

Syllabus

IN THE MATTER OF
MARLBORO TOBACCO BOARD OF TRADE ET AL.

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

Docket 5857. Complaint, Mar. 7, 1951—Decision, Sept. 5, 1951

Where a number of concerns in various states, which (1) were engaged as sellers, buyers, brokers, warehousemen, packers, processors or manufacturers of tobacco products; and which (2), in the case of three operated auction warehouses near the town of Upper Marlboro, Md., through which there had been marketed, prior to the 1949 tobacco selling period, the entire loose leaf tobacco crop sold in said vicinity; and which (3) were members of an association or "Board of Trade", which they organized to regulate and control the marketing of tobacco in said town and adjacent territory (natural or preferential market for tobacco growers in three Maryland counties, where was produced the major portion of the leaf tobacco grown in the state), and which so dominated and controlled said market area that it was impossible to engage in the tobacco market therein without having been admitted to membership—

Entered into and carried out agreements and understandings between and among themselves to suppress competition in the sale and purchase of tobacco in said market area; and pursuant thereto concertedly and collectively—

- (1) Established and maintained a monopoly in the auction sale of tobacco on said market, in their aforesaid three member warehouses;
- (2) Denied membership in their said association or board to a tobacco warehouse corporation which desired to conduct a fourth tobacco auction warehouse in such area in addition to the aforesaid three, which had been unable to handle all the tobacco presented for sale by the Maryland growers, with resulting hardship and inconvenience;
- (3) Required that all member warehouses charge uniform fees;
- (4) Established and maintained a boycott of a potential competitor of said board's member warehouses; and
- (5) Made use of said board as a medium for effectuating and carrying out said agreements, etc. and the acts and practices herein set out;

Capacity, tendency and effect of which agreements, and the things done in pursuance thereof were to unreasonably restrain competition and trade in the sale, purchase and distribution of tobacco and tobacco products in various states and in foreign countries; and deprive the public of the advantage of competitive prices and other advantages which they would receive and enjoy under conditions of unobstructed competition; and otherwise to operate as a restraint upon free and legitimate competition in such trade and industry:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public, and had a dangerous tendency to and did actually hinder and prevent competition and restrain trade between and among said member respondents and others in the sale, purchase and distribution of their said products; placed in themselves the power to control and enhance prices and terms and conditions of sale; had a dangerous tend-

Complaint

48 F. T. C.

ency to create in said member warehouses a monopoly in the auction and sale of tobacco in commerce; unreasonably restrained such commerce in the merchandise concerned; and constituted unfair methods of competition in commerce and unfair acts and practices therein.

Before *Mr. Frank Hier*, trial examiner.

Mr. George W. Williams and *Mr. Rufus E. Wilson* for the Commission.

Barton, Wilmer, Bramble, Addison & Semans, of Baltimore, Md., for respondents, and along with

Mr. William B. Oliver, of Fuquay Springs, N. C., for *Arthur R. Talley*.

Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., for *R. J. Reynolds Tobacco Co.*

COMPLAINT

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

PARAGRAPH 1. The respondent Marlboro Tobacco Board of Trade is an unincorporated association organized on or about September 6, 1939, with its principal office and place of business located in the town of Upper Marlboro (sometimes referred to as Marlboro), State of Maryland. The membership of said respondent Marlboro Tobacco Board of Trade, hereinafter referred to as respondent Board, is composed of corporations, partnerships and individuals located in the various States of the United States and who are generally engaged in the tobacco marketing business either as sellers, buyers, brokers, warehouses, packers, processors, or the manufacturers of various tobacco products, such as cigarettes and pipe smoking tobaccos.

The names of the officers of said respondent Board who, individually and as such officers of said respondent Board, are named as respondents herein, and in such capacity have been, and are now, in the position of dominating and controlling the affairs of said respondent Board, including the practices set forth herein, are:

James J. Buchheister, president.

A. Hamilton King, secretary-treasurer.

PAR. 2. Respondent Edelen Bros. Warehouse, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its principal office located at 315 South Charles Street, in the city of Baltimore, within said State of Maryland and operating a tobacco auction warehouse in or near the town of Upper Marlboro, also within said State of Maryland.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent Edelen Bros. Warehouse, Inc., and as such and individually are named as respondents herein, and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein:

Robert S. Jameson, president.

Peter W. Duvall, vice president.

Wilson C. Bowling, treasurer.

W. R. Schult, secretary.

Respondent Marlboro Tobacco Market, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office located in the town of Upper Marlboro within said State of Maryland, where it is engaged in operating a tobacco auction warehouse.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent, Marlboro Tobacco Market, Inc., and as such, and individually, are named as respondents herein, and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein:

Frank M. Hall, president.

Robert L. Hall, secretary.

Paul F. Summers, treasurer.

Respondent Edw. J. O'Brien & Co. (Inc.), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office located at 815-17 West Main Street in the city of Louisville within said State of Kentucky. Said respondent Edw. J. O'Brien & Co. (Inc.), is a tobacco buyer and maintains a branch office and tobacco warehouse in or near the town of Upper Marlboro, State of Maryland, under the trade name of E. J. O'Brien & Co.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent, Edw. J. O'Brien & Co. (Inc.), and as such, and individually, are named

Complaint

48 F. T. C.

as respondents herein, and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein:

Edw. J. O'Brien, Jr., president.

Joseph Boyd O'Brien, vice president.

James Graves O'Brien, secretary-treasurer.

Respondent Central Leaf Tobacco Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office located at Third and Cary Streets, in the city of Richmond, within the said State of Virginia. Said respondent, Central Leaf Tobacco Co., is a tobacco buyer and maintains a branch office and tobacco warehouse in or near the town of Upper Marlboro, State of Maryland.

The following-named individuals are now, or have been during the time mentioned herein, officers of said respondent, Central Leaf Tobacco Co., and as such, and individually, are named as respondents herein, and in such capacity, together with the members of the board of directors hereinafter named, have been, and are now, in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein:

J. Shields Harvey, president-treasurer.

Greenhow Maury, Jr., vice president.

L. L. Harvey, vice president.

J. M. Duhling, secretary.

C. L. Ball, Jr., assistant secretary.

R. J. Wilkerson, assistant treasurer.

The following-named individuals are now, or have been during the time mentioned herein, members of the board of directors of said respondent, Central Leaf Tobacco Co., and as such, and individually, are named as respondents herein, and in such capacity, together with the officers herein above named, have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein:

J. Shields Harvey.

Greenhow Maury, Jr.

L. L. Harvey.

W. P. Henry.

J. Ross Newell.

George R. Penn.

Mrs. A. B. Tuck.

Respondent Planters Tobacco Warehouse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located in or near the town of Upper Marlboro, within the said

State of Maryland. Said respondent is engaged in operating a tobacco auction warehouse.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent, Planters Tobacco Warehouse, Inc., and as such, and individually are named as respondents herein, and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein:

Gustave A. Buchheister, president.

George Y. Klinefelter, vice president.

James J. Buchheister, secretary-treasurer.

Respondents Alfred H. Tolzman, G. Nelson Davis, and Orville W. Davis are copartners trading under the name and style of Southern Maryland Tobacco Co., a partnership, engaged in purchasing tobacco, with their principal office and place of business located in or near the town of Upper Marlboro, State of Maryland, and as such, and individually, are named as respondents herein.

Respondents George Cassels-Smith and Edward Gieske are copartners trading under the name and style of Gieske & Niemann, a partnership, engaged in purchasing tobacco, with their principal office and place of business located in or near the town of Upper Marlboro, State of Maryland, and as such, and individually, are named as respondents herein.

Respondent Arthur R. Talley is an individual operating as an independent tobacco broker, having his office and place of business in the city of Fuquay Springs, State of North Carolina.

The membership of the respondent Board is as above described, and from time to time the membership therein is changed by the addition and withdrawal of members so that all of the members of said Board, at any given time, cannot be properly described herein for the purpose of naming them as respondents without considerable inconvenience and delay, and also said respondent Board's membership constitutes a class so numerous as to make it impracticable, without considerable inconvenience and delay, to name them all as respondents herein; wherefore, the respondents hereinbefore named as respondents, and as such officers, directors and members, are also made respondents as representative of and as representing all of the members of said respondent Board, including those members not specifically named herein.

PAR. 3. Tobacco, produced in the State of Maryland, is brought by the growers thereof to the respondent tobacco auction warehouses, members of respondent Board, as aforesaid, where it is sold at auction

Complaint

48 F. T. C.

to purchasers, or agents or representatives thereof, who are also members of said respondent Board and who are, in a great many instances, engaged in the export tobacco trade or in the manufacture of tobacco products in States other than that of Maryland and shipped or otherwise transported by them from said State of Maryland to other States within the United States and to foreign countries, and there has been, and now is, a constant current and course of trade and commerce in said tobacco and tobacco products between and among the several States of the United States, as well as with foreign countries.

PAR. 4. Respondent Board was organized by its members to regulate and control the marketing of tobacco in the "Marlboro and adjacent territory" and to that end to provide for rules and regulations that would be uniform in their application and in the mutual interests of the producers, warehousemen and buyers. The rules and regulations adopted, commonly referred to as bylaws were and are a part of the agreement under which said Board was organized, and the pertinent provisions thereof, among others, are as follows:

4. Any person, firm or corporation may become a member of the Marlboro Tobacco Board of Trade upon producing evidence satisfactory to the warehouse, of his financial responsibility and his good character and upon the payment of membership fee hereinafter provided for; and further agreeing to abide by all rules and regulations of the Board of Trade.

5. No person, firm or corporation shall be entitled to purchase tobacco on the Marlboro Tobacco Market unless he or it is a member in good standing of the Marlboro Tobacco Board of Trade.

6. * * * Every member of the Marlboro Tobacco Board of Trade selling tobacco at auction shall charge uniform fees for all tobacco sold at auction and shall not make any rebate or pay any gratuity or perform any services or do any other act which may in any way be calculated to reduce the Commission and other charges.

To effectuate and enforce said bylaws, fines are provided, in certain instances, for their violation. In 1947 the following new bylaw was added:

26. That the Marlboro Tobacco Board of Trade shall be authorized and empowered to employ a supervisor under such terms and conditions they might think right and proper and that any supervisor employed shall have full authority to enforce all the By-Laws of the Marlboro Tobacco Board of Trade; to arbitrate all differences of opinion or interpretations which may arise; to regulate and adjust selling hours; to impose fines for the violation of the rules and regulations of the Marlboro Tobacco Board of Trade and to perform any other duties necessary to promote the honest and efficient sale of tobacco on said markets.

PAR. 5. There are five counties in the State of Maryland within which tobacco is produced, namely, Prince Georges, Anne Arundel,

Calvert, Charles, and St. Marys. Prior to the 1949 market period there were eight auction warehouses in these respective counties from which the entire crop of loose-leaf Maryland tobacco was sold. Three of the said warehouses are located in or near the town of Upper Marlboro, in Prince Georges County, Md. The others are located in or near Waldorf, La Plata, and Hughesville, Charles County, Md.

In the year 1949, there were 34,950,000 pounds of loose-leaf tobacco marketed from the five counties hereinabove named, the greater portion of which, consisting of 22,564,000 pounds, was produced in Prince Georges, Anne Arundel and Calvert Counties. Of this amount Prince Georges County alone accounted for 10,187,000 pounds. The town of Upper Marlboro, and its vicinity, because of its accessibility, is at the present time, and heretofore has been, the natural or preferential market for a substantial number of the tobacco growers in Prince Georges, Anne Arundel, and Calvert Counties. Up to and immediately prior to the opening of the 1949 tobacco selling period the entire loose-leaf tobacco crop sold in the town of Upper Marlboro and vicinity was marketed through three auction warehouses, as aforesaid, namely, respondents Edelen Bros. Warehouse, Inc., Planters Tobacco Warehouse, Inc., and Marlboro Tobacco Market, Inc., all of which are located approximately one-fourth mile to the east of the said town of Upper Marlboro, on United States Highway 301. In the past few years the three respondent warehouses aforesaid have been and are now unable to handle all the tobacco when and as presented in the usual course of business for sale by the Maryland growers, as the floors of said warehouses become so crowded at times that it becomes necessary to close down in order to clear out the tobacco thereon. This operates as a hardship and inconvenience to the growers who are then compelled to leave it on their trucks, find storage, or return same to their farms, to be brought again to the market on another day.

The market for the sale of Maryland tobacco opens on or about the first of May of each year and normally does not close until some time during the month of August. In the 1949 market season a fourth tobacco auction warehouse was opened at Waysons Corner, Anne Arundel County, which is some 2.6 miles from the nearest respondent warehouse near the said town of Upper Marlboro but in that market area, for the purpose of buying and selling tobacco at auction.

PAR. 6. Said respondent Board, and its members, operating under and by virtue of its bylaws, have in the past and now continue, among other things, to allot or apportion, regulate and adjust the selling time among said member warehouses, pass upon applications for membership in said respondent Board, although sole authority in this respect is actually vested in the warehouse members thereof, impose

Complaint

48 F. T. C.

finer for violations of said bylaws, require the charging of uniform fees and at all times herein mentioned the Upper Marlboro tobacco market has been dominated and controlled, and is now under the domination and control of respondent Board and its members.

The authority of said respondent Board is respected, acknowledged, and adhered to by the buyers, agents, and representatives of the principal tobacco manufacturing companies and by the independent buyers and speculators and whose presence is necessary for a successful sale so that it is virtually impossible for any person, firm or corporation to engage in the tobacco business, other than as a producer, in the Marlboro market area, without first having been admitted into membership in respondent Board.

During the years 1949 and 1950 numerous applications were made by the officers of the warehouse at Waysons Corner to respondent Marlboro Tobacco Board of Trade for admission to membership in said respondent Board. Notwithstanding that admission to membership in said respondent Board is, according to the provisions of its bylaws, as aforesaid, nominally open to any applicant of good character and financial responsibility engaged in the tobacco industry of "Marlboro and adjacent territory," said respondent Board refused and still continues to refuse to admit the aforesaid warehouse into membership of said respondent Board. Consequently, the refusal of respondent Board to admit the Waysons Corner warehouse, or any other like situated warehouses, and although in the Upper Marlboro market area, into its membership, as aforesaid, or to allot said warehouse selling time was, in practical effect, to exclude it completely from the Upper Marlboro market and to eliminate it as a competitor of respondent Board's member warehouses as hereinafter set forth.

PAR. 7. The respondent members of said respondent Board who own and operate tobacco auction warehouses in said area, as aforesaid, would be in competition with each other for the tobacco of growers in connection with the sale and marketing thereof, and with such other tobacco auction warehouse, as aforesaid, if it were not for the act of said respondents in refusing to admit such warehouse into membership in said respondent Board. As a result thereof respondent Board's member warehouses continue to enjoy a virtual monopoly in the auction sale of tobacco in the market area in or surrounding the town of Upper Marlboro.

PAR. 8. Said respondents, beginning on or about September 1939, and particularly within the last 2 years, including the present time, have entered into, maintained and carried out agreements, understandings, combinations and conspiracies, between and among themselves, to suppress, hinder, stifle and lessen competition in the sale

and purchase of tobacco in the market area of Upper Marlboro, State of Maryland.

Pursuant to, and in furtherance of, and to make effective said agreements, understandings, combinations and conspiracies, said respondents have cooperatively, concertedly and collectively adopted, engaged in, and carried out, the following methods, acts and practices:

1. Established and is now maintaining a monopoly in respondent member warehouses in the auction sale of tobacco on the Upper Marlboro market.

2. Denied membership in respondent Board to a tobacco auction warehouse corporation, engaged or that desired to engage, in the business of conducting a tobacco auction warehouse in such area.

3. Required that all respondent member warehouses charge uniform fees.

4. Established and maintained a boycott of potential competitor of respondent Board's member warehouses.

5. Used respondent Board as a medium for effectuating and carrying out the said agreements, understandings, combinations, and conspiracies alleged herein and have by and through said respondent Board carried out and done, and are now carrying out and doing, the acts and practices herein alleged.

PAR. 9. The capacity, tendency and effect of the aforesaid agreements, understandings, combinations, and conspiracies in the methods, acts, and practices and things done and performed by respondents in pursuance thereof are, and have been, to unreasonably lessen, suppress, stifle and restrain competition and trade in the sale, purchase, manufacture, and distribution of tobacco and tobacco products, in the various States of the United States and with foreign countries, and to deprive the purchasing, using, and consuming public of the advantage of competitive prices, terms, and conditions in connection with the purchase thereof, and other advantages which they would receive and enjoy under conditions of normal, unobstructed, free and fair competition in said trade and industry and to otherwise operate as a restraint upon, obstruction and detriment to, the freedom of fair and legitimate competition in such trade and industry.

PAR. 10. The acts and practices of said respondents, and the things done and performed by them, as herein alleged, are all to the prejudice of the public; have a dangerous tendency to hinder and prevent, and actually hindered and prevented, competition and restrained trade between and among said members of respondents and others in the sale, purchase manufacture, and distribution of their said articles of merchandise in commerce, within the intent and meaning of the Federal Trade Commission Act; and placed in respondents the power

to control and enhance prices and other terms and conditions in connection with the sale, purchase, manufacture, and distribution of the said articles of merchandise; have a dangerous tendency to create in said respondent member warehouses a monopoly in the auction sale of tobacco in said commerce; have unreasonably restrained such commerce in their said articles of merchandise, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to rule XXII of the Commission's rules of practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated September 5, 1951, the initial decision in the instant matter of trial examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 7, 1951, issued and subsequently served its complaint in this proceeding upon respondents Marlboro Tobacco Board of Trade, an unincorporated association, James J. Buchheister and A. Hamilton King, individually and as officers of the Marlboro Tobacco Board of Trade, its members; Edelen Bros. Warehouse, Inc., a corporation, Robert S. Jameson, Peter W. Duvall, Wilson C. Bowling and W. R. Schult, individually and as officers and directors of Edelen Bros. Warehouse, Inc.; Marlboro Tobacco Market, Inc., a corporation, Frank M. Hall, Robert L. Hall and Paul F. Summers, individually and as officers and directors of Marlboro Tobacco Market, Inc.; Edw. J. O'Brien & Co. (Inc.), a corporation, Edw. J. O'Brien, Jr., Joseph Boyd O'Brien and James Graves O'Brien, individually and as officers and directors of Edw. J. O'Brien & Co. (Inc.); Central Leaf Tobacco Co., a corporation, J. Shields Harvey, Greenhow Maury, Jr., L. L. Harvey, J. M. Duhling, C. L. Ball, Jr., R. J. Wilkerson, W. P. Henry, J. Ross Newell, George R. Penn, and Mrs. A. B. Tuck, individually and as officers and directors of Central Leaf Tobacco Co.; Planters Tobacco Warehouse, Inc., a corporation; Gustave A. Buchheister, George Y. Klinefelter, and James J. Buchheister, individually and as officers and directors of Planters Tobacco Warehouse, Inc.; Alfred H. Tolzman, G. Nelson Davis, and Orville W. Davis, individually and as copartners trading

under the name and style of Southern Maryland Tobacco Co., a partnership; George Cassels-Smith and Edward Gieske, individually and as copartners trading under the name and style of Gieske & Niemann, a partnership; and Arthur R. Talley, an individual, the above-named respondent members, officers and individuals named also as representatives of the entire membership of respondent Marlboro Board of Trade, charging them with the use of unfair methods of competition and unfair acts and practices in commerce in violation of the provision of said act. After respondents filed their answers in this proceeding, a stipulation was entered into and incorporated in the record with the approval of the trial examiner, theretofore duly, designated by the Commission, on behalf of all respondents named with the exception of respondents Greenhow Maury, Jr., and R. J. Reynolds Tobacco Co., with counsel supporting the complaint.

By the terms of said stipulation, it was agreed that the attorneys supporting the complaint have and can produce competent witnesses who, if called, would testify that all the allegations of fact in the complaint are true and correct, that the record may be taken as if they had been so called and had so testified, that the stipulation should be made a part of the record and may be taken as the facts in this proceeding and in lieu of evidence in support of the charges stated in the complaint, or in opposition thereto, that the trial examiner may proceed thereupon to make his initial decision stating his findings as to the facts, including inferences which he may draw from said facts and his conclusions based thereon and to enter his order disposing of the proceeding without the filing of proposed findings and conclusions or the presentation of oral argument.

Said stipulation further provided that the Federal Trade Commission may, if the proceeding comes before it on appeal from the initial decision of the trial examiner or by review upon the Commission's own motion, set aside the stipulation and remand the case to the trial examiner for further proceeding under the complaint.

By said stipulation, each respondent agreeing thereto waived any right to offer or have received in evidence any testimony, documents or other evidence in opposition to the allegations of the complaint, waived any right to submit any proposed findings, conclusions or reasons therefor and all other intervening procedure, and waived any right to challenge or contest any findings as to the facts in this proceeding based on the stipulation on the ground that such findings do not have substantial supporting evidence or that they are otherwise not proper and lawful.

Said stipulation further provided that it was entered into solely for the purpose of this proceeding, for the review thereof and for the

Findings

48 F. T. C.

enforcement of any order issued in connection therewith and for no other purpose; that respondents do not admit or concede the accuracy of any findings to be made herein but agree that they may be made; and do not admit that they have violated or intended to violate any law.

Thereafter this proceeding regularly came on for final consideration by said trial examiner upon the complaint, answers thereto, said stipulation and the record, said stipulation having been approved by the trial examiner, who after duly considering the record herein finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Marlboro Tobacco Board of Trade is an unincorporated association organized on or about September 6, 1939, with its principal office and place of business located in the town of Upper Marlboro (sometimes referred to as Marlboro), State of Maryland. The membership of said respondent Marlboro Tobacco Board of Trade, hereinafter referred to as respondent Board, is composed of corporations, partnerships and individuals located in the various States of the United States and who are generally engaged in the tobacco marketing business either as sellers, buyers, brokers, warehouses, packers, processors or the manufacturers of various tobacco products, such as cigarettes and pipe-smoking tobaccos.

The names of the officers of said respondent Board, who, individually and as such officers of said respondent Board, have been, and are now, in the position of dominating and controlling the affairs of said respondent Board, including the practices set forth herein, are James J. Buchheister, president, and A. Hamilton King, secretary-treasurer.

PAR. 2. Respondent Edelen Bros. Warehouse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office located at 315 South Charles Street, in the city of Baltimore, within said State of Maryland and operating a tobacco auction warehouse in or near the town of Upper Marlboro, also within said State of Maryland.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent Edelen Bros. Warehouse, Inc., and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein: Robert S. Jameson, president; Peter W. Duvall, vice president; Wilson C. Bowling, treasurer; and W. R. Schult, secretary.

Respondent Marlboro Tobacco Market, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office located in the town of Upper Marlboro within said State of Maryland, where it is engaged in operating a tobacco auction warehouse.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent, Marlboro Tobacco Market, Inc., and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein: Frank M. Hall, president; Robert L. Hall, secretary; and Paul F. Summers, treasurer.

Respondents Edw. J. O'Brien & Co. (Inc.) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, with its principal office located at 815-17 West Main Street in the city of Louisville within said State of Kentucky. Said respondent Edw. J. O'Brien & Co. (Inc.) is a tobacco buyer and maintains a branch office and tobacco warehouse in or near the town of Upper Marlboro, State of Maryland, under the trade name E. J. O'Brien & Co.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent, Edw. J. O'Brien & Co. (Inc.), and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein: Edw. J. O'Brien, Jr., president; Joseph Boyd O'Brien, vice president; and James Graves O'Brien, secretary-treasurer.

Respondent Central Leaf Tobacco Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal office located at Third and Cary Streets, in the city of Richmond, within the said State of Virginia. Said respondent, Central Leaf Tobacco Co., is a tobacco buyer and maintains a branch office and tobacco warehouse in or near the town of Upper Marlboro, State of Maryland.

The following-named individuals are now, or have been during the time mentioned herein, officers of said respondent, Central Leaf Tobacco Co., and in such capacity, together with the members of the board of directors hereinafter named, have been, and are now, in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein: J. Shields Harvey, president-treasurer; L. L. Harvey, vice president; J. M. Duhling, secretary; C. L. Ball, Jr., assistant secretary; and R. J. Wilkerson, assistant treasurer. The following-named individuals are now, or have been during the time mentioned herein, members of the board of directors

Findings

48 F. T. C.

of said respondent, Central Leaf Tobacco Co., and in such capacity, together with the officers hereinabove named, have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein: J. Shields Harvey, L. L. Harvey, W. P. Henry, J. Ross Newell, George R. Penn, and Mrs. A. B. Tuck. Respondent Greenhow Maury, Jr., since July 1949, has had no connection with Central Leaf Tobacco Co. or the board.

Respondent Planters Tobacco Warehouse, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located in or near the town of Upper Marlboro, within the State of Maryland. Said respondent is engaged in operating a tobacco auction warehouse.

The following-named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent, Planters Tobacco Warehouse, Inc., and in such capacity have been and are now in the position of dominating and controlling the affairs of said corporation, including the practices set forth herein: Gustave A. Buchheister, president; George Y. Klinefelter, vice president; James J. Buchheister, secretary-treasurer.

Respondents Alfred E. Tolzman, G. Nelson Davis, and Orville W. Davis are copartners trading under the name and style of Southern Maryland Tobacco Co., a partnership, engaged in purchasing tobacco, with their principal office and place of business located in or near the town of Upper Marlboro, State of Maryland.

Respondents George Cassels-Smith and Edward Gieske are copartners trading under the name and style of Gieske & Niemann, a partnership, engaged in purchasing tobacco, with their principal office and place of business located in or near the town of Upper Marlboro, State of Maryland.

Respondent Arthur R. Talley is an individual operating as an independent tobacco broker, having his office and place of business in the city of Fuquay Springs, State of North Carolina.

R. J. Reynolds Tobacco Co. was erroneously and inadvertently listed as a member of the Marlboro Tobacco Board of Trade through the unauthorized action of its tobacco buying agent. It at no time was aware of this, until this proceeding was commenced, never paid dues or took any part in the acts and practices herein found.

Respondent Board has a large and frequently changing membership, wherefor respondents specifically named herein, were named and are treated herein as being representative of the entire membership of respondent Board.

PAR. 3. Tobacco, produced in the State of Maryland, is brought by the growers thereof to the respondent tobacco auction warehouses, members of respondent Board, as aforesaid, where it is sold at auction to purchasers, or agents or representatives thereof, who are also members of said respondent Board and who are, in a great many instances, engaged in the export tobacco trade or in the manufacture of tobacco products in States other than that of Maryland and shipped or otherwise transported by them from said State of Maryland to other States within the United States and to foreign countries, and there has been, and now is, a constant current and course of trade and commerce in said tobacco and tobacco products between and among the several States of the United States, as well as with foreign countries.

PAR. 4. Respondent Board was organized by its members to regulate and control the marketing of tobacco in the "Marlboro and adjacent territory" and to that end to provide for rules and regulations that would be uniform in their application and in the mutual interests of the producers, warehousemen and buyers. The rules and regulations adopted, commonly referred to as bylaws, were and are a part of the agreement under which said Board was organized, and the pertinent provisions thereof, among others, are as follows:

4. Any person, firm or corporation may become a member of the Marlboro Tobacco Board of Trade upon producing evidence satisfactory to the warehouse, of his financial responsibility and his good character and upon the payment of membership fee hereinafter provided for; and further agreeing to abide by all rules and regulations of the Board of Trade.

5. No person, firm or corporation shall be entitled to purchase tobacco on the Marlboro Tobacco Market unless he or it is a member in good standing of the Marlboro Tobacco Board of Trade.

6. * * * Every member of the Marlboro Tobacco Board of Trade selling tobacco at auction shall charge uniform fees for all tobacco sold at auction and shall not make any rebate or pay any gratuity or perform any services or do any other act which may in any way be calculated to reduce the Commission and other charges.

To effectuate and enforce said bylaws, fines are provided, in certain instances for their violation. In 1947 the following new bylaw was added:

26. That the Marlboro Tobacco Board of Trade shall be authorized and empowered to employ a supervisor under such terms and conditions they might think right and proper and that any supervisor employed shall have full authority to enforce all the Bylaws of the Marlboro Tobacco Board of Trade; to arbitrate all differences of opinion or interpretations which may arise; to regulate and adjust selling hours; to impose fines for the violation of the rules and regulations of the Marlboro Tobacco Board of Trade and to perform any other duties necessary to promote the honest and efficient sale of tobacco on said markets.

Findings

48 F. T. C.

PAR. 5. There are five counties in the State of Maryland within which tobacco is produced, namely, Prince Georges, Anne Arundel, Calvert, Charles, and St. Marys. Prior to the 1949 market period there were eight auction warehouses in these respective counties from which the entire crop of loose-leaf Maryland tobacco was sold. Three of the said Warehouses are located in or near the town of Upper Marlboro, in Prince Georges County, Md. The others are located in or near Waldorf, La Plata, and Hughesville, Charles County, Md.

In the year 1949, there were 34,950,000 pounds of loose-leaf tobacco marketed from the five counties hereinabove named, the greater portion of which, consisting of 22,564,000 pounds, was produced in Prince Georges, Anne Arundel, and Calvert Counties. Of this amount Prince Georges County alone accounted for 10,187,000 pounds. The town of Upper Marlboro, and its vicinity, because of its accessibility, is at the present time, and heretofore has been, the natural or preferential market for a substantial number of the tobacco growers in Prince Georges, Anne Arundel, and Calvert Counties. Up to and immediately prior to the opening of the 1949 tobacco selling period the entire loose-leaf tobacco crop sold in the town of Upper Marlboro and vicinity was marketed through three auction warehouses, as aforesaid, namely, respondents Edelen Bros. Warehouse, Inc., Planters Tobacco Warehouse, Inc., and Marlboro Tobacco Market, Inc., all of which are located approximately one-fourth mile to the east of the said town of Upper Marlboro, on United States Highway 301. In the past few years the three respondent warehouses aforesaid have been and are now unable to handle all the tobacco when and as presented in the usual course of business for sale by the Maryland growers, as the floors of said warehouses become so crowded at times that it becomes necessary to close down in order to clear out the tobacco thereon. This operates as a hardship and inconvenience to the growers who are then compelled to leave it on their trucks, find storage, or return same to their farms, to be brought again to the market on another day.

The market for the sale of Maryland tobacco opens on or about the first of May of each year and normally does not close until sometime during the month of August. In the 1949 market season a fourth tobacco auction warehouse was opened at Waysons Corner, Anne Arundel County, which is some 2.6 miles from the nearest respondent warehouse near the said Town of Upper Marlboro but in that market area, for the purpose of buying and selling tobacco at auction.

PAR. 6. Said respondent Board, and its members, operating under and by virtue of its bylaws, have in the past and now continue, among other things, to allot or apportion, regulate and adjust the selling time among said member warehouses, pass upon applications for

membership in said respondent Board, although sole authority in this respect is actually vested in the warehouse members thereof, impose fines for violations of said bylaws, require the charging of uniform fees and at all times herein mentioned the Upper Marlboro tobacco market has been dominated and controlled, and is now under the domination and control of respondent Board and its members.

The authority of said respondent Board is respected, acknowledged and adhered to by the buyers, agents and representatives of the principal tobacco manufacturing companies and by the independent buyers and speculators and whose presence is necessary for a successful sale so that it is virtually impossible for any person, firm, or corporation to engage in the tobacco business, other than as a producer, in the Marlboro market area, without first having been admitted into membership in respondent Board.

During the years 1949 and 1950 numerous applications were made by the officers of the warehouse at Waysons Corner to respondent Marlboro Tobacco Board of Trade for admission to membership in said respondent Board. Notwithstanding that admission to membership in said respondent Board is, according to the provisions of its bylaws, as aforesaid, nominally open to any applicant of good character and financial responsibility engaged in the tobacco industry of "Marlboro and adjacent territory," said respondent Board refused and still continues to refuse to admit the aforesaid warehouse into membership of said respondent Board. Consequently, the refusal of respondent Board to admit the Waysons Corner warehouse, or any other like situated warehouses, and although in the Upper Marlboro market area, into its membership, as aforesaid, and to allot said warehouse selling time was, in practical effect, to exclude it completely from the Upper Marlboro market and to eliminate it as a competitor of respondent Board's member warehouses as hereinafter set forth. Membership carries with it a fair allocation of selling time.

PAR. 7. The respondent members of said respondent Board who own and operate tobacco auction warehouses in said area, as aforesaid, would be in competition with each other for the tobacco of growers in connection with the sale and marketing thereof, and with such other tobacco auction warehouse, as aforesaid, if it were not for the act of said respondents in refusing to admit such warehouse into membership in said respondent Board. As a result thereof respondent Board's member warehouses continue to enjoy a virtual monopoly in the auction sale of tobacco in the market area in or surrounding the town of Upper Marlboro.

PAR. 8. Said respondents, beginning on or about September 1939, and particularly within the last 2 years, including the present time,

Conclusion

48 F. T. C.

have entered into, maintained, and carried out agreements, understandings, combinations and conspiracies, between and among themselves, to suppress, hinder, stifle, and lessen competition in the sale and purchase of tobacco in the market area of Upper Marlboro, State of Maryland.

Pursuant to, and in furtherance of, and to make effective said agreements, understandings, combinations and conspiracies, said respondents have cooperatively, concertedly and collectively adopted, engaged in, and carried out, the following methods, acts and practices:

1. Established and is now maintaining a monopoly in respondent member warehouses in the auction sale of tobacco on the Upper Marlboro market.

2. Denied membership in respondent Board to a tobacco auction warehouse corporation, engaged or that desired to engage, in the business of conducting a tobacco auction warehouse in such area.

3. Require that all respondent member warehouses charge uniform fees.

4. Establish and maintain a boycott of potential competitor of respondent Board's member warehouses.

5. Used respondent Board as a medium for effectuating and carrying out the said agreements, understandings, combinations and conspiracies found herein and have by and through said respondent Board carried out and done, and are now carrying out and doing, the acts and practices herein found.

PAR. 9. The capacity, tendency and effect of the aforesaid agreements, understandings, combinations and conspiracies in the methods, acts and practices and things done and performed by respondents in pursuance thereof are, and have been, to unreasonably lessen, suppress, stifle and restrain competition and trade in the sale, purchase, and distribution of tobacco and tobacco products, in the various States of the United States and with foreign countries, and to deprive the purchasing, using and consuming public of the advantage of competitive prices, terms, and conditions in connection with the purchase thereof, and other advantages which they would receive and enjoy under conditions of normal, unobstructed, free, and fair competition in said trade and industry and to otherwise operate as a restraint upon, obstruction and detriment to, the freedom of fair and legitimate competition in such trade and industry.

CONCLUSION

The acts and practices of said respondents, and the things done and performed by them, as herein found, are all to the prejudice of

269

Order

the public; have a dangerous tendency to hinder and prevent, and actually hindered and prevented, competition and restrained trade between and among said member respondents and others in the sale, purchase, and distribution of their said articles of merchandise in commerce, within the intent and meaning of the Federal Trade Commission Act; and placed in respondents the power to control and enhance prices and other terms and conditions in connection with the sale, purchase, and distribution of the said articles of merchandise; have a dangerous tendency to create in said respondent member warehouses a monopoly in the auction sale of tobacco in said commerce; have unreasonably restrained such commerce in their said articles of merchandise, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Marlboro Tobacco Board of Trade, an unincorporated membership association, its officers and directors, individually and as such officers and directors, its members, or any group of such respondents, their agents, representatives, and employees, James J. Buchheister, individually and as president, and A. Hamilton King, individually and as secretary-treasurer, respectively, of such association; Edelen Bros. Warehouse, Inc., a corporation, its officers, directors, representatives, agents, and employees; Robert S. Jameson, Peter W. Duvall, Wilson C. Bowling and W. R. Schult, individually and as president, vice president, treasurer and secretary, respectively, of respondent Edelen Bros. Warehouse, Inc.; Marlboro Tobacco Market, Inc., a corporation, its officers, directors, representatives, agents, and employees, Frank M. Hall, Robert L. Hall and Paul F. Summers, individually and as president, secretary, and treasurer, respectively, of Marlboro Tobacco Market, Inc.; Edw. J. O'Brien & Co. (Inc.), a corporation, its officers, directors, representatives, agents, and employees, and Edw. J. O'Brien, Jr., Joseph Boyd O'Brien and James Graves O'Brien, individually and as president, vice president and secretary-treasurer, respectively, of Edw. J. O'Brien & Co. (Inc.); Central Leaf Tobacco Co., a corporation, its officers, directors, representatives, agents, and employees, and J. Shields Harvey, L. L. Harvey, J. M. Duhling, C. L. Ball, Jr., and R. J. Wilkerson, individually and as president-treasurer, vice president, secretary, assistant secretary and assistant treasurer, respectively, of Central Leaf Tobacco Company; and J. Shields Harvey, L. L. Harvey, W. P. Henry, J. Ross Newell, George R. Penn, and Mrs. A. B. Tuck, individually and as

Order

48 F. T. C.

directors of said Central Leaf Tobacco Co.; Planters Tobacco Warehouse, Inc., a corporation, its officers, directors, representatives, agents, and employees, Gustave A. Buchheister, George Y. Klinefelter, and James J. Buchheister, individually and as president, vice president and secretary-treasurer, respectively, of Planters Tobacco Warehouse, Inc.; Alfred H. Tolzman, G. Nelson Davis, and Orville W. Davis, individually and as copartners trading under the name and style of Southern Maryland Tobacco Co., a partnership, their representatives, agents, and employees; George Cassels-Smith and Edward Gieske, individually and as copartners trading under the name and style of Gieske & Niemann, a partnership, their representatives, agents and employees; and Arthur R. Tally, his representatives, agents, and employees in, or in connection with, the offering for sale, sale, purchase and distribution of tobacco and tobacco products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out, or directing, instigating or cooperating in, any planned common course of action, agreement, understanding, combination or conspiracy between and among any two or more of said respondents or between any one or more of said respondents and others not parties hereto to do or perform any of the following things:

1. Refusing membership in the Marlboro Tobacco Board of Trade of the American Tobacco Growers Corp., referred to in the complaint as the Waysons Corner Warehouse, or any other person, firm or corporation similarly situated.

2. Establishing, fixing or maintaining fees or adhering to any fees so established, fixed or maintained.

3. Employing or utilizing the Marlboro Tobacco Board of Trade or any other medium or central agency as an instrumentality, aid, or vehicle in performing or doing any of the things prohibited by this order.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to the R. J. Reynolds Tobacco Co., a corporation, and Greenhow Maury, Jr., an individual.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within 60 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of September 5, 1951].

Commissioner Mason not participating.

Syllabus

IN THE MATTER OF
ATOMIC PRODUCTS, INCORPORATED ET AL.

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

Docket 5866. Complaint, Mar. 27, 1951—Decision, Sept. 8, 1951

Merchandisers have a custom of imprinting and otherwise labeling or marking foreign products and their containers with the name of the country of their origin, in legible English words in a conspicuous place, and a substantial portion of the buying and consuming public has come to rely upon such imprinting, labeling or marking, and is influenced thereby to distinguish between competing products of foreign and domestic origin, including foreign-made or imported mechanical pencils.

When products composed in whole or substantial part of imported articles are offered for sale and sold in the channels of trade in commerce throughout the United States and in the District of Columbia, they are purchased and accepted as products wholly of domestic manufacture and origin unless they are imprinted, labeled or marked in a manner which informs purchasers that the said products, or parts thereof, are of foreign origin.

There has been, and now is, among members of the buying and consuming public, including purchasers and users of mechanical pencils, in and throughout the United States and in the District of Columbia, a substantial and subsisting preference for products which are wholly of domestic manufacture or origin, as distinguished from products of foreign manufacture or origin and from products which are made in substantial part of materials or parts of foreign manufacture or origin.

Where a corporation and its three officers, engaged in assembling mechanical pencils through a process whereby the words "Made in Occupied Japan", which appeared on the imported mechanisms they purchased, were completely concealed within the completed pencils; and in the interstate sale and distribution of said pencils, some boxed in sets with fountain pens, to jobbers and retailers—

(a) Sold said products without any imprinting, labeling, or conspicuous marking on the pencils and the individual cartons in which packed, to disclose that any part of the pencils was of foreign origin;

With tendency and capacity to deceive members of the buying public into the erroneous belief that said pencils were wholly of domestic manufacture, and thereby cause purchase thereof; and

(b) Followed the practice of furnishing, at the request of their retailers and jobbers, price tags and stickers in denominations of \$3.50 and \$7.50, for affixing to their boxed sets in which, in some cases, they sold their said pencils and pens at from \$3.85 to \$4.75 per dozen or from 32 cents to 39 cents per set; notwithstanding the fact that such sets sold at retail for about \$1 each, and rarely, if ever, for as much as \$3.50 or \$7.50;

With tendency and capacity to deceive purchasers into the erroneous belief that said fictitious prices were the customary prices at which said articles were normally sold, and with tendency and capacity thereby to cause the purchase thereof: