itself and protect commerce against continued or renewed unlawful practice.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—IF COMMISSION CHARGED WITH RESPONSIBILITY FOR COMPLIANCE REPORTS AND CONTEMPT PROCEEDINGS—WHETHER COMMISSION'S REQUIREMENT OF SUBSEQUENT REPORTS TO SHOW CONTINUING COMPLIANCE, BARRED BY DECREE'S REQUIREMENT OF INITIAL COMPLIANCE REPORTS

Where decree affirming with modifications a cease and desist order of Federal Trade Commission had directed that reports showing manner of compliance be filed with the commission and the corporations involved had filed such reports, the commission could later require the filing of additional reports to show continuing compliance with decree even though commission did not charge violation either of decree or statute and was allegedly engaged in a mere "fishing expedition" to see if it could uncover evidence of guilt.

ADMINISTRATIVE BODIES—INVESTIGATORY POWERS—AS INCIDENT TO INVESTIGATIVE AND ACCUSATORY DUTIES

An administrative body to which by statute investigative and accusatory duties are delegated may take steps to inform itself as to whether there is probable violation of the law.

COMMISSION PROCEDURE AND PROCEEDINGS—REVIEW AND ADJUDICATION—DECREES—COMPLIANCE—WHETHER COMMISSION DEPRIVED OF RIGHT TO INVESTIGATE CONTINUED

The Federal Trade Commission cannot intrude upon or usurp the court's function of adjudication, and the court's jurisdiction to review cease and desist order is exclusive and its enforcement decree final, but the commission is not deprived by such decree of its right, in the exercise of its own law enforcing powers, to investigate the question of continued compliance with decree.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—CEASE AND DESIST ORDERS AND ENFORCEMENT DECREES—IF COMPLIANCE REPORTS REQUIRED BY, FILED—WHETHER REQUIREMENT OF SUBSEQUENT REPORTS BY COMMISSION, SHOWING CONTINUED COMPLIANCE, THEREBY BARRED

Where decree of the Court of Appeals affirming with modifications a cease and desist order of the Federal Trade Commission had directed that reports showing manner of compliance be filed with the commission and the corporations concerned had complied therewith, a subsequent order of the commission requiring additional reports to show continuing compliance with decree did not constitute an interference with the decree or an invasion of the powers of the Court of Appeals.

ADMINISTRATIVE PROCEDURE ACT—IN GENERAL

The Administrative Procedure Act was framed as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices, and it creates safeguards even narrower than the [359] constitutional ones, against arbitrary official encroachment on private rights.

ADMINISTRATIVE PROCEDURE ACT—COMMISSION RULES—REPORTS OF COMPLIANCE—AS PUBLISHED IN FEDERAL REGISTER

Federal Trade Commission rule, as published in Federal Register, setting time limit for filing initial reports of compliance with commission orders and asserting the commission's right to require filing of further compliance reports thereafter, satisfied requirements of Administrative Procedure Act for publication in Federal Register of statements of rules, organization and procedure.

FEDERAL TRADE COMMISSION—POWERS OF—WHETHER FORFEITED BY NONUSER

None of powers granted to the Federal Trade Commission had been forfeited by nonuser.

FEDERAL TRADE COMMISSION ACT—INVESTIGATORY POWERS—WHETHER REPORTS OF COMPLIANCE WITH DECREES ENFORCING CEASE AND DESIST ORDER, INCLUDED

Provision in the Federal Trade Commission Act empowering the commission to conduct investigations and require submission of special reports empowers the commission to require special reports as to manner in which a corporation is complying with a decree enforcing a cease and desist order entered under provision of the act relating to the suppression of unfair practices.

COMMISSION PROCEDURE AND PROCEEDINGS—RULES OF PRACTICE—COMPLIANCE AND SUPPLEMENTAL COMPLIANCE REPORTS—IF ENFORCEMENT DECREE THERETOFORE ENTERED—WHETHER ULTRA VIRES, ETC.

Rule of the Federal Trade Commission announcing the right to require a corporation against which an enforcement decree has been entered to file supplemental reports of compliance is not ultra vires and violative of the Administrative Procedure Act but is authorized by the Federal Trade Commission Act.

INVESTIGATORY POWERS—CORPORATE RIGHTS—IN GENERAL

Corporations are entitled to protection from unlawful demands made in the name of public investigation but they can claim no equality with individuals in the enjoyment of a right to privacy.

INVESTIGATORY POWERS—CORPORATE RIGHTS—IF INQUIRY WITHIN AUTHORITY OF AGENCY, DEMAND NOT TOO INDEFINITE, AND INFORMATION SOUGHT REASONABLY RELEVANT

Governmental investigation into corporate matters may be of such sweeping nature and so unrelated to matter properly under inquiry as to exceed investigatory power, but constitutional safeguards as to searches and seizures and due process are not violated if inquiry is within authority of agency, demand is not too indefinite and information sought is reasonably relevant.

COMMISSION PROCEDURE AND PROCEEDINGS—JUDICIAL RELIEF—IN GENERAL

Parties who seek judicial aid to avoid compliance with an order of the Federal Trade Commission on the ground that requirements for reports are arbitrarily excessive must have first made reasonable efforts before the Commission itself to obtain reasonable conditions.

COMMISSION PROCEDURE AND PROCEEDINGS—ENFORCEMENT PROVISIONS AND PROCEDURE—COMPLIANCE AND SUPPLEMENTAL COMPLIANCE REPORTS—IF PURPOSE TO SHOW CONTINUING, WHERE DECREE FOR ENFORCEMENT THERETOFORE ENTERED—WHETHER VIOLATION OF FOURTH OR FIFTH AMENDMENTS

Order of the Federal Trade Commission requiring submission of additional reports to show continuing compliance by corporations with decree for enforcement of cease and desist order did not violate the prohibition of Fourth Amendment against unreasonable searches and seizures or transgress "due process of law" clause of the Fifth Amendment.

(The syllabus, with substituted captions, is taken from 70 S. Ct. 357)

On writs of certiorari to The United States Court of Appeals for Seventh Circuit, judgments reversed.

**[360]** *Mr. Philip Elman*, Washington, D. C., for petitioner.  
*Mr. L. M. McBride*, Chicago, Ill., for Morton Salt Co.  
*Mr. Frederic R. Sanborn*, New York City, for International Salt Co.

Mr. JUSTICE JACKSON delivered the opinion of the Court.

This is a controversy as to the power of the Federal Trade Commission to require corporations to file reports showing how they have

complied with a decree of the Court of Appeals enforcing the Commission's cease and desist order, in addition to those reports required by the decree itself.

Proceedings under § 5 of the Federal Trade Commission Act<sup>1</sup> culminated in a Commission order requiring respondents Morton Salt Company and International Salt Company, together with eighteen other salt producers and a trade association, to cease and desist from stated practices in connection with the pricing, producing and marketing of salt. The Court of Appeals for the Seventh Circuit affirmed the order with modifications and commanded compliance. 134 F. (2d) 354. The decree directed that reports of the manner of compliance be filed with the Commission within ninety days, but it reserved jurisdiction "to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The decree expressly was "without prejudice to the right of the [361] United States, as provided in § 5 (1) of the Federal Trade Commission Act to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree." The reports of compliance were subsequently filed and accepted, and there the matter appears to have rested for a little upwards of four years.

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<sup>1</sup> The Federal Trade Commission was established, under the Federal Trade Commission Act, 38 Stat. 717, as amended 52 Stat. 111, 1028, 15 U. S. C. §§ 41 *et seq.*, to prevent unfair methods of competition and unfair or deceptive acts or practices in interstate commerce by certain persons, partnerships or corporations. Under § 5 (b) of that Act the Commission is empowered and directed, following suitable hearing and determination, to order that those found guilty of such practices cease and desist therefrom; and under §§ 5 (c) and 5 (d) exclusive jurisdiction to affirm, enforce, modify, or set aside such orders is placed in the appropriate Court of Appeals, whose judgment and decree are final except insofar as they may be subject to review here. Civil penalties for violations of cease and desist orders are provided for, § 5 (1), to be recovered in civil actions brought by the United States. Under §§ 6 (a) and 6 (b) of the Act, the Commission is authorized to compile information concerning, and to investigate, the organization, business, conduct, practices, and management of any corporation within its jurisdiction, and to require any such corporation to file "annual or special, or both annual and special, reports or answers in writing to specific questions," concerning such information. For the purposes of the Act, the Commission is empowered, in § 9, to examine and copy documentary evidence of any corporation being investigated or proceeded against, and to require attendance of witnesses and production of all such documentary evidence. The same section also gives District Courts jurisdiction to compel compliance with the subpoena as well as other provisions of the Act or any order of the Commission made in pursuance thereof. And, finally, in § 10, it is provided that, "If any corporation required by this Act to file any annual or special report shall fail to do so within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture . . . shall be recoverable in a civil suit in the name of the United States . . ." The present action was brought to compel the filing of reports ordered by the Commission and for money judgment under § 10 for respondents' default to do so.

On September 2, 1947, the Commission ordered additional and highly particularized reports to show continuing compliance with the decree. This was done without application to the court, was not authorized by any provision of its decree, and is not provided for in § 5 of the statute under which the Commission's original cease and desist order had issued. The new order recited that it was issued on the Commission's own motion pursuant to its published Rule of Practice No. XXVI<sup>2</sup> and the authority granted by subsections (a) and (b) of § 6 of the Trade Commission Act. It ordered these and other parties restrained by the earlier decree to file within thirty days "additional reports showing in detail the manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree." It demanded of each producer a "complete statement" of the "prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944." From the Salt Producers Association it required information as to its activities and services. The Association and some of the producers reported satisfactorily. These two respondents did not. Instead, each informed the Commission in general terms that it had complied with the decree in the manner previously reported, but that it doubted the Commission's jurisdiction to require further reports and declined to supply the particulars demanded. Neither asked any hearing or made objection to the scope of the order.

The Commission next gave respondents notices asserting their default and calling attention to penalties provided in § 10 of the Act. Neither respondent asked any hearing on the notice of default. These suits were then commenced in the name of the United States in District Court under §§ 9 and 10 of the Trade Commission Act, asking mandatory injunctions commanding respondents to report as directed, together with judgment against each for \$100 per day while default continued. Respondents answered. Both sides moved for summary judgments. The court found no dispute as to material facts and dismissed the complaints for want of jurisdiction. 80 F. Supp. 419. The Court of Appeals, by divided vote, affirmed. 174 F. (2d) 703. We granted certiorari, 338 U. S. 857, because the case involved issues of some importance to enforcement of the Act and of court decrees under it and under other Acts which provide similar methods to enforce orders of administrative bodies.

The Government's suits and the Commission's order are challenged upon a variety of grounds, not all of which were considered by the

<sup>2</sup> See note 4, *infra*.

Court of Appeals. They include contentions that (1) the order constitutes an interference with the decree and an invasion of the powers of the Court of Appeals; (2) the Commission's Rule XXVI is *ultra vires* and violates the Federal Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001 *et seq.*; (3) the procedure is unauthorized by those sections of the Act on which it is based; (4) it is novel and arbitrary and violates the Fourth and Fifth Amendments to the Constitution. For reasons given, we reject each of these contentions. [362]

#### I. INVASION OF COURT OF APPEALS JURISDICTION

The respondents' case and the decision below are rested heavily on this argument that the Commission is invading the province of the judiciary. The Court of Appeals held that the Commission's order of September 2, 1947, represented an unauthorized attempt to enforce that court's decree. It pointed out that the statute had made the court's own jurisdiction of the proceeding "exclusive" and its own decree final. It considered that "every vestige of jurisdiction" over that subject was "firmly and exclusively lodged in [the] Court of Appeals." It noted that it had required filing of only the original compliance reports, and that it had protected its jurisdiction by reserving power to enter further orders necessary to enforce compliance and prevent evasion. It thought that the effect of the Commission's proceedings was to assert "such jurisdiction to reside elsewhere."

It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission.<sup>3</sup> Certainly entry of the court decree did not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility "to initiate conempt proceedings for the violation of this decree." This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not cause for such a proceeding. The decree also required the original report showing the manner and

<sup>3</sup> For example, one of the respondents frankly states: "... At no time has this respondent attempted to argue that it was immune to investigation by the Federal Trade Commission simply by virtue of the original case having come within the jurisdiction of the Court of Appeals. This respondent assumes that in some manner or other the Commission can, if it chooses, continue to police the compliance of this respondent by appropriate investigatory procedures. Whether or not the appropriate procedure is (a) by petitioning the Court of Appeals for permission to investigate the respondent with a view to possible contempt or Section 5 (1) proceedings, (b) by an assertion of a right of investigation under Section 9, even though it be an investigation supplemental to a Court of Appeals decree, or (c) by an assertion of an alleged inherent right of investigation under Section 5, is a matter of law not at issue in this case, and it represents an issue as to which this respondent at the moment is completely indifferent. . . ."

form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established.

If the Commission had petitioned the court itself to order additional reports of compliance, it could properly have been required to present some evidence of probable violation to overcome the "presumption of legality," of innocence, and of obedience to the law which respondents here urge. Courts hesitate to alter or supplement their decrees except the need be proved as well as asserted. Evidence the Commission did not have; it had at most a suspicion, or let us say a curiosity as to whether respondents' reported reformation in business methods was an abiding one.

**[363]** Must the decree, after a single report of compliance, rest upon respondents' honor unless evidence of a violation fortuitously comes to the Commission? May not the Commission, in view of its residual duty of enforcement affirmatively satisfy itself that the decree is being observed? Whether this usurps the courts' own function is, we think, answered by consideration of the fundamental relationship between the courts and administrative bodies.

The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process. Its agencies are provided with staffs to institute proceedings and to follow up decrees and police their obedience. While that process at times is adversary, it also at times is inquisitorial. These agencies are expected to ascertain when and against whom proceedings should be set in motion and to take the lead in following through to effective results. It is expected that this combination of duty and power always will result in earnest and eager action but it is feared that it may sometimes result in harsh and overzealous action.

To protect against mistaken or arbitrary orders, judicial review is provided. Its function is dispassionate and disinterested adjudication, unmixed with any concern as to the success of either prosecution or defense. Courts are not expected to start wheels moving or to follow up judgments. Courts neither have, nor need, sleuths to dig

up evidence, staffs to analyze reports, or personnel to prepare prosecutions for contempts. Indeed, while some situations force the judge to pass on contempt issues which he himself raises, it is to be regretted whenever a court in any sense must become prosecutor. Those occasions should not be needlessly multiplied by denying investigative and prosecutive powers to other lawful agencies.

The court in this case advisedly left it to the Commission to receive the report of compliance and to institute any contempt proceedings. This was in harmony with our system. When the process of adjudication is complete, all judgments are handed over to the litigant or executive officers, such as the sheriff or marshal, to execute. Steps which the litigant or executive department lawfully takes for their enforcement are a vindication rather than a usurpation of the court's power. In the case before us, it is true that the Commission's cease and desist order was merged in the court's decree; but the court neither assumed to itself nor denied to the Commission that agency's duty to inform itself and protect commerce against continued or renewed unlawful practice.

This case illustrates the difference between the judicial function and the function the Commission is attempting to perform. The respondents argue that since the Commission made no charge of violation either of the decree or the statute, it is engaged in a mere "fishing expedition" to see if it can turn up evidence of guilt. We will assume for the argument that this is so. Courts have often disapproved the employment of the judicial process in such an enterprise. Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the color[364]ful and nostalgic slogan, "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than

those which underlay many older decisions. Compare *Jones v. Securities & Exchange Comm'n*, 298 U. S. 1, with *United States v. Morgan*, 307 U. S. 183, 191.

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Of course, the Commission cannot intrude upon or usurp the court's function of adjudication. The decree is always what the court makes it; the court's jurisdiction to review is and remains exclusive, its judgment final. What the Commission has done, however is not to modify but to follow up this decree. It has not asked this report in the name of the court, or in reliance upon judicial powers, but in reliance upon its own law-enforcing powers.

That Congress did not regard it as a judicial function to investigate compliance with court decrees, at least initially, is shown by its action as to other antitrust decrees. Section 6 (c) of the Act under consideration specifically authorizes the Commission, on its own initiative and without leave of court, to investigate compliance with final decrees in cases prosecuted by the Attorney General and not involving the Commission as a party. Congress obviously deemed it a function of the Commission, rather than of the courts, to probe compliance with such decrees, even when it had no part in obtaining them. It surely was not because of fear it would involve collision with the judicial function that Congress omitted express authorization for the Commission to follow up decrees in its own cases. Express grant of power would only seem necessary as to decrees in which the Commission had no other interest.

Whether the Commission has invaded any private right of respondents, we consider under later rubrics. Our only concern under the present heading is whether the Commission's order infringes prerogatives of the court. We hold it does not.

## II. VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

Thus § 3 (a) of the Act requires every agency to which it applies, which includes the Federal Trade Commission, to publish in the Federal Register certain statements of its rules, organization and procedure, "including the nature and requirements of all formal or informal procedures available," and adds that, "No person shall in [365] any manner be required to resort to organization or procedure not so published." In addition § 6 (b) proscribes any requirement of a report or other investigative demand "in any manner or for any purpose except as authorized by law."

Principally on the basis of these two sections respondents contend that the current order cannot be enforced except in violation of the Administrative Procedure Act. Have the respondents been ordered to comply with procedure of which they were not put on notice by publication in the Federal Register? And to the extent that the procedure had been defined and published, was it authorized by law?

The pertinent provisions of the Administrative Procedure Act became effective September 11, 1946. On December 11, 1946, the Federal Trade Commission published in the Federal Register its Rules of Practice, 11 Fed. Reg. 14233-14239. The Commission's Rule XXVI, *id.*, 14237, republished without change in 12 Fed. Reg. 5444, 5448, sets the time limit for filing initial reports of compliance with Commission orders and asserts the Commission's right to require, within its sound discretion, the filing of further compliance reports thereafter.<sup>4</sup> In § 7.12 of its Statement of Organization, Procedures, and Functions, 12 Fed. Reg. 5450, 5452, the Commission restated its right

<sup>4</sup>"§ 2.26. *Reports showing compliance with orders and with stipulations.* (a) In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation: *Provided, however,* That if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination . . . .

"(b) Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation. . . ."

to require by order "such supplemental reports of compliance as it considers warranted," and defined the contents of such a report.<sup>5</sup>

We conclude that the Commission's published Rule XXVI announced the [366] right it claims in this case to demand of a party against whom an enforcement decree has been entered that it "file with the Commission from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order. . . ." Taken together with the Commission's Statement of Organization, Procedures, and Functions, *supra*, if indeed not by itself, Rule XXVI amply met the requirements of § 3 (a) of the Administrative Procedure Act.

Respondents hardly challenge this conclusion. Theirs is the more subtle argument that requirement of supplemental reports following court enforcement of a Commission order is unauthorized by statute and *ultra vires*, so that no valid notice of Rule XXVI had been or could be given, as required by § 3 (a) of the Administrative Procedure Act. Also, it is said to be in direct violation of § 6 (b) of that Act. This leads to the question of statutory authority for the order to report, a question we must determine even apart from consideration of the Administrative Procedure Act. Accordingly we turn to the Federal Trade Commission Act itself to see whether it contains statutory authority for the Commission's Rule XXVI, as well as for its order here sought to be enforced, issued, as it was, pursuant to the procedures proclaimed in that Rule. If we find such statutory authority, we must conclude that the objections under the Administrative Procedure Act are taken in vain.

### III. STATUTORY AUTHORITY TO REQUIRE REPORTS

The Court of Appeals found the Commission to be without statutory authority to require additional reports as to compliance. Sec-

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<sup>5</sup> "§ 7.12. *Compliance and enforcement.* (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of § 2.26 of the rules of practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

"(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade Commission Act has become final as provided for under section 5 of that act, and the Commission has reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accomplished by way of contempt proceedings in the Circuit Court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings. . . ."

tion 6 of the Federal Trade Commission Act, it thought, could not be invoked in connection with a decree sought and entered pursuant to § 5, which sections the court regarded as insulated from each other and directed to wholly different situations. Section 6, so it was held, authorized requirement only of "special reports" supplemental to "annual reports" and could not be authority for requiring special reports supplemental to a report of compliance required by court decree in a § 5 case.

At the root of this position lies the elaborate and plausible argument of respondents that §§ 5 and 6 of the Act set up self-sufficient, independent and exclusive procedures for dealing with different matters and that therefore neither section can be supported or aided by the other. Respondents also say that the present use of the asserted power is novel and unprecedented in Commission practice and introduces a new method of investigating compliance. Respondents are not without statements by the Commission or its officials, *dicta* from judicial opinions, views of text writers and facts of legislative history which give some support to this theory. But this Court never before has been called upon to deal consciously and squarely with the subject.

The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser.

The Commission's organic Act, § 5, comprehensively provides substantive and procedural rules for checking unfair methods of competition. The procedure is complete from complaint and service of process through final order, court review, and enforcement proceedings to recover penalties which are not those here sued for. This entire subject of unfair competition, it is true, came into the bill late in its legislative history and dealt with a commercial evil quite different from the target of prior antitrust laws. It is to be noted, however, that although complete otherwise, this section confers no power to investigate this or any other matter. That power, without which all others would be vain, must be [367] found in other sections of the Act. The Commission, for power to investigate compliance with a § 5 order, has turned to § 6, which authorizes it to require certain reports but is not expressly applicable to a § 5 case. Respondents say it might better have turned to § 9, which authorizes it to send in-

investigators to examine their books, copy documents and issue subpoenas, and which is expressly applicable to § 5 proceedings.

Section 6, on which the Commission relies, is entitled, "Additional Powers of the Commission." Among other things and with exceptions not material, it adds the power "to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, . . . and its relation to other corporations and to individuals, associations and partnerships." It also authorizes the Commission "to require by general or special orders, corporations engaged in commerce . . . to file with the Commission in such form as the Commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relationship to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing."

To one informed of no fact apart from this text, it would appear to grant ample power to order the reports here in question. Respondents are in the class subject to inquiry, the call is for what appears to be a special report and the matter to be reported would seem to be as to business conduct and practices about which the Commission is authorized to inquire. But respondents advance several arguments to persuade us that this seemingly comprehensive power is subject to limitations not evident in the text.

Respondents derive from legislative history their contention that Congress divided the duties and powers of the Commission into two separate categories, one in § 6 merely re-enacting the old powers of investigation and publicity in antitrust matters—"essentially a mere continuance of the former powers of the old Bureau of Corporations." The other was a new unfair-competition power, self-contained and sealed off in § 5. It is argued that the reports set forth in § 6 can be required only "in support of general economic surveys and not in aid of enforcement proceedings under Section 5."

While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least. The information was such as the Com-

mission was authorized to obtain and we think it could be required for use in determining whether there had been proper compliance with the court's decree in a § 5 case.

It is argued, however, and the court below has agreed, that the "special report" authorized by statute does not embrace the one here asked as to the method of compliance with the decree. We find nothing in the legislative history that would justify so limiting the meaning of special reports, or holding that the report here asked is not such a one. The very House Committee Report (H. R. Rep. No. 533, 63d Cong., 2d Sess.) which the court below thought sustained respondents' contention, we read in its context to support the Commission. Speaking of this section, the Report said, "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in [368] its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." An annual report of a corporation is a recurrent and relatively standardized affair. The special report was used to enable the Commission to elicit any information beyond the ordinary data of a routine annual report. If the report asked here is not a special report, we would be hard put to define one.

Nor does the fact that § 5 applies to individuals, partnerships, and corporations, while §§ 6 (b) and 10 apply only to corporations, lead us to conclude that the Act must not be read as an integrated whole. The argument that, because the reporting and penalty provisions of the latter extend only to corporations they must not be invoked to implement, as against corporations, a § 5 proceeding which contemplates action against persons and partnerships as well, would have force were there not sound reason for more drastic powers to compel disclosure from corporations than from natural persons. What the former may be compelled to disclose without objection the latter may withhold, or reveal only after exacting the price of immunity from prosecution. Corporations not only have no constitutional immunity from self-incrimination; but the disparity between artificial and natural persons is so significant that differing treatment can rarely be urged as an objection to a particular construction of a statute. Moreover, Congress may have considered that the volume or proportion of unincorporated business or the relatively small size of individually owned enterprises, or even a lesser capacity and disposition to resist made it possible to omit persons from duties and penalties imposed on artificial combinations of capital.

We conclude that the authority of the Commission under § 6 to require special reports of corporations includes special reports of the manner in which they are complying with decrees enforcing § 5 cease and desist orders.

#### IV. RIGHTS UNDER FOURTH AND FIFTH AMENDMENTS

The Commission's order is criticized upon grounds that the order transgresses the Fourth Amendment's proscription of unreasonable searches and seizures and the Fifth Amendment's due process of law clause.

It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186. Although the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," Brandeis, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd v. United States*, 116 U. S. 616, *Hale v. Henkel*, 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale v. Henkel*, *supra*; *United States v. White*, 322 U. S. 694.

While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. *Cf. United States v. White*, *supra*. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. *Cf. Graham v. Brotherhood of Locomotive Firemen*, 338 U. S. 232; *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen & Engineers*, 323 U. S. 210; *Wickard v. Filburn*, 317 U. S. 111, at 129. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n v. American Tobacco Co.*, *supra*. But it is sufficient if the

inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208. Nothing on the face of the Commission's order transgressed these bounds.

Nor do we consider whether, for reasons peculiar to these cases not apparent on the face of the orders, these limits are transgressed. Such questions are not presented by the procedure followed by respondents. Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. Neither respondent raised objection to the order's sweep, nor asked any modification, clarification or interpretation of it. Both challenged, instead, power to issue it. Their position was that the Commission had no more authority to issue a reasonable order than an unreasonable one. That, too, was the defense to this action in the court below.

Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract. But it is safe to say that they would stop the Commission considerably short of the extravagant example used by one of the respondents of what it fears if we sustain this order—that the Commission may require reports from automobile companies which include filing automobiles. In this case we doubt that we should read the order as respondents ask to require shipment of extensive files or gifts of expensive books. This is not a necessary reading certainly, and other parties to the decree seem to have been able to satisfy its requirements.

If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.

It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify

such an order it still is considered to be so arbitrary as to be unlawful and the Government pursues a policy of accumulating penalties while [370] avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. *Cf. Oklahoma Operating Co. v. Love*, 252 U. S. 331. It is enough to say that, in upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act.

The judgment accordingly is reversed.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON took no part in the consideration or decision of these cases.

# ALBERTY ET AL. v. FEDERAL TRADE COMMISSION<sup>1</sup>

No. 9843—F. T. C. Docket 5101

(United States Court of Appeals for the District of Columbia Circuit.  
March 20, 1950)

## CEASE AND DESIST ORDERS—SCOPE—IF REMEDY SELECTED WITHOUT REASONABLE RELATION TO UNLAWFUL PRACTICES FOUND

The Federal Trade Commission Act confers upon Federal Trade Commission not only the power specifically prescribed but all powers falling within the penumbra of meaning in the statutory provisions, and courts will not interfere with Commission's choice of remedy where unfair deceptive trade practices have been disclosed, except where remedy selected has no reasonable relation to the unlawful practices found to exist.

## CEASE AND DESIST ORDERS—SCOPE—FALSE AND MISLEADING ADVERTISING—IF PROD- UCT ADVERTISED FOR CERTAIN CONDITION DUE TO CERTAIN CAUSE—WHETHER DIS- CLOSURE OF PRODUCT'S INEFFECTIVENESS FOR OTHER MORE OR LESS FREQUENT CAUSES, VALID REQUIREMENT

Where advertisers stated plainly that their product would aid a certain condition when that condition arose from one certain described condition, Federal Trade Commission could not require advertisers to include the statement that frequently, or less frequently, or more frequently, the

<sup>1</sup> Reported in 182 F. (2d) 36. For case before Commission see 44 F. T. C. 475. Petition for certiorari was denied October 9, 1950.

described condition springs from causes which would not be reached by product unless it was found that failure to make such statement was misleading because of consequences from use of the product, or that failure to make such statement was misleading because of things claimed in the advertisement.

**FEDERAL TRADE COMMISSION ACT—SCOPE AND PURPOSE—METHODS, ACTS AND PRACTICES—FALSE AND MISLEADING ADVERTISING—WHETHER AFFIRMATIVE ENCOURAGEMENT OF PROPERLY INFORMATIVE ADVERTISING, AS DEEMED, INCLUDED.**

Both purpose and terms of Federal Trade Commission Act are to prevent falsity and fraud in advertisements, and when Federal Trade Commission goes beyond that purpose and enters upon affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority.

**METHODS, ACTS AND PRACTICES—NONDISCLOSURE—FALSE AND MISLEADING ADVERTISING—IF PRODUCT ADVERTISED FOR CERTAIN CONDITION DUE TO CERTAIN NAMED CAUSE—WHETHER NONDISCLOSURE THAT CERTAIN AILMENTS NOT REACHED BY DRUG, "FALSE ADVERTISING"**

Where advertisers of drug claimed only that their product would aid a certain condition when that condition arose from one certain described cause, failure of advertisers to state affirmatively that there were other ailments not reached by the drug was not "false advertising" under Federal Trade Commission Act, and Federal Trade Commission had no power to require advertisers to include such affirmative statement in their advertisement.

**METHODS, ACTS AND PRACTICES—NONDISCLOSURE—FALSE AND MISLEADING ADVERTISING—IF PRODUCT, ADVERTISED FOR CERTAIN CONDITIONS, RECOGNIZED AS BENEFICIAL BY ONE OF TWO ESTABLISHED SCHOOLS—WHETHER NONDISCLOSURE OF WHICH, "FALSE ADVERTISING"**

Failure of advertisement claiming drug to possess therapeutic value in treatment of sleeplessness, nervousness, etc., to designate which of two established schools of medicine recognized the product as beneficial did not make the advertisement false within Federal Trade Commission Act, and did not authorize Federal Trade Commission to require advertisers to designate which of the established schools of medicine recognized their product as beneficial.

(The syllabus, with substituted captions, is taken from 182 F.(2d) 36.)

On petition to review order of Commission, order modified and affirmed.

*Mr. Carl McFarland*, Washington, D. C., with whom *Messrs. Ashley, Sellers* and *Kenneth L. Kimble*, Washington, D. C., were on the brief, for petitioners.

*Mr. Donovan R. Divet*, Special Attorney, Federal Trade Commission, Washington, D. C., with whom *Mr. W. T. Kelley*, General Counsel, Federal Trade Commission, and *Messrs. Walter B. Wooden* and *James W. Cassidy*, Associate General Counsel, Federal Trade Commission, Washington, D. C., were on the brief, for respondent.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, *Circuit Judges*.

PRETTYMAN, *Circuit Judge*:

This is a petition to review an order of the Federal Trade Commission. Petitioners are engaged in selling food and food products. They were charged by the Commission with disseminating false advertisements amounting to unfair and deceptive acts or practices in commerce. Four products are involved in this petition. They are Oxorin Tablets, Zen, Vitamin A Shark Liver Oil, and Alberty's Phospho B. After hearing, the Commission made detailed findings and issued a cease and desist order. Petitioners contest the validity of two clauses contained in parts of the order.

The Commission found that typical of the advertisements in respect to Oxorin are:

"Pep up your blood! Iron . . . A principal factor in Red Blood Cells . . . The disease Fighting Units of the Blood."

"When you are weary, tired, run-down, just dragging yourself around with no ambition left, when every effort you make seems to leave you weak and spent then try Oxorin Tablets, a tonic for the blood."

The Commission found as a fact that these tablets have no beneficial effect upon the blood except in cases of simple iron-deficiency anemia and that there are many causes of run-down conditions and lack of energy which will not be beneficially affected by the tablets. Petitioners do not object to that portion of the cease and desist order which forbids them to represent "That the preparation 'Oxorin Tablets' will have any therapeutic effect upon the blood or the red corpuscles thereof, except in cases of simple iron-deficiency anemia; or that said preparation will relieve, correct, or have any beneficial effect upon the condition of lassitude characterized by such expressions as 'weariness,' 'tiredness,' 'weakness,' 'lack of energy,' or 'general run down condition,' unless such representation be expressly limited to symptoms or conditions due to simple iron-deficiency anemia."

However, the Commission added to the foregoing the requirement that the advertisement also state

"that the condition of lassitude is caused less frequently by simple iron-deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it."

This additional clause is one of the two which are the subject matter of the petition for review. It is applied to other products as well as to Oxorin Tablets.

The Federal Trade Commission Act gives the Commission authority to prevent persons from using unfair or deceptive practices in com-

merce,<sup>1</sup> provides that the dissemination of false advertisement is an unfair or deceptive practice in commerce,<sup>2</sup> and defines a false advertisement as one which is misleading in a material respect.<sup>3</sup> [38] In determining whether the advertisement is misleading, failure to reveal facts made material by existing representations and failure to reveal facts made material by reason of the consequences of using the product are to be considered.<sup>4</sup> Thus, false advertising, by the terms of the statute, includes failure to reveal certain characteristics of the product which become important either because of certain things which are represented in the advertisement or because of consequences which arise from the use of the product. The Supreme Court has held that the act confers upon the Commission not only the powers specifically prescribed but all power falling within the penumbra of meaning in the statutory provisions. In *Siegel Co. v. Federal Trade Comm'n*,<sup>5</sup> the Supreme Court held that in these cases "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

The question posed in the case at bar is not restricted to the peculiarities of these products. None involved is injurious or harmful in any sense. On the contrary, it is agreed that they have beneficial effects. The proposition that an advertisement should limit claims of beneficial effect to the causes for which the product is helpful—in the case of Oxorin Tablets simple iron-deficiency anemia—is not disputed. But the Commission says that these advertisers must go further and say that the condition of lassitude is caused less frequently by simple iron-deficiency anemia than by other causes and that in such cases the product will not be effective. In short, the Commission requires that the advertiser tell the public that his product is more frequently valueless than it is valuable.

<sup>1</sup> 38 Stat. 719 (1914), 52 Stat. 111 (1938), 15 U. S. C. A. § 45 (a).

<sup>2</sup> 52 Stat. 114 (1938), 15 U. S. C. A. § 52 (b).

<sup>3</sup> 52 Stat. 116 (1938), 15 U. S. C. A. § 55 (a), reads:

"The term 'false advertisement' means an advertisement other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact and includes, or is accompanied by each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

<sup>4</sup> *Ibid.* False advertising is defined in this section of the act for the purposes of Sections 12, 13, and 14. Section 12 (b) (52 Stat. 114 (1938), 15 U. S. C. A. § 52 (b)), says that false advertising is an unfair or deceptive practice within the meaning of Section 5 of the act (*supra*, note 1). Cf. *Fresh Grown Preserve Corp. v. Federal Trade Comm'n*, 125 F. (2d) 917 (C. C. A. 2d 1942) [34 F. T. C. 1827, 3 S. & D. 460].

<sup>5</sup> 327 U. S. 608, 613, 90 L. Ed. 888, 66 S. Ct. 758 (1946), [42 F. T. C. 902, 4 S. & D. 476].

If this rule applies to petitioners, it must also apply to all other products similarly advertised. The scope of the power thus claimed by the Commission will be seen if the advertisements which are currently customary in newspapers and magazines and on the radio are called to mind. Headaches, lack of energy, indigestion, and numerous other ailments may be due to any one or more of many causes, and remedies for these ills are usually beneficial only when the condition results from certain of those causes. It is admitted in this case that the Commission can require an advertiser of a product beneficial to a certain condition to specify which cause of that condition will yield to the product. But under the power claimed, the Commission could require every such advertiser to announce that in most cases the remedy will be useless. The question before us deals with an advertiser who states plainly that his product will aid a certain condition when that condition arises from one certain described cause. The question is whether that advertisement is, nevertheless, false and fraudulent unless it also states that frequently, or less frequently, or more frequently, the described condition springs from other causes which will not be reached by the product.

Even if we give effect to the broadest possible concept of the power conferred by the Congress upon the Commission, we do not think that the Commission has the power here claimed. There is a limit to the Commission's power. It is not given a general charter to police the expenditure [39] of the public's money or generally to do whatever is considered by it to be good and beneficial. The task assigned it by Congress is specific, and it has no other authority in respect to this subject. False advertising is defined by the act as including failure to reveal facts made important, or of some consequence, because of other things claimed, and failure to reveal facts made important, or of some consequence, because of the results of the use of the product. The Commission must find either of two things before it can require the affirmative clause complained of: (1) that failure to make such statement is misleading because of the consequences from the use of the product, or (2) that failure to make such statement is misleading because of the things claimed in the advertisement. There is no such finding here.

Nor do we see how a derogatory addendum to the advertisement, such as that required here by the Commission, has any reasonable relation to the purpose of preventing the advertisements from being misleading. As we have pointed out, there are no harmful consequences from use of these products. The limitations imposed by the first part of the Commission's order reveal the stark, complete truth. In the case of Oxorin Tablets, petitioners can say that they help lassitude only if they specify lassitude due to simple iron-deficiency

anemia. The Commission has found that such a statement is true. Moreover, it is the full truth. It is clear enough that an additional derogatory negative emphasizes the truth. No matter how clear and complete an affirmative statement is, it can be sharpened by a negative delimitation. Almost every advertisement of a food, drug or drink, no matter how accurately described and carefully limited in claims, would fall within the scope of the rule here sought to be established.

We are concerned with the scope of the power thus sought by the Commission. If it has this power, it could, if it chose, require an advertiser of a breakfast food rich in iron to state not only that the food is good for those deficient in iron but also that iron deficiency is less frequent than other ills and that for these others the advertised food is valueless; and similarly through the long list of foods, drugs and drinks good for one or a few of the ills of men but not for all. Such power seems to us to be no less than the power to control the marketing of all such products, because, if particular advertisers, selected by the Commission, can be required not only to state accurately the limited benefits of their products but also to call attention to what the products will not do the effect on marketing is clear enough. Such a requirement seems to us to have no relation to the prevention of falsity in advertising. It is a wholly different power.

Our dissenting judge says that "The Act's purpose is to encourage the informative function of advertising." That view reflects clearly the difference between us. We think that neither the purpose nor the terms of the act are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority. Of course, the truth of an advertisement affects its informative function. But the scope and nature of the information contained in an advertisement involve many more considerations than its mere truth. It would be ideal from the buyer's point of view if all advertisements were required to describe the product with cold precision, to enumerate with fidelity its shortcomings, and to call attention to the circumstances in which it is valueless. And a plausible argument can be made that an advertisement is not really truthful unless it does all those things. But we think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter. In our judgment, the Commission goes far across the line when it attempts to require the

advertiser of a drug admittedly beneficial in one ailment to state affirmatively that there are other ailments not reached by the drug. This latter requirement is merely the encouragement of the informative function of advertising.

Congress has given us a definition of false advertisement and in it has specified the respects in which failure to reveal amounts to falsity. It has thus indicated, even though it has not prescribed precisely, the limits to which it meant the Commission could go. It seems to us that the limit of the Commission's power is to require that a product be truthfully represented, and that it has no power to require additional negative statements except as the act itself indicates, *i. e.*, where the affirmative representations require further explanation or where the consequences of using the product require further warning. Neither of these specifications is present in the case at bar.

The other part of the Commission's order complained of relates solely to Phospho B. The Commission required that if the petitioners make any claim that this product possesses any therapeutic value in the treatment of sleeplessness, nervousness, etc., they must expressly limit such claims to "claims of value made for the preparation under the principles of the homeopathic school of medicine". The homeopathic school is one of the two generally recognized schools of medicine, and, although it has considerably less supporters in number than has the allopathic school, it is nonetheless respectably established and practiced. According to the principles of the homeopathic school, this particular product is a medicine. We do not think that failure to designate which of two established schools of medicine recognizes a product as beneficial is misleading and makes the advertisement false.

We hold that failure to include the two disputed clauses in the advertisements under consideration is not false advertising under the Federal Trade Commission Act, and that the Commission has no power to enforce such requirements.

The statute gives this court power not only to affirm or to reverse but also to modify orders of the Commission.<sup>6</sup> The order under review is modified by striking from paragraph 1 (d) the clause "and unless the advertisement reveals that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it", and eliminating from other paragraphs similar clauses; and by striking from paragraph 1 (k) the phrase "under the principles of the homeopathic school of medicine". As thus modified, the order is affirmed.

Order modified and affirmed.

<sup>6</sup> 38 Stat. 719 (1914), 52 Stat. 111 (1938), 15 U. S. C. A. §§ 45 (c) and 45 (d).

BAZELON, *Circuit Judge*, dissenting: Ever since Congress decided that many of the problems of our complex economy should be entrusted to specialized agencies, courts have relied on notions of "self-restraint" and "special competence" to limit their review of agency action. This was tacit recognition that no court could match the skill, time and selectivity which are brought to bear upon any given problem by an agency especially established and equipped for that purpose. A direct outgrowth of this development was a reorientation in judicial thinking, fundamental to which was the distinction between that which one finds personally acceptable or "reasonable" and that which falls within the bounds of acceptability or "reasonableness." The former tends to approximate the relatively subjective decision of the administrator himself; the latter represents merely a determination of whether the action under scrutiny bears some rational connection with the facts. This distinction—between that which is personally acceptable and that which is within the bounds of acceptability—is often difficult to grasp, but it is hardly new to the law. For example, members of a jury are required, in negligence cases, to apply the standard of conduct observed by a "reasonable man," who represents a community ideal, rather than to measure the tortfeasor's conduct by what they themselves [41] would do under the same circumstances. See Holmes, *The Common Law* 111 (1881).

Although judicial deference to administrative expertness was first applied in the area of fact-finding, it has been extended to the matter of remedy as well. In a series of cases involving orders of the National Labor Relations Board, the Supreme Court held that the Board's choice of remedy would not be disturbed, absent a clear showing of abuse of discretion.<sup>1</sup> And the same was true of Securities and Exchange Commission dissolution orders under the Public Utilities Holding Company Act;<sup>2</sup> and of the orders of other administrative agencies.<sup>3</sup>

Since this development post-dated the enactment of the Federal Trade Commission Act and its grant of authority to Courts of Appeals to "modify" orders of the Commission, 15 U. S. C. A. § 45 (b), there arose a need for reexamination of the case law in this area. In *Herz-*

<sup>1</sup> See, e. g., *International Ass'n of Machinists v. National Labor Relations Board*, 311 U. S. 72, 82 (1940); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194 (1941); *Virginia Electric Co. v. National Labor Relations Board*, 319 U. S. 533, 543 (1943); *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 704-5 (1944).

<sup>2</sup> *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 115-6 (1946).

<sup>3</sup> See, e. g., *Board of Trade v. United States*, 314 U. S. 534, 548 (1942); *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227-9 (1943); *Northwestern Electric Co. v. Federal Power Commission*, 321 U. S. 119, 124 (1944); *Ayrshire Collieries Corp. v. United States*, 335 U. S. 573, 593 (1949); cf. *Gray v. Powell*, 314 U. S. 402, 412-3 (1941).

*feld v. United States*, 140 F. (2d) 207 (C. A. 2d, 1944), which involved a prayer for review of a Federal Trade Commission order prohibiting false advertising, the court refused to follow the precedent of modification established in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 218 (1933) [17 F. T. C. 664, 2 S. & D. 217]. Judge Learned Hand, speaking for the Second Circuit, said that since the *Royal Milling Co.* case was decided, "the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme. [Citing cases] It is true that all these decisions concerned the Labor Board, but that tribunal does not enjoy a position of peculiar authority, as the court has indicated in other connections. [Citing cases] \* \* \* Congress having now created an organ endued with the skill which comes of land experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed." 140 F. (2d) at 209.<sup>4</sup>

It seems to me that, by its disposition of *Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) [42 F. T. C. 902, 4 S. & D. 476] the Supreme Court has tactily narrowed its own decision in the *Royal Milling Co.* case to such an extent that it [42] is drawn within the rationale expressed by Judge Hand in the *Herzfeld* case. In the *Siegel* case, the Federal Trade Commission had ordered Siegel to cease and desist from using its trade name because of certain misrepresentations contained therein. Petitioner, citing the *Royal Milling Co.* decision, asserted that so valuable a right as a trade name should not be destroyed if qualifying words might cure the misrepresentation. The Third Circuit held, however, that it was powerless to disturb the remedy, following the *Herzfeld* case. *Siegel Co. v. Federal Trade Commission*, 150 F. (2d) 751, 755-6 (C. A. 3d, 1944) [4 S. & D. 294]. The Supreme Court reversed, relying in large part on the fact that, by being prohibited from further use of a valuable trade name, petitioner was being deprived of a valuable business asset. Mr. Justice Douglas, speaking for a unanimous Court, stated: "The Commission

<sup>4</sup> Followed by the Second Circuit in *Parke, Austin & Lipscomb v. Federal Trade Commission*, 142 F. (2d) 437, 442 (C. A. 2d, 1944), cert. den. 323 U. S. 753 (1944); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. (2d) 676, 680 (C. A. 2d, 1944) [39 F. T. C. 657, 4 S. & D. 226]; *Deer v. Federal Trade Commission*, 152 F. (2d) 65, 67 (C. A. 2d, 1945) [41 F. T. C. 463 4 S. & D. 437]; cf. *Irving Weis & Co. v. Brannan*, 171 F. (2d) 232, 235 (C. A. 2d, 1948); by the Third Circuit in *Siegel Co. v. Federal Trade Commission*, 150 F. (2d) 751, 755-6 (C. A. 3d, 1944) (discussed *infra*); [42 F. T. C. 902, 4 S. & D. 476] *Perloff v. Federal Trade Commission*, 150 F. (2d) 757, 760 (C. A. 3d, 1944) [40 F. T. C. 878, 4 S. & D. 316]. See also *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 726-7 (1948) [44 F. T. C. 1460, 4 S. & D. 676].

has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes,<sup>5</sup> judicial review is limited. It extends no further than to ascertain whether the Commission made an *allowable judgment in its choice of the remedy*. As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change 'short of the excision' of the trade name would give adequate protection. \* \* \* The issue is stated that way for the reason that we are dealing here with trade names which, as *Federal Trade Commission v. Royal Milling Co.*, \* \* \* emphasizes are valuable business assets. \* \* \* The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." [Emphasis supplied.] 327 U. S. at 612-3. The Court did not, however, proceed to order the Commission to permit "proper qualifying words" as was done in the *Royal Milling Co.* case, 288 U. S. at 217 [17 F. T. C. 664, 2 S. & D. 217], but instead, remanded to the Federal Trade Commission, saying: "we are left in the dark whether some change of name short of excision would *in the judgment of the Commission* be adequate." [Emphasis supplied.] 327 U. S. at 613. The inference to be drawn from the Supreme Court decision in the *Siegel* case seems to me to be that if the Commission had considered the possibility of qualifying words and found them insufficient to cure the misrepresentation, especially if no property in a trade name were involved, the Court would not interfere with the Commission's expert judgment, unless there was a clearly demonstrable abuse of discretion.

"The question before the court is not whether my view is right but whether it is reasonable."<sup>6</sup> our function is limited to finding whether the remedy has a rational basis in the facts. Since I find such a rational basis, I am unable to agree with the majority that the Commission abused its discretion.

The Commission found that Alberty had falsely advertised that Oxorin Tablets had beneficial effects on lassitude, tiredness, etc.<sup>7</sup> Typical of these misrepresentations is the following advertisement:

<sup>5</sup> Citing cases which are included in Notes 1 and 3, *supra*.

<sup>6</sup> Judge Edgerton dissenting in *Hannegan v. Read Magazine*, 81 U. S. App. D. C. 339, 343, 158 F. (2d) 542, 546 (1946), reversed, *Donaldson v. Read Magazine*, 333 U. S. 178, 188 (1948).

<sup>7</sup> The stipulation of facts reads: "\* \* \* respondents have represented, directly and by implication, that by the use of 'Oxorin Tablets' the blood and the red corpuscles of the user will be rendered stronger, more vital and active and will perform their functions better, and that it will correct run-down conditions and bring back energy."

"Pep up your blood! Iron . . . A principal factor in Red Blood Cells . . . The disease Fighting Units of the Blood.

[43] "When you are weary, tired, run-down, just dragging yourself around with no ambition left, when every effort you make seems to leave you weak and spent then try Oxorin Tablets, a tonic for the blood."

In truth, as the stipulated facts show, the tablets had no such beneficial effects except when the designated symptoms were caused by iron deficiency anemia—and that was infrequently the case.<sup>8</sup> Thus, in deciding how best to remedy the falsehood without unnecessarily restricting petitioner from stating the "complete truth," the Commission carved out of the misrepresentation all that was false, expressly or impliedly. The resulting order enjoined petitioner to cease and desist from representing

"That the preparation 'Oxorin Tablets' will have any therapeutic effect upon the blood or the red corpuscles thereof, except in cases of simple iron deficiency anemia; or that said preparation will relieve, correct, or have any beneficial effect upon the condition of lassitude characterized by such expressions as 'weariness', 'tiredness', 'weakness', 'lack of energy', or 'general run down condition', unless such representation be expressly limited to symptoms or conditions due to simple iron deficiency anemia and unless the advertisement reveals that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it."

If the Commission had considered only what affirmative statements could minimally be made to cure the misrepresentation, it would have ignored its statutory mandate. The Federal Trade Commission Act, as amended in 1938, specified that

"\* \* \* in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also *the extent to which the advertisement fails to reveal facts material in the light of such representations* or material with respect to consequences which may result from the use of the commodity

<sup>8</sup> Following is the stipulation of facts in this connection: "That 'Oxorin' will have no beneficial effect upon the blood or the red corpuscles thereof except in cases of simple iron deficiency anemia. There are many causes of rundown conditions and lack of energy which will not be beneficially affected in any way by 'Oxorin'."

"That the causes of lassitude described by such expressions as 'weary,' 'tired,' 'run-down,' 'just dragging around,' 'no ambition left,' 'slipping,' 'all gone,' and the like, are so numerous that in the aggregate they are due much less frequently to simple iron deficiency anemia than to other causes."

to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." [Emphasis supplied.] 52 Stat. 116 (1938), 15 U. S. C. A. § 55 (a).

It is clear from the italicized language that Congress realized that omissions could be as misleading as affirmative misrepresentations. With this in mind, I am unable to reject the Commission's finding that we have here a situation where, "In recommending a particular preparation [i. e., Oxorin] as a cure or remedy for certain designated ailments, symptoms or conditions [i. e., lassitude], respondents suggest not only that such ailments, or conditions may be due to causes for which the preparation is beneficial, but also that there is at least a reasonable chance that they are in fact due to such causes." To prevent such a suggestion from being accepted and relied on in a case where it would be false or misleading, as here, the Commission ordered "appropriate disclosure of the possibility of other causes of the ailments, symptoms or conditions."

It seems to me that, where the sin is one of omission, the Commission may find that it can be remedied only by eliminating any possibility that consumers may draw incorrect inferences in the future. Just as the flat statement "Oxorin is good for lassitude" requires the qualifying phrase, "when that symptom is due to iron deficiency anemia," so also might the Commission have concluded that this single qualification, without more, would raise the inference that, more probably than not, [44] such a symptom *is* the result of iron deficiency anemia. To remove the possibility of this incorrect secondary inference on the part of consumers, the Commission may properly insert a second qualifying phrase.

Nor is such a decision on the part of the Commission completely without precedent. In a case under the Food and Drug Act which, according to the Court, forbids "every statement, design and device [on a label] which may mislead or deceive," the Supreme Court said that "Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false." *United States v. 95 Barrels of Vinegar*, 265 U. S. 438, 443 (1924). It then upheld the view of the lower court that a label describing vinegar as "apple cider vinegar made from *selected apples*" gave rise to the inference that selected *fresh* apples were used. In reality, the vinegar was the product of *dried* apples. The omission was found to be misleading even though the two products were equally wholesome.<sup>9</sup>

<sup>9</sup> Cf. *United States v. Six Dozen Bottles, etc.*, 158 F. (2d) 667, 669 (C. A. 7th 1947).

Similarly, under the Federal Trade Commission Act, it was held that advertisement of defendant's "6% finance plan" tended to mislead the public into thinking that a simple interest charge of six percent on unpaid balances was contemplated and, therefore, that a curative order was required. *General Motors Corp. v. Federal Trade Commission*, 114 F. (2d) 33 (C. A. 2d, 1940) [3 S. & D. 282].<sup>10</sup>

As I view the development of the law in this field, the Commission is entitled to exercise the utmost caution rather than put the consumer to the risk of inquiry. The cases are almost legion which state that this statute was "made to protect the trusting as well as the suspicious. \* \* \* the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 116 (1937) [25 F. T. C. 1715, 2 S. & D. 429]. The Commission's function is "to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent and discerning public." *Parker Pen Co. v. Federal Trade Commission*, 159 F. (2d) 509, 511 (C. A. 7th, 1946) [43 F. T. C. 1190, 4 S. & D. 597]. Even if it is "only the careless or the incompetent [who] could be misled \* \* \* if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment." *General Motors Corp. v. Federal Trade Commission*, 114 F. (2d) 33, 36 (C. A. 2d, 1940) [35 F. T. C. 955, 3 S. & D. 282]. The Federal Trade Commission Act was not "'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous,' \* \* \* and the 'fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced' \* \* \*. The important criterion is the net impression which the advertisement is likely to make upon the general populace. \* \* \* It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements," *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. (2d) 676, 679-80 (C. A. 2d, 1944) [39 F. T. C. 657, 4 S. & D. 226].<sup>11</sup> It is, of course, almost axiomatic that "'words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.'" *Sebrone Co. v. Federal Trade Commission*, 135 F. (2d) 676, 679 (C. A. 7th, 1943)<sup>12</sup> [36 F. T. C. 1142, 3 S. & D. 570].

<sup>10</sup> See Judge Minton's dissent in *D. D. Corp. v. Federal Trade Commission*, 125 F. (2d) 679, 682-3 (C. A. 7th, 1942) [34 F. T. C. 1821, 3 S. & D. 455].

<sup>11</sup> *Aronberg v. Federal Trade Commission*, 132 F. (2d) 165, 167 (C. A. 7th, 1942) [35 F. T. C. 979, 3 S. & D. 528].

<sup>12</sup> Cf. *Donaldson v. Read Magazine*, 333 U. S. 178, 188-9 (1948).

There are intimations in the majority opinion that if use of these products were to have harmful consequences, it might be permissible to add further qualifications than those considered adequate by the majority. Although such a distinction, between misleading advertisements which may [45] have harmful effects (beyond the useless expenditure of money) and those which do not, may be a desirable one, I do not believe it is established by the Act. The statutory language draws within its condemnation all "false advertisements." Failure to reveal facts becomes determinative of falsehood when they are "material in the light of such representations ['made or suggested by statement, word, design, device, sound, or any combination thereof'] or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." 15 U. S. C. A. § 55 (a). Only the clause after the conjunction "or" adverts to considerations of harmfulness. The clause before it seems to me to authorize the Commission to require qualifying or explanatory statements whenever these may be necessary to remedy omissions found by the Commission to be misleading. Since the statute makes no provision for requiring a greater amount of truth when a product is harmful than when it is not, I think the majority are injecting an irrelevant criterion into the case.

Nor is this a case, like *Royal Milling* and *Siegel*, where the property right in a trade name would have been entirely lost if the Commission order had been permitted to stand. Perhaps, in such cases, there is need for greater scrutiny and for consideration of every available alternative before permitting so drastic a course.<sup>13</sup> But no such "right" is involved here. The Commission made no attempt to prevent petitioner from advertising that Oxorin Tablets had a beneficial effect on iron deficiency anemia. The circumscription was only with regard to a symptom, "lassitude," which is only infrequently caused by such deficiency.

It seems to me that the main thrust of the majority opinion is towards caution in interfering with the "right" to advertise. It decides that the Commission goes too far when its order "requires that the advertiser tell the public that his product is more frequently valueless than it is valuable." I do not find that a startling requirement when its function is to rebut a false or misleading inference that the product is more frequently valuable than it is valueless. In my view, the action taken by the majority overlooks the fact that Congress, by enacting legislation proscribing false and deceptive advertising, sought to remedy the consumer's patent inability to ascertain the merit of claims

<sup>13</sup> See *Churchill Tabernacle v. Federal Communications Commission*, 81 U. S. App. D. C. 411, 415, 160 F. (2d) 244, 248 (1947).

made by advertisers. The Act's purpose is to encourage the informative function of advertising; and the Commission's duty is to eliminate falsehoods. If that which is left after the elimination of all that is expressly or inferentially false is hardly worth saying, then, of course, it need not be said.<sup>14</sup>

These same considerations apply to the other part of the Commission's order complained of by petitioner. Phospho B, another of petitioner's products, has therapeutic value in the treatment of sleeplessness, nervousness, etc., *only under the tenets of the homeopathic school of medicine*. That school, as the majority points out, has considerably less supporters than has the allopathic school. For the reasons already discussed, I feel that it was within the discretion of the Commission to order that the public be informed of the limited medical support for the claims made by petitioner. To permit petitioner to continue its representations without restricting them to adherents of the homeopathic school is to "fail to reveal facts material in the light of such representations." 15 U. S. C. A. § 55 (a).

I think the order of the Commission should be affirmed without modification. But even if I were to accept the view of the majority, I think the proper procedure now would be to remand to the Commission for its reconsideration of the entire order in light of this court's rejection of the second qualifying clause. See *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 55 (1948) [44 F. T. C. 1499, 4 S. & D. 716]

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DR. F. A. NEWCOMB v. FEDERAL TRADE COMMISSION<sup>1</sup>

No. 3920—F. T. C. Docket 4962

(Circuit Court of Appeals, Tenth Circuit. April 12, 1950)

Order dismissing, for failure to prosecute, petition to review order of Commission of March 23, 1949, 45 F. T. C. 568, at 578, requiring respondent individual, his representatives, etc., in connection with the offer, etc., of a home treatment for various diseases, disorders, and ailments of the human body, which treatment consisted of an electric device, a preparation designated "Ray Solution" used therewith, a preparation designated "Cataract Tonic," and a recommended diet, or of any similar treatment, to cease and desist from disseminating advertising representing, directly or through inference, and among other things, that said device or preparations or diet, alone or in any combination, constitute a remedy or competent treatment for diseases and conditions of the eyes including cataracts, opacities of the vitreous and aqueous humor, corneal ulcers, optic nerve atrophy, etc., as well as a long list of other ailments and diseases.

<sup>14</sup> Cf. *American Medicinal Products v. Federal Trade Commission*, 136 F. (2d) 426, 427 (C. A. 9th, 1943).

<sup>1</sup> Not reported in Federal Reporter. For case before Commission, see 45 F. T. C. 568.

*Mr. Jerome Walsh*, Kansas City, Mo., for petitioner.

*Mr. James W. Cassedy*, Assistant General Counsel, of Washington, D. C., for Federal Trade Commission.

#### ORDER OF DISMISSAL

It appearing to the court that on March 13, 1950, a certified type-written transcript of the record in this cause was received from the secretary of the Federal Trade Commission and that on such date the clerk of this court advised counsel for petitioner of the receipt of such record and that under the provisions of rule 34, paragraph 5 (a) the designation for printing should be filed within 10 days, that no designation was filed within such 10 days, and that on March 24, 1950, the clerk of this court advised counsel for petitioner that the time for filing such designation had expired and that no designation had been received as of that date, and it further appearing that on April 3, 1950, the clerk of this court advised counsel for the petitioner that the time for filing the designation for printing had long expired and unless a reply was received by the end of the week of April 3, 1950, the matter would be presented to the court, and it further appearing to the court that no designation had been filed to date and no reply has been made to any of the three letters of the clerk above set out,

It is now here ordered on the court's own motion that the petition to review the order of the Federal Trade Commission in this cause be and the same is hereby dismissed out of this court for failure to diligently prosecute the same.

## PENALTY PROCEEDINGS

*United States v. Atlantic Coast Oil Company of New York, Inc.*, United States District Court, Eastern District of New York; \$2,500 penalty assessed on April 6, 1950.

Atlantic Coast Oil Company of New York, Inc., its officers, etc., in connection with the offer, sale, and distribution of its motor oils and greases in interstate commerce, was ordered to cease and desist from:

(1) Representing through the use of the emblem of the Pennsylvania Grade Crude Oil Association that it is a member of said association, unless and until such is the case.

(2) Representing through the use of the emblem of the Pennsylvania Grade Crude Oil Association, the phrase, "Guaranteed 100 Per Cent Pure Pennsylvania Oil, Specially Processed," the word "Pennsylvania" or any derivation thereof, the phrase "Permit No. —," or the word "License" together with said emblem, that the oil or greases being offered for sale or sold by it are pure, unadulterated Pennsylvania oils or greases produced in the Pennsylvania strata of oil fields, unless and until such is the case.

(3) Representing, through the use of the letters and numbers developed by the Society of Automotive Engineers to indicate relative viscosities in motor oils, that the products being offered for sale and sold have the viscosities indicated by said numbers and letters, when such is not the case (D. 2865, 23 F. T. C. 533 at 540).

*United States v. Oland D. Redd (Woelfel Studio, et al.)*; United States District Court for the Western District of New York; settled by compromise about May 4, 1950, for \$4,500, to be paid in installments of \$500, of which the last installment was submitted on September 4, 1951.

Respondent individuals, their agents, etc., had been ordered, as of February 7, 1945, in connection with the offer and sale, etc., in commerce of tinted or colored photographs, or enlargements or miniatures of photographs or snapshots, and of frames therefor, to cease and desist from:

1. Representing in any manner, directly or by implication, that colored or tinted photographs, photographic enlargements, or reductions are paintings.

2. Using the terms "oil painting," "portrait painting," "hand painted," or "hand painted portrait," or the word "painting," either alone or in conjunction with any other words or terms, to designate,

describe, or refer to colored or tinted photographs, photographic enlargements or reductions, or other pictures produced from a photographic base or impression.

3. Using a "draw" or "draw contest" or so-called "lucky coupons" or "lucky certificates," or any similar device, plan, or scheme, so as to represent, indicate, or imply that any customer will obtain any substantial discount or reduction in the price of any picture or pictures.

4. Representing, in connection with pictures being offered or sold in the regular course of business at the usual and customary prices therefor, that such pictures are being offered or sold at a reduced price as an advertising offer or introductory offer, or representing in any manner that a purchaser is receiving an advantage in price not available to all purchasers.

5. Representing that a picture to be made and delivered will be equal in quality and appearance to any sample displayed to the customer unless in fact the picture thereafter delivered is of the same quality, design, and workmanship as said sample.

6. Using trade names consisting of or including terms such as "Art Studios," "Art Institute," "Art Association," or any other fictitious name of similar import, unless the respondent using such name or names actually owns, operates, conducts, or controls an organization or establishment of the character indicated and comprehended by the trade name so used.

7. Misrepresenting or authorizing, permitting, or cooperating in the misrepresentation of the financial responsibility, prestige, or standing of respondents, or any of them, or of the character or extent of such business, by falsely claiming to be connected with an operating established house or by deceptively using the business address of such established house as and for a business allegedly operated by respondents, or any of them, and from misrepresenting through the use of fictitious trade names and misleading State and post office addresses the place, character, and extent of the business actually conducted.

8. Concealing from or failing to disclose to customers at the time pictures are ordered that the finished picture when delivered will be so shaped and designed that it can be used only in a specially designed, odd-style frame that cannot ordinarily be obtained in stores accessible to the consuming public, and that it will be difficult or impossible to obtain a frame to fit the picture from any source other than respondents.

9. Representing that States Finance Company, or any similar collection agency operated by or for respondents, is an innocent purchaser for value without notice of notes for unpaid balances due on pictures or frames sold to the consuming public by respondents, or has in good faith discounted such notes or paid out any money or

given anything of value in connection with the alleged purchase of such notes.

10. Failing or refusing, in cases where pictures have been ordered, completed, and paid for, to deliver to the customer the completed picture or return the photograph or snapshot previously loaned by the customer for use in producing the picture (Docket 4649, 40 F. T. C. 84, 106).

## MISCELLANEOUS MATTERS

IN THE MATTER OF

NEW STANDARD PUBLISHING CO., INC., ET AL.

ORDER DENYING RESPONDENTS' MOTIONS TO SUPPRESS AND STRIKE ALL EVIDENCE, RETURN DOCUMENTARY EVIDENCE, AND TO DISMISS THE COMPLAINT, AND SUPPORTING AND DISSENTING OPINIONS, ETC.

*Docket 4697. Order, June 16, 1950*

This matter came on to be heard in regular course upon motions filed May 2, 1946, by the individual respondent Julius B. Lewis and the corporate respondent New Standard Publishing Co., Inc., to suppress and strike from the record all evidence and other information introduced in this proceeding against said respondents, to return to the individual and corporate respondents all the documentary evidence introduced, and to dismiss the complaint as to them.

The motions to suppress and strike from the record all evidence and information introduced against said respondents and to return the documentary evidence to them allege that said documents and other evidence were the private papers and property of the individual respondent Julius B. Lewis and were the papers and property of the corporate respondent and were obtained by illegal search and seizure directly or indirectly by the Commission, acting through its duly constituted officers.

The motion to dismiss the complaint alleges that the documentary and other records, unlawfully seized, were used against the individual respondent in violation of the fourth and fifth amendments to the United States Constitution and against the corporate respondent in violation of the fourth amendment to the United States Constitution. As to the individual respondent Julius B. Lewis, these motions further allege (1) that when he was subpoenaed as a witness by the Commission and compelled to testify in its behalf in compliance with said subpoena he was granted immunity from prosecution under the fifth amendment to the United States Constitution and under section 9 of the Federal Trade Commission Act; (2) that having been subpoenaed and having given testimony in behalf of the Commission in compliance with said subpoena he was granted immunity by the provisions of subsection (1) of section 5 of the Federal Trade Commission Act; and (3) that he was not warned by officials of the Federal Trade Com-