

FILE NAME: National Safety Council (NSC)

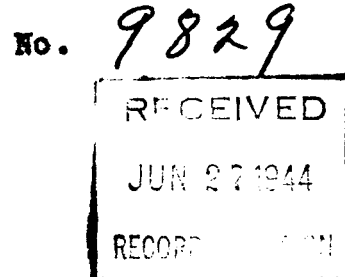
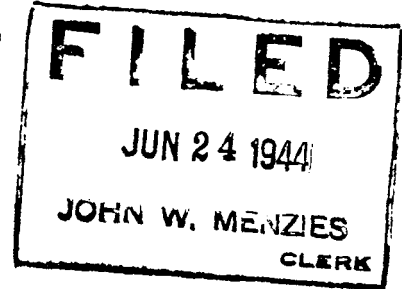
DATE: 1944 Jun 24

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

1 IN THE
2 UNITED STATES CIRCUIT COURT OF APPEALS
3 FOR THE SIXTH CIRCUIT
4 - - - -

6 PLANT RUBBER & ASBESTOS WORKS,)
7 a corporation,)
8 Petitioner,)
9 vs.)
10 FEDERAL TRADE COMMISSION,)
11 Respondent.)



12
13 PETITION TO REVIEW AND SET ASIDE
14 AN ORDER OF THE FEDERAL TRADE COMMISSION

15 To the Honorable Judges of the United States Circuit
16 Court of Appeals for the Sixth Circuit.

17 Comes now Plant Rubber & Asbestos Works, a cor-
18 poration, petitioner herein, and files this, its peti-
19 tion to review and to set aside an Order to Cease and
20 Desist of the Federal Trade Commission, hereinafter
21 called "Commission," and respectfully represents and
22 shows to the Court:

23 I.

24 NATURE OF PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

25 1. On October 10, 1941, the Commission issued and
26 subsequently served upon the respondents named therein,
including your petitioner, its complaint in a proceeding

before it entitled "In the Matter of Acme Asbestos
Covering and Flooring Company, et al., Docket No.
4613," and thereafter, on December 27, 1941, issued
and subsequently served its amended complaint in said
proceeding upon the respondents named therein, includ-
ing your petitioner, in which it was alleged, among
other things, that said respondents, including your
petitioner, were engaged in an unlawful combination
and conspiracy in connection with the sale and dis-
tribution of asbestos pipe covering, and that the same
and the acts and practices therein alleged to have been
committed and engaged in in furtherance thereof were
unfair methods of competition in commerce within the
intent and meaning of Section 5 of the Federal Trade
Commission Act. A copy of said complaint and a copy
of said amended complaint will appear in the transcript
of the record of said proceeding to be filed herein by
the Commission.

2. Thereafter your petitioner duly and timely
filed with the Commission its answers to said complaint
and said amended complaint, wherein your petitioner
admitted that it was a winder of low pressure asbestos
covering which it sold and caused to be transported to
purchasers located in various states, and that it had
been and was in competition with others; but denied
that it had hindered, lessened, restricted or forestalled

competition or that it had violated, or that the
complaint or amended complaint stated any violation
by it of Section 5 of the Federal Trade Commission
Act. A copy of each of said answers will appear in the
transcript of the record of said proceeding to be filed
herein by the Commission.

3. Thereafter, and at various times and places
from May 4, 1942, to and including February 15, 1943, hear-
ings on said amended complaint and the answers filed by
the several respondents thereto were held before Randolph
Preston, a duly appointed trial examiner of the Commission,
and said trial examiner's Report upon the evidence was
submitted to and filed with the Commission on or about
March 15, 1943, and a copy thereof was served upon your
petitioner; thereafter your petitioner filed with the
Commission its exceptions to said trial examiner's re-
port upon the evidence and briefs were thereafter filed
with the Commission in said proceedings by your petitioner
and by the attorney for the Commission; thereafter the
cause came on for oral argument before the Commission
and following such argument was taken under submission.

4. Thereafter, and on the 27th day of April,
1944, the Commission issued and subsequently served on
the respondents in said proceeding, including your
petitioner, the Commission's Findings as to the Facts
and Conclusion and its Order to Cease and Desist. A

copy of said Findings as to the Facts and Conclusion and Order to Cease and Desist will appear in the transcript of the record of said proceeding to be filed herein by the Commission, and a true and complete copy of said Order to Cease and Desist is attached hereto, marked Exhibit A, and made a part hereof.

5. Said "Report and findings as to the facts" of said Commission are without support in the evidence received by the Commission in said proceeding; said "Conclusion" of said Commission in said proceeding is not supported by the findings or by the evidence received by the said Commission; the order entitled "Order to cease and desist," so made by the said Commission against your petitioner, is not supported by the record before the said Commission in said proceeding and is beyond the authority and jurisdiction of said Commission.

II.

FACTS AND STATUTES UPON WHICH VENUE IS BASED.

1. Petitioner is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, with its office and principal place of business located at 537 Brannan Street, San Francisco, California, within the jurisdiction of this Court. Petitioner does not manufacture any of the products alleged in the amended complaint hereinabove referred to, but is, and has been for many years last

1 past, a winder of materials which it purchases from
2 manufacturers and converts into low pressure asbestos
3 pipe coverings, which it sells and causes to be trans-
4 ported to purchasers located in various states.

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

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

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

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

17 "(c) Any person, partnership, or corpora-
18 tion required by an order of the Commission
19 to cease and desist from using any method of
20 competition to act or practice may obtain a
21 review of such order in the circuit court of
22 appeals of the United States, within any cir-
23 cuit where the method of competition or the
24 act or practice in question was used or where
25 such person, partnership or corporation resides
26 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 Commis-
sion 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,
* * *

3. Your petitioner does not reside nor carry on business within the jurisdiction of this Court, nor has it used therein the method of competition or any acts or practices in question in said proceeding before the Commission; but the jurisdiction of this Court is asserted because a majority of the respondents in said proceeding before the Commission reside or carry on business within the jurisdiction of this Court and are filing in this Court their petitions to review and set aside said Order to Cease and Desist, and because the method of competition and the acts and practices in question in said proceeding before the Commission were used by certain of said respondents, if at all, within the jurisdiction of this Court.

III.

POINTS ON WHICH PETITIONER INTENDS TO RELY.

Said Order to Cease and Desist is erroneous, improper and unwarranted as to your petitioner on the grounds and for the reasons following, being the points on which your petitioner intends to rely, to-wit:

(1) The Order to Cease and Desist as to your petitioner is not supported or justified by evidence or any finding or findings of fact, and is erroneous, contrary to law and wholly void.

(2) The amended complaint in said proceeding

before the Commission fails to state any violation of law by your petitioner or the commission by it of any acts upon which the Order to Cease and Desist could be predicated.

(3) No proof was adduced in said proceeding before the Commission showing or tending to show that your petitioner has committed any act or acts, or engaged in any practice or practices prohibited under the provisions of Section 5 of the Federal Trade Commission Act, or warranting issuance by the Commission as to your petitioner of said Order to Cease and Desist.

(4) The findings of the Commission as to the facts and its conclusions, to the extent that they purport to find and conclude that your petitioner had committed or was engaged in any acts, practices, combination or conspiracy constituting unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, are not supported by evidence.

(5) The findings of the Commission as to the facts and its conclusions, to the extent that they purport to relate to your petitioner or to acts or practices of your petitioner at any time or times after August, 1938, are not supported by

proceeding before the Commission as to your petitioner is that your petitioner became a sublicensee under the patent therein involved on or about November 20, 1936, that it cancelled said sublicense and discontinued use of said patent in August, 1938, and a statement of its counsel showing its sales on a delivered price zone basis prior to its entry into said sublicense agreement, a slight modification of said zones while it was a sublicensee and a resumption of its own zones when it ceased to be a sublicensee.

(6) No evidence was adduced in the proceeding before the Commission as to your petitioner, or as to any act or practice of your petitioner, of any kind or character whatsoever, from and after its cancellation of, and withdrawal from, said sublicense agreement in August, 1938; and there is no evidence or basis whatsoever to support or justify any finding or conclusion by the Commission, if made, that there is any likelihood, possibility or reason to apprehend that your petitioner will, in the future, engage in any of the acts or practices which the Commission found and concluded are unfair methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

1 evidence, in that the only evidence adduced in the
2 proceeding before the Commission as to your petitioner
3 is that your petitioner became a sublicensee under
4 the patent therein involved on or about November
5 20, 1936, that it cancelled said sublicense and dis-
6 continued use of said patent in August, 1938, and
7 a statement of its counsel showing its sales on a
8 delivered price zone basis prior to its entry into
9 said sublicense agreement, a slight modification
10 of said zones while it was a sublicensee and a re-
11 sumption of its own zones when it ceased to be a
12 sublicensee.

13 (6) No evidence was adduced in the proceeding
14 before the Commission as to your petitioner, or as
15 to any act or practice of your petitioner, of any
16 kind or character whatsoever, from and after its
17 cancellation of, and withdrawal from, said sublicense
18 agreement in August, 1938; and there is no evidence
19 or basis whatsoever to support or justify any finding
20 or conclusion by the Commission, if made, that there
21 is any likelihood, possibility or reason to apprehend
22 that your petitioner will, in the future, engage
23 in any of the acts or practices which the Commission
24 found and concluded are unfair methods of competition
25 in commerce, within the intent and meaning of Section
26 5 of the Federal Trade Commission Act.

IN SENATE
JUNE 20, 1944.
COMMITTEE ON LABOR AND HUMAN RESOURCES
REPORT ON THE PETITION OF
PLANT RUBBER & ASBESTOS WORKS, INC.

Commission,
D. C.

(7) On the record before the Commission
in said proceeding and the proof adduced before
it, the Commission was without authority or
jurisdiction to enter any order respecting
your petitioner other than an order dismissing
the proceeding as to your petitioner.

IV.

PRAYER FOR RELIEF

WHEREFORE, your petitioner prays that this Court
review and set aside said Order to Cease and Desist.

PLANT RUBBER & ASBESTOS WORKS,
a corporation, Petitioner

By _____
Herman Phleger,
111 Sutter Street,
San Francisco, California.

*Tap, Hettinius, Hollister
Of counsel*

Theodore R. Meyer,
111 Sutter Street,
San Francisco, California.

R. D. Daniels,
913 Southern Building,
Washington, D. C.

DATED: June 20, 1944.

Attorneys for Petitioner

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.

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,
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,
STANDARD ASBESTOS MANUFACTURING COMPANY,
corporations; and
DONALD TULLOCH, JR.,
an individual

DOCKET NO. 4613

ORDER TO
CEASE AND DESIST

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. McArthur 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 of 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

REPRODUCED AT THE NATIONAL ARCHIVES

use would result in making respondents' 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 sixty (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 (Signed)

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 Retition to
Review and Set Aside an Order of the Federal
Trade Commission
in the case of Plant Rubber & Asbestos Works,

vs.

Federal Trade Commission

No. 9829, 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 24th

day of June, A. D. 1944.

J. W. Menzies
Clerk of the United States Circuit Court of Appeals
for the Sixth Circuit.