

FILE NAME: National Safety Council (NSC)

DATE: 1944 Jun

DOC#: NSC266

DOCUMENT DESCRIPTION: Legal - U.S. Circuit Court of Appeals Petition to Review and Set Aside Order of Federal Trade Commission

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUN 27 1944

RECORDS DIVISION

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NORRISTOWN MAGNESIA AND ASBESTOS COMPANY, :
a corporation, and :
SALL MOUNTAIN COMPANY, a corporation, :
Petitioners, :
-against- :
FEDERAL TRADE COMMISSION, :
Respondent. :

9827

FILED
JUN 23 1944
JOHN W. MENZIES
CLERK

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PETITION TO REVIEW AND SET ASIDE ORDER
OF THE FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Circuit Court of
Appeals for the Sixth Circuit:

NOW COME your petitioners, NORRISTOWN MAGNESIA AND
ASBESTOS COMPANY, a corporation, and SALL MOUNTAIN COMPANY, a
corporation, by their attorney, and jointly and severally present
this their petition to review and set aside a certain order of
the Federal Trade Commission (hereinafter referred to as the
"Commission"), made and entered on the 17th day of April, 1944,
in certain proceedings entitled "In the Matter of Acme Asbestos
Covering and Flooring Company, et al., Docket No. 4613", and in
support thereof respectfully show:

I

NATURE OF PROCEEDINGS AS TO WHICH
REVIEW IS SOUGHT

1. On the 10th day of October, 1941, the Commission
issued a complaint naming as respondents thereto nineteen
corporations, including the petitioners, and one individual,
Donald Tulloch, Jr., and on the 17th day of December, 1941 issued

an amended complaint. The amended complaint alleged that the respondents entered into an unlawful combination to restrain competition in the sale and distribution of licensed and non-licensed materials (defined in the amended complaint) and also of the low-pressure asbestos covering embodying some or all of such materials, in interstate commerce, that pursuant thereto they had, among other things, fixed and maintained prices, had fixed and maintained fixed differentials in prices between different classes of customers, had adopted and maintained a system of selling at delivered prices only predicated on basing points, had adopted and maintained a plan dividing the United States into certain price zones, had adopted and used a merchandising plan, and had entered into and carried out license agreements under the Toohey Patent. It was alleged that these acts restrained commerce in said product and constituted unfair methods of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

2. Answers were filed by your petitioners and by other respondents denying that they had maintained an unlawful combination to restrain competition. Your petitioners denied that at the time of the issuance of the complaint they sold licensed materials. They admitted being engaged in interstate commerce but denied all other material allegations of the complaint. They stated that their selling methods had been in effect for many years and were not adopted through understandings or agreements with other respondent corporations.

3. Thereafter the Commission designated a Trial Examiner to take testimony in the proceeding. Testimony on behalf of the Commission was taken in Philadelphia, Brooklyn, Cincinnati, Cleveland, Chicago, Milwaukee, Minneapolis and Washington and on behalf of respondents in Cincinnati, Brooklyn, Boston, Chicago, and Philadelphia.

4. The Trial Examiner filed his report on March 15, 1943 and a copy was served on each of your petitioners. Pursuant

to the rules of the Commission, your petitioners herein and other respondents filed exceptions to the report of the Trial Examiner. These exceptions dealt with matters of detail wherein the report was inaccurate. Trial counsel for the Commission ignored the report of the Trial Examiner and filed no exceptions thereto.

5. A brief was filed on behalf of the Commission repeating the charges contained in the complaint, and your petitioners and other respondents filed briefs asking that the complaint be dismissed.

6. The case was argued orally before the Commission and was submitted on June 12, 1943.

7. On April 27, 1944, the Commission entered its findings of fact, conclusion and order. The Commission concluded that all respondents, including your petitioners, were violating Section 5 of the Federal Trade Commission Act and ordered them to cease and desist and to file a report setting forth in detail the manner and form in which they have complied with the order. A copy of the findings, conclusion and order is attached hereto and made a part hereof as Exhibit "A".

8. Your petitioners contend the Commission's so-called findings as to the facts contain many conclusions which in reality are not findings of fact nor inferences justified by the evidence; that the omissions from its findings, of facts shown by the evidence, render its findings misleading; that its conclusion is not supported by its findings or the evidence and is erroneous; and that the order to cease and desist is erroneous and illegal in that it is not based on facts established by evidence. These contentions are amplified and more specifically set forth hereinafter.

II

FACTS AND STATUTES UPON WHICH VENUE IS BASED

A. Facts as to Venue

Your petitioner, Ball Mountain Company, is a Delaware

corporation with its principal place of business and its manufacturing factory (now in course of reconstruction after a fire) in Rockdale, Ohio. It sells the products of its manufacture and carries on business in Ohio and elsewhere. Your petitioner, Norristown Magnesia and Asbestos Company and many of the other respondents in the Commission proceeding likewise sell the products of their manufacture and carry on business in Ohio and elsewhere. Other respondents, The Philip Carey Manufacturing Company and The Clark Asbestos Company, are corporations organized and existing under the laws of the State of Ohio and have their principal office and place of business in said State.

B. The Statutes

The statutes under which this Court has jurisdiction and venue are Sec. 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), and Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act).

Sec. 225, Title 28, U. S. Code, aforesaid, provides in paragraph (e):

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

Section 45 of Title 15, provides in paragraph (c) in part:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have jurisdiction of the proceeding and of the question determined therein, * * * "

III

POINTS ON WHICH PETITIONERS INTEND TO RELY

1. The Commission's findings indicate that the combination and conspiracy deemed to exist consisted of: (a) negotiations which culminated in a license agreement and numerous sublicense agreements under the Toohey patent and (b) the activities of respondents under, and the administration of, the said license and sublicense agreements. There is no evidence to show, nor any finding that, there is or was any combination or conspiracy among your petitioners or any other respondents with respect to insulating materials not within the scope of the Toohey patent.

2. The Commission's findings and the evidence indicate that the prices for unpatented insulating materials were not fixed or uniform and, therefore, the inferred conclusion as to a "price-fixing combination and conspiracy" with respect to such materials, and the order covering such materials, are erroneous and unwarranted by law. There is no finding, nor evidence from which it could be found that there was any purpose, intent, combination or conspiracy to fix or maintain prices of any insulating materials not covered by the Toohey patent, or that any uniformity of selling prices of such products in fact existed.

3. The order, in its present form, covering unpatented as well as patented insulating materials, is not supported either by the findings or the evidence.

4. Your petitioners having withdrawn from the sublicense agreements under the Toohey patent to which they had been parties, prior to the service of the Complaint and prior to the investigation preceding the service of the Complaint, the Commission erred in entering its order against them and should have dismissed the complaint.

5. There is no finding nor any evidence in the record that the prices, terms, conditions of sale, sales methods and practices of your petitioners subsequent to their respective withdrawals from their sublicense agreements, were fixed, entered into, continued, cooperated in or carried out pursuant to or under any planned common course of action, understanding, agreement, combination or conspiracy.

6. The Commission erred in concluding that your petitioners violated the provisions of Section 5 of the Federal Trade Commission Act.

7. The Commission erred in ordering your petitioners, and each of them, to cease and desist from doing or performing any of the seven practices numbered 1 through 7 inclusive in said order with respect to insulating materials of its manufacture, the same not being within the scope of the Toohey patent, nor made nor sold under any sub-license agreement.

8. The Commission erred in ordering your petitioners, and each of them, to cease and desist from continuing to do or perform any of the seven practices numbered 1 through 7 inclusive in said order, independently and without any agreement or understanding with any other respondent or other person.

9. The Commission erred in not including in its order a provision that nothing therein contained shall be construed to prohibit the owner of the Norristown flexible range boiler jacket patent from granting lawful licenses to others to use said patent, or to prevent any respondent or others from taking lawful licenses to use said patent.

10. The Commission erred in not including in its order a provision that nothing contained therein should prevent any of the corporate respondents from establishing and maintaining prices and terms of sale for its products independently and from determining independently whether or not and to what extent it will use price zones or freight equalization in the sale of its

products, and whether and to what extent it will classify costs, and to establish or maintain a formula for calculating unit price or for calculating total prices from unit prices, or use any existing formula for such purposes.

IV

PRAYER FOR RELIEF

WHEREFORE, believing that the aforesaid findings, conclusion and order of the Commission are erroneous, unauthorized and without foundation in law or in fact, your petitioners pray:

1. That a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file with this Court a transcript of the entire record in the proceeding aforesaid.

2. That the Federal Trade Commission be required to include in said record the complaint, the amended complaint, the answers, the order appointing the Trial Examiner, all the evidence taken, the report of the Trial Examiner, the exceptions thereto, the findings as to the facts and conclusion and order to cease and desist entered by the Commission.

3. That this Court review the proceeding and set aside and vacate said findings, conclusion and order to cease and desist, and that this Court order said Commission to dismiss the complaint issued by it against your petitioners.

4. And that this Court give these petitioners such other and further relief as may be meet.

Guy George Gabrielson
Guy George Gabrielson
70 Pine Street
New York 5, New York
Attorney for
Ball Mountain Company
and
Norristown Magnesite and
Asbestos Company

Taft, Stettinius & Hollister
by *John W. Clippinger*
of counsel.

United States Circuit Court of Appeals
FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States
Circuit Court of Appeals for the Sixth Circuit, do hereby certify
that the foregoing is a true and correct copy of Petition to
Review and Set Aside Order of the Federal
Trade Commission
in the case of Norristown Magnesia and Asbestos Co.,
and Sall Mountain Company
vs.

Federal Trade Commission

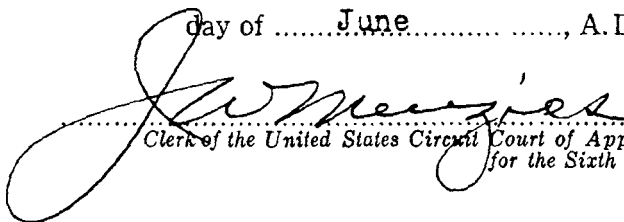
No. 9827, as the same remains upon the files and records
of said United States Circuit Court of Appeals for the Sixth Circuit,
and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed

my name and affixed the seal of said Court

at the City of Cincinnati, Ohio, this 23rd

day of June, A.D. 1944.


Clerk of the United States Circuit Court of Appeals
for the Sixth Circuit.