IN THE

United States Court

FOR THE SEVENTH

NATIONAL LEAD C

against

FEDERAL TRADE CO

PETITION TO REVIEW AND
OF THE FEDERAL TRAD

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Dated March 11, 1953

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

NATIONAL LEAD COMPANY,
Petitioner,

against

FEDERAL TRADE COMMISSION,
Respondent.

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

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

Now comes your petitioner, National Lead Company, by its attorneys, and presents its petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission") issued January 12, 1953 and served on January 15, 1953, and in support thereof, respectfully states and shows:

1. National Lead Company is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business located in the City of New York, State of New York.

Nature of the Proceedings.

2. On November 25, 1944 the Commission issued and subsequently served its complaint in a proceeding entitled "In the Matter of National Lead Company, et al.", Com-

mission Docket No. 5253, charging petitioner and the other respondents named therein with the use of unfair methods of competition in commerce in the sale of white lead in violation of Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45) and with having discriminated in price in the sale of white lead in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (Title 15, United States Code, Section 13). In addition to petitioner, six other corporations were named as respondents in said complaint.

3. After the filing of respondents' answers to said complaint, certain testimony and other evidence in support of the allegations of the complaint were introduced before a Hearing Examiner of the Commission. Subsequently, on April 12, 1946, the Commission issued and thereafter served upon the same respondents an amended complaint charging petitioner and the other respondents with the use of unfair methods of competition in commerce in the sale of various lead pigments in violation of the provisions of Section 5 of the Federal Trade Commission Act and with having discriminated in price in the sale of various lead pigment in violation of the provisions of subsection (a) of Section 2 of the Clayton Act.

The Amended Complaint.

4. Count I of the amended complaint charged petitioner with having monopolized and attempted to monopolize the interstate sale of lead pigments, with having acted unlawfully to secure a monopolistic control over the prices of lead pigments, with having conspired with the other respondents to eliminate price competition in the sale of lead pigments, and with having entered into contracts and understandings with E. I. duPont de Nemours & Company, Inc. for the purpose and effect of promoting maintenance of prices of white lead fixed by petitioner and other sellers. Count I

further charged that petitioner and the other respondents in connection with the sale of lead pigments agreed to adopt and adopted a system of delivered price quotations which prevented reflection of differences in the costs of delivery from the respective manufacturing plants of the respondents; agreed to adopt and adopted a zone delivered price system; agreed to secure and secured the cooperation of the Lead Industries Association in fixing and adopting non-competitive terms and conditions of sale; exchanged directly and through the office of the Lead Industries Association price factors and information concerning price factors; agreed to adopt and adopted consignment or agency agreements for the purpose of preventing dealers from selling lead pigments at lower prices; and agreed to fix and fixed prices, terms and conditions of sale.

5. Count II of the amended complaint charged each of the respondents with having discriminated in price in the sale of lead pigments with respect to competing purchasers in any one zone, and competing purchasers in different zones, and with having discriminated in price in the sale of lead pigments as the result of certain quantity, trade and regional discounts.

Answer of Petitioner.

6. Petitioner duly filed its answer to the amended complaint, denying all material allegations thereof charging unfair methods of competition and discriminations in price in the sale of lead pigments.

Hearings Before Trial Examiner.

7. Thereafter further testimony and other evidence in support of and in opposition to the allegations of the amended complaint were introduced before a substituted

Hearing Examiner, it having been stipulated by counsel for all parties that the testimony and other evidence theretofore received in support of the original complaint, with certain exceptions, might be considered as a part of the record under the amended complaint.

8. The Trial Examiner's Recommended Decision was filed on March 31, 1948. Thereafter, counsel for the Commission, counsel for petitioner and counsel for the other respondents filed exceptions to the Trial Examiner's Recommended Decision and the matters came on for oral argument before the Commission on May 19 and 20, 1949. Thereafter, on motion of the Commission, a second argument on the merits was had on February 1 and 2, 1950. On January 12, 1953 the Commission issued orders sustaining in part and denying in part the exceptions theretofore filed by the Commission's counsel and the exceptions theretofore filed by counsel for petitioner and counsel for the other respondents.

The Order to be Reviewed.

9. On January 12, 1953 the Commission made and thereafter on January 15, 1953 served on the petitioner its "Findings as to the Facts and Conclusion" and its "Order to Cease and Desist". A copy of the "Order to Cease and Desist" is attached hereto as Exhibit A. At the same time there were issued by the Commission and served upon the petitioner the "Opinion of the Commission" and the "Dissenting Opinion of Commissioner Lowell B. Mason."

10. The "Order to Cease and Desist" orders the petitioner and the other respondents to forthwith cease and desist from entering into or continuing any planned common course of action, understanding, agreement, combination or conspiracy between any two or more of the respondents,

or between any respondents or any other party, to do or perform any of the following acts or things:

> "1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.
>
> 2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.
>
> 3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.
>
> 4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.
>
> 5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.
>
> 6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves."

11. Said "Order to Cease and Desist" further provides that petitioner and each of the other respondents "do forthwith cease and desist from quoting or selling lead pigments

at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

12. Said "Order to Cease and Desist" further orders petitioner and each of the other respondents to cease and desist from discriminating in the price of lead pigments:

> "1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.
>
> 2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein."

13. Said "Order to Cease and Desist" further provides that petitioner "do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead

Company in the manufacture or in the sale or distribution of lead pigments."

Jurisdiction and Venue.

14. This Court has jurisdiction and venue under Section 5 of the Federal Trade Commission Act (Title 15, United States Code, Section 45) and Section 11 of the Clayton Act, as amended (Title 15, United States Code, Section 21).

Said Section 5 of the Federal Trade Commission Act provides in subdivision (c) thereof, 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 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 transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, * * *."

Said Section 11 of the Clayton Act, as amended, provides in part:

> "* * * the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, * * *.
>
> Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside."

15. Your petitioner regularly carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act, in that it is regularly engaged in the sale of lead pigments and other products to purchasers in this Circuit. In addition, your petitioner is required by said order of the Commission to cease and desist from continuing to use in this Circuit certain acts and practices in the sale of lead pigments in interstate commerce.

Relief Prayed.

Your petitioner therefore prays:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act.

2. That this Court review said "Findings as to the Facts and Conclusion" and said "Order to Cease and Desist" of the Commission, and set aside and vacate said findings, said conclusion and said order.

3. That this Court grant such other and further relief as this Court may deem proper.

Points on Which Petitioner Intends to Rely.

Petitioner intends to rely on the following points:

(a) The Commission's findings as to the facts are not supported by the evidence.

(b) The Commission's findings as to the facts are insufficient as a matter of law to support the "Order to Cease and Desist".

(c) The "Order to Cease and Desist" prohibits acts, practices and methods of competition which the Commission has no power, authority or jurisdiction to prohibit.

(d) The Commission's findings as to the alleged conspiracy in the sale of lead pigments are not supported by the evidence.

(e) The Commission has neither the power nor the authority to prohibit the petitioner from selling lead pigments in accordance with a zone delivered price method of sale.

(f) The right of each respondent to employ its own zone delivered price method of sale was not an issue raised by the allegations of the amended complaint.

(g) The Commission's findings as to the alleged illegal discriminations in price charged by the petitioner in the sale of lead pigments are not supported by the evidence.

(h) The conclusion that certain of petitioner's prices for lead pigments constitute illegal discriminations in price is contrary to law.

(i) The Commission has neither the power nor the authority to prohibit the petitioner from acquiring or attempting to acquire any interest of ownership or control in the capital stock or physical assets of any competitor in the manufacture, sale or distribution of lead pigments.

Dated: March 11, 1953.

Alexander & Green,
120 Broadway,
New York 5, N. Y.,

By James D. Ewing,
A Member of said Firm,
Attorneys for Petitioner,
National Lead Company.

Mayer, Meyer, Austrian & Platt,
231 South La Salle Street,
Chicago 4, Illinois,
of Counsel.

Exhibit A.

UNITED STATES OF AMERICA

Before Federal Trade Commission

Commissioners:

James M. Mead, Chairman
Lowell B. Mason
John Carson
Stephen J. Spingarn
Albert A. Carretta

In the Matter of

National Lead Company, a corporation,

Eagle-Picher Lead Company, a corporation,

Eagle-Picher Sales Company, a corporation,

Anaconda Copper Mining Company, a corporation,

International Smelting & Refining Company, a corporation

The Sherwin-Williams Company, a corporation, and

The Glidden Company, a corporation

Docket No. 5253

Order to Cease and Desist

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It Is Ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments 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 or 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. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It Is Further Ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It Is Further Ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were

shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It Is Further Ordered that the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It Is Further Ordered that the respondent, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after 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, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

(Seal)

D. C. Daniel,
Secretary.

Issued: January 12, 1953.