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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 4613

IN THE MATTER OF

ACME ASBESTOS COVERING AND FLOORING COMPANY, ET AL.

BRIEF FOR RESPONDENTS
NORRISTOWN MAGNESIA & ASBESTOS COMPANY AND SALL MOUNTAIN COMPANY

GUY GEORGE GABRIELSON,
Attorney for above named Respondents.

Of Counsel:
ALBERT L. WOLFE.

Press of Fremont Payne, Inc.

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This brief, in order to avoid undue repetition, is filed for the purpose of supplementing the extensive briefs filed by Cadwalader, Wickersham & Taft, Esqs. on behalf of Acme Asbestos Covering and Flooring Company, et al., and by Philip L. Leidy, Esq. on behalf of Keasbey & Mattison Company, from the viewpoint of Norristown Magnesia & Asbestos Company and Sall Mountain Company, and will, for the most part, be limited to a consideration of some of the misleading features of the brief of Counsel for the Commission, as it is the primary position of these respondents that the charges made in the amended complaint fall far short of being proved, and the amended complaint should be dismissed for that reason.

Statement of the Case

These two respondents were served with the original complaint in October 1941. After their answers had been filed the original complaint was superseded by an amended complaint served in December 1941. The original complaint is, however, of some significance in the light that it throws in connection with the construction of the amended complaint.

The amended complaint charges one of these respondents, Norristown Magnesia & Asbestos Company (herein called Norristown) along with two other specified corporations and one individual with entering into an unlawful conspiracy prior to and during 1934 for the purpose and with the effect of substantially restricting, suppressing and eliminating actual and potential competition in price and otherwise in the sale in interstate commerce of "both licensed and non-licensed materials and also of the low pressure asbestos covering embodying some or all of such materials" and charges the other of these two respondents, Sall Mountain Company (herein called Sall Mountain) generally—in the category of "other respondents" —with either entering into said conspiracy prior to and during 1934, or, becoming a party to it during 1935 or 1936 (Paragraph Eight). The specifications as to what is alleged to have been done pursuant to and to effectuate the conspiracy are set forth in Paragraph Nine. Paragraph Twelve charges that what was done in the sale of "both licensed and non-licensed material and of low pressure pipe covering embodying some or all of such materials" constitute unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

The amended answers of both respondents deny that they now sell licensed materials as defined in the amended complaint and deny all the other material allegations of the amended complaint except that they admit that they were and are engaged in interstate commerce and that they were at one time licensees of Donald Tulloch, Jr. Sall Mountain denies that its principal place of business is at 70 Pine Street, New York. The defenses set up were to the effect that the actions taken under the National Industrial Recovery Act prior to June 14, 1935 cannot be deemed in violation of Section 5 of the Federal Trade Commission Act; that actions taken pursuant to its sublicense agreement while the same was in effect were not in violation of Section 5 of said act; and that these respondents at no time entered into any unlawful agreement, understanding, combination or conspiracy to substantially restrict, suppress or eliminate competition in price or otherwise in the sale and distribution of low pressure asbestos covering or other materials in violation of Section 5 of said act.

Neither of these respondents pleaded any such defense as stated by way of "summary" in the brief of Counsel for the Commission under "Answers" at the top of page 4 of his brief, to the effect that they operated "under the voluntary agreement invited by the President from May until September, 1935". That statement is wholly untrue as an examination of their answers will disclose.

Construction of the Amended Complaint

It is lamentable that at this stage of the proceeding it is necessary to argue with reference to the construction of the English language as used in the amended complaint. However, it is essential to do so because of Commission's Counsel's contention in his brief (C. C.* 1) that the amended complaint charges a conspiracy with respect to the sale and distribution "of asbestos paper and other low pressure asbestos pipe covering" and because of his repeated references to "said products" and because of his complete disregard of the fact that the conspiracy actually charged in the amended complaint is with respect to "licensed and non-licensed materials" as expressly defined in the amended complaint. The distinction is of importance be-

* "C. C." references herein are to pages of the brief of Counsel for the Commission.

cause these two respondents have not attempted and are not called upon to meet charges other than those made in the amended complaint.

The amended complaint (Paragraph One) expressly defines "Licensed Materials" as the eleven types of products therein stated "which the respondents classified * * * as forming part of" the Toohey Patent. "Non-Licensed Materials" are expressly defined to include such items as "solid brass, zinc, and lacquered bands, flexible range boiler jackets, and canvas covering." As pointed out above, the conspiracy charged is with reference to licensed and non-licensed materials. In view of this and in view of the fact that while in the original complaint the two definitions of "licensed" and "non-licensed" materials were identical with those in the amended complaint, the conspiracy charged in the original complaint was with reference to licensed and "unlicensed" materials. While the term "unlicensed materials" was not expressly defined, its natural meaning was taken to be materials of a similar type to "licensed materials" but not made under or classified as part of the Toohey patent. It therefore appeared when the amended complaint was served, that it eliminated the conspiracy charges with reference to "unlicensed materials."

The evidence shows, indeed it is a matter of common knowledge, that corrugated asbestos paper, for example, was manufactured and sold long prior to the time the Toohey patent was issued and long prior to the time the patented invention was conceived. Such corrugated asbestos paper clearly is not within the definition of either "licensed materials" or "non-licensed materials." The corrugated asbestos paper classified in the sub-license agreements "as forming a part of" the Toohey patent was only such as was made under and in conformity with that patent. Unpatented corrugated asbestos paper was made and sold prior to the issuance of the patent, after the issuance of the patent, and up to and including the present time, and will in all likelihood continue to be made and sold for years to come. The same is generally true of the other eleven types of material classified under the Toohey patent as set forth in the definition in Paragraph One of the amended complaint—that is to say, there were and are somewhat similar materials with the same names which are unpatented and are not "licensed materials." The point is that the amended complaint charges no conspiracy with reference to such unpatented products as they do not fall within the definition of either "licensed" or "non-licensed" materials. Had the amended complaint not expressly limited the term "non-licensed materials" by definition, such products would, of course, in ordinary nomenclature have been considered as non-licensed.

Terminology

The brief of Counsel for the Commission is most confusing and at times not understandable because in so many places it is impossible to ascertain the meaning of his language—arising in part out of his failure to distinguish between patented and unpatented products. How are his expressions "said products", "the products hereinbefore described" and "products in question" to be construed by one having in mind that pipe covering, corrugated asbestos paper, etc. may be either patented products (licensed materials) or unpatented products (unlicensed materials) depending on how they were made and what they contain? Commission's Counsel, in his brief, has not consistently followed the definitions set forth in the amended complaint.

In this brief every effort is being made to avoid such confusing terminology. The definitions of the amended complaint are adopted and the term unpatented or unlicensed materials is used to mean products which are not covered by any of the claims in the Toohey patent and were not included in the Tulloch license from Johns Manville Corporation or the sub-license agreements thereunder.

The Norristown Flexible Range Boiler Jacket

Counsel for the Commission insists that the Norristown flexible range boiler jacket patent (U. S. Letters Patent No. 1902794 hereinafter called the Norristown patent), and the licenses to others under said patent are "involved in this proceeding" (C. C. 7). They are involved only because of Counsel's nebulous theory of his case. The only mention of flexible range boiler jackets in the amended complaint occurs in the definition of "non-licensed materials" (Paragraph One). There are no allegations with respect to the Norristown patent or license agreements under it; there is no specification as to how or in what manner there was any conspiracy with respect to flexible range boiler jackets except in so far as such may be implied or inferred in a backhanded way from the general allegations covering "non-licensed materials" which it appears was intended primarily to mean pipe covering accessories.

For a proper understanding of the situation it is necessary to point out that there is really no connection between the Norristown patent and the Toohey patent. Prior to the invention embodied in the Norristown patent, range boiler jackets (really a special type of pipe covering of large diameter to cover a boiler) were what is known as of rigid construction. The Norristown patent covers a flexible feature which facilitates packing and shipping (takes up much less space) as well as making it easy to apply. It has nothing whatsoever to do with the type of material with which the jacket is made. The evidence on this is clear and uncontradicted. The jacket can be made either of Toohey patented products or of products not covered by the Toohey patent.

The Trial Examiner correctly summarized the evidence on this point in paragraph 58, page 24, of his report as follows:

> "58. As stated, a flexible range boiler jacket is a large size piece of pipe covering sold for use on a range boiler. It can be manufactured either under the Toohey patent or outside the Toohey patent. The flexible feature of the flexible range boiler jacket is a mechanical change on the rigid type range boiler jacket which is covered by a patent owned by respondent Norristown Magnesia & Asbestos Company. This patent relates only to the flexible feature which enables the jacket to be folded into a more compact package for shipping, thus reducing freight charges. This Norristown patent has no relation to the materials from which the jacket is manufactured nor to its moisture resistant or shrink-proof character (R. 113-5, 195-6, 202-4, 322, 482-4, 1996-8, 1994, 2003-4, 2007, 2190, 2192-5, 3308-9)."

The Norristown patent was in existence and used for some time prior to the issuance of the Toohey patent. Norristown licensed the respondent, Philip Carey Manufacturing Company, under its jacket patent on August 20, 1933. That license is in evidence (Com. Ex. 150). There is nothing unusual about it. It provides for a royalty but no price control. Norristown licensed Johns Manville Corporation on February 16, 1934 (Com. Ex. 149); that license contained a price control provision. It is to be noted that these transactions could not possibly have had anything to do with the Toohey patent or the Tulloch license agreement. These transactions occurred in the normal course of business while the National Industrial Recovery Act was in effect. The Toohey patent was not issued until September of 1934 (Res. Ex. 12) and the Tulloch License from Johns Manville Corporation did not come into being until September 11, 1935 (Com. Ex. 1).

Furthermore, the evidence shows that the Philip Carey Manufacturing Company agreed to take a license from Norristown under its patent only after it had been threatened by Norristown with a suit for infringement (R.* 1021-2, 1104-5; Coms. Exs. 179-182; Res. Exs. 55-66).

Norristown's counsel consistently objected to the introduction of testimony in connection with the Norristown flexible range boiler jacket because of its lack of relevancy in the proceeding. Counsel's efforts to hold down the size of the record and minimize the cost of the proceeding to both the government and the respondents were in vain. All the evidence which the Commission's Counsel could produce on this subject was admitted on the theory that it would be connected "later on." The record will be searched in vain for such connection. The Commission's Counsel now seeks to connect it in his brief by arguing that it is evidence of a "purpose to fix and maintain prices on all products in this field" (C. C. 28-29). There is no evidence of any such purpose.

The testimony makes it clear that it was not until the Tulloch license agreement was in effect that Tulloch attempted any price control with reference to boiler jackets. The control he then exercised was only under the Toohey patent, i. e. when and if the jacket was made by Tulloch's licensees under the Toohey patent. This illustrates the confusion which the injection of the Norristown jacket patent into this proceeding caused. A flexible range boiler jacket can be made under two patents, the Norristown patent covering the flexible feature, and the Toohey patent covering the type of materials used. A flexible range boiler jacket can (and is) also made without using the Toohey patent at all. The Philip Carey Manufacturing Company never agreed to any price control under its license with Norristown (R. 892, 978, 979, 1106) even though concededly Norristown in its own interests and because its other licensees were bound by a price control

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* "R" references are to page numbers of the Official Report of Proceedings.

provision in their licenses from Norristown, attempted to pursuade the Carey Company to accept price control. After Carey's sublicense with Tulloch under the Toohey patent became effective, Carey was thereafter in a position where it could make and sell flexible range boiler jackets at any price it chose by using materials not covered by the Toohey patent but was subject to Tulloch's price control on flexible range boiler jackets made under the claims of the Toohey patent. The testimony indicates that that company made and sold both kinds and at different prices even though it was a minor item in its sales (R. 981).

Commission's Counsel further attempts to point an accusing finger because (C. C. 29) Norristown did not issue any further price lists after Tulloch included flexible range boiler jackets in his price lists. The record at page 719 clearly shows that there was no occasion for Norristown to issue "any further price lists" because it did not change its price! Likewise he infers (C. C. 29) that because no legal action was taken against infringers of Norristown's jacket patent, that, in some way, tends to show "a purpose to fix and maintain prices". Needless to say, as the record shows, Norristown protested infringements which came to its attention and eventually forced the infringers to take licenses from it (R. 855-857). The mere fact that it failed to institute expensive litigation to enforce its rights with respect to an item which was of minor importance in its sales volume is certainly not of any significance. The testimony cited by Counsel for the Commission (R. 1013) on page 29 of his brief to the effect that Respondents manufactured and sold flexible range boiler jackets but did not pay any royalty on such sales is again misleading as the witness (W. L. Steffins of Philip Carey Manufacturing Company) was then testifying with respect to the Toohey patent and was not testifying with reference to the Norristown jacket patent license agreement. The same witness testified (R. 979) that his company did pay royalties to Norristown on flexible range boiler jackets. Such royalty was payable whether the jackets were made under the Toohey patent or not!

The letter of January 8, 1935 (Com. Ex. 91) from Johns-Manville to Norristown as to which Counsel seeks to draw unwarranted inferences (C. C. 29) is likewise perfectly innocuous when read in the light of the fact that Johns-Manville was at that time a licensee of Norristown under the jacket patent and subject to Norristown's lawful price control on the jackets. It was perfectly natural and proper for it to be interested regarding negotiations with infringers and the stabilization of the price to which it was bound. Likewise the letter of April 8, 1935 (Com. Ex. 103) cited by Counsel is nothing more than an example of a licensee seeking information to protect its own interests.

It is noteworthy, as Commission's Counsel concedes (C. C. 28), that Norristown never licensed Tulloch under its jacket patent and never assigned to him any rights or interests in its patent. Norristown's withdrawal from the Tulloch license had no relationship nor effect on its boiler jacket patent or license agreements with other respondents some of whom were, and some of whom were not, licensees of Tulloch under the Toohey patent at that time (June 1939—Trial Examiner report p. 19). It is also noteworthy that only six (R. 700) out of the eighteen other respondent corporations were licensees of Norristown under its patent.

Again it must be repeated that the Norristown jacket patent, and Norristown licenses under it, have no place in this proceeding and the record should not have been burdened with the testimony and exhibits introduced with reference to them.

Hearsay Evidence

Under the heading of "Planned Common Course of Action to Eliminate Competition in Price" Commission's Counsel (C. C. 25-27) relies heavily on testimony of an attorney-examiner who was permitted to testify with respect to interviews he had with Mr. Robert Clark and Mr. George Clark of respondent The Clark Asbestos Company and with Mr. George Mladinich and Mr. J. Ozurovitch of the respondent Atlantic Asbestos Corporation and with Mr. Collopy of the respondent Acme Asbestos Covering and Flooring Company. The testimony quoted by Commission's Counsel well illustrates the vice of allowing such "evidence" to go into a record. The witness was permitted, two years after his interviews happened, to testify as to what the person interviewed said that someone else told him (about five years before that) and as to what the "impression" of the person interviewed was (as of a time about five years previous). He was further permitted to testify not only what the person interviewed told him but as to what the person interviewed "knows" and what he "understands" with respect to the intentions of "everyone" in the industry (C. C. p. 25-27). None of this "evidence" should have been admitted. It is hearsay in its worst form. It was very properly stricken by the Trial Examiner as to Norristown, Sall Mountain, Keasby & Mattison Company, Plant Rubber & Asbestos Works and most other respondents (R. 1867, 1875, 1895, 1896, 1897, 1898, 1899, 1291). The "testimony" given second hand by the witness was not subject to explanation by cross examination. It should never have been permitted to encumber the record; and by this no aspersions are cast, nor disparagement intended, as to the Commission's attorney-examiner. It is just that the circumstances are such that the testimony is not competent assuming his complete integrity and desire to tell the truth as he understood it. The use of this testimony by the trial attorney in his brief demonstrates his dire need for support in his strained effort to make out a case. It is admissible, if at all, only with respect to the respondents with whom the persons interviewed were associated. It is not connected in any way whatsoever with Norristown or Sall Mountain and they strenuously object to its being considered as evidence so far as they are concerned. If "evidence" of this character is to be considered by the Commission, holding hearings is a complete and meaningless waste of time.

Misleading Character of Commission Counsel's Brief

A prolific source of irritation (to put it mildly) among business men generally in the United States is the propensity of some government employees to attack, and attempt to characterize as unlawful, bona fide attempts to comply with the law and carry out the expressed intentions of the executive and administrative branches of the Government. The brief filed by the Commission's Counsel herein is an excellent example. In his zealous effort to "win his case" he relies heavily:

(a) On what the respondents did, as they were required by law to do, under the National Industrial Recovery Act.

(b) On what certain of the respondents did under the authority of the same law and while it was still in effect in attempting to comply with the wishes and intentions of the President after the Schechter decision.

Fortunately, the days of the N.R.A. are not so far removed that the members of the Commission cannot recall the economic conditions then prevailing, the conditions which the act sought to ameliorate, as well as the spirit then prevailing both in the government and out. It would seem that the pendulum has swung far since that day. However, it is in the light of that background that the conduct of the respondents during that period properly should be judged. The spirit is well exemplified by the requirement of the Code (Res. Ex. 2—Article VI, Sec. 4) approved by the President, that the Merchandising Plan, subject to the review of the Administrator, when approved by three-fourths of the Code members of the Division and duly filed, shall be binding upon all members of the Industry who are members of the Division to which it applies. This requirement had the force of law for which a criminal penalty was provided (National Industrial Recovery Act, Sec. 3(f)). Filing and publicity of all prices, terms and conditions of sale was deemed essential to the promotion of fair competition (Article VIII). The obvious and admitted purpose of this was to enable a member of the industry to sell at the same price as a competitor. None of us has forgotten the opprobrium cast upon the "chiselers" by the N.R.A. administrator himself in those days. See also Release No. 11036, 4/24/35 of the National Industrial Recovery Board (Res. Ex. 5). Section 5 of the Act provided that while the act was in effect and for a period of sixty days thereafter any action complying with the provisions of a code taken during such period shall be exempt from the provisions of the anti-trust laws. In the light of this background, coupled with the price decline during the period of the Code, the Commission's Counsel says that the conduct of the respondents during the period from the enactment of the N.I.R.A. to May 27, 1935 shows an unlawful "planned common course of conduct to eliminate competition in price"!

Realizing the weakness in his argument, Counsel then seeks to charge respondents with entering into and acting under a Voluntary Agreement after May 27, 1935 which date he characterizes as the "demise of the N.R.A." (C. C. 9). He ignores the fact that Title I of the N.I.R.A. was not repealed by Congress until June 14, 1935 and that certain portions of the Act were expressly continued in effect by Congress until April 1, 1936 (Public Resolution No. 26—74th Congress). See also Executive Orders (Res. Exs. 7, 9). At this point he becomes confused and refers to Com. Ex. 18 and 152 A & B in one breath as evidence of "this agreement". The two are entirely unrelated! Com. Ex. 18 is a document dated June 15, 1935 unsigned by anyone and marked "Second Draft". The testimony shows clearly that it was an abortive attempt to carry out the President's wishes with respect to continuing under the portions of the N.I.R.A. which were not invalidated nor repealed. Furthermore, it specifically stated that it was not to become effective until approved by the President. It was never approved nor acted under (R. 386-7, 1075, 2339, 3053-5) and did not provide, as stated by Counsel (C. C. 9) for any merchandising plan. It was formulated for the entire Asbestos Industry and not merely for the Asbestos and Allied Products Division, the merchandising plan of which is attacked. On the other hand, Coms. Ex. 152 A & B is a copy of a telegram sent by the Chairman of the Code Authority dated May 28, 1935 to the President of Norristown, again in compliance with the request and urging of the President of the United States, asking it as a Code member to agree, by wire, to continue to observe the articles of the Code specified in his telegram (3, 4, 5, 7, 8 & 10). These Articles, respectively, dealt with, Hours of Labor, Minimum Wages, Child Labor, Unfair Trade Practices, Publicity of Prices, Terms, and Conditions of Sale and Labor Provisions. It is noteworthy that they did *not* include Article 6, Administration, which included the merchandising plan. Norristown sent a wire in compliance with this request (Com. Ex. 153). There is no evidence that Sall Mountain received such a telegram, or if it did, whether it replied.

This is the sum and substance of the case of Counsel for the Commission up to the time of the Tulloch License Agreement and sublicenses thereunder!

The Tulloch license agreement covered only patented products and is adequately and effectively dealt with in the brief filed on behalf of Acme Asbestos Covering and Flooring Company, et al. It suffices to say here that both Norristown and Sall Mountain admit that they were licensees of Donald Tulloch, Jr. under the Toohey patent, but it appears in evidence and is uncontradicted that Norristown withdrew and has not been a licensee since June of 1939 and Sall Mountain since January of 1940.

No connection of either Norristown or Sall Mountain Company with any other respondents since their respective withdrawals from the license agreement appears in the evidence.

Conclusion

As is usual in cases of this type the real difficulty is not with the law but rather with the facts. The Commission's Counsel in an effort to make out a case has attempted by inference, innuendo and distortion of the evidence to make the facts of this case appear similar to cases in which the courts have decided that violation of the law occurred. In this we believe he has failed and that a careful study of the exhaustive brief filed on behalf of Acme Asbestos Covering and Flooring Company, et al, will convince the Commission that the Commission's Counsel has failed.

Before closing we wish to point out that the entire record is so barren of evidence with respect to Sall Mountain Company that, as shown by the brief of the Counsel for the Commission, he does not even at this stage of the proceeding know where that Company is located, as he repeats the allegation of the complaint to the effect that it is located in New York. As a matter of fact, it is located in Ohio and has its sales office in

Chicago. This detail, of course, is not significant except to the extent that it shows that Sall Mountain Company has practically been ignored in this proceeding.

The evidence is clear that both Norristown Magnesia & Asbestos Company and Sall Mountain Company have not been licensees of Donald Tulloch, Jr. since June of 1939, and January of 1940, respectively. There is nothing in the record to indicate any connection of any character, with respect to any licensed materials or non-licensed materials, between these two respondents and other respondents since their respective withdrawals as licensees. It therefore appears that even if, in the judgment of the Commission, the Tulloch license agreement is unlawful under Section 5 of the Federal Trade Commission Act, there is no practical reason why either of these respondents should be included in the terms of any cease and desist order which might be issued in the proceeding. In this connection, attention is respectfully called to the decision of this Commission in *United Importers and Distillers, Inc.*, 24 F. T. C. 1379 and *Oppenheim Collins & Co. Inc.*, 30 F. T. C. 1390. The case of *Winston* v. *F. T. C.*, 3 Fed. 2d 961 (1925) is also pertinent. These respondents "ceased and desisted" from the practices complained of prior to the Commission's investigation in this matter.

Respondents Norristown Magnesia & Asbestos Company and Sall Mountain Company respectively pray that the complaint be dismissed as to them.

Respectfully submitted,

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Norristown Magnesia & Asbestos Company
and Sall Mountain Company.

ALBERT L. WOLFE,
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APPENDIX

Exceptions to Trial Examiner's Report

Now Come Norristown Magnesia & Asbestos Company and Sall Mountain Company, two of the Respondents herein, by Guy George Gabrielson, their attorney, and except to the report of the Trial Examiner herein, filed March 15, 1943 as follows:

1. To the second paragraph on page 2 of the report regarding the principal difference between the original and the amended complaint. While the original complaint alleged a conspiracy with respect to licensed and unlicensed materials (original complaint paragraphs Eight and Nine), the amended complaint limits the charge to licensed and non-licensed materials, as both terms are defined in the amended complaint (amended complaint paragraphs One, Eight and Nine). The amended complaint also contained an allegation in subdivision 10 of paragraph Nine which was not included in the original complaint and which is significant as follows:

> "This merchandising plan was adopted during the period the National Industrial Recovery Act was in effect by respondent corporations, including The Philip Carey Company, the wholly owned subsidiary of respondent, The Philip Carey Manufacturing Company, but it never was approved by the Administrator of the National Recovery Administration."

2. To paragraph numbered 6 on page 3 of the report and the corresponding subdivision heading "f" on page 33 of the report as incorrect statements by reason of the use of the term "unlicensed" rather than the term "non-licensed" as defined in the amended complaint.

3. To the last paragraph on page 3 of the report in so far as it states that the complaint covers violations not connected with the Toohey patent and the Tulloch licenses thereunder.

4. To the ninth paragraph on page 6 of the report in so far as it states that the principal place of business of the respondent Sall Mountain Company is located at 70 Pine Street, New York, N. Y. The allegation to that effect was denied in its answer and there is no evidence in the record to support it.

5. To the fourth paragraph on page 8 of the report which is an inaccurate and incomplete statement of the differences in methods of manufacture as between patented and unpatented products. Paragraph numbered 17 on page 13 of the report is a much more accurate and complete statement as indicated by the portions of the record there cited.

6. To the paragraph concluding at the top of page 9 *of the report in so far as it states that voluntary agree*ments were signed by a number of respondents and that it does not appear in evidence that these agreements were ever approved by the President. Attention is directed to the fact that Commission's Exhibit 18 is marked "Second Draft" and to the testimony of Donald Tulloch, Jr. at page 3055 of the transcript where the following appears:

> "Q. So far as you know, was the voluntary agreement signed by anybody?"
> "A. There was no provision made for signing the voluntary agreement until after the President had approved it, and it never was approved nor disapproved."

7. To the failure to report in connection with paragraph numbered 5 on page 11 of the report that the revised merchandising plan therein mentioned was never used. (R. 2157, 2254-5, 2329, 2370, 3160-3163).

8. To paragraph numbered 6 on page 11 of the report in so far as the use of the plural "plans" implies that the revised merchandising plan referred to in the preceding paragraph is included in that statement.

9. To paragraph numbered 12 on page 12 of the report in so far as it implies that the so called Voluntary Agreement was ever effective or acted under as an agreement (R. 386-7, 1075, 2339, 3053-5).

10. To the last sentence in the paragraph numbered 26 on page 15 of the report which is unsupported by the record.

11. To the inclusion of the word "directly" in paragraph numbered 32 on page 16 of the report in so far as it implies that there was indirect consultation or communication and to the last portion of said paragraph: "but there is evidence that there were communications with and through Tulloch with other prospective licensees (R. 356-7, 1098, 1100, 2048-9, 2075, 2104, 2352, 3096-7)." The citations do not support the quoted portion of the statement.

12. To the last sentence of paragraph numbered 37 on page 17 of the report which is unsupported by the evidence cited.

13. To subdivision (d) of paragraph 46 on page 21 of the report in so far as it states that the merchandising plan under the sublicense agreement therein mentioned required uniform contracts. Such statement is contrary to the evidence (Com. Ex. 1).

14. To the failure to report in connection with the sublicense agreement of Donald Tulloch, Jr., to the effect that Tulloch did not, and made no attempt to, control the prices or terms or conditions of sale of any asbestos or wool felt paper or pipe covering not covered by the Toohey patent (R. 316, 337-8, 632, 1083-4, 1206, 1322, 1355, 1440, 2183, 3177-8; Coms. Exs. 1, 251; Resps. Exs. 11, 19, 87-126, 148-151, 211-215, 226-233, 236-248).

15. To the last sentence in paragraph 54 on page 23 of the report in so far as it implies that any decisions

of the nature therein referred to were made by mutual agreement, majority rule or by anyone other than Donald Tulloch, Jr. (R. 391, 907-8, 1072, 1216, 1320-1, 2049, 2174, 2275).

16. To the last sentence of paragraph 55 on page 24 of the report in so far as it implies that the licensees gave Tulloch any authority other than by the terms of the sublicense agreements and in so far as it implies any confirmation of his actions other than abiding by the terms of the sublicense agreements prior to their respective terminations thereof.

17. To the failure of the Trial Examiner to report in connection with paragraph 59 on pages 24 and 25 of the report that Philip Carey Manufacturing Company agreed to a license under the Norristown company's boiler jacket patent only after it had been threatened with a patent infringement suit by Norristown Magnesia & Asbestos Company (R. 1104-5; Coms. Exs. 179-182; Resps. Exs. 55-66).

18. To the statement in paragraph 59 at the top of page 25 of the report "though Tulloch endeavored to have same inserted", which statement is not supported by any evidence.

19. To the words "usually" and "at times" in paragraph 64 on page 26 of the record in so far as they infer that there were other times when jobbers could not obtain similar unpatented products, and at different prices, from various respondents and others. Such qualifying words are not supported by the evidence cited in the report or any other evidence.

20. To the paragraph following the heading, subdivision (a) on page 28 of the report in the following particulars:

Appendix.

(a) The record page 2137 cited supports only that portion of the first sentence to the effect that there were price lists;

(b) There is no evidence of any "general merchandising plan" prior to N.R.A. as stated in the second sentence.

(c) With reference to the last sentence, an examination of the record cited clearly shows that "list" or "published" prices are referred to, rather than "quoted prices".

21. To the second sentence in the first paragraph on page 29 of the report which is misleading because an examination of the record page 2600 and the pages cited "R. 2611-2" shows clearly that MacDougal was testifying as a Johns-Manville distributor and was talking about Johns-Manville salesmen exclusively.

22. To the first, third and fifth sentences in the first paragraph under sub-division (b) on page 29 of the report in that they are not limited to the patented products under the Toohey patent and the sublicense agreements during the respective periods when they were in effect as to particular respondents. The references clearly show that such statements should be so limited.

23. To the first paragraph under subdivision (d) on page 31 of the report which is inaccurate and misleading. See paragraph 67 on page 27 of the report and R. 1216, 1322, 3172.

24. To the last sentence in the second paragraph under subdivision (e) on page 32 of the report. There is no such evidence as to any respondent.

25. To the fifth and sixth paragraphs under subdivision (e) on page 32 of the report which are not supported by the testimony cited or other testimony.

Appendix.

26. To the first paragraph under subdivision (f) on page 33 of the report as unsupported by any cited, or other, evidence.

27. To the last sentence in the second paragraph under subdivision (f) on page 33 of the report in that it misinterprets the testimony cited, i. e., R. 407. The testimony was as to non-licensed materials and the witness obviously was talking not about rings or bands but about unpatented products of a nature similar to patented products.

The making of the foregoing particular exceptions are not intended, and should not be construed, as a waiver of any other inaccuracies in, or omissions from, the report, which are either pointed out by counsel for other respondents or are apparent from the record.

Dated: April 2, 1943.

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