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

RECEIVED
JUN 27 1944
RECORDS DIVISION

In the Matter

of

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,
JOHNS-MANVILLE CORPORATION,
L. A. RUBBER & ASBESTOS WORKS, INC.,
G. A. MacARTHUR COMPANY,
W. S. NOTT COMPANY,
PACIFIC ASBESTOS & SUPPLY COMPANY,
THE RUBEROID COMPANY, and
DONALD TULLOCH, JR.,

Petitioners,

-against-

FEDERAL TRADE COMMISSION,

Respondent.

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

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

The petitioners above named, by Cadwalader,
Wickersham & Taft, their attorneys, file this their joint
and several petition to review and set aside the order
of the Federal Trade Commission herein more fully des-
cribed, and respectfully show to the Court:

1. Petitioner Acme Asbestos Covering and
Flooring Company is a corporation organized and exist-
ing under the laws of the State of Illinois, with its
principal office and place of business located at

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JOHN W. MENZIES
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Fulton and Elizabeth Streets, Chicago, Illinois.

Petitioner Asbestos, Asphalt and Insulation Manufacturing Company is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 2100 West Fullerton Avenue, Chicago, Illinois.

Petitioner Atlantic Asbestos Corporation is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 2128 Westchester Avenue, New York City.

Petitioner A. H. Bennett Company is a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business located at 113 First Street North, Minneapolis, Minnesota.

Petitioner The Philip Carey Manufacturing Company is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located in Lockland, Ohio.

Petitioner The Clark Asbestos Company is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 1893 East 55th Street, Cleveland, Ohio.

Petitioner Johns-Manville Corporation is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 22 East 40th Street, New York City.

Petitioner L. A. Rubber & Asbestos Works, Inc. is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 124 East Third Street, Los Angeles, California.

Petitioner G. A. MacArthur Company is a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business located at 2387 Hampden Avenue, St. Paul, Minnesota.

Petitioner W. S. Nott Company is a corporation organized and existing under the laws of the State of Minnesota, with its principal office and place of business located at Second Avenue North and Third Street, Minneapolis, Minnesota.

Petitioner Pacific Asbestos & Supply Company is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at S. W. Front and Clay Streets, Portland, Oregon.

Petitioner The Ruberoid Company is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York City.

Petitioner Donald Tulloch, Jr. is an individual having a business office located in the Inquirer Building, Philadelphia, Pennsylvania.

II. On October 10, 1941, the Federal Trade Commission instituted a proceeding against your petitioners under Section 5 of the Federal Trade Commission Act, by the issuance of a complaint charging your

petitioners (and certain others named as respondents therein) with having engaged in unfair methods of competition in interstate commerce in that they had entered into an unlawful agreement, understanding, combination and conspiracy for the purpose, intent, and with the effect of substantially restraining competition in price and otherwise in the sale and distribution of certain patented asbestos and other insulating materials, and accessories usually sold therewith, described in said complaint. An amended complaint containing the same charge was issued in said proceeding on December 27, 1941.

III.. Your petitioners duly filed their answers to said amended complaint, admitting that they were engaged in the sale and distribution of insulating materials in interstate commerce, but denying many of the material allegations of said complaint, denying that they had been engaged in any unfair method of competition, and setting up certain affirmative matter by way of defense.

IV. Thereafter hearings were held before Randolph Preston, Esq., a trial examiner duly appointed by the Commission, and testimony and other evidence was received in support of said complaint and in opposition thereto. Thereafter, the said trial examiner made and filed his "Report upon the Evidence" in said proceeding, exceptions to said report were filed by your petitioners, briefs were filed with the Commission by the attorney for the Commission and by the attorneys representing your petitioners, and the proceeding came on for oral argument before the Commission upon the record, trial examiner's report, exceptions and

briefs.

V. Thereafter, on the 27th day of April, 1944, the Commission issued in said proceeding its "Findings as to the Facts and Conclusion" together with its "Order to Cease and Desist", which said order directs your petitioners, in connection with the sale and distribution in interstate commerce of insulating materials generally (without limitation to patented materials and accessories), to "forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy" to establish or maintain uniform prices, discounts, terms or conditions of sale, or certain specified selling methods, and also to cease and desist from maintaining or continuing by like concerted action "the licensing system and merchandising plan heretofore established under and pursuant to the Toohey patent". The text of said order is set forth in full as an appendix to this petition.

VI. This petition is filed pursuant to Section 5(c) of the Federal Trade Commission Act. The patent licensing system and merchandising plan referred to in the complaint and findings and the continuance of which by combination or conspiracy is prohibited by the order, was used within the Sixth Circuit. The Philip Carey Manufacturing Company, Johns-Manville Corporation, The Ruberoid Company, and others of your petitioners carry on business within the Sixth Circuit.

VII. The relief hereby prayed is that the

said order of the Commission be set aside, or, if the Court shall be of the opinion that said order should not be wholly set aside, then that the same be modified by striking out the first seven numbered paragraphs thereof and by restricting the application of said order to patented insulating materials.

VIII. In support of this petition your petitioners intend to rely on the following points:

(a) The order of the Commission is improvident in that the methods of competition prohibited by the order are not limited to, but go beyond, the methods of competition specified in the complaint.

(b) The order of the Commission is not responsive to, and is not supported by, the Commission's "Findings as to the Facts and Conclusion".

(c) The Commission's "Findings as to the Facts" are, in material and controlling respects, without substantial support in the evidence received in said proceeding, and are contrary to such evidence.

(d) The evidence in said proceeding, including the facts of record found by the Commission and other material undisputed facts as to which no findings have been made, does not sustain or support the Commission's conclusion that your petitioners have engaged in unfair methods of competition in interstate commerce within the intent and meaning of

Section 5 of the Federal Trade Commission Act.

(e) The order prohibits your petitioners from entering into, continuing, or carrying out any combination or conspiracy to fix the prices, terms, conditions and methods of sale and distribution of unpatented, as well as patented, insulating materials, although the Commission did not allege, and has not found or concluded, that your petitioners ever entered into a combination or conspiracy with respect to unpatented materials, and there is no substantial evidence to support such a finding or conclusion.

(f) If your petitioners ever did enter into a combination or conspiracy having the capacity, tendency and effect of restraining competition in the sale and distribution of insulating materials, as found by the Commission, any such combination or conspiracy was voluntarily discontinued and abandoned by your petitioners prior to the institution of said proceeding and there was not at the time of the institution of said proceeding, nor is there now, any threat or likelihood of the same being resumed.

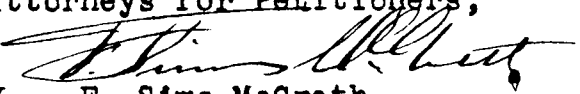
(g) If your petitioners ever did enter into any combination or conspiracy having the capacity, tendency and effect of restraining competition in the sale and

distribution of unpatented insulating materials in the respects found by the Commission, any such capacity, tendency and effect was at most temporary, incidental and of brief duration, did not at any time extend to the fixing of uniform prices or the elimination of price competition in such materials, and had wholly and permanently ceased to exist long before the institution of said proceeding by the Commission.

(h) Said order of the Commission is erroneous, and is contrary to the evidence, to the findings, and to the law.

WHEREFORE, your petitioners jointly and severally pray that the order of the Commission be set aside, or if not set aside that said order be modified as set forth in paragraph "VII" of this petition or in such other manner and to such other extent as to the Court may seem just and proper.

CADWALADER, WICKERSHAM & TAFT
Attorneys for Petitioners,


BY F. Sims McGrath
Office and Post Office Address:
14 Wall Street
Borough of Manhattan
City of New York 5

Dated: New York, N. Y.
June 21, 1944.

APPENDIX

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 27th day of April, A. D. 1944.

COMMISSIONERS:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
William A. Ayres.

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In the Matter of :
:
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., :
GILLEN-COLE COMPANY, : Docket No.
JOHNS-MANVILLE CORPORATION, : 4613
KEASBEY & MATTISON COMPANY, :
L. A. RUBBER & ASBESTOS WORKS, INC., : ORDER TO
G. A. MacARTHUR COMPANY, : CEASE AND
NORRISTOWN MAGNESIA AND ASBESTOS COMPANY, : DESIST
W. S. NOTT COMPANY, :
PACIFIC ASBESTOS & SUPPLY COMPANY, :
PLANT RUBBER & ASBESTOS WORKS, :
THE RUBEROID COMPANY, :
SALL MOUNTAIN COMPANY, :
STANDARD ASBESTOS MANUFACTURING COMPANY, :
corporations; and :
DONALD TULLOCH, JR., :
an individual :
:
-----X

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answers filed thereto by respondents, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and

exceptions thereto, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of Section 5 of the Federal Trade Commission Act:

IT IS ORDERED that the corporate 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.; Gillen-Cole Company; Johns-Manville Corporation; Keasbey & Mattison Company; L. A. Rubber & Asbestos Works, Inc.; G. A. MacArthur Company; Norristown Magnesia and Asbestos Company; W. S. Nott Company; Pacific Asbestos & Supply Company; Plant Rubber & Asbestos Works; The Ruberoid Company; Sall Mountain Company; and Standard Asbestos Manufacturing Company, their respective officers, agents and employees, and respondent Donald Tulloch, Jr., his agents, representatives, and employees, in or in connection with the offering for sale, sale, and distribution of insulating materials (asbestos paper or rollboard, wool felt or sponge felt paper, corrugated asbestos paper, high or low-pressure laminated asbestos pipe covering, sheets or blocks, low-pressure air-cell asbestos pipe covering, sheets or blocks, wool felt, antisweat, or frostproof pipe coverings, boiler jackets, waterproof jackets, and accessories usually sold with the above materials) in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more said respondents and others not parties hereto, to do or perform any of the following things:

1. Establishing or maintaining uniform prices, discounts, terms, or conditions in the sale of said materials, or in any manner agreeing upon, fixing, or maintaining any prices, discounts, terms or conditions of sale at which such materials are to be sold.

2. Establishing or maintaining uniform differentials in price applicable to designated differences in specifications of said materials or to differences in the type or quantity of accessories sold with said materials.

3. Establishing or maintaining any classification of customers or any method or formula for classifying customers used or to be used in determining prices, discounts, terms, or conditions of sale to purchasers.

4. Continuing the uniform delivered-price zones heretofore fixed for making quotations and sales of materials, or establishing or maintaining any delivered-price zones which are similar to those heretofore used in that their use would result in making respondent's delivered prices identical despite their different costs of delivery.

5. Selecting or designating particular locations to be used as freight equalization points for pricing purposes.

6. Establishing or maintaining an exclusive method (such as f.o.b. factory, or f.o.b. factory with freight equalized, or delivered to destination) for quoting and pricing a particular material or group of materials.

7. Establishing or maintaining any formula for calculating unit prices, or for calculating total prices from unit prices, or using any formula so established or maintained.

8. Maintaining or continuing or aiding or assisting in the maintenance or continuance of the licensing system and merchandising plan heretofore established under and pursuant to the Toohey patent.

IT IS FURTHER ORDERED that nothing in this order shall be construed to prohibit the owner or owners of the Toohey patent from granting lawful licenses to others to use said patent, or to prevent any respondent herein, or others, from taking lawful licenses to use said patent.

IT IS FURTHER ORDERED that respondents shall, within sixth (60) days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

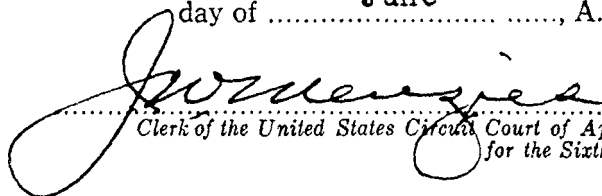
S E A L

Otis B. Johnson,
Secretary

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 Acme Asbestos Covering and
Flooring Company, et al
vs.
Federal Trade Commission
No. 9828, 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.