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UNITED STATES OF AMERICA

BEFORE

Federal Trade Commission

IN THE MATTER

of

ACME ASBESTOS COVERING AND FLOORING COMPANY, *et al.*

Docket No. 4613.

BRIEF FOR RESPONDENTS.

ACME ASBESTOS COVERING AND FLOORING COMPANY; ASBESTOS, ASPHALT AND INSULATION MANUFACTURING COMPANY; ATLANTIC ASBESTOS CORPORATION; A. H. BENNETT COMPANY; THE PHILIP CAREY MANUFACTURING COMPANY; THE CLARK ASBESTOS COMPANY; EMPIRE ASBESTOS PRODUCTS, INC.; JOHNS-MANVILLE CORPORATION; L. A. RUBBER & ASBESTOS WORKS, INCORPORATED; G. A. MAC ARTHUR COMPANY; W. S. NOTT COMPANY; PACIFIC ASBESTOS & SUPPLY COMPANY; THE RUBEROID CO.; AND DONALD TULLOCH, JR.

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Statement of the Case.

The amended complaint issued December 27, 1941, charges one individual and nineteen corporations with engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act by conspiring and agreeing to fix prices and merchandising terms of those asbestos and wool felt insulating materials which were classified as forming part of United States Patent No. 1972500 in sub-license agreements between respondent Tulloch and the other respondents. The amended complaint alleges that respondent Tulloch received an exclusive license under this patent (sometimes referred to as the Toohey patent) from respondent Johns-Manville Corporation, the patent owner, on September 11, 1935, to make, use and sell materials under the said patent, and gave sub-licenses from time to time to the other respondents. The "licensed materials" are defined with particularity in Paragraph One of the Amended Complaint, hereinafter referred to as the Complaint.

The Complaint also charges that the conspiracy and price-fixing applied to "non-licensed materials" which are defined in Paragraph One as including such items as "solid brass, zinc and lacquered bands, flexible range boiler jackets, and canvas covering". These items are the essential accessories of completed pipe covering and have at all times been sold in the Industry as integral parts of completed pipe covering units, except flexible range boiler jackets which are large pieces of pipe covering used to cover range boilers, which may be made either in accordance with the Toohey patent or in the ordinary unpatented manner, but which always include a flexible mechanical feature which is subject to a patent owned by the respondent Norristown Magnesia & Asbestos Company.

The materials which the Complaint charges were the subject of the unlawful conspiracy are specifically referred to throughout as "licensed materials" and "non-licensed materials". Before amendment the Complaint referred to "licensed materials", "*non*-licensed materials" and "*un*licensed materials". The "unlicensed materials" could have been construed to include all *unpatented* materials, but by the amendment the words "unlicensed materials" were in all cases changed to "non-licensed materials", the term defined in Paragraph One. The alleged conspiracy was therefore specifically limited to "licensed materials" and "non-licensed materials" as defined in Paragraph One.

The Complaint charges that prior to and during the year 1934 respondents Tulloch, Johns-Manville, Carey and Norristown, "together with some of the other respondent corporations" entered into a conspiracy to eliminate price competition in licensed and non-licensed materials and in low-pressure asbestos pipe covering embodying any of said materials; that the Toohey patent issued to Johns-Manville September 4, 1934, and that as part of the conspiracy Johns-Manville issued an exclusive license to respondent Tulloch under the patent on September 11, 1935, with the right to issue sub-licenses to others.

It is then alleged that in 1935 and 1936 the respondent corporations that had not originally entered into the conspiracy did join in, and all respondents took part in all the practices engaged in to carry out the conspiracy. These practices are alleged to have been:

(1) Price-fixing.

(2) Uniform method of fixing prices by using a Manual of Unit Prices.

(3) Uniform definitions of customers.

(4) Fixed price differentials between customers.

(5) Uniform contracts.

(6) Delivered price system.

(7) Price zones.

(8) Simultaneous change of price zone areas.

(9) Standard sizes for materials and fixed price differentials between sizes.

(10) Adopting a merchandising plan by all respondents *before* the Toohey patent issued (Sept. 4, 1934) and while the National Industrial Recovery Act was in effect but without obtaining the approval of the Administrator of N. R. A., to be used and which was used for the sale of both licensed and non-licensed materials. Also agreeing in said merchandising plan upon:

(a) Classification of buyers for pricing;

(b) Price zones;

(c) Terms of sale;

(d) Price control with penalties;

(e) Special discounts to selected customers;

(f) Price filing.

(11) Agreeing upon form of license to be given by Johns-Manville to Tulloch, form of sub-license to be given by Tulloch to others, and schedule of prices, terms and conditions of sale.

(12) Entering into and carrying out said license and sub-license agreements and conforming to said prices, terms and conditions of sale.

(13) Adopting a merchandising plan as part of said sub-license agreement, substantially the same as the one described in sub-paragraph (10) with respondent Tulloch operating and enforcing the same.

(14) Discussing and agreeing in advance upon changes in sub-license agreements before the changes were announced by Tulloch.

(15) Including non-licensed materials in said merchandising plan and thereby fixing the prices of said material.

The answers of most of the respondents are as the Trial Examiner correctly finds (Report, p. 4), of substantially the same import. His brief summary of their contents, however, (Report, p. 4) is substantially incorrect except in that they deny any violation of law.

After general denials the answers state that some of the respondents and others were engaged in the low pressure asbestos pipe covering industry for many years before 1934; that through economic forces certain trade practices became established in the industry such as the use of price zones, delivered prices, freight equalization and customer classification; that the Code approved under the N. I. R. A. for the Asbestos Industry on November 1, 1933, authorized the Division which included low pressure asbestos pipe covering manufacturers, to adopt a merchandising plan, that this was done according to the provisions of the Code, and that the Merchandising Plan thereupon became legally binding on all members of the Industry until the Schechter decision in May 1935. It is alleged that this Merchandising Plan included many trade practices long established in the Industry and that there was no price uniformity during the period.

The answers further allege that after the Schechter decision and until December 1935 the President and the National Recovery Administration encouraged industry members to cooperate in maintaining standards of fair competition, and public hearings were held by N. R. A. and by the Federal Trade Commission upon proposed voluntary agreements submitted by certain industries for the approval of the President. It is alleged that meetings were held by members of the Asbestos Low Pressure Pipe Covering Industry to discuss ways and means of adopting policies approved by the Government and a proposed voluntary agreement for the Asbestos Industry incorporating many of the principles of the Asbestos Code was submitted to N. R. A. for the President's approval, but that before it was approved an executive order was promulgated December 21, 1935, terminating the National Recovery Administration as of January 1, 1936.

The statement in the Brief of Counsel for the Commission (p. 4) that the answers claim the respondents *operated* "under the voluntary agreement invited by the President from May until September 1935" is without the slightest basis of fact. It is prejudicial and unwarranted.

The answers allege that long prior to N. R. A. the members of the Industry recognized shrinkage to be a serious defect in the industry's products; that Johns-Manville invented a series of products free from this defect and obtained the Toohey patent covering these products on September 4, 1934; that in order to extend the market for the patented products Johns-Manville decided it would be to its interest to license other members of the Industry to manufacture the improved products subject to price control; that because of the unwillingness of manufacturers to allow a competitor to exercise and enforce price control on the patented products Johns-Manville selected the respondent Tulloch, who as Secretary and Manager of the Sub-Code Authority had become favorably known to all members of the Industry, to receive an exclusive license under the patent with the right to grant sub-licenses subject to price control. After negotiations between Johns-Manville and Tulloch the license agreement of September 11, 1935, was entered into.

It is alleged that Tulloch proceeded to issue sub-licenses from time to time to twenty-four members of the Industry, establishing minimum prices and a merchandising plan but that the patented product was not promoted sufficiently by the licensees to create a general acceptance by the public because of price competition of the lower cost unpatented products. The licensees therefore began withdrawing from their agreements in 1936 and only two remained in 1941.

It is further alleged that respondent Tulloch consulted his licensees from time to time to determine their views as to marketing conditions but always found conflicting views and interests and in all instances made decisions himself as to prices and terms and conditions of sale on patented products. Finally, it is alleged that active price competition existed between all members of the Industry as between patented and unpatented materials and that at all times there was active price competition between all members of the Industry in the sale of unpatented materials.

The above allegations of the answers were sustained by the respondents fully and convincingly by documentary evidence and oral testimony. In great part the facts are undisputed. Unfavorable inferences are sought to be drawn in some instances by Counsel for the Commission from isolated documents or bits of testimony. The whole evidence on any one issue, however, is overwhelmingly in favor of the respondents and to such an extent that we contend with assurance that no material issue of fact can be found against them. The case resolves itself into a decision of questions of patent law.

For these reasons we make no overall statement of the facts established, but deal in specific points with questions raised by Counsel for the Commission.

POINT I.

The Record shows conclusively that there was no price fixing conspiracy with respect to *unpatented* asbestos pipe covering materials.

The brief of Counsel for the Commission attempts to draw from inferences and suspicion the conclusion that there was a general price fixing conspiracy as to all asbestos pipe covering materials originating with the Asbestos Industry Code in 1933, and then carried into a Voluntary Agreement and culminating in the Tulloch licenses. When dealing with the Code period and the Voluntary Agreement the evidence is confused in the brief and the facts are so distorted as to present a grossly erroneous report of the acts of the respondents during the period between the passage of the National Industrial Recovery Act on June 16, 1933 and its expiration on April 1, 1936. The evidence covering that period will be dealt with later. There are certain facts in the case which are so completely inconsistent with the existence of a price-fixing conspiracy relating to *unpatented materials* that the contention of Counsel for the Commission on this branch of the case may be summarily dismissed. These facts are as follows:

A. Out of fifty-five manufacturers of asbestos pipe covering materials spread all over the country only nineteen are charged with attempting to fix the price of unpatented materials. With thirty-six manufacturers, including at least four of the larger producers, competing actively with the nineteen alleged price fixers, it is self-evident that the price of unpatented materials could not have been controlled and that practical business men would not have engaged in such a futile effort.

B. During the first two years of the alleged conspiracy the general price level of unpatented materials was continuously declining and remained at its lowest level until three and a half years after the inception of this imaginary conspiracy. A conspiracy to *reduce* the price of competitive products is a novelty in proceedings before this Commission.

C. The actual prices charged by the respondents for unpatented materials throughout the period of the alleged conspiracy were never uniform and were widely different as shown by both the testimony and actual sales.

D. The price zone areas used by the respond[illegible] ing unpatented materials were not uniform. *Price uniformity is impossible under a zoning system without uniform pricing zones.*

The evidence under these headings will be dealt with in order and it will be seen that there is no justification for attempting to extend the alleged price-fixing conspiracy to unpatented materials.

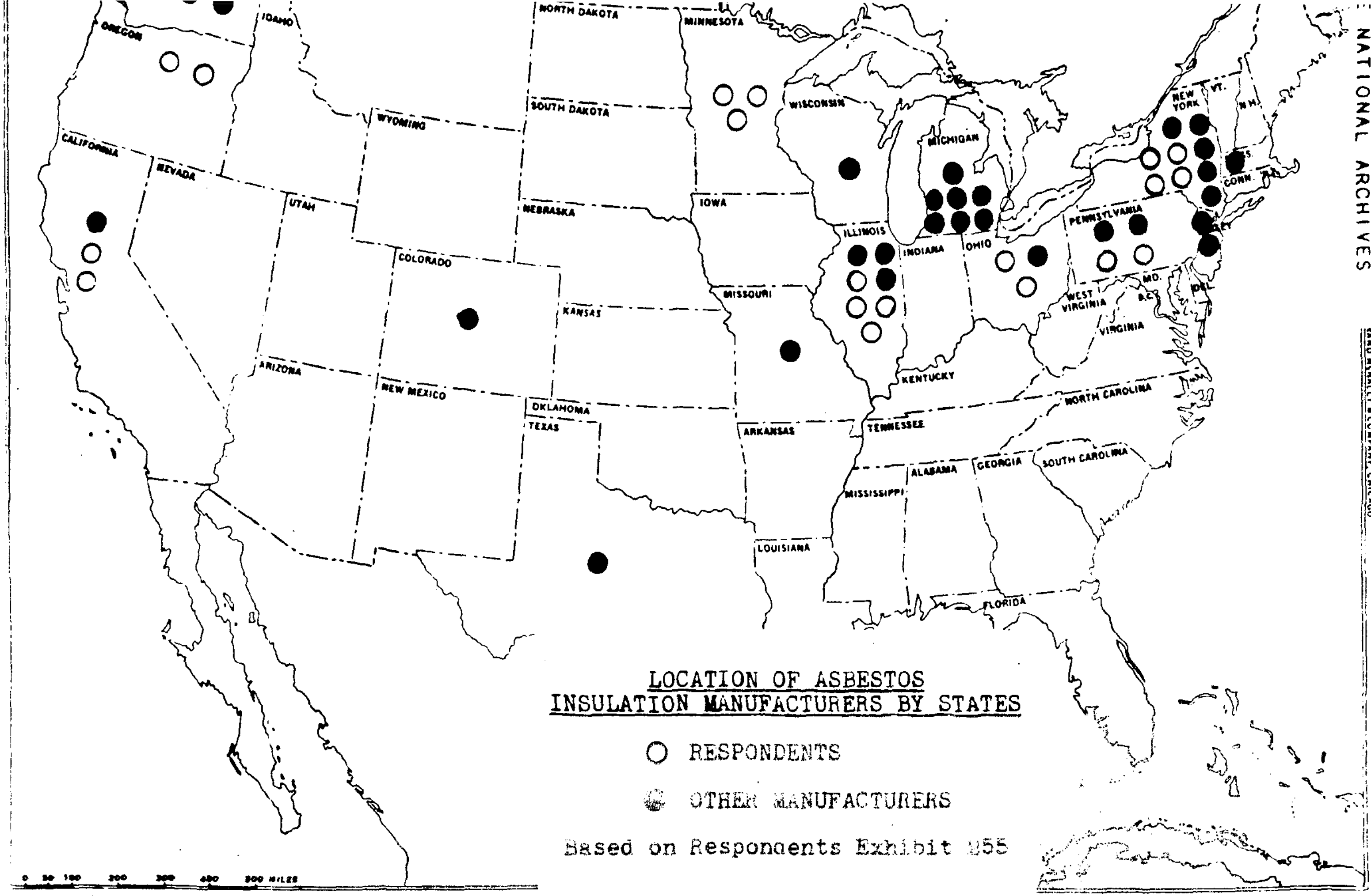
A. Out of fifty-five manufacturers of asbestos pipe covering materials spread all over the country only nineteen are charged with attempting to fix the price of the unpatented materials. With thirty-six manufacturers, including at least four of the larger producers, outside of the alleged conspiracy it is self-evident that the price of the unpatented materials could not have been controlled and that practical business men would not have engaged in such a futile effort.

Nineteen licensees of Mr. Tulloch out of twenty-five licensees (Coms. Ex. 3) and out of a total of fifty-five manufacturers of asbestos pipe covering (R. 3085) are charged in the brief of Counsel for the Commission with a conspiracy to fix the price of both patented and unpatented asbestos pipe covering materials. Since only licensees of Mr. Tulloch could sell the patented materials, it was at least not impossible for the nineteen corporate respondents to enter into a conspiracy as to patented materials. But to argue that nineteen manufacturers out of a total of fifty-five conspired to fix the prices of the Industry for *unpatented* materials is fantastic.

The testimony runs throughout the record and is undisputed that the licensees always encountered active price competition in the sale of unpatented asbestos pipe covering materials, both from licensees and non-licensees (R. 625, 982, 1064, 1208, 1226, 1332-4, 1365, 2050, 2179, 2356). Some of the larger companies in the low pressure pipe covering business who were not licensees were C. Stanley Morgan of Detroit, U. S. Gypsum Company, Charles Brower Co. of Seattle, and Standard Asbestos Company of Kansas City (R. 904-905). Compared with these manufacturers the department of Johns-Manville which manufactured the same kind of materials would not be so outstanding in production, and the same was true of the Carey Company (R. 913-914). The only larger manufacturers who were licensees were Norristown, Carey, Sall Mountain, Ruberoid, Keasbey & Mattison, and Johns-Manville (R. 111). While Mr. Tulloch testified that the asbestos materials manufactured and sold by the respondents would be in excess of 50% of all that was sold and manufactured in the United States (R. 112), he said this referred to asbestos materials manufactured by the Asbestos Paper & Allied Products Division, and that the percentage would be very much less than 50% if all five divisions of the Asbestos Industry were considered (R. 406-407). Nor does this mean that respondents manufactured anywhere near 50% of the *unpatented* asbestos materials produced by the Industry. The respondents Johns-Manville and Bennett, whose production is included in Mr. Tulloch's estimate, produced only patented (R. 568). All the other respondents produced patented and unpatented. Respondents' Exhibit 249 shows that in 1937, for example, Carey manufactured 5,748,000 pounds of unpatented asbestos paper and 4,097,000 pounds of patented asbestos paper, that is to say, only about 58% of Carey's production was unpatented. Between January 1, 1937 and June 30, 1940, the Ruberoid Company sold $512,027 of asbestos insulating materials, of which $188,773 represented sales of materials covered by the Tulloch license agreement—less than two-thirds was unpatented (R. 568). Therefore, it cannot be inferred that the production of unpatented materials by the respondents in any way approached 50% of the total production of the Industry.

The members of this Commission know that nineteen manufacturers of a nationally sold product producing substantially less than 50% of the product cannot fix the price of the product when there are thirty-six other manufacturers, including four of the larger producers, scattered all over the country and competing actively in the sale of the product.

The location of forty-seven of the fifty-five manufacturers appears on respondents' Exhibit 255. The record does not show the names or location of all manufacturers. On page 9 is a map of the United States showing with small circles the location of the nineteen manufacturers charged with this conspiracy and by solid dots the location of twenty-eight of the thirty-six competing manufacturers who are not charged with participation in any conspiracy. It will be seen that the manufacturers who are not so charged were scattered all over the country and located where they could engage in active price competition with the alleged conspirators. In the Chicago area there were four respondents and three competing manufacturers who were not charged with conspiracy. In the Detroit area there were seven manufacturers no one of whom was charged with price-fixing and all of whom could compete with Chicago. In the New York area there were four respondents and seven other manufacturers admittedly competing with them. All these fifty-five manu-



LOCATION OF ASBESTOS
INSULATION MANUFACTURERS BY STATES

○ RESPONDENTS

● OTHER MANUFACTURERS

Based on Respondents Exhibit 255

facturers were producing standard products always subject to the most intense price competition.

The conspiracy is alleged to have begun in the summer of 1933 and to have continued until the commencement of this proceeding, a period of more than eight years. Seventeen producers of unpatented materials attempting to control the prices and selling terms of an industry in which thirty-seven producers were not parties to the alleged conspiracy! The tail wagging the dog.

No business man could be convinced of the existence of such an extraordinary conspiracy without the most persuasive evidence. But there is no such evidence. There are only tenuous inferences and arguments, all of which are at variance with common sense and business experience. On the other hand, the evidence that there was no such conspiracy is abundant and convincing. Officers of the various respondents testified that their unpatented products were customarily sold at lower prices than those established by Mr. Tulloch for the patented products, and that his prices had nothing to do with the price at which they sold the unpatented. We give only a few of the many possible citations to this effect (R. 629, 1064, 1206, 1355, 2209).

This testimony was supported by invoices and sales bulletins showing that the prices at which unpatented products were actually sold were not uniform and were far lower than the patented prices (Resps. Exs. 87-126, 148-151, 211 A to N, 212 A to G, 213 A to J, 214 A to H, 246 A to Z7, 247 A to Z16, 248 A to V).

Twenty-one independent purchasers of asbestos insulating materials were subpoenaed and testified that throughout the period involved in this proceeding they purchased all the unpatented materials they wanted at non-uniform prices from different respondents and other companies in the Industry (R. 2287, 2310, 2390, 2416-7, 2434-5, 2457, 2493, 2527, 2604, 2620-2, 2656-7, 2668, 2688, 2707, 2736, 2746, 2779, 2799, 2955, 3020). They produced hundreds of invoices showing thousands of actual purchases of unpatented products from respondents at non-uniform prices which were far below the current price of patented materials (Resps. Exs. 215 A-Z6, 226 A-H, 227 A-Y, 228 A-E, 229 A-F, 230 A-G, 231 A-Z3, 232 A-F, 236 A-Z4, 237, 238, 239, 240 A-J, 241 A-D, 242 A-C, 243 A-N, 244 A-K, 245 A-Q, 252, 257-272). The testimony of these independent jobbers and distributors was unequivocally to the effect that they had never been forced to pay a uniform price to get unpatented products similar to the patented products. There is no conflicting testimony.

B. During the first two years of the alleged conspiracy the general price level of unpatented materials was continuously declining and remained at its lowest level until three and a half years after the inception of this imaginary conspiracy. A conspiracy to *reduce* the price of competitive products is a novelty in proceedings before this Commission.

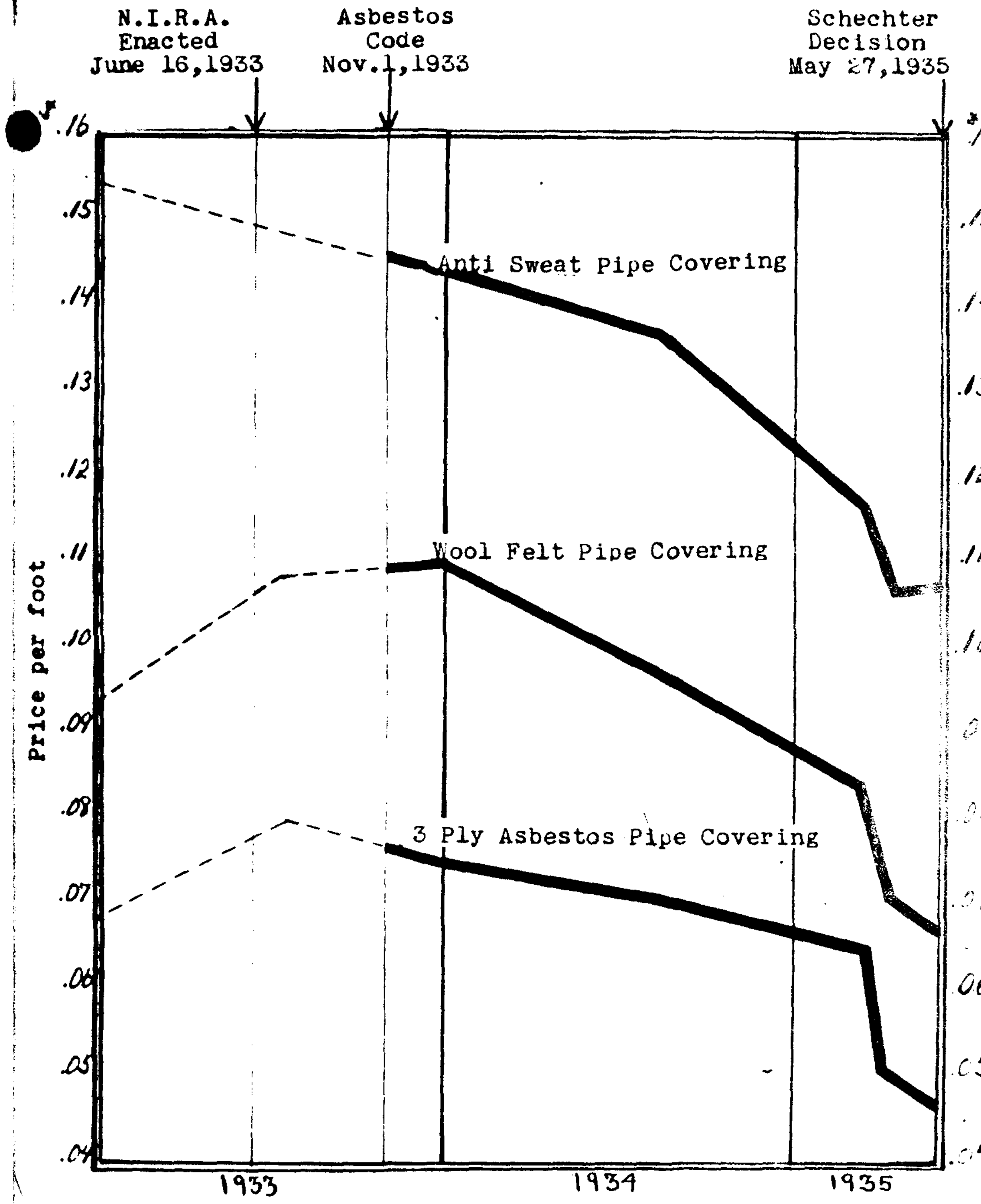
The brief of counsel for the Commission says at page 22:

> "There is in this record conclusive evidence of the intent on the part of the respondents to eliminate competition in price and otherwise in the manufacture, sale and distribution of the products in question.
>
> "It can readily be seen that the respondents were following a common course of action from the date of the first merchandising plan in evidence on down through 1941. Just when and where the plan for this common course of action was promulgated is not clear, but it began to reveal itself in 1933."

What actually revealed itself in 1933, through price filing under the Code, was the low price being charged by some members of the Industry. Instead of correcting this through a price fixing conspiracy, as Counsel for the Commission would have it, the other members of the Industry hit these low prices on the nose and there was a continuous drop in the general price level of unpatented materials until the end of 1935 *and the lowest level continued until the beginning of 1937,* when the market on these products in company with the market on other building materials began to move up. Mr. Abraham, President of The Ruberoid Company, testified:

> "Under the Code period when the prices were filed, which happened for the first time and the exact prices were made known to competitors, there came out in the open some facts which were previously not generally known, and as the result of the price filings prices declined, the reason being that the asbestos paper division industry is a highly competitive one and just as soon as a member of the industry makes a low price and that fact becomes cognizant to his competitors they jump on the band wagon and reduce their prices accordingly, and that happened during the Code" (R. 2345).

Mr. Abraham further testified that prices on unpatented materials declined steadily throughout the code period and continued at a low level until the end of 1936, when prices started to crawl upward (R. 2383-4). Testimony to the same general effect was given by Mr. Hoff, President of the Johns-Manville Sales Corporation, and by other witnesses, some of whom were not connected with the respondents. (R. 2054, 2059) Mr. Stuart George, who was not connected with any respondent, testified that at times there seemed to be no bottom to prices, but that the market went up again around 1937. (R. 2455-6) The prevailing market price on a number of products in 1934 was approximately 81% discount off the standard list (R. 3057-8); whereas, in July 1935 Commission's Exhibits 289-296 show a price drop to a discount of 85.6% and 86% off the standard list. No other citations need be given because there is no conflicting evidence. The chart at page 13 shows in graphic form the drop in respondent Johns-Manville's prices on several of the Industry's products from 1933, when this imaginary conspiracy disclosed itself, to May 27, 1935, the date of the Schechter decision. This chart well illustrates the absurdity of the argument that the respondent Johns-Manville Corporation engaged in a conspiracy in 1933 to fix prices on asbestos and wool felt insulating materials. It also illustrates the absurdity of the argument that the Code Merchandising Plan was used to implement the conspiracy, because it was not until the Merchandising Plan became effective in the latter part of 1933 that prices in the Industry began their continuous descent. This chart is based upon testimony and exhibits which show that the price on 3 ply air cell pipe covering declined from \$.079 per foot in July 1933 to \$.045 per foot in July 1935, that the price of ¾" wool felt pipe covering declined from \$.108 per foot in July 1933 to \$.065 per foot in July 1935, and that the price of anti-sweat pipe covering declined from \$.153 per foot in Jan. 1933 to \$.106 per foot in April 1935. (R. 2111-2, 2115, 2118) Counsel for the Commission does not attempt to explain these facts, but ignores them. He does not pretend to have direct evidence of the alleged conspiracy, nor does he question that its existence was denied by officers of the respondents under his examination. The inferences which are sought to be drawn seem to lack even the merit of plausibility.



PRICES OF JOHNS-MANVILLE
on Principal Types of Pipe Covering During Code Period
(Based on R. 2111-2, 2115, 2118)

C. The actual prices charged by the respondents for unpatented materials throughout the period of the alleged conspiracy were never uniform and were widely different as shown by actual sales.

All officers of respondents who were examined on the subject testified that there was active price competition for unpatented materials throughout the period involved in this proceeding (R. 625-8, 1056, 1208, 1332-4, 1365, 1441, 2049, 2179, 2356, 2858, 2904), but in order that there might be no doubt on this subject counsel for respondents subpoenaed twenty-one witnesses who were engaged in buying asbestos and wool felt insulation materials from the respondents and others in the Industry. These witnesses were jobbers and distributors of plumbing, heating and building supplies, representing the class of trade that dealt with the manufacturers of asbestos and wool felt insulation materials. (R. 2285, 2304, 2387, 2414, 2433, 2497, 2592, 2615, 2642, 2682, 2703, 2732, 2743, 2772, 2796, 2944, 2990) Their testimony was uniformly to the effect that there was always active price competition for unpatented materials, and no witness was called in behalf of the Commission to dispute this fact.

Henry G. Hoffman, a jobber in Chicago, named four respondents from whom he had bought unpatented pipe covering materials, and stated as to prices:

> "They were not stable as the invoices show there (indicating). There are different discounts" (R. 2799).

Stuart H. George, who did business in the State of New York, said he had bought from at least five of the respondents and "could always find different prices from different manufacturers" (R. 2456-7).

Harry Lampert, a jobber in New England and New York, had bought from at least six of the respondents and stated as to prices:

> "There was always a differential. If you would go out shopping you could always get a better price from one than from the other."

Louis Messe, a jobber in Chicago, had bought from at least three of the respondents, and stated he had always found they had different prices (R. 2745).

Morris Curtis, a distributor in the Boston area, had bought from at least four respondents and said:

> "It seems that everybody had a different discount" (R. 2655-6).

Philip Kaplan, a Chicago jobber, had bought from at least three respondents, and said the manufacturers had different discounts (R. 2720).

Frank H. Shipe, who did business in Washington, had bought from at least four respondents. Asked if there was any difference in the prices of manufacturers of asbestos materials, he said:

> "Very decidedly, sometimes ranging as high as twenty and twenty-five per cent for the same so-called material" (R. 2993).

Maurice J. Karpen, who bought for a jobber in Chicago, and had done business with at least five different respondents, said he kept himself informed of prices charged by the manufacturers, and they were not uniform (R. 2779).

Morris Sussman, a jobber in White Plains, N. Y., stated he had bought unpatented products from at least four respondents. He said he found the prices were different during the entire period (R. 2501-[illegible]). He referred to one period when the respondent Empire Asbestos Manufacturing Company allowed a discount of 83 and 10; Norristown, 85; and Johns-Manville, 77 (R. 2506).

Irving Roth, a buyer in the Chicago area, named at least three respondents from whom he had bought the unpatented materials and said their prices always varied. He testified that he had purchased the same materials at one time within a period of two or three weeks from Empire Asbestos at 77 less 10, from Acme Asbestos at 77 and from Sall Mountain at 79 less 10 (R. 2735-6).

Jacob L. Hittner, a New York City jobber, had bought from several different respondents and testified:

> "They had different prices, sometimes a difference of five or ten per cent."

He said he never knew any time when the manufacturers were selling at the same price (R. 2390).

Saul R. Shapiro, a jobber in New Jersey, said he never got the same price from any of the manufacturers. In answer to a question from the Trial Examiner he said the prices varied as much as 15% (R. 2434).

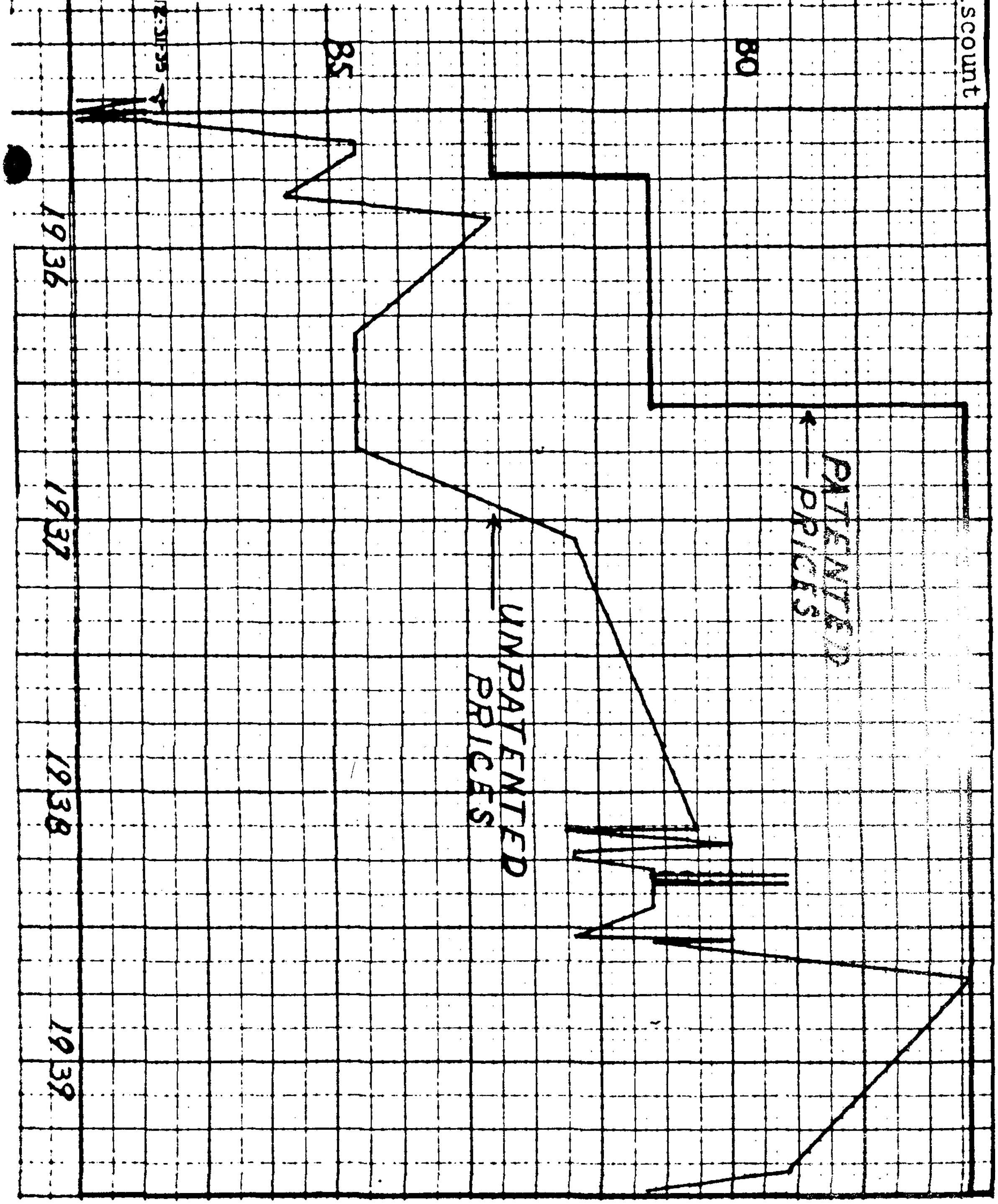
Nine other independent witnesses testified to the same general effect.

The brief of counsel for the Commission relies on the fact that a few of these witnesses said they had seen price lists of some of the respondents showing uniform prices, but there is no evidence that the price lists were for *unpatented* materials. Obviously, the uniform prices represented the price fixed by Tulloch for the patented materials. It is conceded that the respondents when selling patented materials published the Tulloch prices.

In order to confirm the oral testimony of these jobbers and distributors hundreds of invoices taken from their files were placed in evidence showing sales by respondent manufacturers of unpatented materials at prices far below the Tulloch prices for patented materials and which differed widely among the respondents themselves. Each invoice listed numerous items sold and the price for each, and therefore showed the prices charged by the respondents for thousands of items of asbestos and wool felt insulating products (Resps. Exs. 215A-Z6, 226A-H, 227A-Y, 228A-E, 229A-F, 230A-G, 231A-Z3, 232A-F, 236A-Z4, 237, 238, 239, 240A-J, 241A-D, 242A-C, 243A-N, 244A-K, 245A-Q, 252). Respondents' Exhibit 270, the substance of which is reproduced at page 17, is a chart based on those invoices showing the prices charged by different respondents in sales of unpatented 3-ply air cell pipe covering in Zone 1. As will be seen, the prices were constantly changing and, with one exception, were always far below the price of the corresponding patented materials.

D. The price zone areas used by the respondents in marketing unpatented materials were not uniform. *Price uniformity was impossible under a zoning system without uniform pricing zones.*

Price zone areas were not used in the asbestos pipe covering industry for the sale of heavy products, such as asbestos paper and roll board. Zones for pricing purposes have been used by many members of the Industry over a long period of years in the sale of air cell pipe covering and other light products (R. 271, 842, 1016, 2327, 2905-6). The record does not show when this merchandising policy



Prices on 3-ply Air Cell Pipe Covering to Jobbers on
L.C.L. Purchases in Zone 1 Territory Jan. 1, 1936 to

was first used in the Industry, but some of the respondents used zones for pricing purposes at least as early as the following dates:

Norristown Asbestos	1927	(Com. Ex. 384)
Johns-Manville	October 5, 1928	(Com. Ex. 381)
Carey	August 10, 1929	(Com. Ex. 379)
Sall Mountain	October 21, 1929	(Com. Ex. 385)
Plant Rubber	about 1930	(Com. Ex. 387)
Empire Asbestos	1932	(Com. Ex. 380)
W. S. Nott Co.	1932	(Com. Ex. 386)
Keasbey & Mattison	August 1932	(Com. Ex. 382 J)
Acme Asbestos	1933	(Com. Ex. 376)
MacArthur Co.	August 1, 1933	(Com. Ex. 383)
Asbestos Asphalt	1934	(Com. Ex. 377)
Ruberoid	October 25, 1934	(Com. Ex. 375 A)
Ozoruvich	Never used zones	(Com. Ex. 378)
Bennett & Co.	Never used zones	(R. 3385)
Clark Asbestos	Never used zones	(R. 3385)
L. A. Rubber & Asbestos Co.	Never used zones	(R. 3386)
Pacific Asbestos	Never used zones	(R. 3386)

Contrary to the statement made in the brief of Counsel for the Commission the areas of the price zones used by the Respondents were never uniform except as required by the N.R.A. Code and for the sale of patented materials during the period when they were licensees of Mr. Tulloch. The complaint in this proceeding charges that the Johns-Manville Corporation and the Philip Carey Manufacturing Company manufactured and sold approximately 50% of all low pressure asbestos pipe covering in the United States (Complaint, par. 3). Although this charge was wholly unsupported by the evidence, those companies were singled out in the trial of the proceeding as leading manufacturers and members of the alleged conspiracy. After the Toohey invention the Johns-Manville Corporation manufactured only the patented asbestos pipe covering materials (R. 2042-3), and, as a sublicensee of Tulloch, necessarily observed the license zone areas in selling the patented materials. The Carey Company, as we have shown, sold large quantities of unpatented materials and while it necessarily used the Tulloch zone areas for pricing the patented materials, *it used no zone areas in the sale of unpatented materials from the time it became a Tulloch licensee* (Com. Ex. 379).

The Carey Company began using zone areas as early as August 10, 1929, but discontinued their use during the period December 1, 1930 to March 1, 1932 (Com. Ex. 379) during which period a large number of its competitors were using zone prices as appears above. Commission's Exhibit 379 states with reference to the respondent Philip Carey Manufacturing Company:

> "From the time of the Tulloch license this Company has used zone areas prescribed by the licensor from time to time for licensed materials. This Company has not used a zoning system in the sale of unpatented products since the date of the Tulloch license."

It follows inevitably that the Carey Company could not have had one price list for both patented and unpatented materials and could not have had the same prices or merchandising policies for its *unpatented materials* as its competitors Norristown Asbestos, Sall Mountain, Keasbey & Mattison, Ruberoid and others who were using zones for pricing their unpatented materials. The two respondents charged in the complaint with marketing half the products of the Industry therefore had different marketing policies and could not have had the same marketing policies as their competitors in the sale of unpatented materials, because one of them (Johns-Manville) did not sell unpatented materials, and the other (Carey) did not use a zone pricing system for such materials.

On the last page of Commission's Exhibit 379 appears a detailed tabulation of Carey marketing policies with respect to each item of asbestos pipe covering material from August 1929 to December 1935. From December 1, 1930 to March 1, 1932, asbestos paper and corrugated asbestos paper were sold f.o.b. factory, freight equalized, and *all other materials were sole f.o.b. factory;* whereas, in 1934 and 1935 asbestos papers and three other products were sold f.o.b. factory, freight equalized, and all the other products were sold *by zones, freight allowed.* There were five different periods in which radical changes were made in marketing policies for selling the different materials, as appears on the last page of Commission's Exhibit 379.

Comparing these merchandising policies with those of the Johns-Manville Corporation prior to December 1935 we find substantial differences (Com. Ex. 381).

The Johns-Manville zone areas in effect from August 18, 1930 until December 29, 1933 (referred to on the second page of Commission's Exhibit 381 as Exhibit 3 thereto attached, and being also Respondents' Exhibit 251 A to D), were as follows:

"ZONES—DESCRIPTION

Zone 1	Zone 2	Zone 3
"1. Maine	North Carolina	Kentucky
2. New Hampshire	South Carolina	Ohio
3. Vermont	Georgia	Indiana
4. Massachusetts	Florida	Illinois
5. Rhode Island	Alabama	Michigan
6. Connecticut	Mississippi	Wisconsin
7. Pennsylvania	Tennessee	Iowa
8. New Jersey		Minnesota
9. Delaware		Missouri(a)
10. Maryland		Nebraska (Omaha only)
11. Dist. of Columbia		
12. Virginia		
13. West Virginia		
14. New York		

Zone 4	Zone 5	Zone 6
Louisiana	Montana	California
Arkansas	Idaho	Washington(e)
Oklahoma	Wyoming	Oregon
Texas(b)	Utah	Nevada
Kansas	Colorado	
Nebraska(c)	Arizona	
North Dakota	New Mexico	
South Dakota	Washington (East of Cascades)	
Missouri(d)	Texas (El Paso County only)	

(a) That part of Missouri which is within ten miles of the Mississippi River.
(b) Except El Paso District which is in Zone 5.
(c) Except Omaha, which is in Zone 3.
(d) Except that portion which is within ten miles of the Mississippi River, which falls in Zone 3.
(e) West of the Cascade Mountains."

The Carey zone areas during the same period were radically different. Instead of six zones there were only three Carey zones from March 1, 1932 to May 8, 1933 (Coms. Ex. 379 Z to Z1). The areas in effect from May 8, 1933 to November 30, 1934 were radically changed from earlier zones and included four zones (Coms. Ex. 397 Z1). The Carey zone areas from March 1, 1932 to May 8, 1933 were as follows:

"ZONE I—Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin and all points within ten miles of the west bank of the Mississippi River north of the northern boundary of the State of Arkansas."

"ZONE II—Alabama, Florida, Georgia, Louisiana (East of the Mississippi River), Mississippi, North Carolina, South Carolina, Tennessee and all points within ten miles of the west bank of the Mississippi River south of the southern boundary of the state of Missouri."

"ZONE III—Arkansas, Iowa, Kansas, Louisiana (West of the Mississippi River), Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas."

In order that the marked differences between the zone areas being used by Johns-Manville and Carey at that time may be visualized, maps showing the respective zone areas are set forth at pages 22 and 23.

Even after Carey changed its zones on May 8, 1933 they were very different from the Johns-Manville zones which had been in effect for nearly 3 years and which remained in effect for seven months thereafter.

This difference in zone areas between two outstanding competitors in the sale of asbestos pipe covering materials is of peculiar significance and of course completely disproves the existence of any price fixing conspiracy between those respondents during that period.

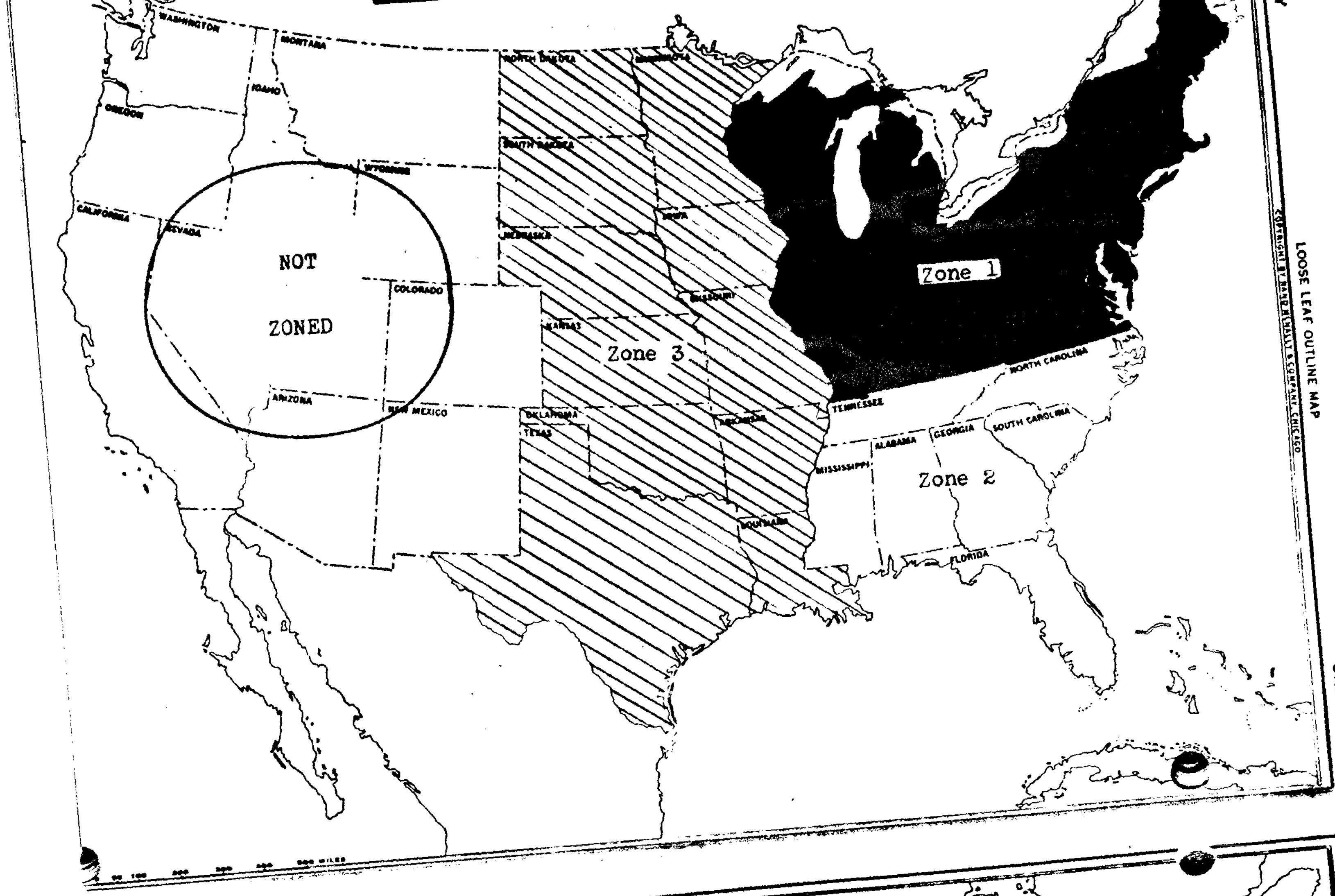
Counsel for the Commission attempts to analyze the respondents' zone areas in pages 13 to 17 of his brief, and asserts that the record shows concert of action on the part of the respondents in establishing these areas, but the analysis is curiously incorrect and does not even attempt to show that similar zone areas were established by any two respondents at or about the same time.

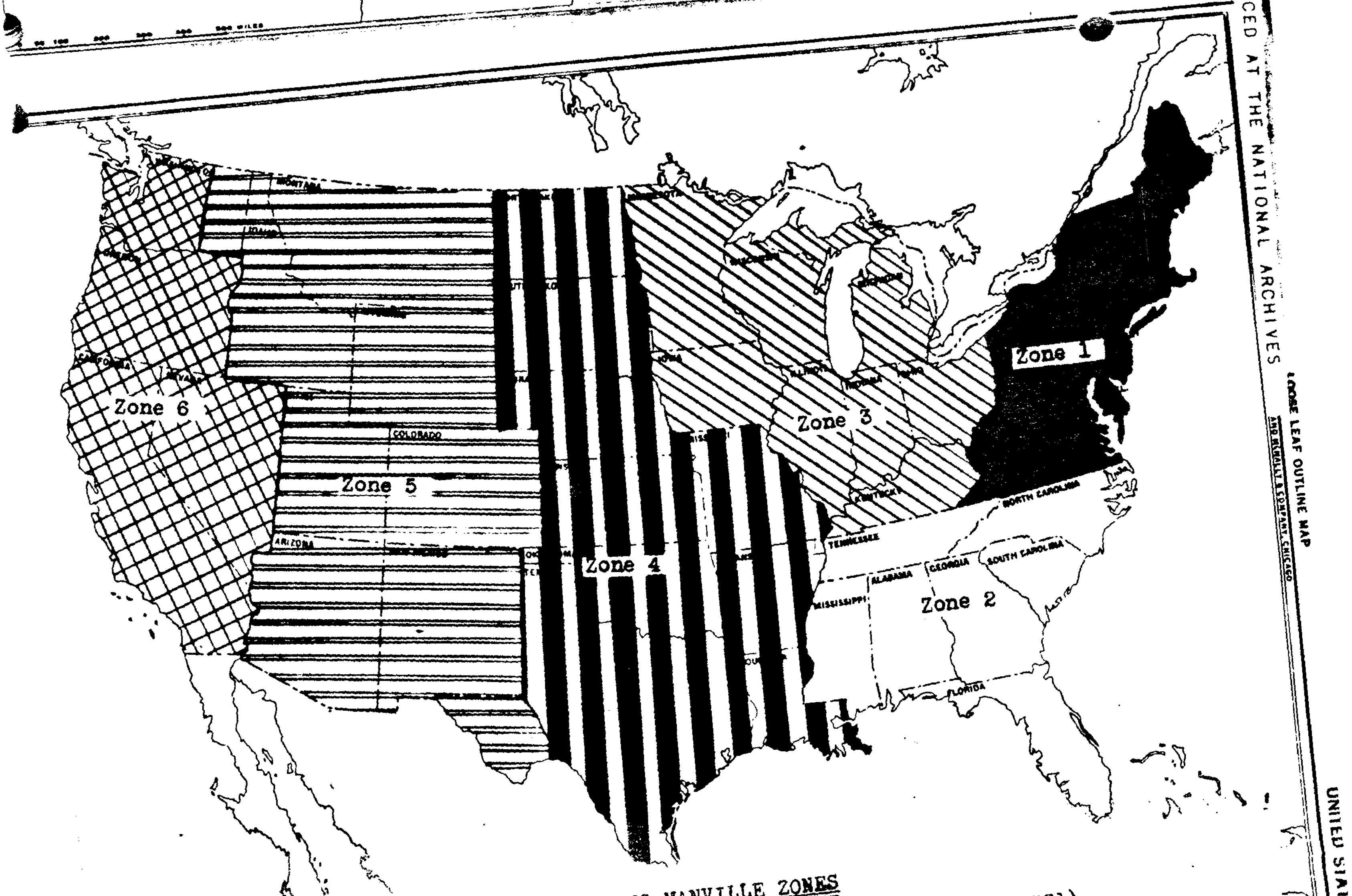
The brief asserts that the Norristown zone areas effective *July 19, 1933* were the same as those established by Johns-Manville *December 29, 1933,* except that Norristown had North Carolina in Zone 1 and Johns-Manville had North Carolina in Zone 2. Between those dates then, *July 19, 1933* and *December 29, 1933,* the zone areas were *not* the same, and even after Johns-Manville established its December 29, 1933 zones, prices of the two respondents were necessarily different in North Carolina. There is no evidence that prices were the same where zones were the same. The casual disregard of a zoning difference involving an entire state suggests the time

CAREY ZONES

March 1, 1932 to May 8, 1933 (Based on Coms. Ex. 379)

Zone 1 Zone 2 Zone 3





JOHNS-MANVILLE ZONES

Aug. 18, 1930 to Dec. 29, 1933 (Based on Coms.Ex.381)

Zone 1 Zone 2 Zone 3 Zone 4 Zone 5 Zone 6 worn excuse of the unmarried girl when reproved for having a baby. She said, "but it was such a little baby." A price difference between competitors in the entire state of North Carolina may seem unimportant to an attorney overzealous in proving his case, but to a business man it would not suggest concert of action.

In further support of the alleged concert of action it is stated at page 14 of the brief that the states placed by Carey in Zone 1 are all found in Johns-Manville Zones 1 and 2. Inasmuch as the purpose of using different zones was to charge different delivered prices in the different zones, this is an amazing method of showing concert of action.

It is further stated that the zone areas used by Keasbey & Mattison beginning August 10, 1934 corresponded in every detail with the zones used by Norristown, Johns-Manville and Carey. It would have been fair to add that the Code Merchandising Plan was in effect at that time and every member of the Industry was legally required to use the same zones.

It is unnecessary to go through the whole curious analysis contained in the brief. As a final word, however, attention may be called to the following seriously erroneous statement at page 16:

> "A comparison of the zones used by the respondents Norristown, Johns-Manville, Carey, Sall Mountain, Keasbey & Mattison, and the Ruberoid since the year 1940 shows that all these respondents were using zones identical in every detail."

Respondents' Exhibit 375 B shows that zone areas were established by Ruberoid January 2, 1940, that these were changed May 1, 1940, and again August 1, 1941. Reference to these zone areas appearing on Respondents' Exhibit 375 V to 375 Z 8 shows that *they were different from zoning areas used by any other respondent at any time.* For instance, zone areas established by Ruberoid on May 1, 1940, as shown in Respondents' Exhibit 375 X 1 to Z 6 were without zone numbers and were as follows:

Air cell Pipe Covering 2 or 3-ply.
Discount from list prices LCL 82%.
State of Pennsylvania other than Metropolitan Philadelphia. State of New Jersey and New York other than Metropolitan New York. Discount in quantity 85%. State of Connecticut, the following counties in the State of New York: Nassau, Rockland, Suffolk (Huntington-Babylon Townships only), Westchester, the Boroughs of Richmond, Manhattan,

Brooklyn, Queens, Bronx. The following counties in the State of New Jersey: Bergen, Essex, Hudson, Middlesex. Monmouth, Morris, Passaic, Somerset, Union.

LCL 84%—Metropolitan Philadelphia, Counties of Bucks, Chester, Delaware, Montgomery and Philadelphia, State of Pennsylvania; also Camden County in New Jersey.

LCL 82%—States of Maine, Vermont and New Hampshire.

LCL 84%—States of Massachusetts and Rhode Island.

There is nothing like this in the zone areas of any other respondent. It is difficult to understand the reason for the incorrect and prejudicial statement quoted from page 16 of Counsel for the Commission's brief. The statement is equally erroneous and incomprehensible with reference to the other respondents named. It appears from respondents' Exhibit 382 B that in January 1939 Keasbey & Mattison ceased using the Tulloch license areas and published its own zone descriptions. The only descriptions in evidence are shown on Respondents' Exhibits 382 F, G, H, I and J. Without quoting the areas, there are *fourteen states* in Keasbey & Mattison Zone 1, whereas the Norristown corresponding zone in effect after Norristown withdrew from the license agreement (Com. Ex. 81 A) applied to only *nine* states, and whereas the Keasbey & Mattison Zone 1 applied to all of New York and Pennsylvania, the Norristown zone areas applied only to Eastern New York and Eastern Pennsylvania. Norristown also had a zone applying only to the metropolitan New York area (Com. Ex. 81 B) and Keasbey & Mattison had no such zone. Keasbey & Mattison Zone 2 (Com. Ex. 382 F) applied to *seven* southern states. Norristown's corresponding zone included *nineteen* states. The differences are so radical that it is evident Counsel for the Commission was laboring under a complete misapprehension with respect to the zoning situation.

The obvious fact is also ignored that competitors who priced by zones would use the same zone areas to a considerable extent because fundamentally they are established for economic reasons just as zones for freight charges are established by the Interstate Commerce Commission and postal zones are established by the Postmaster General under authority of law. They are natural market areas. The New England states, for instance, form a natural market area, also certain Southern states and the West Coast.

Also in the marketing of standard products there is a tendency on the part of manufacturers in all industries to meet the prices of their competitors on a decline and to follow a price increase if the market is favorable. In order to do this the zones used for pricing must be the same, hence there is a tendency among competitors to follow zone changes to the same extent as price changes. If the zones had been similar in the Asbestos Pipe Covering Industry it would not have been surprising, but the evidence shows there were, in fact, substantial differences at all times, and *in no instance* were changes made by these respondents at the same time.

Counsel for the Commission concedes on page 21 of the brief that the Merchandising Plan under the Tulloch license agreement stated that it applied to products manufactured in accordance with the Toohey patent, but adds that the acts of the respondents show that they did not so limit it. The act of the Carey Company in discontinuing the use of zones for unpatented material while using the Tulloch zones for patented material shows that the Carey Company did so limit it. Another instance appears in the zone descriptions of Keasbey & Mattison (Com. Ex. 382) showing six zones used by Keasbey & Mattison while a licensee, whereas the Tulloch Merchandising Plan established September 11, 1935 contained only four zones (Com. Ex. 375 A and E) Tulloch established a fifth zone area August 20, 1936 (Com. Ex. 375 A and J), and a sixth zone area April 20, 1937 (Com. Ex. 375 A and M). Comparison between the Keasbey & Mattison zones 5 and 6 and the Tulloch zones 5 and 6 shows radical differences involving the States of Colorado, Montana, New Mexico and Texas.

Even if it be assumed that some of the respondents used the Tulloch zones in marketing unpatented as well as patented materials, it does not follow that they did so as part of a conspiracy. That some of the respondents did not use the Tulloch zones affirmatively disproves the inference, and the fact that they were charging competitive prices for unpatented materials throughout the license period further disproves the inference.

The affirmative evidence being now conclusive that no price uniformity in the sale of unpatented materials existed from the year 1933 until the commencement of this proceeding, we direct ourselves to the allegations charging a conspiracy with respect to patented materials and to the activities of respondents under the N. R. A. Code and with respect to the so-called Voluntary Agreement.

POINT II.

The alleged conspiracy in preparing and using a code merchandising plan is not supported by any evidence whatever.

Paragraph Nine of the Complaint, subparagraph 10, alleges that while the National Industrial Recovery Act was in effect and *before September 4, 1934,* the respondents collusively adopted a merchandising plan to be used in the sale of licensed and unlicensed materials. The record shows that this charge is entirely fanciful. Counsel for the Commission identifies the merchandising plan in question as Respondents' Exhibits 3 and 4, being two schedules of the Code Merchandising Plan adopted by all members of the Asbestos Pipe Covering Industry pursuant to the terms of the Asbestos Code.

The National Industrial Recovery Act became effective June 16, 1933, and, among other things, authorized the President to approve codes of fair competition for certain industries (48 U. S. Statutes at Large 195). The Asbestos Institute was thereupon organized for the purpose of preparing a code for the Asbestos Industry to effectuate the terms of the National Industrial Recovery Act (R. 3052). A code of fair competition for the Asbestos Industry was prepared and was approved by the President on November 1, 1933 (R. 3053, Resps. Ex. 2). It applied to five divisions of the Industry, one of them being the Asbestos Paper & Allied Products Division, which included the manufacturers of asbestos paper and wool felt insulating products. The other divisions were Asbestos Cement Products, Asbestos Magnesia Products, Asbestos Textile Products, and Brake Lining and Related Friction Products (Resps. Ex. 2). Article VI, section 4(b) of the Asbestos Code authorized the members of each Division to prepare a merchandising plan incorporating the merchandising policies best calculated to promote fair competition in such Division, and subject to the review of the Administrator, such merchandising plan, when approved by three-fourths of the Code members of the Division and filed with the Sub-Code Authority, became "binding upon all members of the Industry who are members of the Division" (Resps. Ex. 2). Such a merchandising plan was prepared for the Asbestos Paper and Allied Products Division and was duly adopted pursuant to Article VI, Section 4(b) of the Asbestos Code.

The Trial Examiner found as to this (p. 10, par. 2):

> "The members of the Asbestos Paper and Allied Products Division of the Asbestos Code, which was the Division that embraced the manufactures of asbestos paper, corrugated asbestos paper, asbestos pipe covering and associated products, completed preparation of a merchandising plan in December 1933. This merchandising plan was approved by three-fourths of the members of the Asbestos Paper and Allied Products Division and was filed with the Sub-Code Authority and was put into effect by all members of the Division, including all of the corporate respondents, and was operated under by them until May 27, 1935 (R. 273-5, 473-4, 1258, 1493-4, 2051-3, 2144-5, 2154, 2324-5, 2330, 2370, 3054, Resp. Exs. 3, 4, 153, 216A, 216B)."

Page 29 is a photostatic copy of the title and first two paragraphs of the respective first pages of Respondents' Exhibits 3 and 4, the only schedules of this merchandising plan which are in evidence. Exhibit 3 contains 20 pages, and Exhibit 4, 13 pages.

Inasmuch as these schedules state on their face that they constitute a merchandising plan adopted pursuant to Article VI, Section 4(b) of the Asbestos Code, and the Code did not come into existence until November 1, 1933, it is impossible that they could have been adopted before that date. Furthermore, Respondents' Exhibit 3 shows that the final revision and correction was made on December 21, 1933, and Respondents' Exhibit 4 bears only the date December 21, 1933. It is evident then that this Code Merchandising Plan was not completed, and therefore not adopted until December 21, 1933, and it is referred to in the testimony as the December Merchandising Plan (R. 2329, 2370). The frequent reference to this Merchandising Plan in the brief of Counsel for the Commission as having been adopted in June 1933 is contrary to the evidence and appears to be an attempt to create an erroneous impression.

An examination of this Code Merchandising Plan will show that it controls all the manifold details affecting the merchandising of asbestos insulating materials except the prices to be charged. During the period of the Code, however, all fifty-five members of this Industry, including the respondents, were compelled by law to adhere to the terms of the Code Merchandising Plan.

June 26, 1933
1st Rev. & Correction 11-27-33
2nd " " " 12-13-33
3rd " " " 12-21-33

SCHEDULE IV - B

MERCHANDISING PLAN OF THE
ASBESTOS PAPER AND ALLIED PRODUCTS DIVISION
OF THE ASBESTOS INDUSTRY

THIS MERCHANDISING PLAN IS ADOPTED PURSUANT TO
ARTICLE VI, SECTION 4 B OF THE ASBESTOS CODE

4613 — Exhibit No. 3
Acme Asbestos
Culloch
Johnston
578142

SECTION 1 - SCOPE OF MERCHANDISING PLAN

A. PRODUCTS

1. The following products are subject to all of the provisions of this

2. Merchandising Plan;

I. Corrugated Aircell type Asbestos Pipe Covering Sheets and Blocks (4-6-8 Ply per 1" thickness)

II. Woolfelt Pipe Covering with Asbestos and/or Waterproof Linings.

III. Anti Sweat types of covering.

Dec. 21, 1933

SCHEDULE IV - ?

4613 — No. 4
Acme Asbestos
Culloch
Johnston
578142

MERCHANDISING PLAN OF THE
ASBESTOS PAPER AND ALLIED PRODUCTS DIVISION
OF THE ASBESTOS INDUSTRY

THIS MERCHANDISING PLAN IS ADOPTED PURSUANT TO
ARTICLE VI, SECTION 4 B OF THE ASBESTOS CODE.

SECTION 1, SCOPE OF THE MERCHANDISING PLAN

A. PRODUCTS

1. The following products are subject to all of the provisions of this

2. Merchandising Plan:-

I. All types of corrugated Asbestos Paper.

Top of first page of two sections of original Code Merchandising Plan

Section 3(b) of the National Industrial Recovery Act provided:

> "(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

and subsection (f) of the Act provided:

> "(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense."

The evidence is that the members of the Industry adhered to the terms of the Code Merchandising Plan until the Schechter decision and then ceased to do so.

For many years before the Asbestos Code was adopted certain merchandising practices had grown up in the Asbestos Pipe Covering Industry and were followed in a general way by most members of the Industry (R. 2325-6, 2905). However, the different members of the Industry varied widely in their detailed application of these general practices (R. 2326-8, 2364, 2374, 2906). One of these merchandising practices was selling products on the basis of a discount from a single universally recognized list price. This standard list price was originated in 1907, apparently to cope with difficulties in quoting prices on the many sizes and thicknesses in which pipe covering was made and used (R. 2184, 2410, 2871, Trial Exs. Report, par. 50). There were always wide variations in price, however, between different manufacturers because of differences in discounts (R. 2327). One manufacturer would give a discount of 77% off the standard list, another 85% off, and another 83% off with an extra 10%, and sometimes an extra 5% (R. 2506). There were multitudes of price variations arrived at in this way. The standard list price had been the basis of all pricing in the Industry for so long that the

Code Merchandising Plan naturally required that all prices be filed in terms of discounts from this standard list price table.

Other trade practices which had long been in use were freight equalization, geographical zones for quoting delivered prices, classification of customers, price differentials between classes of customers, furnishing two and a half bands per section of pipe covering without extra charge, price protection on future orders to certain classes of customers, and many other practices (R. 271, 2061-2, 2145-6, 2149, 2234, 2325-7, 2905-6). The interpretation of these general trade practices, however, varied widely among different manufacturers (R. 2145, 2328). For instance, the territory included in delivered price zones varied between the different manufacturers (Coms. Exs. 379, 381, 385), price differentials for different classes of trade varied (R. 2328), and definitions of the different classes of trade varied very considerably (R. 2327, 2368).

Mr. Abraham, President of the Ruberoid Company, explained the manner in which these divergent applications of generally recognized principles were brought into a temporary uniformity under the Code as follows (R. 2364-2365, 2374):

> "Exhibits 3 and 4 are the Merchandising Plan which was adopted by the Asbestos Paper & Allied Products Division for the Industry under the Code, and these two exhibits crystallized for the first time many details pertaining to merchandising which were not followed by our Company prior to that. * * * The Merchandising Plans in question I believe represented a composite of all the manifold varying practices which were in vogue in the Industry prior to the Code. * * * The Code Merchandising Plan was put together like a jigsaw puzzle representing practices of one company, plus the practices of another company, plus some generally accepted practices, and represented a composite opinion of the manifold varying practices that were in vogue prior to the Code. * * *"
>
> "Prior to the Code there were general principles only followed by the Industry, general principles not in particular detail."
>
> "After the Schecter decision they became loosened up. The three decimal points got back to two, and got back to one, and then had a variation of 10% possibly in being interpreted. The same principles were generally followed after the Schechter decision with much latitude and much deviation and variation."

This testimony was confirmed by other witnesses without exception, and the Trial Examiner found (p. 10, par. 4):

> "The merchandising plan used by the Asbestos Paper and Allied Products Division of the Asbestos Code, recognized and included many merchandising practices and customs in the industry already developed such as classification of buyers, use of geographical zones for pricing purposes, and allowance of special discounts to certain distributional accounts. Manufacturers had previously differed in their detailed application of these general practices and customs (R. 291-2, 1016, 2060-2, 2150-1, 2234, 2276-7, 2364-6, 2372-4. Resp. Exs. 3, 4, 5, 153)."

The detailed discussion of the Code Merchandising Plan contained in the brief of Counsel for the Commission, pages 17 to 21, cannot be reconciled with an intelligent understanding of the testimony in this proceeding relating to it. The discussion bears the following heading:

"MERCHANDISING PLAN PERFECT SET-UP FOR PRICE-FIXING."

This headline is followed by a statement to the effect that all manufacturers used "one standard list price" without any explanation of the undisputed fact already mentioned that the 1907 standard list price was merely a basis for quoting widely varying selling prices on products that were made in hundreds of different size and thickness combinations. The statement is misleading without an explanation of the function of the list price and its ancient origin.

On the next page (p. 18), in the same spirit, is a statement relating to freight equalization, which reads: "The factory prices being the same, the delivered prices would be the same", followed by a quotation from Mr. Tulloch's testimony to the effect that the net result of the freight equalization was that a buyer at any point "could buy at the same price from any licensee". There is not a scintilla of evidence that factory prices were the same during the Code period and we submit there is no possible excuse for quoting Tulloch's testimony about the uniform price on *patented* products under the License Agreement executed September 11, 1935 to support an incorrect statement about prices on *unpatented* products during the Code period which began November 1, 1933 and ended in May 1935. Mr. Tulloch concededly fixed the minimum price at which licensees could sell patented materials, and of course the price was uniform.

At page 34 of the brief appears a quotation from Mr. Abraham's
[illegible] period the prices of different

members of the Industry were, generally speaking, the same, but the brief does not mention Mr. Abraham's next answer to the effect that he was speaking of prices filed with the Code Authority (R. 2346) or his explanation that this resulted from meeting the lower prices published by competitors. He testified (R. 2345):

> "Under the Code period when the prices were filed, which happened for the first time and the exact prices were made known to competitors, there came out in the open some facts which were previously not generally known, and as the result of the price filings prices declined, the reason being that the asbestos paper division industry is a highly competitive one and just as soon as a member of the industry makes a low price and that fact becomes cognizant to his competitors they jump on the band wagon and reduce their prices accordingly, and that happened during the Code."

The evidence is undisputed that *prices declined* all through the Code period (Resps. Exs. 204, 206). The Trial Examiner stated in paragraph 7 of his Report:

> "7. Prices for asbestos pipe covering and associated products declined during the period of the Asbestos Code and the various companies in the industry usually followed price declines instituted by another company from time to time. Different companies led in publishing a lower price at one time or another. As a rule during this period published sheets of manufacturers were at same price for same material (R. 2111-8, 2161-4, 2335-7, 2345, 2383-4, 2956-7, 3057-9. Resp. Exs. 204, 205, 206)."

Hence, the undisputed evidence is that the Code Merchandising Plan which is trumpeted as above mentioned as "a perfect set-up for price-fixing" resulted in a continuous decline in prices during the entire period of its existence.

This Merchandising Plan was approved under the terms of the Code and became a law binding on the members of the Industry in December 1933, eight months before the Toohey patent issued, and it expired in May 1935 with the Schechter decision, three and a half months before the first Tulloch license agreement. The origin of the Code Merchandising Plan has not been connected in the remotest degree with the Toohey patent or the Tulloch licenses. It was developed in a perfectly normal way under condtions existing in the

Commission. Certainly it was not a restraint of trade on the part of the members of the Industry or a violation of Section 5 of the Federal Trade Commission Act for the members of the Industry to comply with the legal requirements of the National Industrial Recovery Act up to the time of the Schechter decision. The position of Counsel for the Commission is strangely ambiguous for, while the Complaint charges (par. Nine, subparagraph 10) that the respondents adopted this Merchandising Plan before the granting of the Toohey patent, "to be used and which was used" for the sale of licensed and non-licensed materials, and the brief attacks it as a "perfect set-up for price fixing", nevertheless, the brief states at page 42:

> "Had the matter stopped at the demise of the NRA and after the Court had characterized the NRA Act as a method adopted by Congress for alleviating the penalties of the Sherman Act, I do not offer any argument that the respondents should have been criticised for their acts;"

This is a recognition of the fact well established in the record that there had been no illegal acts on the part of the respondents up to the time of the Schechter decision.

POINT III.

The charge of an alleged conspiracy in preparing a voluntary agreement after the Schechter decision is based upon an erroneous statement of facts.

At page 42 of the brief of Counsel for the Commission there is the following statement:

> "While the obituary of the NRA was still ringing in their ears they formulated the 'Voluntary Agreement' which had all the earmarks of the previous Merchandising Plan.
>
> THE VOLUNTARY AGREEMENT CONTRARY TO PUBLIC POLICY DECLARED IN THE SHERMAN ACT.
>
> As has been pointed out hereinbefore, the Voluntary Agreement formulated by the respondents carried all the necessary elements of a price-fixing agreement."

The brief is noticeably in error in these statements. The "Voluntary Agreement" had no earmarks of the previous Merchandising

Immediately following the Schechter decision the President asked the business men of the country to continue voluntarily the fair trade practice and labor provisions *of their codes* until something could be worked out to meet the situation caused by the Schechter decision (R. 2054, 3053). Mr. Lewis Brown, Chairman of the Code Authority of the Asbestos Code, thereupon telegraphed the members of all five divisions of the Asbestos Code calling attention to the President's request and asking that certain provisions of the Code be continued, but specifically omitting Articles VI, IX and XI, which were the only ones relating to a merchandising plan (R. 2055, Com. Ex. 152).

Thirteen of the fifty-five members of the Asbestos Paper and Allied Products Division, including nine of the respondents, responded that they would abide temporarily by the articles of the Code relating to labor, fair trade practices, and open price filing (Com. Ex. 354). Price filing was continued by a steadily diminishing number of these companies for sixty to ninety days after the Schechter decision and then ceased entirely (R. 2158, 2333-4). This voluntary action for a very short period by a very few members of the Industry has been confused in the brief of Counsel for the Commission with the preparation of a "Voluntary Agreement" authorized by subdivision (a) Section 4 of the National Industrial Recovery Act. The term *Voluntary Agreement* when used in connection with the N.R.A. period has a technical meaning, because the National Industrial Recovery Act authorized the President in Section 3 of the Act to approve codes, and in Section 4, to approve "Voluntary Agreements". Section 4 says:

> "The President is authorized to enter into agreements with and to approve voluntary agreements between and among persons engaged in trade or industry * * *."

This section was not invalidated by the Schechter decision but remained in effect until April 1, 1936 (Resps. Exs. 6, 10).

It seems not too much to expect a lawyer to grasp the meaning of the term "Voluntary Agreement" when used in connection with the National Industrial Recovery Act, and it is difficult to understand how such a document could be confused with the willingness of a few members of the Industry to comply with the President's request to continue voluntarily without agreement the labor and unfair trade practice provisions of their codes. The record shows that the two subjects were dealt with separately and at different

Covering Industry. As stated, only a few members of the Industry and only a few respondents took part in the voluntary continuation of the fair trade practice and labor provisions at the request of the President, but all members of all five divisions of the Asbestos Code took part in preparing the "Voluntary Agreement" for submission to the President under Section 4 of NIRA (R. 3053-5). We respectfully protest against the confusion of these two subjects in the brief of Counsel for the Commission and against the implication that they were connected with a continuation of the Code Merchandising Plan.

The evidence is explicit and undisputed that adherence to the Merchandising Plan stopped with the Schechter decision (R. 2157, 2330, 3163, Resps. Exs. 218 A-B). The Voluntary Agreement which was drafted contained no merchandising plan, and could not contain one, because it applied to all five divisions of the Asbestos Code, which dealt with five fundamentally different kinds of products (R. 3053-5).

Continuing Fair Trade Practice and Labor Provisions and Open Price Filing.

The Schechter decision did not invalidate the National Industrial Recovery Act. It only invalidated the Codes. *Schechter Poultry Corp. v. U. S.* (1935) 295 U. S. 495. Immediately following the decision the President asked industry to adhere voluntarily to their Code provisions relating to hours and wages and standards of fair competition (R. 2054, Coms. Ex. 152). The telegram of the Chairman of the Code Authority asked the members of the Asbestos Code pending consideration by Congress of the whole situation to continue the provisions of their code entitled, Hours of Labor, Minimum Wages, Child Labor, Unfair Trade Practices, Publicity of Prices, Terms and Conditions of Sale, and Labor Provisions (Coms. Ex. 152). The open price filing included in this request of May 28, 1935, had been approved in principle the month before in Release No. 11036, April 24, 1935, of the National Industrial Recovery Board. This stated (Resps. Ex. 5):

> "E. *Price-Filing not Price-Fixing*
>
> "It is hardly necessary to say that open price filing is not price-fixing. Nor should evidence of collusion in their making be inferred from a uniformity in the prices which are filed. Competition is supposed to effect uniformity of prices through an open market; and an approximation to uniformity

> is almost certain to result from the proper maintenance of open price filing. It is when the prices quoted by the members of an industry move in concert faster than competitors can easily accommodate themselves to each other's activities or when prices move uniformly and sharply upward in contrast to trends in related industries that evidence of collusion is present. Open price filing is a device; price-fixing is a business policy in operation."

That price-filing as practiced in the Asbestos Pipe Covering Division was not price-fixing was strikingly confirmed by the continuous decline in prices during the N.R.A. period and by the continuation of the decline after the Schechter decision which is evidenced by the price-filing that took place in July 1935. The following price notices were filed and distributed, all representing a price decline.

Empire Asbestos Company issued notice of a price decline prior to July 1, 1935, effective July 1, 1935 (Coms. Ex. 289; Coms. Ex. 288).

R. A. Keasbey Co. met the price reduction, July 1, 1935 (Coms. Ex. 290).

Johns-Manville met the price reduction, July 5, 1935 (Coms. Ex. 291).

Norristown Magnesia met the price reduction, July 8, 1935 (Coms. Ex. 292).

Smith & Kanzler met the price reduction, July 9, 1935 (Coms. Ex. 294).

Keasbey & Mattison met the price reduction, July 9, 1935 (Coms. Ex. 297).

Philip Carey Co. met the price reduction, July 11, 1935 (Coms. Ex. 296).

The foregoing is dealt with by Counsel for the Commission as evidence of price-fixing. There could be no stronger evidence of price competition, because it shows a lower price being published by one company and being met by competitors as soon as they heard of the competition over a period of nearly two weeks. The Trial Examiner found no evidence of price-fixing but on the contrary found as follows with respect to this period:

> "Prices of asbestos pipe covering and associated products continued to decline for a few months after the Schechter decision. There is evidence that these prices reached their lowest level during the summer of 1935 and they did not begin to rise until early in 1937, except on the products manufactured under the Toohey patent. Butl...

approved by ... (Coms. Ex. 18). At ...
approval (R. 3053-5, Coms. Ex. 18). Before
pared and submitted Voluntary Agreements (Resps. Ex. 8). Before
the President had approved the Voluntary Agreement an executive order was promulgated December 21, 1935 terminating the National Recovery Administration as of January 1, 1936, and that was the end of the matter.

The proposed Voluntary Agreement specifically disavowed any control over prices. Article IX, as drafted and submitted to the President, provided:

> "Prices, discounts and other terms of sale shall at all times be determined by each party to this Agreement individually, and nothing contained in this Agreement shall be construed to limit the right of each party hereto to determine the prices, discounts, and other terms of sale of all products manufactured and sold by him, nor limit the right of such party to change such prices, discounts or other terms of sale at any time" (Coms. Ex. 18).

The decisive facts are that it was never operated under by any respondent, it contained no merchandising plan, and was merely an ineffective attempt to conform to the policy of the Federal Government (R. 386-7, 1075, 2339, 3055, Trial Exs. Report pars. 11, 12). In the brief of Counsel for the Commis-

... repellent and substantially shrink-proof (R. 1938, 1972). The patent which was granted to Johns-Manville Corporation as assignee on September 4, 1934 (Resps. Ex. 12) describes in several closely printed pages the numerous ingredients used and the method of manufacture. An essential feature of the patent was the application of heat at certain stages of manufacture, which varied in the production of the three distinct products—paper, corrugated paper and pipe covering (R. 1972). As found by the Trial Examiner (Report, par. 17), "After the particular product, paper, corrugated paper or pipe covering, was completed it was subjected to a further heat treatment at specified gradations of temperature to complete the setting or fusing of the wax compound into the product."

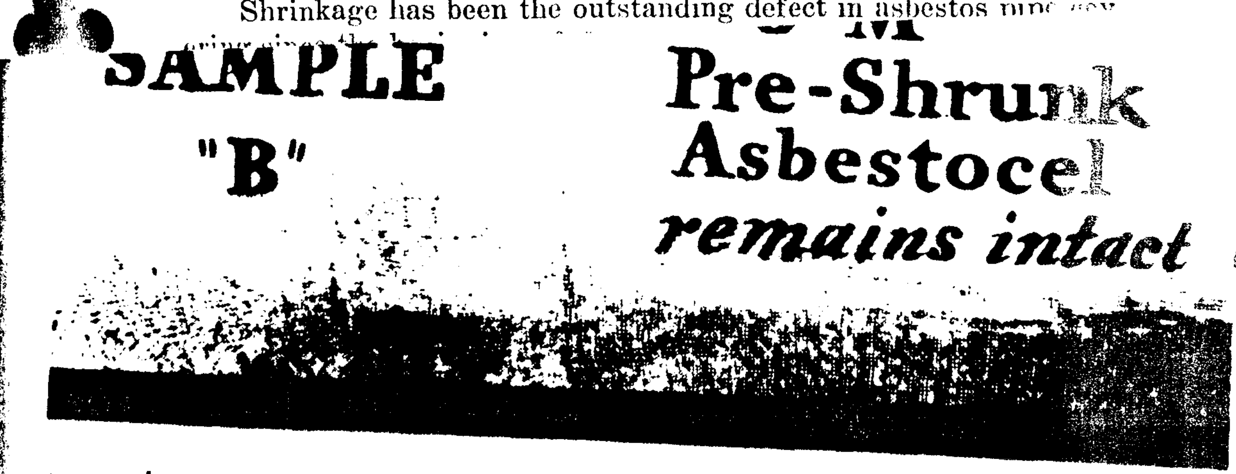
Shrinkage was universally recognized as a serious defect in ordinary asbestos pipe coverings, so Johns-Manville began restricting its production to the Toohey preshrunk materials shortly after they had been developed, and has produced the patented products exclusively since 1932 (R. 2041-2, 2068, 3270). It began to advertise the merits of the invention widely even before the patent was granted (R. 3230, Resps. Exs. 74, 234, 235). Williams testified that he had seen shrinkage of as much as 10 inches per 100 feet of unpatented covering (R. 1979) and had made photographs of the comparative results obtained when using the two types of materials. These photographs were published in Johns-Manville catalogues over a long period of years (R. 1980) and one of them is reproduced at page 41.

eral principles of the Merchandising Plan were followed in the Industry but with much deviation and variation. In other words, the Industry reverted to the conditions that existed before the Code Merchandising Plan. The testimony previously referred to established that the general principles incorporated in the Code Merchandising Plan had been followed by the Industry for many years but had been applied differently by the different members of the Industry. When the Code Merchandising Plan ended the same general principles of merchandising continued but as before the Code they were applied differently by different manufacturers. There is no evidence whatever supporting the contention that the Industry continued to operate under the Code Merchandising Plan.

POINT IV.

The Toohey invention was the result of years of labor in the Johns-Manville laboratories and represents an outstanding improvement in the quality of asbestos insulating materials.

Shrinkage has been the outstanding defect in asbestos pipe cov-



Samples of insulation tested under identical conditions reveal the superiority of Pre-Shrunk Asbestocel in overcoming objectionable shrinkage cracks

PHOTOGRAPH OF RESULTS OF ACTUAL SHRINKAGE TEST

First published in Johns-Manville's 1932 catalogue and reproduced in its catalogues every year thereafter.

(Resps. Exs. 74-79, 138)

As early as 1932, Williams developed a method of demonstrating the advantages of pipe covering made according to the Toohey invention which was used by the Sales Department in promotion work (R. 1980). News of the new type of covering spread in the Industry after the filing of the patent application and aroused great interest (R. 1308-9, 2348). Mr. Corydon Hall was employed by the Johns-Manville Corporation to conduct demonstrations all over the country showing the advantages of the Toohey invention (R. 2899). National exhibitions were given at the Chemical Show, the National Power Show, the National Electric Light Association Show, the Air Conditioning, Heat & Ventilating Show (R. 2172). Mr. Simoni was also employed to demonstrate the advantages of the Toohey type covering and used a special apparatus for this purpose which was prepared by the Research Department of the Corporation (R. 1951). Mr. Simoni gave a demonstration with this apparatus at one of the hearings in this proceeding (R. 1953-54). In 1936 he gave demonstrations of the advantages of the product to approximately 8,000 jobbers and their customers the plumbing and heating contractors, and in 1937 to approximately 14,000 jobbers and plumbing contractors. In 1939 about 2500 members of the trade were present at demonstrations, and in 1940 about 4,000 were present (R. 1952-54). In 1941 between three and four thousand members of the trade saw Mr. Simoni's demonstrations at approximately 250 meetings. The witness Corydon Hall originated the expression "preshrunk" to describe the patented products in 1932 (R. 2897) and that word has been used in the Industry since then to describe these products. To quote paragraph 20 of the Trial Examiner's Report:

> "In the years following 1932, there is evidence of an increasing consumer interest in the 'preshrunk' type of asbestos and wool felt insulating products. Various purchasing agencies of the United States Government began to specify preshrunk asbestos pipe covering in bid inquiries in about 1933. The number of Government bid inquiries which specified preshrunk pipe covering increased after 1933 to the point where a substantial percentage of all government inquiries today so specify. Between 1936 and 1940 the preshrunk type of pipe covering was specified in bid inquiries or orders by many departments and agencies of the Government including

ture, and the U. S. Engineer Office, Chicago (R. 1354, 1357, 1391-2, 2072, 2348, 2424, 2568, 2581, 2597-8, 2850, 2955, 3000, 3230-2, 3234, 3236-40, 3243A-3251, 3267-8, 3271. Resp. Exs. 234, 273-87)."

The merits of the patented preshrunk material were generally recognized in the Industry except by the members of the trade who did business with plumbers on a strictly price basis. As the patented preshrunk products cost more to produce and were higher priced than the unpatented they were of no interest to such jobbers as Harry Lampert who testified that it was his policy not to pay more for the sake of getting quality products (R. 2624). Such dealers found it was easier to sell the standard unpatented product at a low price than the quality product at a higher price. Contractors, however, who came in contact with the actual consumers of pipe covering and had to make repairs because of shrinkage without exception knew of the preshrunk type of material.

Government agencies and municipalities began specifying preshrunk asbestos pipe covering about 1933 and the number of Government inquiries specifying preshrunk asbestos pipe coverings increased after that date to a point where about 50% of all Government inquiries today make such specification (R. 3230, Trial Ex. Report, par. 20). Bid specifications and written orders of the Navy Department, Department of Justice, War Department, Veterans' Administration, United States Housing Authority, Department of Agriculture, and the United States Engineering Office, Chicago, which require that preshrunk products be supplied are exhibits in the case (Resps. Exs. 273-287).

Since the date of the Toohey invention some manufacturers claim to have found other methods of treating asbestos insulating materials to reduce the shrinkage, but despite the greater expense the Johns-Manville Corporation continues to manufacture all its asbestos insulation materials under the Toohey patent (R. 2041-2). and the Philip Carey Co. continues to manufacture a large part of its insulation products under the Toohey patent, even though it dislikes promoting a product the patent on which is owned by its leading competitor (R. 1070, 2855).

The statement at page 31 of the brief of Counsel for the Com-

Johns-Manville Corporation which has marketed the more expensive patented products exclusively for eleven years, and upon the engineering departments of almost every agency of the United States Government. They are unsupported by the evidence and should have no place in this proceeding.

POINT V.

The Johns-Manville licensing agreement was entered into in the ordinary course of business and without collusion with any manufacturer.

The application for the Toohey patent was filed by Toohey and Williams September 26, 1931. The patent issued to Johns-Manville as assignee on September 4, 1934. (Resps. Ex. 12) Between the date of the application and the granting of the patent manufacturers of asbestos insulating materials generally became interested in the invention as a means of correcting the principal defect in their product. Before the patent issued certain manufacturers competing with Johns-Manville began selling products which they claimed to be "pre-shrunk", while the competition of other manufacturers took the form of disparaging the value of the pre-shrunk material. (R. 349, 1044, 3075, Resps. Ex. 180)

Soon after the patent issued the respondent Tulloch had a talk with officers of Johns-Manville Corporation and suggested that they give him an exclusive license under which he would issue sub-licenses to members of the Industry and establish prices and merchandising terms for the patented materials. He told them:

> "A. Well, I was interested in attempting to secure the right to license manufacturers under this new and improved product, and I advised the Johns-Manville people that I thought I could make the patent or the patented product more valuable to them than it would be if they alone handled it. The advantages which I felt I could give them were it would be possible to stop the infringement which we all knew existed after the patent was issued, which they had advised me was in the offing; that it would prevent the disparagement of the product which some members of the industry were endeavoring to use as a competitive factor; that I felt I could by means of that expand the market for the patented product and that in the event they did give me the right to license the process and the product, in the event that price control became a part

of the license, I could assure them of the elimination of the price cutting on the patented materials.'' (R. 349, see Trial Exs. Report, par. 29)

He was told that Johns-Manville would take the matter under consideration. (R. 2044)

Several months later, in 1935, respondent Johns-Manville Corporation decided to negotiate a licensing agreement with Tulloch. (R. 2100, 2045) Mr. Hoff, President of Johns-Manville Sales Corporation, testified as to Johns-Manville's reason for reaching the decision:

> ''A. Well, the discussion with Mr. Tulloch covered the point of the fact that we had reason to believe that other manufacturers were infringing our patent. We either had to let them go scotfree or spend a very considerable amount of money and a long time to either win or lose our patents. The second was the fact that the advantage to our company would be that if other manufacturers were licensed to make the materials that would immediately obviate the necessity of the law suits as long as they recognized the patents; and at the same time the more people that were manufacturing the patented goods and the more facility with which the materials could be provided for the consumer at large, the larger we thought the demand for the product would be, and we felt that we should hold about the same percentage of business that we had been holding, and that we would reap that percentage of a very much larger volume of business in the particular products which had been cut into by the supplantive materials.'' (R. 2094, see Trial Exs. Report, par. 31)

Mr. Hoff further testified as to Johns-Manville's reasons for not licensing other members of the Industry directly, as follows:

> ''A. Well, for several reasons. The first was because we felt, after we had decided that we would extend the license, that we did not believe that some of the concerns would be willing to take a license from us and have us be the arbitrary authority to carry on the license.
>
> ''The second was because we had no organization or set-up in our company whereby we could acquire [administer] a license in all of those phases that it would be required to look after.'' (R. 2075)

The terms of an exclusive license agreement and sub-license agreement were discussed by Johns-Manville with their counsel and with Tulloch from time to time until September 11, 1935, when they were completed in an all-day conference in the Johns-Manville office, at which only Tulloch and Johns-Manville representatives were present. (R. 2101, 2104) Attached to the sub-license agreement from Tulloch to Johns-Manville was a detailed mechandising plan, important parts of which were written at the conference on September 11, 1935. (R. 2102, 3076-7) So far as Johns-Manville was concerned, the negotiations about the license agreement were exclusively with Tulloch and members of their own organization. No other manufacturer was consulted.

Mr. Louis R. Hoff, the President of Johns-Manville Sales Corporation, testified (R. 2048):

> "Q. It has appeared that the exclusive license granted Tulloch by Johns-Manville was dated September 11, 1935, and I will ask you whether prior to that time what, if any, manufacturing company engaged in the asbestos pipe covering business you consulted or discussed the license with?
>
> "A. None.
>
> "Q. Did you discuss the terms or any of the terms of the proposed license agreement with any manufacturer?
>
> "A. I did not."

Mr. Vandiver Brown, General Counsel of Johns-Manville Corporation, testified as follows (R. 2104):

> "Q. With what other manufacturer, if any, had you discussed the proposed Tulloch License Agreement before it was executed on September 11?
>
> "A. With none. I had no contact with any other manufacturer. My contacts were solely with Mr. Tulloch."

Mr. Tulloch testified (R. 356):

> "Q. Was the Johns-Manville Company, so far as you know, negotiating with any one but you about the license?
>
> "A. I think I was the only one interested in trying to get a license from them for the purpose of re-licensing others, and they were having no contact with anyone else so far as I am aware.
>
> "Q. That is, your contacts with the Carey Company were independent of Johns-Manville?
>
> "A. Oh, the Carey Company was not negotiating with them. They were negotiating only with me."

The license agreement gave Tulloch the exclusive right to license others to use the Toohey patent provided such sub-licenses were "in the form of and upon terms and conditions no more favorable to the sub-licensee" than those contained in the sub-license to Johns-Manville which was executed contemporaneously with the exclusive license. Tulloch thus obtained the right to collect royalties on sales of patented pipe covering by his licensees, pipe covering being the only product manufactured by all members of the Industry. (Coms. Ex. 1)

Johns-Manville received from Tulloch under the terms of the exclusive license an annual royalty of $1250, which would fully reimburse Johns-Manville during the remaining term of the patent for the $20,000 expended in developing the Toohey invention, and the agreement of Tulloch to prosecute infringers. (R. 3072, 3075, Coms. Ex. 1)

The primary advantage to Johns-Manville, however, was in obtaining the services of a man who was experienced and favorably known in the Industry to determine the pricing and merchandising terms for the sale of the patented materials. (R. 270, 350, 2329, 3074-5). The prices and merchandising terms were fixed in the first instance by Johns-Manville in the sub-license agreement with Tulloch to Johns-Manville executed September 11, 1935. (R. 2102, 3077, Coms. Ex. 1) It was necessary, however, to give the exclusive licensee the right to use his judgment in changing prices and other selling terms. (R. 2075) In order that the patent should be of any value to Johns-Manville it was essential that the prices and terms, if changed, should be established by a man of integrity and sound judgment. (R. 350-1, 3074-5)

Tulloch had been associated in different capacities with the low pressure pipe covering industry for a number of years and was Manager of the N. R. A. Sub-Code Authority of the Asbestos paper and Allied Products Division of the Asbestos Industry. (R. 47, 270) He was a business man, and the license agreement with Johns-Manville was a business proposition which would be unprofitable to him unless he could obtain a reasonable number of licensees. (R. 353) Johns-Manville, therefore, had reason to believe that it would get the benefits to which it was legally entitled under its patent monopoly by placing Tulloch in control of the licensing of the Toohey patent.

When Johns-Manville told Tulloch in the latter part of 1934 that it would consider giving him an exclusive license he began making inquiries among a few of the larger manufacturers located in or near New York as to whether they would be interested in taking a sub-license in the event that he was granted an exclusive license by Johns-Manville. (R. 353-4) In this way he tried to discover how interested some nearby members of the Industry were in the patented pre-shrunk products.

Mr. Mills of the Philip Carey Co. testified concerning his first talk with Tulloch about the Toohey patent:

> "He told me he had not obtained a license on the patent to sub-license to us but that he was negotiating for it.
>
> "I said it would be necessary for me to be satisfied he had a license, to give me the proper authority to license us and that it will be arranged that we will retain that license if we go into it. 'If they take your license away, we won't lose out. It must be in that form,' and some other things." (R. 1097-8)

Mr. Abraham, President of Ruberoid, testified concerning Tulloch's first approach to him:

> "A. Tulloch called at my office and told me that he was trying to make an arrangement with the Johns-Manville Corporation to obtain an exclusive license under the Toohey patent. He wanted to know whether we would be interested in becoming a sub-licensee, and I told him that if he succeeded in obtaining an exclusive license from Johns-Manville and he was able to submit to us a license agreement which was satisfactory to myself and my counsel, that we would be very glad to consider it.
>
> * * * * * * *
>
> "A. Well, I called attention to the fact that our organization was all 'burning up' to make a shrink proof covering so as to be able to keep up with the Johns-Manville Corporation, who had already featured their shrink proof covering by exhibits and advertisements, and it evoked a great deal of interest among the trade.
>
> "We had also made some tests in our laboratories after the Johns-Manville pipe covering was on the market and the Manville product looked like a very good product.
>
> "Therefore I personally was interested in trying to work out some arrangement with Tulloch to become a sub-licensee,

provided that the terms and conditions of the license agreement were satisfactory to me." (R. 2348-9)

Mr. Crabbs of the Carey Co. testified concerning Tulloch's first visit in June 1935:

> "A. On the occasion of his first visit to my office, he said that he was negotiating for a license agreement with the Johns-Manville Company under the Toohey patent, and asked if and when he was successful in securing such a license agreement with the privilege of so licensing, would our company be interested, and I said to Mr. Tulloch that we were very much impressed with the Toohey process and if he was successful, I was quite sure we would be very much interested and would give it every consideration." (R. 3095)

In the summer of 1935, after Johns-Manville had decided to negotiate a license agreement with Tulloch, he discussed the current merchandising policies of a few of the companies with their representatives at three meetings in New York at which no more than four representatives were present (R. 3068-70) The reason for and content of these discussions was described by Tulloch as follows:

> "Q. Now, when you had a meeting, for instance, of some of those who were nearby, what did you discuss with them?
>
> "A. Well, they discussed the material, the advantages of the material, the conditions under which licenses were to be granted. Of course, I wasn't in position to be particularly specific about that because I had at no time any authorization to grant a license, and for that reason I couldn't be particularly accurate in saying what I could do, and for that reason my licensees weren't particularly definite in saying what they would do, but they did indicate interest." (R. 353-4)
>
> "Q. Did you tell them at those preliminary meetings what you were going to do in the way of terms in a merchandising plan?
>
> "A. Do you you refer to the individual conditions of the licensees? I was unable to tell them anything of that sort, because I had not worked out a license.
>
> "Q. And did you or did you not inquire from them about their merchandising practices at that time?
>
> "A. I asked them about their merchandising conditions and endeavored to secure all the information possible about

> methods of merchandising that could best develop the market I was interested in developing." (R. 3067-8)

Tulloch did not know until September 11, 1935 what terms he could make with Johns-Manville. (R. 3077) The vital question of minimum prices was decided at the all-day conference when the agreement was signed and the merchandising plan was developed at the same time. (R. 2102-3, 3076, Coms. Ex. 1) No merchandising plan was shown by Tulloch to any manufacturer before September 11, 1935 and the merchandising plan could not have been shown because it was worked out at the conference held on that day. (R. 368-9) A glance at the merchandising plan attached to the Johns-Manville sublicense agreement (Coms. Ex. 1) shows how much of the plan was developed on September 11th. All of the many changes, erasures and additions made in ink or pasted in were made at the conference on September 11, 1935, and therefore can be readily identified. (R. 2102, 3076) At pages 51 and 52 two pages of the merchandising plan are reproduced, showing the changes made at the conference. Almost every page of the merchandising plan was worked out in the same way the day the agreement was signed. (Coms. Ex. 1)

After Tulloch obtained his exclusive license agreement from Johns-Manville he approached other members of the Industry to obtain sub-licensees. (R. 368) He relied on the advantages of the pre-shrunk material as a selling argument in getting licensees.

Mr. Fitzgerald of Standard Asbestos Co. testified concerning Mr. Tulloch's first visit:

> "A. Well, Mr. Tulloch either called or wrote me a letter to meet him in Chicago on a certain date, and he mentioned the fact that—oh, he asked us whether we would be interested in any process for eliminating the shrinkage of aircell pipe covering, which up to that point had been a big problem to us.
>
> "I went down to see him, and he outlined that he had a process which we could use in the manufacture of our paper which would eliminate this shrinkage. We were particularly interested, we told him, because we had competition at the present time in the market of a shrinkproof material which had been affecting our business.
>
> "We also told him we were in the contract business, as well as the manufacturing business, and we had got into numerous difficulties where we had finished a job and were

3. STANDARD CONSTRUCTIONS (cont'd)

~~their internal body construction layers of either saturated rag felt or saturated asbestos felt spaced between the layers of dry deadening felt or dry wool felt and/or with both the inner liner and the outer liner of the shell or shells being a layer of either aforementioned saturated felt.~~

~~Thicknesses of anti-sweat less than 1" thick shall be solid construction.~~

~~Thicknesses of anti-sweat 1" thick and over must be double shell construction.~~

~~The use of "anti-sweat" or any similar descriptive term in connection with covering not constructed as above described is prohibited.~~

~~Frost proof coverings consist of either 1/2" or 3/4" of hairfelt inner layer and 1/2" of woolfelt outer layer.~~

4. PRICES

All prices are specified as discounts from standard lists attached and made a part of this Schedule and include full freight allowance unless specific exception is made.

(a) FACTORY ZONES

All territory within 50 miles of the following factory points is established as factory zones.

Ambler, Norristown, Elizabeth, Jersey City, Brooklyn, Erie, Cleveland, Cincinnati, New York City, Chicago, Detroit, Waukegan, Minneapolis, Holyoke, Milwaukee.

(b) ZONE DESCRIPTION

State	Zone	State	Zone
Alabama	II	Montana (Note 3)	IV
Arkansas	IV	Nebraska (Note 4)	IV
Colorado	IV	New Hampshire	I
Connecticut	I	New Jersey	I
Delaware	I	New Mexico (Note 5)	IV
Dist. of Col.	I	New York	I
Florida	II	North Carolina	II
Georgia	II	North Dakota	IV
Illinois	III	Ohio	III
Indiana	III	Oklahoma	IV
Iowa	III	Pennsylvania	I
Kansas	IV	Rhode Island	I
Kentucky	III	South Carolina	II
Louisiana	IV	South Dakota	IV
Maine	I	Tennessee	II
Maryland	I	Texas	IV
Massachusetts	I	Vermont	I
Michigan	III	Virginia	I
Minnesota (Note 1)	IV	West Virginia	I
Mississippi	II	Wisconsin	III
Missouri (Note 2)	IV	Wyoming (Note 6)	IV

Note 1. Except Ramsey and Hennepin Counties which are in Zone III.

Note 2. Except towns within 10 miles of Mississippi River which are in Zone III.

Note 3. Except the following counties which are in Zone V:

Beaverhead	Lincoln	Missoula
Flathead	Madison	Ravalli
Lake	Mineral	Sanders

Note 4. Except Omaha which is in Zone III.

Note 5. Except McKinley County which is in Zone V.

Note 6. Following Wyoming Counties only:

Albany	Laramie
Campbell	Natrona
Carson	Niobrara
Converse	Platte
Crook	Sheridan
Goshen	Weston
Johnson	

1. DATINGS: Manufacturers shall not grant future invoice datings on any shipment of the Materials.

2. CONSIGNMENT STOCKS: No consigned stocks may be shipped under any conditions.

3. WAREHOUSE PRICES: Quotations and sales from warehouses, located outside factory zones shall be made at not less than the less carload zone prices for the zone in which the delivery is made plus 10%.

4. SUB STANDARD MATERIALS: No seconds or sub standard materials may be offered at lower than the established prices except by specific written permission of the Licensor.

5. TAXES: All Federal sales, excise, processing or other direct taxes operative upon all Licensees or upon the sale of the Licensed Materials, shall be added to prices contained in attached schedules. State or other governmental taxes, not applicable to all Licensees may be absorbed by Licensees upon whom they apply.

6. CREDIT FOR RETURNED MATERIALS: Errors on the part of shipper as to quantity, size or type of Licensed Material may be rectified by full allowance for the actual material returned plus actual freight both ways. Error on the part of buyer, involving return of usable material, suitable in every respect for sale as first class merchandise, may be rectified by making allowance of cost to buyer less 10% for handling, buyer paying freight both ways. Material not usable and suitable for sale as first class merchandise may be accepted only as scrap and an allowance of not more than 1¢ per lb. ($20 per ton) may be made, freight to be paid by the buyer returning material.

7. UNIT PRICES: Wherever used unit prices must be figured to the fourth decimal. When the fifth or succeeding decimal is greater than zero, increase the fourth to the next higher digit. Extensions or lump sums shall be figured to even cents only raising all fractions of cents to the next higher cent. ~~In the case of material sold on list and discount basis the net price shall in no case be less than the total list less the proper discount.~~

Exception:
Quotations to U.S. Government (Permanent or Temporary Depts.) and to State, County, Municipal or other government bodies must be quoted unit prices. In such cases drop all decimals beyond the fourth.

Page 6 1z9 [illegible]

called back, and the asbestos aircell had probably shrunk maybe an inch in a hundred feet or a half inch, and so on, and it was up to us to do the work over again.

"Also, that certain engineers and architects in this town had eliminated aircell products from specifications for the same reason.

"Q. What do you mean by aircell products? I don't believe that word has been used in that connection.

"A. Asbestos aircell products. Also, that instead of using those products, they were specifying molded products, which we did not manufacture.

"We told him that if he had a material that would help us to eliminate this trouble, we would be very much interested, based on what it would cost us and how it would affect our production.

"He outlined that he had the same material, the same process, rather, that one of our competitors was then using against us in this territory, and he outlined to us on what basis we could use this process." (R. 1391-3)

Mr. Bennett of A. H. Bennett Company testified concerning Tulloch's offer of a license:

"Q. What reasons did he give you for suggesting that you take it?

"A. Well, he claimed he had a patent on a preshrunk covering which would eliminate a lot of troubles and, of course, that has always been the case with an aircell covering. There has been quite a little shrinkage, which would have to be fixed up. It costs money to go back on a job and fix those things up." (R. 1549)

Mr. Collopy of Acme Asbestos Covering and Flooring Company testified concerning Tulloch's representations as follows:

"The Witness: Well, he reported having such a license agreement and represented to us that it would be a very desirable feature for us to incorporate in our products, that having that would stimulate our sales and help us considerably.

"By Mr. Collins:

"Q. Now, is that the only desirable feature that he discussed?

"A. Yes.

"Q. That it would just increase your sales?

"A. That through its desirability sales would increase, that complaints regarding the shrinkage of the material would be practically eliminated and the expense incidental to the correction of shrinkage would be eliminated.

"Q. Did he make any representations to you on that occasion with reference to the price features?

"A. None whatever." (R. 1280-1)

By far the larger number of licensees never heard of the Johns-Manville license until after September 11, 1935.

Tulloch's method of approach is illustrated by his letter to the Clark Asbestos Co. in Cleveland. (R. Ex. 133)

"Nov. 5, 1935.

"The writer has recently acquired the rights under U. S. Letters Patent #1,972,500 involving improvements in certain asbestos products such as Aircell and Woolfelt covering.

"I am offering licenses under this patent to manufacturers in the industry and would be glad to go into the matter more fully if you are interested.

"Copy of the patent is attached hereto, and any information you may require regarding it will be supplied."

Mr. Clark testified this was the first he had heard of a proposed license agreement. (R. 1212-3)

Specific dates when some of the other sub-licensees first heard from Mr. Tulloch about a license agreement are in the record:

Respondent Atlantic Asbestos Corporation, New York City, on or about January 17, 1936. (R. 582)

Asbestos Insulating Materials Co., Milwaukee, on or about October 16, 1935. (R. 1490-1)

Respondent A. H. Bennett Co., Minneapolis, on or about February 12, 1936. (R. 1549)

Respondent Standard Asbestos Co., Chicago, on or about October 13, 1935. (R. 1428)

Respondent Acme Asbestos Covering and Flooring Co., Chicago, on or about October 1, 1935. (R. 1279)

Mr. Tulloch described his procedure as follows:

"Q. When you obtained the signed license from Johns-Manville on September 11, 1935, how did you go about attempting to get signatures from sub-licensees?

"A. I went around and called on various prospects and endeavored to make a sale. I presented them with a copy of the license agreement and tried to answer any questions that might be raised by them or by their attorneys.

"Q. And were there many of them who at that time had never seen the proposed merchandising plan or the merchandising plan?

"A. Yes, I would say that at that point all of them had failed to see the merchandising plan.

"Trial Examiner Preston: Had failed to see it?

"The Witness: Had not seen the merchandising plan.

"Trial Examiner Preston: All of them had not seen it?

"The Witness: They had not seen it at the time that I went around to call on them." (R. 368)

Tulloch testified that, prior to September 11, 1935, he inquired of a few of the larger manufacturers about their interest in manufacturing pre-shrunk products under a license. (R. 353) He later identified *four* manufacturers whom he had thus approached and to whom he had shown copies of a proposed license agreement. These companies indicated interest, but all reserved their decision until Tulloch could show them an agreement with Johns-Manville giving him the right to grant licenses. (R. 1097-8, 2348-9, 3068, 3095) The Trial Examiner reports that the evidence on this point shows (par. 33):

> "While these negotiations were in progress respondent Tulloch talked with some of the other manufacturers in the eastern part of the United States asking whether they would be interested in taking a license to manufacture 'preshrunk' products; submitted copies of the patent to these manufacturers and also a draft of a license agreement to four of them, The Ruberoid Co., the Philip Carey Mfg. Co., the Keasbey & Mattison Co., and the Norristown Magnesia & Asbestos Co. There is evidence that these manufacturers informed Tulloch that they would not be able to negotiate a license agreement with him or to make any commitments until he had obtained the right to grant licenses from Johns-Manville Corporation (R. 353-4, 357, 2348-9, 3064, 3069-71, 3095)."

From the foregoing it appears as a mathematical certainty that 20 out of twenty-five licensees could have had no part in a conspiracy to establish a licensing system because they had never seen the license agreements or merchandising plan or even heard of them until after Tulloch and Johns-Manville had executed their license agreement.

If Johns-Manville and Tulloch had planned such a conspiracy as is charged in the complaint, it is inconceivable that they would have gone about the matter as they did. Johns-Manville owned a valuable patent and had a legal right to exclude all competitors from the production and sale of the patented material. As an alternative, it had the right to license competitors and control the prices and other selling terms of the patented product which they manufactured. No conspiracy was needed to accomplish the result. For business reasons, fully explained in the testimony, Johns-Manville decided to make use of Tulloch through an exclusive licensing agreement to obtain licensees and fix and maintain prices and terms of sale for the patented products. Unless the alleged conspiracy included price control of the unpatented material, there was no conceivable purpose in engaging in a conspiracy about the patented material *which Johns-Manville could legally control without a conspiracy.* Obviously, no control of unpatented prices could be effective without the participation of substantially all members of the Industry. A contention that a price-fixing conspiracy was carried out by five manufacturers in an industry of fifty-five cannot be taken seriously.

When Tulloch asked manufacturers whether they would be interested in taking a sub-license they made it clear that any sub-license they might take must not interfere with their right to produce and sell unpatented materials.

Mr. Steffens, Vice-President of the Carey Co. testified concerning a discussion which he and Mr. Mills had with Mr. Tulloch:

> "A. Well, specifically, I took the position that we would definitely be interested in the right to manufacture the Toohey Patent but that any arrangement that was eventually negotiated would have to take into consideration certain things of importance to our company; namely, we would want no restrictions on either the manufacture or sale of our asbestos products.
>
> * * * * * *
>
> "Mr. Mills said that we would have to be given the privilege of manufacturing unpatented materials, as well as patented materials." (R. 1041-2)

Mr. Tulloch testified concerning his negotiations in January 1936 with Mr. Ozurovich of Atlantic Asbestos Corp.:

> "A. He explained to me something with which I was familiar in a general way, that quite a bit of his business depended on his ability to sell at cut prices below the general market at the time, and he was able, by putting certain contractors in position where they had a low cost, to get them to help him by increasing his volume, and that he would not be able to make all of his products under the license.
>
> "Q. What did you say to him as to that?
>
> "A. Nothing. It was simply a fact, and there was nothing I could do about it." (R. 3133)

That all manufacturers continued to produce the unpatented material with the exception of Johns-Manville and one small concern is established by documentary evidence (Resps. Exs. 87-126, 148-151, 211-215, 226-232, 236-248, 252, 257-272) and the undisputed testimony of many witnesses. The continued sale of unpatented materials at competitive prices has already been referred to. What, then, could be accomplished by a conspiracy of five manufacturers to accept sub-licenses from Tulloch? Presumably counsel for the Commission realized when writing his brief that the charges of the Complaint, if limited to patented material, could not be sustained, and therefore tried to show a conspiracy to fix the prices of both patented and unpatented materials. Having totally failed as to the unpatented materials, nothing is left to support the charge against the patented, and we submit that the only question of any substance before this Commission for decision is the question of law as to whether the exclusive license agreement and the sub-license agreements incorporating the merchandising plan were within the lawful scope of the patent monopoly. This will be dealt with under the next two points.

Counsel for the Commission relies on the testimony of the witness Morgan to support the contention that the license agreements were the result of a price stabilization conspiracy. Morgan insisted that *in 1933 before the NRA Code* (nine years before the time of his testimony) Mr. Tulloch went to see him and asked him to participate in a plan to use a patent on pre-shrunk asbestos paper for the purpose of stabilizing prices in the Industry. (R. 1251, 1258, 1268) Tulloch denies this statement and testified that he discussed nothing with Morgan in 1933 except the Asbestos Code. (R. 3124-7) Tulloch testified as to this conversation:

"I told him according to my understanding, even though he did not become a member of the division, he would naturally be interested in things that the division did in the Code, which was developed under the division and we wanted to offer him, as well as others, an opportunity to take part in the formation of the Code and the development of the merchandising plans under the Code, and the administration of the labor and fair practices division and so forth.

"Q. What did he say?

"A. He indicated some interest in assisting to develop these things, but never did take any active interest, never did so far as I know or recall become a member of the division.

"Q. Did you discuss any subject with him other than the Code?

"A. No, I did not." (R. 3124-5)

When asked whether he had discussed the granting of licenses under the Toohey patent with *anyone* as early as 1933, Tulloch testified:

"No, I certainly did not discuss it with anyone in 1933. There was no patent in effect at that time." (R. 3119)

Morgan's testimony is incredible. The patent was not issued until September 1934. (Resps. Ex. 12) Why then would Tulloch have gone to Morgan in the summer of 1933 to talk about stabilizing prices with a patent and at a time when everyone, including the Government, thought prices would be stabilized by the Codes. Tulloch might have discussed this stabilizing effect of the Code with Morgan in 1933, but he could not have discussed any effect of a non-existent patent. Inasmuch as no attempt was ever made to stabilize the prices of unpatented materials, and inasmuch as the patent owner had the right to fix the prices of the patented materials, Morgan's testimony does not make any sense as applied to the situation disclosed in this proceeding.

No evidence was produced by the Trial Attorney suggesting, even remotely, that Tulloch discussed the Toohey patent with anyone except Morgan before the patent issued. That he did not have any such discussion is established by the testimony. (R. 3119)

James Parker, the Federal Trade Commission investigator, stated that Robert Clark told him that some other officer of the Clark Asbestos Company, who was not produced as a witness, had stressed price control and stabilization rather than the shrinkproof advantages of the patent in advising Mr. Clark to take a license. Of course, the price of the patented material would be stabilized under a license —but what of that? Mr. Clark was the one who took the license and he testified that the other executive referred to by Mr. Parker thought the patented material was a good thing. When asked why, Mr. Clark testified (R. 1230):

> "A. Well, because he thought you could make a material that wouldn't shrink. That's about all the discussion we had on it.
>
> "Q. Did he say anything about price?
>
> "A. No.
>
> "Q. No prices were mentioned?
>
> "A. No, he didn't say anything about prices."

Mr. Parker also testified that Mladnich, an employee of Respondent Atlantic Asbestos Corporation, told him that the Toohey license agreements were "merely a method used by the Industry for everyone to stabilize asbestos prices". This was a conclusion stated six years after the event. Mladnich was not an officer of the corporation and it is not clear that his hearsay opinion should have been admitted in evidence or had the slightest probative value. It is true that the license agreements stabilized the prices of the patented asbestos products, and that may have been in his mind. Mr. Parker also testified that when he interviewed Mr. Ozurovich, the President of the Company, this officer who presumably alone knew the facts, gave his reason for signing the license agreement as follows:

> "Mr. Ozurovich stated that he was told that if the agreement was not signed he would be unable to manufacture the material with the shrink proof, and he entered into the agreement only to protect himself in this respect on such orders as he might receive that would require processed goods.
>
> "He was mostly interested in maintaining his position by having that processed material on hand the same as his competitors." (R. 1610)

Mr. Ozurovich also said he had no recollection of having been told by Mr. Tulloch or anyone else when he signed the license agreement that there would be any price control advantage to it. (R. 1610) The evidence of Ozurovich's prices shows very convincingly that his prices on unpatented materials were not in any way affected by the license agreement. (Resps. Exs. 226 H, 227 A, B, D, E, F, H-V, X, 229 A-E, 230 C-G, 231 A, B, D, O, P, V, Z2, 232 A-C, 257, 258, 262, 264, 265, 267, 268) A few vague statements made years after the period in question about what witnesses believed the purpose of a license agreement was, cannot outweigh the uncontradicted and conclusive evidence of continued manufacture of unpatented materials by all members of the Industry except the owner of the patent and one small concern; and the continuous and active price competition in the sale of unpatented materials.

The evidence shows that the Johns-Manville license agreement was entered into in the ordinary course of business for the purpose of gaining for Johns-Manville the benefits to which it was legally entitled from its patent. The inferences of collusion which the Trial Attorney attempts to raise can be seen to lack all substance when faced with the uncontroverted facts shown by the evidence.

Counsel for the Commission relies on *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, as authority for the proposition that the Tulloch licensing agreements were unlawful. We welcome the challenge because the facts of that case are in such sharp contrast with the Tulloch situation. The Standard Sanitary patent was a process patent covering a method of manufacturing *unpatented* bathtubs and basins at a lower cost than by the methods previously used. The resulting products were no different than those previously sold. Therefore, price control over the products in the *Standard Sanitary* case was automatically price control on unpatented products. The Toohey patent is a product patent (R. 1116; Resps. Ex. 12) which created something new and the control of the new Toohey products did not affect the market for similar unpatented products.

In the *Standard Sanitary* case, Weyman, as manager of the Standard Enamelware Manufacturers Association, obtained an option from Standard to buy the patent for the purpose of setting up a licensing system under which prices on all enamelware would be fixed and the manufacturers could abolish "ruinous competition". The Association appointed a committee of five to interview the manufacturers and obtain their consent to the license agreements *which were to become effective only when 85% of the production adopted them.* The members of the Association also agreed to discontinue long term contracts until it was decided whether the licensing system would go into effect. License agreements were executed fixing royalties and penalties for violation and agreeing to employ a commission of six persons, of which Weyman was chairman, the other five being appointed by a majority of the licensees. No change was to be made in the terms and conditions fixed by the licensor without the consent of a majority of the members of the Commission.

In order to obtain the enamelware from licensees all jobbers were required to sign contracts agreeing to resale prices. The Court stated in the *Standard Sanitary* case:

> "Before the agreements the manufacturers of enamelware were independent and competitive. By the agreements they were combined and subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their own number, and zones of sales were created. The jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enamelware from any manufacturer who was in the combination and the condition of entry was not to resell to the plumbers except at prices determined by the manufacturers. The trade was therefore practically controlled from producer to consumer and the potency of the scheme was established by the cooperation of 85% of the manufacturers and their fidelity to it was secured not only by trade advantages, but what was practically a pecuniary penalty not inaptly termed in the argument, cash bail." (page 47)
>
> "The agreements clearly, therefore transcend what was necessary to protect the use of the patent or the monopoly which the law conferred upon it." (page 48)

The plan in the *Standard Sanitary* case was the result of group action with price control and resale price control over the entire production of every participant exercised by the group itself, and the whole plan was conditioned upon 85% of production signing licenses.

When Tulloch obtained his exclusive license under the Toohey patent no member of the Industry except the patent owner was committed to anything. He has shown a proposed license agreement (but not the one eventually used) to only four of the fifty-five members of the Industry to decide if he had a fair chance of getting licensees and making a profit through his royalties.

Resale price control is not even suggested here by Counsel for the Commission.

If judged on the basis of the facts and reasoning of the *Standard Sanitary* case, Mr. Tulloch was legally as clean as a hound's tooth when he signed his agreement with the Johns-Manville Corporation.

POINT VI.

The Respondent Tulloch was not controlled by his sub-licensees and the control he exercised was within the lawful scope of the patent monopoly.

The most convincing proof imaginable that Tulloch fixed prices and terms of sale independently is the fact that the changes he made in prices and selling terms from time to time were not in any instance satisfactory to all the licensees and that many of the changes he made were contrary to the expressed desires of more than half the licensees. (R. 391-3, 397-8, 466, 1124, 1216, 2169-70)

The testimony of Mr. High of The Ruberoid Co., one of the larger licensees, is illuminating on this point:

> "Q. Were any changes in the merchandising terms or prices made by Mr. Tulloch from time to time without your previous knowledge of them?
>
> A. Yes, sir. I recall one price decline which came to me as a shock. I had no knowledge that such a price decline was coming whatsoever.
>
> Q. Do you know when that was, or what the product was?
>
> A. It was on asbestos paper, and the price decline came some time in 1938, I think." (R. 2169)

Mr. High also testified that Tulloch lowered the price of pipe covering in New York without any previous knowledge on his part, and stated:

> "I recall that I did protest to Mr. Tulloch either at his office or by telephone or by letter, I don't recall which, but I put in a protest because it seriously affected the profits of our organization and I did not feel that it was necessary.
>
> By Mr. McGrath:
>
> Q. What if anything was done about it?
>
> A. Nothing. The price stayed where it was." (R. 2170)

Mr. Steffens of the Carey Co. testified:

"Q. Do you recall a lowering in price which Mr. Tulloch put into effect for asbestos paper about 1938?

A. I do.

Q. What was it, and when did it take place?

A. It took place in September, 1938.

Q. And what was it?

A. The amount of it?

Q. What was the change in the regulation?

A. The change was from a base price of $100 per ton to a base price of $85 per ton.

Q. A reduction in price to that extent?

A. A reduction in price.

Q. Was that a substantial matter to your company?

A. A very substantial matter.

Q. Did you know anything about it until Mr. Tulloch did it?

A. We did not.

Q. He did not consult you in any way?

A. He did not consult us." (R. 1124)

Mr. Clark of Clark Asbestos Co. testified:

"Q. So far as you know, who fixed the minimum price which were published by Tulloch?

A. On the——

Q. On the patented goods?

A. Mr. Tulloch.

Q. Did you at any time have anything to do with fixing those prices?

A. No, sir.

Q. Do you recall whether in the year 1937 you asked Tulloch to establish warehouse prices? A. I believe I do remember. Yes; that's right.

Q. And did he do it? A. No, sir." (R. 1216)

As the Trial Examiner has stated in paragraph 55 of his Report:

"There is evidence that the changes in prices, terms and conditions of sale on patented products which were made by Tulloch from time to time under the license agreement, were not in any instance entirely satisfactory to all licensees and one or more of the said changes were contrary to the desires of more than half the licensees. On several occasions protests were made to Tulloch by larger licensees against changes he had announced. Tulloch maintained the changes. In other cases Tulloch refused to make changes requested by licensees."

Tulloch travelled around the country from time to time and met with local groups of licensees to discuss problems which had arisen in the merchandising of patented products and to gain information about the effect on the sale of patented products of the terms he fixed. No more than 10 licensees were ever represented at one of those meetings. (R. 3148-9)

The evidence is unanimously to the effect that no vote was taken at these meetings and that Tulloch *alone* fixed prices and selling terms on patented products.

Mr. Collopy of Acme Asbestos testified about one meeting that was representative of several he attended while a licensee:

> "A. Well, there was a general discussion of the problems of the industry, that is, of the licensees, I should say, some discussion about the products, the different products, how they were best made, and so forth.
>
> Q. Was any vote taken at that meeting?
>
> A. No, no votes.
>
> Q. Was any decision reached at that meeting about anything?
>
> A. No." (R. 1320)

Mr. Bergman of Asbestos Insulating Materials Inc. (a licensee but not a respondent) testified:

> "Q. According to your best recollection, what took place at the meeting which you say you can definitely recall?
>
> A. Well, there was a discussion of various merchandising plans.
>
> Q. Was any vote taken?
>
> A. No votes.
>
> Q. Was any decision reached?
>
> A. No, sir." (R. 1495)

Paragraph 53 of the Trial Examiner's Report deals with this point and reads:

> "Respondent Tulloch made it a practice to visit his various licensees in different parts of the country at different

times throughout the period that they were licensees and held meetings with local groups of these licensees on numerous occasions during the existence of their license agreements. No more than ten licensees were ever represented at any one meeting. At these meetings all problems encountered in the merchandising of the materials were discussed and the merchandising practices fixed by Tulloch were also discussed. The licensees frequently complained to Tulloch of things they did not like and set before Tulloch facts as to costs and market conditions which would aid him in arriving at his decisions. Tulloch rarely announced any change in merchandising conditions at these meetings and there appears to be no record of any votes being taken by licensees upon matters under discussion (R. 122, 390, 583, 1071-2, 1215, 1320-1, 1370, 1476, 1495-6, 1512, 2049, 2104, 2168-9, 2257, 3142, 3148-9. Resp. Ex. 145)."

The Trial Attorney has attempted to show that the licensees operated the license agreement here for their own benefit as a group of licensees did in the *Standard Sanitary* case, but he has been frustrated by the facts. In the *Standard Sanitary* case the patent was turned over by the patent owner to be operated by a committee of licenses for the benefit of all the licensees and was so operated. Here Johns-Manville allowed the other members of the industry to use the Toohey patent because it was in the interest of Johns-Manville to do so. The prices and terms were fixed by Tulloch independently, as the exclusive licensee of Johns-Manville, whether the sub-licensees liked them or not.

The fact that Tulloch wrote courteous and even conciliatory letters to his licensees instead of adopting the tone of a Prussian martinet in communicating with them shows no more than that he was an intelligent business man.

In fact the whole basis of the relationship between Tulloch and his licensees was clearly stated in a letter Tulloch wrote at the outset to Sall Mountain Company, a prospective licensee which sought to impose some conditions on its signature to the license agreement. This letter was written by Tulloch on October 11, 1935 and reads:

"October 11, 1935.

"I return herewith conditional delivery of license agreement under letters patent No. 1,972.500.

> "A patent monopoly, as you are aware, gives me certain rights and I cannot limit or abrogate them by an agreement such as you proposed.
>
> "Suggestions from licensees as to merchandising methods and other similar matters will be welcomed and will be given every consideration. I cannot, however, permit licensees to dictate such conditions.
>
> "I would appreciate it if you will detach the qualifying supplement and return the licenses to me." (Resps. Ex. 26)

The Sall Mountain Company complied with this letter and signed a license agreement unconditionally. (R. 368)

The control which Tulloch exercised over prices and terms of sale of patented products was within the scope of the patent monopoly.

Neither the validity nor the scope of the Toohey patent has been challenged in this proceeding. It stands as a fully valid patent carrying with it all the privileges and immunities which the laws of the United States under the decisions of the Supreme Court bestow upon valid patents.

The Toohey patent covers every one of the products described in and licensed in the various license agreements issued under it. (R. 1108-1110) As the Report of the Trial Examiner states (page 14, par. 23) the evidence shows that:

> "The Toohey Patent contained ten different claims. Claim 1 covered corrugated paper. Claims 3, 4, 5, 6, 7, 8 and 9 covered asbestos and wool felt paper. Claims 2 and 10 covered asbestos and wool felt pipe covering."

The merchandising plan under the Toohey patent applied only to specific products coming within these claims and it is well recognized patent law that each claim of a patent is in effect a separate patent.

As the Supreme Court stated in *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. 301 at 319:

> "Claims are independent inventions. One may be infringed, others not, and the redress of the patentee is limited to the injury he suffers, not by the abstract rights which have been granted him in other claims."

Veneer Machinery Co. v. *Grand Rapids Chair Co.*, 227 Fed. 419,

General Foods Corp. v. *Broder,* 80 Fed. (2d) 492.

Walker on Patents (Deller's Ed. Vol. 2) states at page 1275:

> "In contemplation of law, each claim of a patent is considered as setting forth a complete and independent invention."

The Court stated in the *Veneer Machinery Co.* case at page 425:

> "The rule is that each claim embodies a complete invention and in effect is an independent patent for the device it covers."

Claims 3 through 9 cover, as the Trial Examiner has stated, asbestos and wool felt papers. (R. 1108-9) These are separate and distinct products for which there is a particular market. They are used for different purposes than the other products manufactured under the Toohey patent. (R. 924, 1087, 1126-7, 1207, 1311-2, 1434, 2188, 2296, 2430, 2452)

Claim 1 of the patent covers corrugated paper. (R. 1108) This is a separate and distinct product which is sold to the general public as such and used for purposes for which plain paper and pipe covering are not adapted. (R. 625, 924, 1126, 1207, 1312, 1434, 2188-9, 2296)

Claims 2 and 10 of the patent cover asbestos and wool felt pipe covering (R. 1108-9) which are also separate and distinct products. A flexible range boiler jacket is merely a large sized piece of asbestos pipe covering for use on domestic hot water tanks. (R. 113, 483-4, 1996-7, 2004, Trial Exs. Report, par. 58)

As has been shown under Point I, no control was exercised over the prices at which any of these products were sold except when they were manufactured under the Toohey patent.

The Trial Attorney has invoked the case of *U. S.* v. *Univis Lens Co. Inc.*, (1942) 316 U. S. 241, in support of his contention that under the Toohey patent the price of patented pipe covering could not be fixed if the price of patented paper used by the licensee in manufacturing the patented pipe covering had previously been fixed. The *Univis Lens Co.* case does not so hold. In fact the *Univis Lens* case does not apply to the present case because only one patented product was involved in that case. One licensee partially manufactured the article and sold it at a fixed price to another licensee who completed the manufacture and sold the finished article at a fixed price. The half completed article sold by the first licensee had no utility except to be completed and sold by the second licensee. Only one patent and one patented article were involved and the court held that the price could not be fixed twice *on this one article.*

In the present case asbestos and wool felt papers were completed patented products. There was a market and uses for them as such. The same is true of corrugated asbestos paper. Either of these products might be sold as completed products or might be used in the course of manufacturing asbestos or wool felt pipe covering. If they were used in manufacturing pipe covering the resulting product was a completely different product created under a different patent claim.

The licensing of the use of a patent claim on paper does not carry with it a license to use a separate patent claim on pipe covering which the law states is a separate patent. Therefore, the licensor can license the use of the pipe covering claim and exercise price control over the patented pipe covering product even though he has previously licensed a different company to use the patent on paper. The Supreme Court clearly states in the *Univis Lens Co.* case that it is not passing on the proposition for which the Trial Attorney has cited the case here. The Court stated at page 248:

> "As appellees concede, the invention of only a single lens patent is utilized in making each blank and finishing it as a lens. We therefore put to one side questions which might arise if the finisher of a particular lens blank utilized the invention of some patent other than the patent which was practiced in part by the manufacture of the blank. And we assume for present purposes, without deciding, that the patent is not fully practiced until the finishing licensee has ground and polished the blank so that it will serve its purpose as a lens."

In this connection it should be noted that no resale price control was exercised under the Toohey patent, nor does the Trial Attorney so argue. (R. 337, 500, 1322, 1370, 1436) Even when a licensee purchased a patented product from another licensee and resold it as such, the second licensee's sales price was not fixed. (R. 3087, Resps. Ex. 254) In fact special efforts were exercised by the licensor to make sure that no licensee received any prices or terms of sale applicable to patented products which the particular licensee did not manufacture. (R. 3086-9, 3110-2, Resps. Ex. 254)

There was no attempt here to extend the patent monopoly beyond the scope of the patent. Prices were fixed only upon the first sale by the manufacturer who used one of the claims of the patent in manufacturing the product sold. No subsequent sale of any patented product was controlled in any way.

The fact that the merchandising plan dealt in detailed fashion with all the merchandising factors that could affect the price of patented products does not render it illegal. In the first place simple logic requires that the right to control prices means the right to do so effectively. Every provision of the merchandising plan related directly or indirectly to sales price. (R. 3077, Coms. Exs. 1, 2) The merchandising plan under the license agreement upheld by the Supreme Court in *U. S.* v. *General Electric Co.,* (1926) 272 U. S. 476, was even more detailed than the one involved here. The original merchandising plan in that case fills 43 pages of the record, the original merchandising plan here is 30 pages long. The merchandising plan in the *General Electric Co.* case provides for the use of uniform sales contracts; fixes prices in terms of discounts from a basic list price with specific extra charges for special features; requires classification of customers with different prices for different classes; provides for allowance of freight charges on some products; requires the use of geographical price zones; establishes terms of payment; describes the specification of the many products made under the patent in great detail; etc.

The Supreme Court did not question the legality of that merchandising plan.

As is stated in Toulmin, *Trade Agreements and the Anti-Trust Laws* (1937) at page 201:

> "The patentee in licensing another person to make, use and vend may lawfully impose the condition that sales by the licensee shall be at prices fixed by the licensor and subject to change at his discretion. The mere comprehensiveness of the patentee's control of the business of selling the patented article is not necessarily an evidence of illegality in method. The mere size and comprehensiveness of the scheme do not bring it within the Anti-Trust Laws."

The authority to fix prices on patented products must necessarily carry with it the authority to fix those prices effectively. This cannot be done if the established price can be evaded by misclassifying customers, juggling freight charges, accepting long term price commitments, etc. The entire merchandising plan, under the Toohey patent, deals with potential fields of evasion such as these. (R. 3077, Coms. Exs. 1, 2)

The Trial Attorney throughout his brief speaks of Commission's Exhibit 2 as being the Merchandising Plan under the License Agreement and carefully points out that there are 274 pages in that exhibit.

It is conceded that the Merchandising Plan is detailed, but it is only *30* pages long (Coms. Exs. 1Z3 to 1Z32). Commission's Exhibit 2 is not "the merchandising plan", but is a compilation of every reprinting of and amendment to the original Merchandising Plan from November, 1935 to March, 1941 which Tulloch assembled and produced in response to a *subpoena duces tecum* in this proceeding.

The table of standard list prices which was used in defining minimum prices in the merchandising plan had been used in the industry by manufacturers and customers alike for over 26 years. Prices had been quoted in terms of discounts from this particular list since 1907. (R. 271, 2184, 2410, 2871, 2883, Resps. Ex. 1) Naturally Johns-Manville and Tulloch provided for the fixing of prices on patented products as discounts from this list which all manufacturers and customers used and knew. The implication in the Trial Attorney's brief that Johns-Manville and Tulloch devised this standard list price in 1934 or 1935 is absurd.

The Manual of Unit Prices which Tulloch suggested that his licensees use in pricing their products in order to enable them to translate the discount-from-list price into the actual dollars and cents price to a customer on any sale instantaneously, was not and could not be a price-fixing device since, as the Report of the Trial Examiner correctly states (page 23, paragraph 52), the evidence shows that:

> "The manual is a set of precalculated mathematical computations which enables the user to determine quickly and accurately the dollars and cents price resulting from taking *any discount from one to one hundred percent* from the standard list price on the particular size and thickness of pipe covering or asbestos block involved." (Emphasis supplied) (R. 1071, 1324-5, 1498, 2185, 2883, Resps. Ex. 1)

The Trial Attorney emphasizes the fact that the merchandising plan made provision for a different charge for pipe covering when more than the normal number of bands were sold with it. This is a very minor matter, but the real situation should be understood. It is necessary to employ some mechanical instrumentality to hold pipe covering on pipes. (R. 1986-7) Metal bands are the mechanical instrumentality which has been customarily used for this purpose in the industry throughout its history. (R. 1986-7, 2030, Trial Exs. Report, par. 62) Metal bands are usually furnished with pipe covering for this purpose at the rate of 2½ bands per 3-foot section of pipe covering. (R. 324-5, 2009, 2030) However, under special circumstances it is sometimes necessary to use more than this number of bands, as, for example, when cut sections of pipe covering are used at joints or corners. (R. 324-5, 2009-10, Resps. Ex. 203) These bands are an integral part of the pipe covering and the pipe covering is of no utility unless the bands or some other means of affixing it to the pipes are employed. (R. 115-6, 324-5, 1986-7, 2238)

In fixing the price of patented pre-shrunk pipe covering in the merchandising plan, it is provided that the normal 2½ bands per 3-foot section may be delivered with the pipe covering without any change in the price of the pipe covering and without any charge for the bands. (Coms. Ex. 1) It is provided, however, that if more than 2½ bands per section are delivered the price of the pipe covering of which they are a part must be increased. (Trial Exs. Report, par. 62) As the price of pipe covering is established by fixing the discount from the standard list price at which it is to be sold, the additional price for extra bands is arrived at by reducing the discount at which the *pipe covering* may be sold. (R. 327, 427-8, 3130-1) Only in the case of flexible range boiler jackets is a specific price fixed for extra bands and that is because these are larger sized pieces of pipe covering than are listed in the standard list price table. (Coms. Exs. 1, 2) As there is no list price on them prices must be quoted in terms of dollars and cents rather than as discounts. This being so, the extra charge for additional bands to be used on the flexible range boiler jackets had to be fixed in the terms of dollars and cents. However, it is very clear from the evidence that except in the case of flexible range boiler jackets, the charge fixed for extra bands had no meaning or definable character other than as an element in the discount on the pipe covering itself involved. No control was exercised over bands except when sold in connection with a sale of pipe covering or flexible range boiler jackets on which they were to be used. (Coms. Exs. 1, 2, Trial Exs. Report, par. 62)

It is obvious that price fixing of a patented product would be ineffective and subject to evasion if the licensee could not be prevented from making a gift of unpatented fixtures which are integral parts of the patented products. The Court, in the only case which has considered this problem, has recognized the necessity of preventing free gifts of essential fixtures and has upheld the patent licensor in fixing the price of the unpatented fixture when sold in conjunction with and as a part of a price-fixed patented product. The Court stated in *General Electric Co.* v. *Willey's Carbide Tool Co.* (1940) 33 Fed. Supp. 969 at page 977:

"The requirement that the licensees shall not modify the established price of the patented material indirectly by the inclusion of other items at less than their regular prevailing prices is obviously a reasonable and proper one. Obviously, the right of a patent owner to require his licensee not to undersell him would be an empty thing if with each sale the licensee could include something else of value, needed by the customer, at a fraction of its real worth.

* * * * * *

"It is my opinion that in mounting the patented material on simple unpatented steel supports the plaintiff has gone no farther than is reasonably and properly necessary in putting the patented material to practical use in such a way as to enable users to enjoy the full benefit of the patented material. Under the circumstances involved in this case the public interest is served since the public has been and is free to purchase the patented material at prices which include no allowance for supports, and to invite the keenest competition for the business of supplying the supports and affixing the patented material to them. Yet the Carboloy Company's right to protect its hoped-for profit is preserved and made effective."

The decrease in the discount on the pipe covering when special quality bands or canvas covering were supplied with it were specified in the Merchandising Plan for the same reason. Canvas covering is also an integral part of completed pipe covering. (R. 323-4, 1989, 2019, 3130-1, 3167)

The use of geographical zones to facilitate the fixing of delivered prices on certain patented products was simply an adaptation of a method of merchandising which had been used in the Industry for many years. (R. 271, 842, 2145-6, 2327, 2905) The Court in *Salt Producers Association* v. *Federal Trade Com.* (1943) C. C. A. 7th 134 Fed. (2nd) 354 refused to prohibit the use of price zones except when they were established through a price-fixing conspiracy. The Court stated at page 358:

"We must take judicial cognizance of the fact that the Government postal service has established statutory zones and uniform prices fixed within said zones. (39 U. S. C. A., §§292, 293) Likewise, railroad tariffs are also based on zones."

The Merchandising Plan in the *General Electric Co.* case used geographical price zones and yet the entire license agreement was held to be legal. It can only be concluded that there is nothing inherently evil in the use of geographical delivered price zones. As there was no conspiracy present here, there is no basis for condemning the use of these zones.

The companies in this Industry had equalized freight for many years on such heavy products as asbestos paper and rollboard and the License Merchandising Plan naturally provided that this practice should be used in selling patented asbestos paper and rollboard. The effect of freight equalization in increasing the number of manufacturers who can compete in any given territory is well explained by witness High at page 2189 of the record. (See Trial Exs. Report, par. 48)

Thus it can be seen that the provisions of this Merchandising Plan were adapted to long existing merchandising customs in the Industry and that every provision of the plan was specifically directed to making the price control on the first sale of a patented product effective.

The Trial Attorney has attempted to tie together activities under the Asbestos Code with the License Agreement by stating that the License Merchandising Plan "corresponds in every particular" with the Code Merchandising Plan "with the exception that this Plan specifically designated the prices and specifies that it applies to products manufactured in accordance with the Toohey patent."

There are some details of the two merchandising plans that are similar as there would have to be in any two plans dealing with the merchandising of the same type of products in the same industry. But these two plans are actually utterly different. In fact they are so different in arrangement and content that it is difficult to segregate sections dealing with the same general subject matter for purposes of comparison.

For example, the Code Merchandising Plan (Resps. Exs. 3, 4) contains five pages dealing with 15 different classifications of customers, while the License Merchandising Plan (Coms. Exs. 1z3 to 1z32) contains a little over *one* page dealing with 7 different classifications of customers. The definitions of each class are too lengthy, particularly in the Code Plan, to set forth here but a comparison of the classifications will show a "particular" in which the two plans are extremely different.

Classifications of Customers

Code Plan		*License Plan*	
AA-I	Distributors Listed	A	Approved Distributors Listed
AA-II	Approved Contractors Listed	A	Approved Insulation Contractors Listed
AA-III	Equipment Accounts Listed	B	Equipment Accounts
AA-IV	Special Distributional Accounts Listed	C	Approved Jobbers Listed
A-I	Jobbers Listed	U	U. S. Government Permanent Departments
A-II	Independent Contractors Listed	UU	U. S. Government Corporations or Agencies
A-III	United States Government	Z	All others.
B-I	Industrials Listed		
B-II	Railroads		
B-III	Railroad Equipment Accounts Listed		
B-IV	State and Municipal Governments		
C-I	Department and Retail Stores		
C-II	Plumbing and Heating Contractors		
C-III	Hardware Houses		
D	All others.		

Another comparison which refutes the Trial Attorney's statement that these plans are the same "in every particular" relates to freight equalization points.

Freight Equalization Points

Code Plan	*License Plan*
1. Ambler, Pa.	1. Erie, Pa.
2. Erie, Pa.	2. Ambler, Pa.
3. Norristown, Pa.	3. Norristown, Pa.
4. Chicago, Ill.	4. Elizabeth, N. J.
5. Waukegan, Ill.	5. Jersey City, N. J.
6. Manville, N. J.	6. Chicago, Ill.
7. Jersey City, N. J.	7. Lockland, Ohio
8. Lockland, Ohio	8. Rockdale, Ohio
9. Rockdale, Ohio	9. Detroit, Mich.
10. Detroit, Mich.	10. Milwaukee, Wis.
	11. St. Paul, Minn.
	12. Minneapolis, Minn.
	13. Brooklyn, N. Y.
	14. Bronx, N. Y.
	15. Woodside, N. Y.
	16. Paterson, N. J.
	17. Plymouth Meeting, Pa.

The provisions in the two plans relating to Price Advances differ greatly also, but the length of this section of the License Plan makes it impractical to set forth the text of each here.

These are but a few of the many differences between the two plans. The License Plan contains provisions, such as those relating to definitions of standard construction and of factory zones which the Code Plan does not contain in any form.

We submit that the reckless statement that these plans are alike "in every particular" (except price and the patented or unpatented nature of the products) is grossly incorrect and must have been made without even examining the two plans. This is but a sample of many inaccurate and misleading statements in the brief of counsel for the Commission which do not contribute to a search for the truth and obviously are unfair to the respondents.

POINT VII.

The Johns-Manville exclusive license and the sub-licenses were within the lawful scope of the patent monopoly and were not in violation of the anti-trust laws.

Johns-Manville Corporation has been the owner of the Toohey patent since its issuance and has been engaged in the manufacture and sale of products covered by the Toohey patent. (R. 2036, Resps. Ex. 12) It is unquestionably the law that Johns-Manville was entitled to license other manufacturers to use its invention and to provide that they could sell the patented products which they manufactured only at prices satisfactory to Johns-Manville. The Supreme Court in *Bement* v. *National Harrow Co.*, 186 U. S. 70, stated this to be the law in 1902, and that decision has been followed by the courts since that time.

> *United States* v. *General Electric Co.* (1926), 272 U. S. 476;
>
> *Straight Side Basket Corp.* v. *Webster Basket Co.*, C. C. A. (2d) (1936), 82 Fed. (2d) 245.

"It is now considered settled law that a patent owner is within the scope of his patent monopoly when he grants one or more licenses to manufacture and requires his licensees to restrict their output in accordance with a schedule outlined by him, or to sell the manufactured product embodying his patent at a specified price."

> Mortimer Feuer, *The Patent Monopoly and the Anti-Trust Laws*, 38 Col. L. Rev. 1145 at 1155 (1938).

In fact, the Supreme Court in *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436 (1940), which is cited at page 42 of the Trial Attorney's brief, stated with regard to the owner of a patent at page 456:

> "He may grant licenses to make, use or vend, restricted in point of space or time or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give."

The test of the legality of conditions that may be imposed on licensees sales of patented products which they manufacture, under the anti-trust laws, is whether the conditions are "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." Certainly a provision that licensees could not hamper Johns-Manville in its efforts to make a profit from its own sale of patented products by selling the patented products they manufactured at a price below the level Johns-Manville considered satisfactory would come within this principle.

If there is any doubt on this point it must be resolved by the following statement of the Supreme Court in *United States* v. *General Electric Co.* (*supra*) at page 490:

> "If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell."

Therefore, Johns-Manville Corporation as patent owner had the legal right to license others to use its patented invention and to fix the prices and merchandising conditions under which licensees sold the patented products which they manufactured.

It was very clear to Johns-Manville that it would not benefit from licensing others to use the Toohey patent if they could in any way evade the price control on the patented products (R. 349, 2045-6, 2095, 3072-5). Therefore, it was necessary that details of the merchandising of the patented products be specifically prescribed and that compliance therewith by licensees be strictly supervised. An effective merchandising plan would have to include provisions for inspection of licensees' books and for the imposition and collection of liquidated damages in the event of violation of the merchandising conditions. For a time Johns-Manville considered hiring Tulloch to do the actual fixing and enforcement of prices on patented products as a Johns-Manville employee (R. 2100, 3073-4). However, the Johns-Manville officials were convinced that competing companies would not be willing to put themselves in a position where Johns-Manville, a direct competitor, would have access to their books and could dictate the details of their merchandising of patented goods and change these details from time to time as it saw fit (R. 2046, 2075, 3073-4). Therefore, Johns-Manville decided to contract with Donald Tulloch, Jr. as an independent expert to fix and enforce prices and selling terms under the license in accordance with his own judgment and not subject to its day to day control (R. 361-2, 2101, 2075-6). The Johns-Manville officials were satisfied that Donald Tulloch, Jr. knew the business well enough to establish and maintain minimum prices on the patented products which would allow Johns-Manville to make a satisfactory profit on its sales of patented products and yet would enable other companies, who wished to do so, to manufacture and sell the patented products legally without resorting to infringement (R. 349-351, 3074-5).

As has been explained, the Johns-Manville officials worked out a detailed merchandising plan with Tulloch and incorporated it in an exclusive license agreement which they gave to him on September 11, 1935, with authority to grant sub-licenses under the following conditions:

> "* * * provided, however, that each and every sub-license given and granted by Tulloch hereunder shall be in the form of and upon terms and conditions no more favorable to the sub-licensee than those contained in the sub-license to be

granted to Johns-Manville under said Letters Patent, a copy of which sub-license is annexed hereto marked Exhibit A * * *''

The original merchandising plan and price schedule was annexed to and made a part of the sub-license referred to as "Exhibit A" in Commission's Exhibit 1.

Furthermore, Section III of the exclusive license agreement from Johns-Manville to Tulloch provided:

> "Tulloch covenants and agrees to give and grant to Johns-Manville a sub-license in the form of and upon the terms and conditions set forth in Exhibit A annexed hereto" (Coms. Ex. 1).

Within the bounds of these limitations Tulloch was authorized to make changes in prices and other merchandising terms on the patented products from time to time in accordance with his own judgment and to enforce observance of the merchandising plan by licensees in the sales of the patented products they produced (Coms. Ex. 1).

Johns-Manville reserved the right to cancel this license to Tulloch during the following year in the event that it became dissatisfied with Tulloch's performance (R. 353, Coms. Ex. 1).

Counsel for the Commission does not argue that it was illegal for Johns-Manville Corporation to benefit from price control under licenses on the patented pre-shrunk products nor is it suggested that any aspect of the merchandising plan was not beneficial to Johns-Manville Corporation, the patent owner, in its exploitation of the Toohey patent. Indeed it would have been impossible to support such an argument as the record is replete with evidence showing the benefit to Johns-Manville Corporation of every provision of the licenses and merchandising plan.

The argument is made that the merchandising plan was illegal because Donald Tulloch did not personally benefit from fixing the prices on all patented goods manufactured by the various licensees.

He fixed minimum prices for patented asbestos papers, corrugated papers and pipe coverings, but received royalties only on the sale of pipe coverings, which were the only products manufactured by all licensees. (R. 3111) The fixing of prices for the other products was provided for by Johns-Manville in the merchandising plan attached to the original sub-license agreement (Coms. Ex 1) and it is self-evident that if Tulloch had not carried out the general scope of that merchandising plan Johns-Manville would have cancelled the exclusive license as it reserved the right to do. In that case Tulloch would have had no royalties. Tulloch was benefited financially by continuing the general scope of the merchandising plan established in the first instance by Johns-Manville as owner of the patent (R. 353), and Johns-Manville, the patent owner, was also benefiting.

Counsel for the Commission states with reference to delivered price zones, freight equalization, customer classification, secret rebates and provisions dealing with unfair trade practices that (p. 51) "By no stretch of the imagination can I see how it can be said that such provisions are normally and reasonably adapted to securing the pecuniary reward to which the licensor is entitled." This Commission well knows that price control is impossible without controlling secret rebates and impossible without controlling customer classification and everyone of the practices mentioned, in an industry in which they are in use. If patented price control is permissible and appropriate to securing the pecuniary reward to which the licensor is entitled as the Supreme Court has said it is, then the control of those practices *must* be permissible. Substantially every merchandising policy regulated in the Johns-Manville-Tulloch merchandising plan was in the merchandising plan sustained as lawful in the *General Electric Co.* case, 272 U. S. 476.

There is no requirement in the law that a merchandising plan under a patent license must benefit directly the individual through whom a corporate patent owner acts in imposing price control. The evidence shows that Tulloch was given the job of fixing and enforcing prices on patented products and the opportunity to issue licenses in order to insure and enhance the value of the Toohey patent to Johns-Manville, the patent owner. (R. 349, 2045, 2075, 2095, 2097-8)

The law permits a patent owner to vest in an exclusive licensee its right to control the prices on patented goods. This proposition has only been questioned in one case, *Edison* v. *Ira M. Smith Mercantile Co.* (1911), 188 Fed. 925. The court in that case disposed of the matter by stating at page 927:

> "It is urged that the sales were made and the licensed conditions inaugurated, not by the patentee, but by a licensee. The bill alleges that the complainant, as licensee, held under a grant of exclusive right to make, use, and sell the patented invention throughout the United States. Under such a grant, there is no difference, so far as this question is concerned, between patentee and licensee."

Throughout the brief of counsel for the Commission runs the thought that the Johns-Manville-Tulloch agreement was not the result of negotiations between the parties to it but was the fruit of an understanding between the respondents. This theory is not supported by the evidence or by the probabilities. We have mentioned the marked differences between the facts in this case and the *Standard Sanitary* case. In *United States* v. *Masonite Corporation,* (1942) 316 U. S. 265, the owner of the patent entered into a purported *del credere* agency agreement with six competing manufacturers, but placed the agreement in escrow to become effective only when all six signed it. They knew this and the agreement was arrived at with the knowledge and cooperation of all. This was not true of the respondents here. It is beyond dispute that no respondent was committed directly or impliedly except Johns-Manville and Tulloch when the agreement was signed September 11, 1935. Furthermore, a license agreement was not passed on in the *Masonite* case. The Court said:

> "We do not have here any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence, we need not reach the problems presented by *Bement* v. *National Harrow Co.,* 186 U. S. 70 and that part of the *General Electric* case which dealt with the license to Westinghouse Co."

In the *Masonite* case the six agents by common consent *between themselves* delegated to the patent owner the right to fix the prices of the product and the Court said:

> "The fixing of prices by one member of a group pursuant to express delegation, acquiescence or understanding is just as illegal as the fixing of prices by direct joint action."

In the present case the sub-licensees took their sub-licenses one by one over a period of nearly two years. They delegated no rights to Tulloch, but accepted his right to fix prices pursuant to the patent law. If these sub-licenses were unlawful then any series of sub-licenses would be unlawful, but that is not the law.

We submit that Johns-Manville was within its rights in effectuating price control through the medium of Tulloch as exclusive licensee, and that Tulloch as such licensee could exercise all the control that the patent owner could itself have exercised. As previously stated substantially all the restrictions in the Toohey patent merchandising plan were duplicated in the merchandising plan under the license agreement approved by the Supreme Court in the *General Electric* case.

POINT VIII.

The Norristown flexible jacket patent and licenses have not been connected in any way with the Toohey patent and licenses and no illegal activities regarding them have been shown.

Counsel for the Commission states in his brief (p. 7):

> "There are two patents and license agreements involved in this proceeding."

He then describes the Toohey patent and the Norristown patent. Based upon an assurance by the Trial Attorney that the Norristown patent would be connected with the alleged conspiracy, the Trial Examiner permitted testimony to be introduced extending over hundreds of pages and at least fifty-two documents as exhibits relating exclusively to the Norristown patent. We respectfully submit that this patent was not connected with the alleged conspiracy and served no purpose except to confuse and befog the issues in the case.

The so-called Norristown patent for flexible range boiler jackets was issued March 21, 1933, more than seventeen months before the Toohey patent issued. It related to a mechanical feature in the construction of a range boiler jacket which permitted it to be folded for shipment. Seven hundred of the flexible jackets could be shipped in a freight car that would hold only 350 of the ordinary rigid jackets. On January 20, 1933 (R. Ex. 55) Mr. Arthur E. Page, patent attorney for the Norristown Company, wrote to the Philip Carey Company charging them with infringing the Norristown patent. This led to a long correspondence (R. Ex. 55 to R. Ex. 67 and C. Ex. 179 to 182) culminating in a license agreement between Norristown and Carey dated August 20, 1933, permitting the use of the patent by Carey *without price control*. This was more than a year before the Toohey patent issued and had nothing to do with the Toohey patent or Mr. Tulloch, or any phase of the conspiracy alleged in the complaint (R. 3099). An examination of the correspondence shows this to be true beyond the peradventure of a doubt.

On February 16, 1934 (more than six months before the Toohey patent issued) the Norristown Company, by direct negotiation, entered into a license agreement with Johns-Manville Corporation permitting the manufacture of flexible range boiler jackets under the Norristown patent at prices fixed by Norristown. Efforts were made by Norristown to induce Carey to accept price control, but Carey refused (R. 892, 876, 1106). Why refuse if there was a price-fixing conspiracy? Other manufacturers were infringing the Norristown patent and selling below the price fixed by Norristown for Johns-Manville under the flexible jacket license agreement (R. 884-5). Johns-Manville naturally protested to Norristown about its failure to stabilize the price of patented jackets (C. Ex. 51).

A flexible range boiler jacket can be made under the Toohey patent and be shrinkproof and moisture-resistant or it can be made outside the Toohey patent and be subject to shrinkage and moisture just as other ordinary pipe covering is. After the Toohey patent was issued on September 4, 1934, the flexible jackets were made *in some instances* under the Toohey patent. In that case the jacket was, of course, subject to both the Norristown patent and to the Toohey patent. However, no control was ever exercised by Tulloch on the price of any flexible range boiler jacket unless it was manufactured under the Toohey patent.

Before the Toohey patent issued, Norristown asked Mr. Tulloch to try to induce manufacturers to take licenses under the Norristown flexible jacket patent and agreed to remunerate him if he succeeded in getting any licensees (R. 869). Tulloch tried to get licensees but was totally unsuccessful (R. 408). His efforts to get licensees for Norristown and his activities under the Toohey patent were entirely separate and distinct (R. 467-8). In the mind of the Trial Attorney these facts seemed to create a mystery with ominous implications. This tendency to view *any* matter relating to *any* patent as evil is characteristic of the entire case he has tried to build up against the respondents. Any farsighted manufacturer develops and patents new products and thousands of patent-owning manufacturers license competing companies to use their patents. It is not illegal to do so, and nothing beyond this was done by Norristown with its flexible jacket patent.

POINT IX.

Exceptions to the Trial Examiner's Report on the evidence.

The exceptions to the Trial Examiner's Report are printed in full as Appendix A to this brief. Each exception is fully explained and annotated.

POINT X.

The complaint should be dismissed.

The record in this case shows that active price competition has existed throughout the period covered by the amended complaint in the sale of all unpatented products of the Industry and that these unpatented products have at all times been sold in active competition with the patented products and at lower prices. It appears that these unpatented products were always freely available at competitive prices and that they were produced in quantity and sold at low non-uniform prices by 17 of the 19 corporate respondents and by 36 other members of the Industry.

The evidence shows, and Counsel for the Commission seems to concede at page 42 of his brief, that nothing illegal was done during the N. R. A. Asbestos Code period. The evidence further shows that no agreement of any kind existed among the respondents after the end of the Asbestos Code and that the so-called "Voluntary Agreement" was nothing more than a draft agreement prepared and submitted to the President at his request, which never became effective and never was put into operation.

The record shows that the development of the Toohey patent and the licenses under it were part of a normal business transaction in which the patent owner sought by ordinary business methods to gain the rewards permitted by law from its patent monopoly.

The record further shows that never more than a minority of the Industry were licensed to use the Toohey patent and that the number of licensees diminished rapidly because of the price competition of lower cost unpatented materials.

By 1940 there were only four licensees and when this proceeding was begun the Carey Company was the only sub-licensee except Johns-Manville, the patent owner.

The case against the respondents was built upon three false premises namely that:

(1) The Code Merchandising Plan was developed and used by the respondents as an instrument for price fixing.

(2) When the Code ended the respondents substituted the Voluntary Agreement with a similar merchandising plan and operated under the Voluntary Agreement.

(3) When the Voluntary Agreement was abandoned the respondents substituted the Tulloch license agreement with a merchandising plan identical with the Code Merchandising Plan.

In other words, the respondents are charged with a price fixing conspiracy originating in 1933 and continuing to the commencement of this proceeding, which was implemented by three allegedly identical merchandising plans—the Code Merchandising Plan, the Voluntary Agreement Merchandising Plan and the Tulloch Merchandising Plan. There is as much substance to this charge as there is to Grimm's fairy tales.

There was no price uniformity at any time and therefore no price fixing except as to patented products. The Voluntary Agreement contained no Merchandising Plan. Tulloch's Merchandising Plan instead of being identical with the Code Merchandising Plan, was radically different. These statements cannot be successfully disputed.

The premises being wrong, the conclusion is wrong. We respectfully request that the amended complaint be dismissed.

Respectfully submitted,

Cadwalader Wickersham & Taft

CADWALADER, WICKERSHAM & TAFT,
Attorneys for Respondents

Acme Asbestos Covering and Flooring Company; Asbestos, Asphalt and Insulation Manufacturing Company; Atlantic Asbestos Corporation; A. H. Bennett Company; The Philip Carey Manufacturing Company; The Clark Asbestos Company; Empire Asbestos Products, Inc.; Johns-Manville Corporation; L. A. Rubber & Asbestos Works Incorporated; G. A. MacArthur Company; W. S. Nott Company; Pacific Asbestos & Supply Company; The Ruberoid Co.; and Donald Tulloch, Jr.

F. SIMS MCGRATH,
MALCOLM I. RUDDOCK,
Of Counsel.

Appendix A.

UNITED STATES OF AMERICA

Before Federal Trade Commission

In the Matter *of* Acme Asbestos Covering and Flooring Company, *et al.*	Docket No. 4613.

EXCEPTIONS TO TRIAL EXAMINER'S REPORT.

NOW COME Acme Asbestos Covering and Flooring Company; Asbestos, Asphalt and Insulation Manufacturing Company; Atlantic Asbestos Corporation; A. H. Bennett Company; The Philip Carey Manufacturing Company; The Clark Asbestos Company; Empire Asbestos Products, Inc.; Johns-Manville Corporation; L. A. Rubber & Asbestos Works Incorporated; G. A. MacArthur Company; W. S. Nott Company; Pacific Asbestos & Supply Company; The Ruberoid Co., and Donald Tulloch, Jr., respondents in the above-entitled matter and each of them jointly and severally, by Cadwalader, Wickersham & Taft, their attorneys, and except to the report upon the facts of the Examiner of the Federal Trade Commission, Randolph Preston, filed with the Commission March 15, 1943, in the following particulars, to wit:

(1) To the fourth paragraph on page 8 of the report wherein the Trial Examiner states that

> "* * * it appears that in the Toohey process the same methods of manufacture were used as in the unpatented products, with the exception that in the Toohey process a wax sizer purported to make the pipe covering water repellant is beaten into the asbestos fiber in the vats and before it is rolled into paper."

This statement is contrary to the evidence and is contrary to paragraph 17 on page 13 of the report which correctly reports the facts shown by the evidence in the case. As a reading of paragraph 17 will show, this statement omits certain ingredients and ignores one of the essential features of the invention, the heat treatment at specified gradations of temperature after the particular product has assumed its final form to complete the setting or fusing of the wax compound into the product (R. 115, 1928, 1972-3, 3297-8; Resps. Exs. 12, 71).

(2) To the fifth paragraph on page 8 of the report wherein he states that

> "* * * the respondents introduced 34 witnesses, many of them being the same persons who had theretofore testified for the Commission, and 254 exhibits."

Only two of the 34 witnesses called by the respondents testified also for the Commission. 21 of the witnesses called by the respondents were officers or employees of independent jobbers and distributors who are not parties to this proceeding. The only witnesses who were called by both the Commission and the respondents were Donald Tulloch, Jr. and Walter L. Steffens (See Report pages 35 and 36; also R. 2285, 2304, 2387, 2413, 2431, 2450, 2496, 2524, 2562, 2592, 2615, 2642, 2650, 2681, 2703, 2732, 2743, 2772, 2796, 2944, 2990).

(3) To the paragraph which concludes at the top of page 9 of the report wherein he states that

> "* * * shortly thereafter a number of respondents in this proceeding, together with others, signed voluntary agreements for the alleged purpose of attempting to carry out those provisions of the N.R.A. which had not been declared unconstitutional. It does not appear in evidence that these agreements were ever approved by the President of the United States as they were required to be."

The evidence is undisputed that only one voluntary agreement was ever prepared, that it was prepared for the purpose of carrying out provisions of the N.R.A. which had not been declared unconstitutional, that it was submitted to the President and was never approved by him. The agreement provided that

> "This Agreement shall be effective upon approval by the President."

and it is shown by the uncontradicted testimony of several witnesses that this agreement never went into effect and was never acted under by any respondent (R. 386-7, 1075, 2338-9, 3053-5; Coms. Exs. 18, 55, 56, 286, 287; Resps. Ex. 221).

(4) To the failure of the Examiner to report in connection with the statement set forth in paragraph numbered 2 on page 10 of the report:

> This merchandising plan when approved by three-fourths of the members of the Division and filed with the Sub-Code Authority became legally binding on all members of the Division under the provisions of the Asbestos Code.

Section 4 of Article VI of the Asbestos Code (Respondents' Ex. 2) provided in part:

> "The members of each Division of the Industry may prepare Simplification and Standardization Specifications and a Merchandising Plan for such Division, incorporating the merchandising policies best calculated to promote fair competition in such Division. Subject to the review of the Administrator, every such Merchandising Plan or Simplification and Standardization Specifications, when approved by three-fourths of the Code Members of the Division and filed with the Sub-Code Authority, shall be binding upon all members of the Industry who are members of the Division to which such Merchandising Plan or Specifications apply. Changes may be made in any such Merchandising Plan or Specifications in the same manner that the Originals were established."

(5) To the failure to report in connection with the statement set forth in paragraph numbered 5 on page 11 of the report the following statement:

> This revised Merchandising Plan was never used by the members of the Division, including the respondents, in marketing their products.

The finding is incomplete and misleading without the inclusion of this additional statement which is supported by the uncontradicted testimony of several witnesses (R. 2156-7, 2254-5, 2329, 2369-2370, 3159-3163).

(6) To paragraph numbered 6 on page 11 of the report wherein the Trial Examiner states that:

> "* * * meetings of the members of the Asbestos Paper & Allied Products Division were held during the existence of the Asbestos Code for the purpose of carrying out the provisions of the Code and the application of the provisions of the merchandising plans to new products and new conditions in the industry."

This statement is erroneous in its reference to more than one merchandising plan. The finding is correct as to the merchandising plan described in paragraph 2 on page 10. It is completely contrary to the evidence as applied to any other merchandising plan. Therefore the words "of the merchandising plans" in the next to the last line of this paragraph should read "of the December, 1933 merchandising plan" in order to make this statement conform to the evidence (R. 2156-7, 2254-5, 2329, 2369-2370, 3159-3163).

(7) To the failure to report in connection with the statement set forth in paragraph numbered 8 on page 11 of the report the following statement:

> This distribution was required by the provisions of Article VIII of the Asbestos Code.

This statement is supported by uncontroverted evidence and is essential to a correct interpretation of the statement contained in paragraph 8 (Resps. Ex. 2).

(8) To the failure to report in connection with the statement set forth in paragraph 12 on page 12 of the report the following statement:

> This voluntary agreement included a provision to the effect that it was not to become effective until approved by the President and it was never put into effect or acted under by any respondent.

This statement is supported by the uncontradicted testimony of several witnesses and by the text of the voluntary agreement, which is in evidence (R. 386-7, 1075, 2338-9, 3053-5; Coms. Ex. 18).

(9) To the failure of the Trial Examiner to report:

> The validity and scope of the Toohey Patent, U. S. Letters Patent No. 1,972,500, have not been challenged in this proceeding.

This fact is of great importance in determining the legality of the actions of respondents and is borne out by *the entire record* in the proceeding.

(10) To the inclusion of the words "as a rule" and "entirely" in the portion of paragraph numbered 24 on page 14 of the report wherein the Trial Examiner states that

> "For many years prior to 1934 asbestos and wool felt papers, corrugated asbestos paper and generally various types of asbestos and wool felt pipe coverings had been manufactured and there is evidence that *as a rule* the respondent licensees of Tulloch did not *entirely* cease manufacturing the ordinary types after taking license under the Toohey patent."

The use of the words "as a rule" and "entirely" in this finding give the finding an inaccurate meaning. Without these words the statement is fully supported by the evidence. All the evidence on this point in the case is to the effect that all licensees with the exception of Johns-Manville Corporation (which had been manufacturing the pre-shrunk type products exclusively for several years prior to the licenses) and one small corporation, A. H. Bennett Co., continued to manufacture the ordinary unpatented types of paper and pipe covering after taking a license. There is no evidence in the case which supports the implication of the quoted statement that the manufacture of the ordinary unpatented papers and pipe coverings were discontinued to a substantial degree by the respondent licensees (R. 624-5, 628, 981-2, 1064, 1133, 1206, 1434, 2173-4, 2246-7, 2356, 2377, 2457, 2492, 2845-6, 2960, 2985, 2995-6, 3015-7; Resps. Exs. 13, 15, 17, 18, 19, 80, 82, 83, 84, 85, 249).

(11) To the failure to report:

> There are separate uses and markets for plain asbestos and wool felt papers, corrugated asbestos paper, and asbestos and wool felt pipe coverings whether manufactured in the ordinary way or under the Toohey patent.

A portion of this statement is included in paragraph 24 on page 15 but it is incomplete and not clearly understandable. The evidence in the case shows without contradiction that there are specific separate uses for each of the products named in the proposed statement and separate markets for each. This includes testimony by independent jobbers and distributors who sold each product for use as such (R. 924, 1125-7, 1206-7, 1311-2, 1434, 1973, 2188-9, 2296, 2429-2430, 2452, 3362).

(12) To paragraph numbered 26 on page 15 of the report wherein the Trial Examiner states that

> "This hostile attitude toward pre-shrunk continued with some competitors after they took a Tulloch license."

There is no evidence to this effect. The evidence in the case upon which this statement appears to be founded relates to only one respondent and is to the effect that the Philip Carey Manufacturing Company did not stress the fact that its better-grade pipe covering was manufactured under the Toohey patent after it had taken a license because it did not wish to build up a trade demand for the Toohey product as such when it realized that it might some day lose its license to manufacture its products under the Toohey patent. It is shown by uncontroverted evidence, however, that the Philip Carey Manufacturing Company considered the products manufactured under the Toohey patent to be superior to those manufactured in the ordinary way and that it supplied the Toohey type products whenever a buyer was willing to pay the higher price for them. It is noteworthy that the evidence shows that the Philip Carey Manufacturing Company still retains its license under the Toohey patent (R. 989, 2855, 2876-7, 2894).

(13) To paragraph numbered 28 on page 15 of the report wherein the Trial Examiner states as to Mr. Tulloch that:

> "He was manager of the Asbestos Paper and Allied Products Division under the Asbestos Code, and was acquainted with the difficulties caused by the shrinkage of asbestos pipe covering and with the fluctuations in prices of these products."

The phrase "fluctuations in prices of these products" does not appear in the evidence on this point and it gives an incorrect impression of what the evidence shows. The evidence shows that the prices of the various members of the industry differed among themselves and that competition between them was keen. There is nothing in the evidence to justify the combining of a statement of his knowledge of price competition with a statement of his knowledge that the shrinkage of pipe covering caused difficulties (R. 879, 1365, 2053, 2179, 2310, 2903, 2949-2952; See Paragraph 65 on page 27 of Report).

(14) To the inclusion of the word "directly" and the words "but there is evidence that there were communications with and through Tulloch with other prospective licensees" in the portion of paragraph numbered 32 on page 16 of the report wherein the Trial Examiner states that:

> "Officials of Johns-Manville Corporation also testified that they did not consult or communicate *directly* with any competing manufacturer during the period of its discussions and negotiations with Tulloch and it made its decision to license respondent Tulloch independently, *but there is evidence that there were communications with and through Tulloch with other prospective licensees.*"

There is no evidence in the case that the Johns-Manville Corporation communicated either directly or indirectly with any competing manufacturer about the Tulloch license agreement before it was signed on September 11, 1935, and there is uncontroverted direct evidence that they did not do so (R. 356-7, 1098, 1100, 2048-9, 2075, 2104, 2106-7, 2352, 3096-7).

(15) To the failure to report in connection with the statement set forth in paragraph 33 on page 16 that:

> This draft of a license agreement was never used.

This additional fact is shown by uncontroverted evidence and is an essential part of the facts reported (R. 2349, 3064; Compare Coms. Exs. 1 and 52).

(16) To the failure to report in connection with the statement set forth in paragraph numbered 35 on page 17 of the report that:

> There is uncontroverted evidence that these meetings were called by Tulloch in order to aid him in determining the various mechandising factors he would have to deal with in preparing a merchandising plan that would be adaptable to the different merchandising methods of the different prospective licensees and that the merchandising men who attended had no part in the actual preparation of the merchandising plan which Tulloch later put into effect under the license agreements.

The omission of this additional statement, which is fully supported by the evidence, renders paragraph 35 susceptible to an interpretation directly contrary to this additional statement (R. 98, 2274, 3067-9, 3071, 3149-3150).

(17) To the failure of the Trial Examiner to report:

> Mr. Tulloch did not communicate in any way with Acme Asbestos Covering and Flooring Co., Asbestos Asphalt and Insulation Mfg. Co., Atlantic Asbestos Corp., A. H. Bennett Co., The Clark Asbestos Co., Empire Asbestos Products, Inc., Gillen-Cole Co., L. A. Rubber & Asbestos Works, Inc., G. A. MacArthur Co., W. S. Nott Co., Pacific Asbestos & Supply Co.,

Plant Rubber & Asbestos Works or Standard Asbestos Mfg. Co. of Chicago concerning any proposed license under the Toohey patent before he was granted an exclusive license by Johns-Manville Corp. on September 11, 1935.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 111, 582-3, 1212-3, 1279, 1428, 1475, 1491, 1539, 1540, 1549; Coms. Exs. 184, 300; Resps. Exs. 133-136).

(18) To paragraph numbered 37 on page 17 of the report wherein the Trial Examiner states with reference to the merchandising plan attached to the Johns-Manville sub-license agreement of September 11, 1935, that:

> "There is also testimony that prior thereto Tulloch had conferred and communicated with other prospective licensees with reference to said merchandising plan."

The evidence shows that Tulloch had never discussed the Merchandising Plan with the executive of any prospective licensee at that time, but had only discussed merchandising methods used in the industry for his own guidance in preparing a Merchandising Plan with a few experienced merchandising men who were connected with companies that later became licensees. There is no evidence showing that Tulloch discussed the Merchandising Plan attached to the Johns-Manville sub-license agreement with anyone connected with any prospective licensee except Johns-Manville prior to September 11, 1935 (R. 368-9, 2103-4, 2274, 3067-8, 3076-7).

(19) To the failure of the Trial Examiner to report in connection with the statement set forth in paragraph numbered 38 on page 17 of the record:

> None of these manufacturers whom Tulloch approached after September 11, 1935 had seen the Merchandising Plan attached to the license agreement prior to that time and only a few of these manufacturers had seen drafts of a proposed license agreement under the Toohey patent prior to that time.

This statement is supported by a large amount of uncontroverted evidence in the proceeding, and it is a fact of sufficient significance to merit its being reported (R. 361-9, 1212-3, 1279, 1428, 1475, 1491, 1539, 1549, 2102-4, 2274).

(20) To the failure of the Trial Examiner to report:

> There is uncontroverted evidence to the effect that licensees signed license agreements with Mr. Tulloch because they wished to manufacture and sell some or all of the "pre-shrunk" products covered by the Toohey patent.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 579, 582-3, 984, 987-8, 1005-6, 1230, 1281, 1311, 1317, 1367, 1391-4, 1431, 1492, 1550, 2348, 2877; Resps. Exs. 70, 71, 139).

(21) To paragraph numbered 46 on page 21 of the report wherein the Trial Examiner states that the merchandising plan attached to the sub-license agreement executed September 11, 1935, contained:

> "a. The fixed minimum prices and conditions under which products were to be sold.
>
> "b. Required uniform classification of customers for price fixing purposes.
>
> "c. Fixed the differentials in prices between different classes of customers."

These statements might be construed to apply to both patented and unpatented paper and pipe covering. There is no evidence whatsoever that the Merchandising Plan or any of its provisions had any application to unpatented paper or pipe covering. On the contrary, it is stated in the Merchandising Plan that it applies only to products manufactured and sold under the Toohey patent (Coms. Exs. 1, 2).

(22) To paragraph numbered 46 on page 21 of the report wherein the Trial Examiner states that said merchandising plan

> "* * * required uniform contracts for the sale of products by respondents who held licenses. (This provision does not seem to have been enforced during a portion of the licensing period)".

This statement is contrary to uncontroverted evidence. The evidence shows that the Merchandising Plan under the license agreement provided that the contracts of sale used by licensees in selling products manufactured and sold by them under the Toohey patent should be in a form approved by Mr. Tulloch. He did not enforce this provision. No uniform contract was ever established or used under the license agreements or otherwise. Each licensee that used any form of contract used its own form, and did not submit this form to Mr. Tulloch for approval (R. 489, 490, 1075-6, 1322, 1442, 2181-2, 3151-2, Coms. Exs. 1, 50, 363).

(23) To paragraph numbered 46 on page 21 of the report wherein the Trial Examiner states that said merchandising plan:

> "e. Divided the United States into zones for the purpose of fixing same prices in each zone and required certain of said products to be sold in the zones at the same delivered prices regardless of location of seller or buyer. Also provided for freight absorption and freight equalization to the end that all licensees would sell at the same delivered price and that all purchasers of the same class and in the same zones would have to pay the same price for the same product at any given time."

This statement might be construed to apply to both patented and unpatented products. There is no evidence whatsoever that the Merchandising Plan or any of its provisions had any application to ordinary unpatented paper or pipe covering.

The second sentence of the quoted statement is not supported by the evidence. Freight equalization does not create a delivered price but on the contrary implies that the buyer pays part of the freight. The evidence shows that where freight equalization applied the materials were sold F. O. B. factory price (R. 342-7, 2226, 3417-8).

(24) To paragraph numbered 46 on page 21 of the report wherein the Trial Examiner states that said merchandising plan:

> "f. Established standards for the size and thickness of products and fixed the differentials in price for the said differences.
>
> "g. Provided for rigid enforcement of price schedules and imposition of penalties for violations."

These statements might be construed to apply to both patented and unpatented paper and pipe covering. There is no evidence whatsoever that the Merchandising Plan or any of its provisions had any application to ordinary unpatented paper and pipe covering. On the contrary, the Merchandising Plan states that it applies only to products manufactured and sold under the Toohey patent (Coms. Exs. 1, 2).

(25) To the failure of the Trial Examiner to report:

> The evidence on the subject is to the effect that Mr. Tulloch did not attempt to control the prices or terms and conditions of sale of any asbestos or wool felt paper or any kind of asbestos or wool felt pipe covering except that which was manufactured and sold by his licensees under the Toohey patent.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 316, 337-8, 632, 1084, 1206, 1322, 1355, 1440, 2183, 3177-8; Coms. Exs. 1, 251; Resps. Exs. 11, 19, 87 to 126, incl., 148 to 151, incl., 211 to 215, incl., 226 to 233, incl., 236 to 248, incl.).

(26) To the failure of the Trial Examiner to report:

> Of the five schedules in the Merchandising Plan attached to the sub-license agreement when executed and delivered to Johns-Manville Corporation on September 11, 1935, only Schedule I contained general provisions applying to the sale of all products manufactured and sold under the Toohey patent. Schedule II set forth the prices and terms and con-

ditions of sale on various forms of pipe covering and sheets and blocks when manufactured and sold under the Toohey patent. Schedule III set forth the prices and terms and conditions of sale on corrugated asbestos paper when manufactured and sold under the Toohey patent. Schedule IV set forth the prices and terms and conditions of sale on high pressure laminated type asbestos pipe covering, sheets and blocks when manufactured and sold under the Toohey patent. Schedule V set forth the prices and terms and conditions of sale on asbestos paper and rollboard when manufactured and sold under the Toohey patent.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 71, 83, 395-6; 3086; Coms. Exs. 1, 2).

(27) To the failure of the Trial Examiner to report:

Mr. Tulloch testified that the reason for dividing the Merchandising Plan into separate schedules applying to separate classes of products was that no licensee received a license to manufacture or sell any product under the Toohey patent unless it was manufacturing that general type of product at the time it executed a sub-license agreement; that any licensee could have a license covering any additional product which it later wished to commence manufacturing under the Toohey patent; and that no licensee ever received the schedule of prices and terms and conditions of sale of any type of product which it did not manufacture under the Toohey patent even though it purchased that product from other licensees and sold it.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 82, 83, 527-8, 3086, 3110-2; See Coms. Exs. 10, 254).

(28) To the failure of the Trial Examiner to report:

Sixteen different sub-license agreements did not include asbestos paper and rollboard, wool felt paper or sponge felt among the licensed products. The licensee under each of these sub-license agreements never received Schedule V and there is no evidence of an attempt being made otherwise to control its prices or terms and conditions of sale on products of these types.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 202, 527-8, 1278, 3086-8, 3110-2; Coms. Exs. 198, 204; Resps. Ex. 254).

(29) To the failure of the Trial Examiner to report:

Fourteen different sub-license agreements did not include high pressure laminated asbestos pipe covering sheets and blocks among the licensed products. The licensee under each of these agreements never received Schedule IV and there is no evidence of an attempt being made otherwise to control its prices or terms and conditions of sale on this type of product.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 3086-8, 3110-2; Coms. Exs. 60Q, 60R, 204; Resps. Ex. 254).

(30) To the failure of the Trial Examiner to report:

Six sub-license agreements did not include corrugated asbestos paper among the licensed products. None of these six licensees ever received Schedule III and there is no evidence of an attempt being made otherwise to control their prices or terms and conditions of sale on this type of product.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 3086-8, 3110-2; Resps. Ex. 254).

(31) To the failure of the Trial Examiner to report:

Mr. Tulloch testified and there was no conflicting evidence that all of the provisions of the Merchandising Plan under the sub-license agreements affected the price of products manufactured and sold under the Toohey patent and were designed to make the price control on products manufactured and sold under the Toohey patent effective.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 329, 330, 3077, 3326-7; Coms. Exs. 1, 2).

(32) To paragraph numbered 49 on page 22 of the report wherein the Trial Examiner states that:

> "These zone areas used prior to the issuance of the Toohey patent differed in some details from one another but followed the same general principle of zoning and were substantially similar."

This statement is contrary to all the evidence on the point. The testimony and much documentary evidence shows that while many members of the industry followed the general principle of zoning in merchandising products prior to issuance of the Toohey patent, the particular zone areas and the products sold thereunder varied widely between different companies, except during the N.R.A. period (R. 3423, Coms. Exs. 379-386).

(33) To paragraph numbered 52 on page 23 of the report wherein the Trial Examiner states:

> "Shortly after the license agreements were executed Tulloch suggested to his licensees that they use the 'Manual of Unit Prices', published by Asbestos Magazine, in pricing their products in order to enable them to translate the discount-from-list price into the actual dollars and cents price to a customer on any sale instantaneously."

This statement could be construed to mean that Tulloch suggested that his licensees use the "Manual of Unit Prices" for pricing their unpatented products as well as their patented products. The evidence in the case shows without contradiction that Tulloch did not make any suggestions to his licensees with regard to the pricing of unpatented products. As applied to patent products the statement here excepted to is correct.

(34) To paragraph numbered 53 on page 23 of the report wherein the Trial Examiner states with reference to meetings attended by licensees that:

> "At these meetings all problems encountered in the merchandising of the materials were discussed and merchandising practices fixed by Tulloch were also discussed."

This statement could be construed to apply to both patented and unpatented materials. There is no evidence whatsoever that the merchandising of any unpatented paper or pipe covering was ever discussed by Tulloch with his licensees. The evidence shows only that Tulloch held local meetings of small groups of licensees from time to time at which the licensees pointed out to him the mechanical flaws in his regulation of the merchandising of products manufactured and sold under the Toohey patent (R. 1071-2, 1320-1, 1495-6, 2049, 3148-9).

(35) To the phrasing of paragraph numbered 53 on page 23 of the report wherein the Trial Examiner states that:

> "Tulloch rarely announced any change in merchandising conditions at these meetings and there appears to be no record of any vote being taken by licensees upon matters under discussion."

All the evidence in the case is to the effect that no votes were ever taken by licensees upon matters under discussion. There is no justification in the evidence for limiting this statement to the nonexistence of any record of votes taken (R. 1072, 1320-1, 1495-6, 2049, 2168-2170, 3148-9).

(36) To the inclusion of the words "usually after consultation with licensees" in the sentence in paragraph numbered 54 on page 23 of the report wherein the Trial Examiner states that:

> "There is evidence that the said changes in prices on patented products and in any of the terms or conditions of sale in the merchandising plan under the license agreement were made by Tulloch during the entire licensing period, usually after consultation with licensees."

The use of the word "consultation" in this sentence gives an erroneous impression of what is shown by the evidence in the case. The evidence shows that Mr. Tulloch usually gave his licensees an opportunity to comment on changes he proposed making and to point out harmful results of the change which he might have overlooked. He listened to any comments which his licensees cared to make but proceeded to make changes and rulings independently. There is no evidence that Tulloch's licensees had any participation in the making of changes in the Merchandising Plan (R. 122, 391-3, 397-8, 1124-5, 1216, 2078).

(37) To paragraph numbered 54 on page 23 of the report wherein the Trial Examiner states:

> "Only a few decisions were arrived at during the meetings."

There is no evidence that any decision was "arrived at" during any meeting. The only evidence on this point is to the effect that Tulloch announced his rulings and changes on only a few occasions at meetings. As the statement reads it implies that decisions were reached by group action at meetings on at least a few occasions. There is no evidence whatsoever to support this implication (R. 1072, 1320-1, 1495-6, 2049, 2168-9).

(38) To paragraph numbered 55 on page 24 of the report wherein the Trial Examiner states that:

> "The licensees agreed to and did give Tulloch the authority so to act and confirmed his action thus taken."

This statement is contrary to the evidence. The only agreement by the licensees and the only gift of authority to Tulloch by them was that embodied in the text of the original sub-license agreements which they signed individually to obtain the right to manufacture and sell the patented pre-shrunk products. There is no evidence to the effect that the licensees "confirmed" Tulloch's actions or that any confirmation was necessary. The evidence shows many instances in which changes made by Tulloch were very unsatisfactory to some licensees, sometimes to more than half the licensees, and, as the Trial Examiner has reported, the evidence shows that these changes were maintained by Tulloch. There is no suggestion in the record that these changes, or any others, were "confirmed" by the dissatisfied licensees or that these licensees would have been willing to confirm them (R. 391-3, 397-8, 465-6, 907, 1001, 1124-5, 1216, 1512, 2169, 2170, 2257, 2275, 3148-9).

(39) To paragraph numbered 56 on page 24 of the report wherein the Trial Examiner states that:

> "Certain licensees published 'suggested resale prices' for their customers in their own price lists but these were not always observed by said customers, and there is no direct evidence of an attempt to force them to follow same."

All the evidence on this point shows that no direct or indirect attempt was ever made by Tulloch or his licensees to control resale prices of the licensees' customers. Many of the 21 independent jobber and distributor witnesses in the case testified that they customarily sold the products purchased from licensees at prices below the "suggested resale prices" and no witness testified that any attempt was ever made by any licensee to prevent this (R. 330-1, 336-7, 486, 488, 500, 527-8, 1215, 1322, 1370, 1436, 1501, 2060, 2183, 2296, 2310, 2399, 2414, 2436, 2532-3, 2571-2, 2585, 2603, 2612, 2624, 2706, 2736-7, 2746, 2807, 2960-1, 3006, 3030, 3228, 3323-5; Coms. Ex. 1; Resps. Ex. 161).

(40) To the failure of the Trial Examiner to report in connection with the statement set forth in paragraph 59 on page 24 of the report that:

> The Philip Carey Manufacturing Company had refused to take a license from the Norristown Company under the flexible range boiler jacket patent for some time and was only induced to take one by the imminent danger of an infringement suit.

This statement is fully supported by uncontradicted testimony and much documentary evidence. Unless it is included with the rest of the statement, the statement gives rise to implications contrary to the facts shown by the evidence (R. 1021-2, 1104-5; Coms. Exs. 179-182; Resps. Exs. 55-66).

(41) To paragraph numbered 59 on pages 24 and 25 of the report wherein the Trial Examiner states with reference to the fact that the Philip Carey Manufacturing Company's license under the Norristown jacket patent never incorporated any price control,

> "* * * though Tulloch endeavored to have same inserted."

This statement is not supported by the evidence. It appears that the Norristown Company endeavored to have a price control clause inserted in its license to the Philip Carey Manufacturing Company, but it communicated directly with the Philip Carey Manufacturing Company and not through Tulloch (R. 408-9, 1105-6).

(42) To the failure of the Trial Examiner to report in connection with the statement set forth in paragraph 61 on page 25 in his report that:

> The Philip Carey Manufacturing Company found that other companies were not interested in obtaining licenses and no license was ever granted under this patent.

This additional statement is fully supported by uncontroverted evidence. The statement in paragraph 61 gives an incorrect impression of the facts shown by the evidence without this additional sentence (R. 197, 399, 1019, 1101-2).

(43) To the failure of the Trial Examiner to report:

> Various types of pipe covering that were not included in the Tulloch license agreements serve the same general purposes as asbestos and wool felt pipe coverings and are sold in competition with them. Among these are magnesia, cork, kraft paper, rock wool, clay and asbestos, vermiculite, glass wool, and hair felt pipe coverings.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 245-7, 300, 1082, 1087-8, 1310, 1429, 2098, 2185; Resps. Ex. 132).

(44) To the inclusion of the words "usually" and "at times" in the sentence in paragraph numbered 64 on page 26 of the report wherein the Trial Examiner states that:

> "Jobbers and distributors throughout the country were *usually* able to obtain unpatented products similar to the Toohey patented products during the period of the license agreements and were able *at times* to buy them at different prices from various respondents and other companies in the industry."

The uncontradicted testimony of independent jobbers and distributors shows that there never was any difficulty in obtaining the ordinary unpatented paper and pipe covering during the license period and that they were always able to buy these unpatented products at different prices reached by individual bargaining with the different licensees.

The testimony of these and many other witnesses shows that the price of the ordinary unpatented paper and pipe covering was never uniform as between the different licensees. The words "at times" give a meaning to the statement which is contrary to the evidence (R. 308-9, 317-320, 389-390, 485-6, 624-8, 631-3, 981-3, 1057, 1062, 1064, 1133, 1206, 1208, 1210, 1226, 1229, 1332-4, 1355, 1365, 1425, 1434, 1440, 2016, 2050-1, 2173-4, 2179-2180, 2189, 2202, 2204, 2209, 2247, 2249, 2257, 2265, 2286-9, 2302-3, 2305-2310, 2346, 2356, 2359, 2360, 2375, 2377, 2388-2390, 2398-9, 2401-2, 2415-7, 2419-2422, 2427, 2432-5, 2439-2442, 2453-8, 2463-4, 2469, 2479, 2484, 2487, 2492-4, 2498-2502, 2504-5, 2512-8, 2526-8, 2533-4, 2571, 2574-5, 2578, 2604-6, 2618, 2620-3, 2625-6, 2643-4, 2654-7, 2668, 2672, 2682-3, 2688-9, 2704-5, 2707, 2715, 2720-1, 2733, 2735-6, 2738-9, 2740, 2743-6, 2766-7, 2773-5, 2777-9, 2790, 2797-9, 2806-7, 2811, 2839, 2843-6, 2850-1, 2854, 2857-2860, 2872, 2887, 2889, 2921-2, 2947-8, 2952-4, 2955, 2960, 2968, 2970-1, 2984-6, 2991-9, 3001, 3003, 3009, 3015-7, 3020, 3028, 3035-8, 3045-8, 3081-2, 3108, 3133, 3229, 3360-1; Resps. Exs. 15, 16, 18, 19, 80, 82-126, 148-151, 205, 206, 211-215, 226-233, 236-249, 252, 253, 257-272.

(45) To the phraseology of paragraph numbered 64 on page 26 of the report wherein the Trial Examiner states that:

> "The prices charged by each licensee, except Johns-Manville, for unpatented products similar to these Toohey products, changed from time to time during this same period."

The evidence shows that the prices of unpatented products changed frequently during the license period. This fact is not made clear by the use of the words "from time to time". The evidence shows that the prices of unpatented products varied almost from day to day, and varied widely between different respondents. (See citations under preceding paragraph).

(46) The failure of the Trial Examiner to report in connection with the statement set forth in paragraph 64 on page 26 that:

> There was no established relationship between the prices of unpatented products and similar Toohey type pre-shrunk products.

This fact is established by a great deal of uncontroverted evidence (Resps. Exs. 82-126, 148-151, 205, 206, 211-215, 226-233, 236-249, 252, 253, 257-272).

(47) To paragraph numbered 65 on page 27 of the report wherein the Trial Examiner states that:

> "The selling prices varied from time to time and were not always uniform but the original list prices were usually uniform."

The whole tenor of this statement is to the effect that the different manufacturers quoted uniform prices most of the time prior to the beginning of the license period. This is inconsistent with the evidence in the case which shows that each manufacturer fixed his price for these products independently prior to the beginning of the license period and, except as to patented products, thereafter. There is evidence that different manufacturers copied each other's prices as quickly as they learned of them, especially during the period of price filing under N. R. A. (R. 879, 1365, 2053, 2161-4, 2179, 2255-6, 2371-2, 2903, 2949, 2951-2).

(48) To the third paragraph on page 28 of the report wherein the Trial Examiner states that:

> "The respondents and others in the low pressure pipe covering industry with few exceptions had and have some sort of

> price lists which they send out to the trade and that the prices thus listed and appearing thereon were and are as a rule substantially identical.''

The evidence in the case shows that some of the respondents and others in the low pressure pipe covering industry had and have some sort of a price list, but the evidence does not show, as the quoted statement would indicate, that substantially all of the respondents and others in the low pressure pipe covering industry have such price lists. Furthermore, the phrase ''as a rule substantially identical'' gives an incorrect impression of what is shown by the evidence. The evidence shows that throughout the period here involved and for many years prior thereto the various companies in this industry had met prices published by their competitors and after discovery of the competitor's changed prices had published similar prices. The statement in the report is erroneous in its failure to state the full facts on the point (R. 2161-4, 2255-6, 2371-2, 2493).

(49) To the third paragraph on page 28 of the report wherein the Trial Examiner states that:

> ''There is some divergence in the evidence as to whether or not the general merchandising plan which contains the policies and practices of the industry was substantially the same among all respondents prior to the N. R. A., that is beginning November, 1933.''

The evidence is undisputed that there was no general merchandising plan in the industry. In fact, the testimony referred to in the citation included in the report under this point, R. 2145, is unequivocally to this effect. At page 2145 the witness, High, stated:

> ''There was no general merchandising plan in the industry.''

Furthermore there is much uncontradicted evidence in the case to the effect that while certain general policies and practices which had grown up in the industry earlier were recognized by practically all companies in the industry prior to 1933, the detailed application of these ''general policies and practices'' differed widely between the various members of the industry, including the respondents. Paragraph 4 on page 10 of the report and paragraph 49 on page 22 of the report deal with this point and, with the exceptions taken thereto, constitute a more correct statement of the facts shown by the evidence (R. 2326-8, 2364-5, 2373-5, 2906, 3423; Coms. Exs. 375-387).

(50) To the third paragraph on page 28 of the report wherein the Trial Examiner states that:

> "The quoted prices were usually the same."

Throughout the record in this case a distinction is drawn between "quoted" prices and "published" prices and there is a great mass of uncontradicted evidence, much of it in the form of testimony and documents from independent sources, which shows that the "quoted" prices were almost always different between the various respondents and also between other members of the industry. The statement in the report is therefore directly contrary to the evidence. (see citations under paragraph "(44)" above).

(51) To the third paragraph on page 28 of the report wherein the Trial Examiner states that:

> "A number of witnesses testified that as customers of respondents they were able to get special or supplemental discounts in certain instances which did not appear upon the price lists and which varied the actual prices paid from those appearing on said lists."

The witnesses referred to in this statement testified that they invariably were able to obtain prices which were lower than those shown in the published price lists of those respondents who had price lists, when they were buying unpatented ordinary paper or pipe covering. The only witnesses who testified that they had to purchase at the published price were those witnesses who purchased exclusively from Johns-Manville Corporation which sold only patented pre-shrunk paper and pipe covering during the period involved (R. 2422-3, 2446-7, 2713-4, 2815-6, 2821-3).

(52) To the failure of the Trial Examiner to report in connection with the statement set forth in the fourth paragraph on page 28 that:

> Witness Morgan insisted that this meeting with Tulloch took place in 1933 and that Tulloch's statements were about a patent on pre-shrunk pipe covering. Witness Tulloch contradicted this testimony stating that he had talked with Morgan in 1933 only about adherence to the Asbestos Code, that the Toohey pre-shrunk patent was not issued until September 1934, and that he did not know anything about that patent in 1933 and did not talk to anyone about it until after it was issued in 1934. The evidence does not show any other instance in which Tulloch spoke to anyone about a patent on pre-shrunk pipe covering prior to the issuance of the Toohey patent in September 1934.

These additional facts are essential to an appraisal of Witness Morgan's testimony as they clearly indicate that his testimony is not correct. Witness Morgan insisted on repeated questioning that the meeting took place in 1933 before the Code. In all the extensive record in the case there is no other suggestion that Tulloch was even aware in 1933 that Johns-Manville Corporation had applied for a patent on pre-shrunk covering (R. 1257-9, 3124-7).

(53) To the fourth paragraph on page 28 of the report wherein the Trial Examiner states that:

> "Riordan testified that so far as he knew there was no difference between the price list for pre-shrunk and ordinary aircell."

This statement constitutes an unwarranted expansion of the testimony referred to which appears at page 2695 of the record and reads as follows:

> "Q. On these price lists you received from the different companies, did they have a price for this pre-shrunk material about which you spoke awhile ago, and then a separate price for the other Aircell pipe covering?
>
> "A. No, they did not have it on the price list that was submitted to us."

This is the entire testimony on the point by Riordan and falls far short of the statement excepted to.

(54) To the first paragraph on page 29 of the report wherein the Trial Examiner states that:

> "Witness MacDougal testified that salesmen did not usually discuss prices as it was known in advance what the price lists and discounts would be."

Witness MacDougal testified that his company purchased all its pipe covering from the Johns-Manville Company and in referring to talks with salesmen he was referring only to talks with the Johns-Manville salesmen as clearly appears from his testimony. He testified that the reason he did not discuss price with the Johns-Manville salesmen was that he was notified of the Johns-Manville prices by the Johns-Manville home office and had no need to discuss price with the salesmen. His testimony on this point at page 2611 of the record which is cited in the report reads as follows:

> "Q. And that was the sales talk of the Johns-Manville salesmen that their pipe covering was a superior pipe covering and would naturally sell for a higher price?
>
> "A. Well, we never discussed it much after 1932 when asbestoscel came in. Then we were sold on it and sold others.
>
> "Most of the calls made by salesmen are social calls. The prices are very—well, they are not discussed very often because we were informed by the home office of Johns-Manville of what the discounts are."

The statement excepted to gives the impression that MacDougal talked to salesmen for all companies and that no salesmen ever discussed prices. As can be seen this is inconsistent with the evidence on which it is based.

(55) To the second paragraph on page 29 of the report wherein the Trial Examiner states that:

> "There is also evidence on the part of a number of witnesses who were retail dealers or appliers that the retail prices were suggested to them by various respondents but that they

did not feel bound to comply with the same and did not always do so, but met competition by reducing prices when necessary."

The last part of this statement, i. e. "but that they did not feel bound to comply with the same and did not always do so, but met competition by reducing prices when necessary" implies that the respondents attempted some sort of partial control over resale prices. This is contrary to all the evidence on the point in the case. In fact it is contrary to the testimony on page 2746 of the record which is cited in its support of the Trial Examiner's statement. At page 2746 Witness Messe, an independent jobber, testified as follows:

"Q. Who fixed the price at which you sold your materials?

"A. We fixed our own price. Of course, there was always a suggested resale with some of the manufacturers, but that was just to give you an idea."

Twenty-one independent jobber and distributor witnesses testified in this case and each and every one of them testified that his company fixed its own resale prices and that the manufacturers had nothing whatsoever to do with those resale prices. There is no evidence in the case to the contrary. One or two of these witnesses testified that they sometimes sold at or even above the suggested resale prices but the great majority of the witnesses testified that they consistently sold below the suggested resale prices. There is no evidence in the case of any pressure on any jobber or distributor to sell at suggested resale prices (R. 2296, 2310, 2399, 2414, 2436, 2532-3, 2571-2, 2585, 2603, 2612, 2624, 2706, 2736-7, 2746, 2807, 2960-1, 3006, 3030).

(56) To the failure of the Trial Examiner to report:

The classification of customers by Mr. Tulloch under the license agreement was based upon the function served by the particular type of customer in the distribution of the patented products. It had been the custom of most of the companies in this industry for many years prior to 1935 to classify customers and to allow price differentials between the different classes. During the early part of the license period Mr.

Tulloch required the licensees to list with him their customers whom they claimed came under the Jobber Classification and were entitled to purchase the patented products at the Jobber price fixed in the license agreement. Jobbers' names were removed from this list only when they failed to qualify as Jobbers under accepted merchandising standards. Mr. Tulloch discontinued this practice early in 1938.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 126-7, 272, 329, 330, 337, 1014-5, 1072, 1074, 1500-1, 1503-4, 2060-2, 2146-9, 2184, 2242, 2325-8, 2368, 2905, 3133-4, 3178, 3326-7, 3356; Coms. Exs. 1, 47, 252, 309; Resps. Exs. 155-160, 256).

(57) To the third paragraph on page 29 of the report wherein the Trial Examiner states that:

"As stated, there is undisputed evidence that there was a general classification of respondents' customers in order to ascertain what prices should be given them, that is whether any customers should be classed as wholesaler, jobber, retailer, or purchasing agent, etc., each having a different discount."

This statement is inconsistent with the evidence because it does not limit its application to the quotation of prices on patented preshrunk products under the license agreement. There is ample evidence in the case that customers were classified according to the functions they served in the distribution of the patented products and that there were different prices to classes of customers serving different functions in the distribution of patented products. There is no evidence in the case whatsoever that there was any general classification of customers for the sale of unpatented products (R. 3358).

(58) To the third paragraph on page 29 of the report wherein the Trial Examiner states in speaking of classification of customers:

"* * * and there is evidence that the industry recognizes the same classification as does Johns-Manville."

This statement gives a very incorrect impression of what is shown by the evidence. The evidence shows that the products of this industry are distributed through various rehandlers and that these rehandlers perform different functions in the distribution of the goods. The function which many rehandlers perform is so clear and obvious that it is inevitably recognized as such by all companies in the industry. However there are many rehandlers who are border-line cases and are classified differently by different members of the industry. The evidence shows that under the license agreement Tulloch established specific definitions in order to define the function which must be performed for a rehandler to come within a certain classification for the purchase of patented products. In so far as other members of the industry were selling patented pre-shrunk products to a rehandler they would be obliged to place him in the same classification as Johns-Manville placed him. However, the evidence shows that in so far as a member of the industry was selling unpatented paper and pipe covering he could and did place any rehandler in any classification he wished. In view of these facts the statement excepted to is misleading (R. 2368-9, 3133-4, 3333, 3358).

(59) To the third paragraph on page 29 of the report wherein the Trial Examiner states, in speaking of classification of customers:

> "Tulloch supervised and investigated the qualifications of various customers with reference to the above classification."

This is utterly inconsistent with the evidence in the case unless it is limited to the sale of patented products under the license agreement. There is no evidence that Tulloch had anything to do with the classification of customers, except with regard to the sale of patented products. The evidence also clearly shows that Mr. Tulloch ceased performing this function with respect to patented products within a relatively short time after licenses were issued under the Toohey patent (R. 3133-4, 3333, 3358; Resps. Ex. 256).

(60) To the fourth paragraph on page 29 of the report wherein the Trial Examiner states:

> "Witness High testified that he cannot recall any difference in classifications between respondent Ruberoid Co. when he

was connected with it and that of other respondent companies."

Witness High testified at the cited portion of the record (pp. 2241-2) only to the effect that he was unable to say at the time he testified whether there had been any difference in the classification between respondent Ruberoid Co. and respondent Norristown Company. Mr. High had been an employee of each of these companies at different times. He did not purport to testify as to any companies except Ruberoid Co. and Norristown Company.

(61) To the first full paragraph on page 30 of the report wherein the Trial Examiner states:

> "It also appears there was a special and lower price made for the Metropolitan or New York area in order to meet competition at that point."

This statement is entirely inconsistent with all the evidence in the case unless it is restricted to the special and lower price made by Mr. Tulloch under the license agreement for patented products to meet the price competition of unpatented products. There is no evidence that prices were made for any area by Mr. Tulloch for any paper or pipe covering except the patented pre-shrunk paper and pipe covering nor is there any evidence that any price was made by any group of respondents for any product in any area (R. 3365).

(62) To the first full paragraph on page 30 of the report wherein the Trial Examiner states:

> "Clinchy testified as to the territory included in various zones and as to the prices therein."

The testimony of Witness Clinchy related only to Johns-Manville prices and the statement is incorrect unless restricted to Johns-Manville prices (R. 2110-2117).

(63) To the fourth full paragraph on page 30 of the report wherein the Trial Examiner states:

> "Respondents Norristown and Johns-Manville seemed to have used the zoning system only on their insulation products."

The citation of the record which appears under this statement, i. e., page 2221, contains only testimony of Witness High relating to the merchandising methods of the Norristown Company between 1927 and 1934. There is no testimony in the case that Johns-Manville used the zoning system only on their insulation products, but there is uncontradicted evidence that Johns-Manville did not use the zoning system on some of its insulation products.

(64) To the fifth full paragraph on page 30 of the report wherein the Trial Examiner states with regard to Mr. Tulloch:

> "He also testified that he adopted in the main the zoning system which had been in effect under the N. R. A. and previous thereto, but that he made certain changes in boundaries of the zones, for example, in Wisconsin."

The words "and previous thereto" are contrary to the evidence in the case. The uncontradicted evidence in the case clearly shows that the zones used by the different companies in merchandising their products prior to N. R. A. were very different from one another (R. 3423; Coms. Exs. 375-387).

(65) To the sixth full paragraph on page 30 of the report wherein the Trial Examiner states that Witness Tulloch testified:

> "That probably respondents use the same zones for the sale of their patented and unpatented articles, as it would be most confusing to use different zones for the two."

This statement is not supported by the evidence. It is based solely on a conjecture made by Mr. Tulloch in the course of his testimony. The testimony of the Witness Tulloch on this point at page 3358 of the record is as follows:

> "It would seem it would confuse your salesmen if you gave two zones."

This guess by the Witness Tulloch is far different from the Trial Examiner's statement that "probably" respondents did use the same zones for the sale of both patented and unpatented articles. There is no evidence in the case that the same zones were used for patented and unpatented products and there is an abundance of uncontradicted evidence that unpatented products were sold on the basis of bargaining with individual customers, rather than on a zone basis.

(66) To the first paragraph on page 31 of the report wherein the Trial Examiner states:

> "Tulloch testified he did not go into any extended study of the zoning system but used that already existing and the publications of the Department of Commerce on trading areas, etc."

This statement constitutes an incorrect summary of the testimony on which the citation indicates it is based. Witness Tulloch stated at the page of the record cited in the report (p. 3394) as follows:

> "Q. How did you go about in determining the freight in different zone areas, that is, determining the boundaries from a freight standpoint?
>
> "A. I did not go into any extended study of freight with relation to the different states. You must base it more on the natural places in which the people within a particular state desire to trade.
>
> "Q. Well, how would you know that the people of Louisiana would desire to trade in a territory different from the people in Mississippi?
>
> "A. Well, I won't answer specifically with reference to Louisiana, because I don't recall the circumstances surrounding the placing of Louisiana in the zone in which it fell, but I will say this, that the Department of Commerce has developed studies and a great many newspapers and other publications have developed studies on trading area zones, and those are available, and I have studied many of them. I have seen a great many. I presume you have too, and they do indicate the natural tendency of the buyers within a state or group of states, with respect to their business."

This testimony and all the other testimony on the point in the case indicates that Mr. Tulloch did go into an extended study of the zoning system and that he did not use any "already existing" because the evidence shows that there was no common zoning of the country at the time he obtained his license under the Toohey patent. All the testimony in the case shows that Mr. Tulloch used the zone descriptions which had been in existence under the Asbestos Code as a base in preparing his zone descriptions and that he altered these in the light of his own research concerning trading areas, etc. Mr. Tulloch testified throughout that he did not go into any extended study of freight (R. 3313, 3390-4, 3397-9, 3427-8).

(67) To the failure of the Trial Examiner to report:

> There is no evidence that a basing point system was ever used in the sale of patented or unpatented products by the respondents and Mr. Tulloch testified that a basing point system had never been used in the pipe covering industry.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 142, 342; Coms. Exs. 1, 2).

(68) To the fourth paragraph on page 31 of the report wherein the Trial Examiner states:

> "As stated, freight absorption and freight equalization are the other methods used in arriving at delivered prices or was in effect delivered prices."

The citation refers to methods used by *other* industries which sold their products on a nation-wide basis. Mr. Tulloch, at the cited page in the record (p. 3417) was explaining the general system used by different industries in marketing their products and was not speaking about the marketing of products by the asbestos industry specifically nor about the marketing of patented pre-shrunk paper and pipe covering under the license agreements. Freight equalization is not a delivered price system (R. 342-7, 2226, 3417-8).

(69) To the fifth paragraph on page 31 of the report wherein the Trial Examiner states:

> "There is evidence that after the various respondents had from time to time withdrawn as Tulloch's licensees they were still carrying out substantially the same policies and practices as those contained in the merchandising plans."

The uncontroverted evidence in the case is very clear to the effect that Tulloch's licensees carried out their own individual merchandising policies after they ceased to be licensees. The evidence shows, including the testimony cited in the report at page 2236 of the record, that after the licensees terminated their license agreements they ceased receiving communications from Tulloch and they differed among themselves as to prices, extra charges and all the other details of operation. Paragraph 67 on page 27 of the report should be noted in connection with the statement quoted above as it is a more nearly accurate statement of the facts shown by the evidence on this point than is the statement here excepted to (R. 1216, 1322, 2236-7, 3172).

(70) To the sixth paragraph on page 31 of the report wherein the Trial Examiner states:

> "Tulloch testified that at meetings with the licensees before licenses were granted and afterwards, there were discussions as to the practices and policies under the merchandising plan and as to the other problems of the industry."

This statement is inconsistent with all the evidence because the general language it uses implies far more than any evidence in the case shows to have been the fact.

The cited page of the record, page 357, contains nothing about the matter referred to in the statement. The evidence in the case shows that Mr. Tulloch held two or three meetings with experienced merchandising men who were employed by three or four companies which later became licensees before licenses were granted. Mr. Tulloch gave uncontradicted testimony to the effect that these meetings were called for the purpose of acquainting him with the various merchandising factors that he would have to reconcile in order to be able to prepare a merchandising plan under which all potential licensees would be able to operate without completely overthrowing their established merchandising procedure. The evidence also showed that Mr. Tulloch held certain meetings with local groups of his licensees after they became licensees for the purpose of discussing mechanical flaws in the merchandising plan and other problems which were impeding the sale of the patented products. The evidence to which the statement here excepted to apparently refers is dealt with more accurately in paragraph 53 on page 23 of the report (R. 354-5, 1215, 1320-1, 1370, 1495-6, 2049, 2104, 2168-9, 3068-9, 3148-9).

(71) To the sixth paragraph on page 31 of the report wherein the Trial Examiner states:

> "Some parties were taken off the jobber list to prevent their obtaining products at jobber prices."

This statement distorts the evidence. The evidence in the case shows without contradiction that customers were taken off the jobber list only when they were not performing the function of jobbers as defined in the license agreement (R. 337, 1074-5, 1500-1, 2242, 3133-4; Resps. Ex. 155).

(72) To the seventh paragraph on page 31 of the report wherein the Trial Examiner states:

> "Tulloch appointed High, Bergstresser and others connected with the respondents on a committee to work out provisions of a merchandising plan which when presented were accepted in part by him with the addition of some of his own suggestions."

The only testimony in the case concerning the subject matter of this quoted paragraph is the testimony of Mr. Tulloch. He requested Mr. High, Mr. Bergstresser and one other to suggest a plan for merchandising patented asbestos paper on a delivered price basis. He never put their recommendations into effect and never established delivered prices for patented asbestos paper (R. 3158-9, 3347-8).

(73) To the first full paragraph on page 32 of the report wherein the Trial Examiner states:

> "There is evidence that the Tulloch licensing system of the Toohey patented products was not as successful as those interested had hoped it would be."

There is no evidence in the case whatsoever regarding the success or failure of the "Tulloch licensing system." This statement in the report is apparently founded on evidence in the case to the effect that the trade demand for the patented pre-shrunk Toohey paper and pipe covering proved not to be as great as had been expected when the various respondents signed licensed agreements. Representatives of many of the respondents tstified that they terminated their license agreements because they found that their customers were more interested in the lower priced unpatented paper and pipe covering which they were selling than in the higher quality and more expensive patented pre-shrunk paper and pipe covering. It is noteworthy that there is no citation to the record under the sentence here excepted to and the citation to the record at the end of the paragraph in which the sentence appears has no relation whatsoever to the sentence excepted to (R. 641-2, 1229, 1330-1, 1367, 2240, 2360, 2378).

(74) To the failure of the Trial Examiner to report:

> There is evidence that licensees terminated their license agreements chiefly because they found that the great majority of sales of asbestos and wool felt paper and pipe covering were being made on a low price basis and that their sales of the higher priced pre-shrunk type paper and pipe covering had become too small to justify the extra expense of carrying both a patented and an unpatented line of asbestos and wool felt papers and pipe coverings any longer.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 641-2, 772, 1216, 1229, 1330-1, 1367, 1536, 2240, 2282, 2359, 2360, 2378, 3360-1).

(75) To the second full paragraph on page 32 of the report wherein the Trial Examiner states:

> "There is also testimony that * * * it was not considered important in making a sale whether their pipe covering was pre-shrunk or not."

Testimony to this effect was given by only one of the twenty-one independent jobber and distributor witnesses who testified. The statement incorrectly reflects the facts shown by the evidence. Many witnesses testified without contradiction to the effect that customers, including the United States Government, demanded that the pipe covering they purchased be pre-shrunk (R. 2567-8, 2580-1, 2596-8, 2850-1, 2950, 2955, 2962).

(76) To the second full paragraph on page 32 of the report wherein the Trial Examiner states:

> "There is evidence that certain respondents were not aware of the fact that any manufacturer except Johns-Manville could sell pre-shrunk or that there was a patent on same."

There is no evidence to the effect that a single respondent was unaware of the fact that other manufacturers could sell pre-shrunk or was unaware of the fact that it was covered by a valid patent. Use of the word "respondent" in this sentence is obviously erroneous. Even if this word be read "customers" the statement is contrary to the evidence and contrary to the testimony cited in the report in support of the statement (R. 2686, 2962-6, 3011, 3022).

(77) To the third full paragraph on page 32 of the report wherein the Trial Examiner states:

> "Steffens of Philip Carey testified that he avoided in every way he could the sale of Toohey patented products, the reason given being that the patent finally belonged to Carey's principal competitor, Johns-Manville, and if Carey built up a demand for same and lost their right to make it it would inure to their injury."

This statement is contrary to the testimony of Witness Steffens on the point. A careful reading of Steffens' testimony at pages 2855, 2856 and 2877 demonstrates that he did not testify that the Philip Carey Company avoided the sale of the patented pre-shrunk products but only that the Philip Carey Company avoided designating the patented pre-shrunk products which it sold as "pre-shrunk" products where possible because it feared its customers would come to demand "pre-shrunk" products by name and that it might some day lose its license and not be able to supply its customers with "pre-shrunk" products. The Witness Steffens testified that the Philip Carey

Company sold the patented pre-shrunk products whenever it could as it considered them superior products.

(78) To the fifth full paragraph on page 32 of the report wherein the Trial Examiner states:

> "Tulloch further testified that for many years he had made a practice of meeting executives in the pipe covering industry and discussing conditions of business with them, and that he had called numerous such meetings prior to September 11, 1935, and had discussed the conditions which had arisen after the Schechter decision as everyone felt something would have to be done about the confused and chaotic condition of the industry."

This statement is not supported by the evidence. At page 3065 of the record, cited in the report, Tulloch testified only about a few meetings he called of some merchandising men in the summer [illegible] of 1935 to discuss merchandising conditions that he would [illegible] take into account in preparing a merchandising plan under w[illegible] different prospective licensees could operate. There is no [illegible] that Tulloch called numerous such meetings or that he had [illegible] practice of calling meetings of executives in the industry f[illegible] years. He had talked over business conditions with executives [illegible] he happened to meet them individually but the implication that he [illegible] called meetings of executives for years is not supported by the evidence. The last part of the statement, i.e., "and had discussed conditions which had arisen after the Schechter decision as everyone felt something would have to be done about the confused and chaotic condition of the industry" is not supported by any evidence whatsoever (R. 3065-3071).

(79) To the sixth full paragraph on page 32 of the report wherein the Trial Examiner states:

> "Tulloch said he called these meetings because he had been familiar with these conditions in the industry since December 1922."

Mr. Tulloch did not so testify at page 3071 of the record or elsewhere.

(80) To the first full paragraph on page 33 of the report wherein the Trial Examiner states:

> "There is evidence to the effect that Tulloch fixed the prices upon certain articles used in connection with the pipe covering sold under the Toohey patent, such as brass bands, staples, canvas jackets, wool felt covering with waterproof jackets, tape and possibly others."

The evidence shows that wool felt covering with waterproof jackets and tape (asbestos) were themselves manufactured and sold under the Toohey patent. The evidence shows that Tulloch did not fix the price of any of the other articles mentioned in the statement excepted to. All of these other articles are shown by the evidence to be integral parts of completed pieces of pipe covering and a certain quantity and type of them, fixed by business usage over a period of many years, is delivered with all pipe covering sold at no extra cost. If additional quantities or qualities of these are needed to apply the patented pipe covering sold, the price of that pipe covering was increased. This is well explained in paragraphs 62 and 63 of the report. Tulloch never fixed the prices of these other articles as such and if a licensee sold them separately it sold them at any price it saw fit to (R. 327, 427-8, 1437, 1457, 2030, 3130-1, 3167, 3179, 3184; Resps. Ex. 203).

(81) To the failure of the Trial Examiner to report:

> Metal bands at the rate of two and one-half bands per three foot section of pipe covering and canvas outer covering are integral parts of a completed piece of asbestos or wool felt pipe covering and have been considered as such by the trade and by consumers throughout the entire history of the low pressure pipe covering industry.

This statement is supported by uncontroverted evidence and should be included because of the significance of the facts it states (R. 115, 323-4, 614-5, 2030, 3130-1; Resps. Ex. 203).

(82) To the second full paragraph on page 33 of the report wherein the Trial Examiner states, in discussing rings or bands which are used to attach pipe covering to pipes and hold it in place:

> "The price fixed on these unlicensed materials affected the total price of licensed materials."

The evidence shows that Tulloch did not fix any price for rings or bands as such. The citation to the record at page 407 has no relation to the subject matter of the statement here excepted to. (See citations under preceding paragraph.)

(83) To the entire third and fourth full paragraphs on page 33 of the report.

These statements are partial and incorrect and give an impression far different from that conveyed by the testimony in the case. See pages 3181-3183 of the record.

(84) To the second paragraph on page numbered 2 of the report wherein the Trial Examiner states that:

> "The principal difference between the original and amended complaint was in regard to respondent Philip Carey Manufacturing Company, * * * ; therefore, the amended complaint substituted the Philip Carey Manufacturing Company as respondent in this proceeding."

While this substitution of parties was one of the differences, the principal difference was that the original complaint alleged a conspiracy with respect to both licensed and unlicensed materials whereas the amended complaint limited the alleged conspiracy licensed materials and "non-licensed" materials as defined in the amended complaint, namely "solid brass, zinc, and lacquered bands, flexible range boiler jackets, and canvas covering." These materials, with the exception of flexible range boiler jackets, are necessary parts of completed licensed materials and flexible range boiler jackets are licensed materials when manufactured under the Toohey patent.

"Unlicensed" materials were not defined in either complaint. The word "unlicensed" was used in twelve different paragraphs of the complaint, but was entirely eliminated in the amended complaint. Throughout the amended complaint the word "non-licensed" was substituted therefor.

The report of the Trial Examiner states (paragraph II, page 4) that the hearings were held with reference to the charges contained in paragraph NINE of the amended complaint, subsections (1) to (15). The conspiracy alleged in paragraph NINE relates exclusively to "licensed" and "non-licensed" materials. Paragraph EIGHT of the amended complaint specifically alleges a price-fixing conspiracy with reference to "both licensed and non-licensed materials", and paragraph NINE refers either specifically to licensed and non-licensed materials or to "said materials", referring to the licensed and non-licensed materials as alleged in paragraph EIGHT.

(85) To paragraph numbered 6 on page 3 of the report in which the Trial Examiner states that paragraph 9 of the complaint alleges a violation of the Federal Trade Commission Act on the part of the respondents by:

> "Agreeing upon the inclusion of unlicensed material in the merchandising plan, and controlling license and methods of business as to the same."

The amended complaint omits the words "unlicensed materials" and includes only such unlicensed materials as fall within the definition of "non-licensed materials" as defined in paragraph ONE of the amended complaint. The statement excepted to is, therefore, an unwarranted expansion of the complaint.

(86) To the last full paragraph on page 3 of the report wherein the Trial Examiner states:

> "The complaint covers two broad fields; First, those violations connected with the Toohey patent and the Tulloch licenses thereunder; second, other violations not connected therewith."

No violations are alleged in the complaint except those which are connected with the Toohey patent or the Tulloch licenses thereunder.

Dated: March 24, 1943.

CADWALADER, WICKERSHAM & TAFT,
Attorneys for Respondents Acme Asbestos Covering and Flooring Company; Asbestos, Asphalt and Insulation Manufacturing Company; Atlantic Asbestos Corporation; A. H. Bennett Company; The Philip Carey Manufacturing Company; The Clark Asbestos Company; Empire Asbestos Products, Inc.; Johns-Manville Corporation; L. A. Rubber & Asbestos Works Incorporated; G. A. MacArthur Company; W. S. Nott Company; Pacific Asbestos & Supply Company; The Ruberoid Co., and Donald Tulloch, Jr.