

INVESTIGATIONS AND RECOMMENDATIONS UNDER THE EXPORT TRADE ACT

IN THE MATTER OF

CARBON BLACK EXPORT, INC., ET AL.¹

REPORT OF INVESTIGATION, CONCLUSION, AND RECOMMENDATIONS IN RE
ALLEGED VIOLATIONS OF THE EXPORT TRADE ACT, APPROVED APRIL 10,
1918

*Docket 202-5. Notice and Summons, October 28, 1944. Report, Conclusions, and
Recommendations, July 12, 1949*

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¹ The officers, directors and stockholders joined as respondents, follow :

Officers : C. E. Kayser, president and director, 500 Fifth Avenue, New York 18, N. Y. ;
Reid L. Carr, secretary and director, 45 East Forty-second Street, New York 17, N. Y. ;
F. R. Cantzlaar, treasurer, 41 East Forty-second Street, New York 17, N. Y.

Directors : Godfrey L. Cabot, 77 Franklin Street, Boston 10, Mass. ; Thomas D. Cabot,
77 Franklin Street, Boston 10, Mass. ; Oscar Nelson, United Carbon Co. Building, Charles-
ton 27, W. Va. ; R. H. Eagles, 460 West Thirty-fourth Street, New York 1, N. Y. ; Hans W.
Huber, 460 West Thirty-fourth Street, New York 1, N. Y. ; Robert I. Wishnick, 295 Madis-
on Avenue, New York 17, N. Y. ; L. C. Herkness, Tenth and Lombard Streets, Philadelphia,
Pa.

Stockholders : United Carbon Co., Inc., United Carbon Co. Building, Charleston 27,
W. Va. ; Columbian Carbon Co., 45 East Forty-second Street, New York 17, N. Y. ; Godfrey
L. Cabot, Inc., 77 Franklin Street, Boston 10, Mass. ; J. M. Huber Corp., 460 West Thirty-
fourth Street, New York 1, N. Y. ; Panhandle Carbon Co., Inc., 295 Madison Avenue, New
York 17, N. Y. ; Chas. Eneu Johnson & Co., Tenth and Lombard Streets, Philadelphia, Pa.

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SYLLABUS

Where a Webb-Pomerene Export Trade Act association, the stockholder members of which included six producers of carbon black and which—

- (1) Was organized in 1933 by 8 producers of said product to meet the threat of some 10 or 12 foreign rubber manufacturer consumers of approximately 80 percent of all carbon black exported, who were large enough to be able to act independently and to go into the carbon-black business on their own, and whose actions included the practices of (a) insistence on liberal credit terms, (b) bad faith rejection of merchandise, (c) demand for excessive discounts, and (d) a price-decline clause in contracts which enabled purchasers, upon the allegation of a lower offer, to procure more favorable terms; and
 - (2) Limited its dealings to so-called "channel black" as distinguished from the more recent "furnace black"; provided for stock participation by the stockholding members on the basis of the proportion of export business allotted to each by negotiation as his so-called quota; provided that the stockholders enter into contracts with it to sell carbon black in export exclusively through it; and was authorized by the terms of the contract with its members to purchase not more than 10 percent of its annual export requirements from nonmembers, for the purpose, as testified, of inviting participation in the association's advantages—
- (a) Extended its legitimate objective of maintaining a price policy for its products, to nonmember competitors by way of procuring "intention to cooperate" and "assurance to follow association prices closely" and to observe its terms, in agreements and arrangements entered into with various such concerns;
 - (b) Entered into agreements and arrangements with nonmembers under which it undertook to impose restrictions upon the volume of their exports and production, and upon the source and quantity of their supply of natural gas, raw material of carbon black;
 - (c) Made membership overtures to prospective new stockholders which resulted in trial operations extending from 3 to 9 years, and under which the non-member recipients of such overtures enjoyed "all the advantages of mem-

bership without the necessity of making an investment" and thereby had conferred upon them benefits which were lawfully obtainable only by compliance with the Export Trade Act; and

- (d) Practiced bad policy in making use of the same housing, administrative officer, and personnel for the conduct of its export trade office activities, as were used by a trade association concerned with the industry's domestic trade, which the export association was by statute enjoined not to restrain:

Held, That certain agreements made and acts done by said association, as hereinbefore indicated, were in violation of law; and

Recommended, pursuant to the provisions of said Export Trade Act authorizing the Commission so to do, that Carbon Black Export, Inc.—

- (1) Refrain in the future, from adhering to, maintaining, or entering into any understanding, agreement or arrangement with American producers of carbon black who are not regularly admitted and recognized members, including producers whose membership is in process of solicitation, where said producers agree to sell only at fixed prices and terms, or in apportioned quantities;
- (2) Cease and desist in the future from discussing, negotiating, concerning or seeking an agreement upon, any plan, arrangement, scheme or understanding whereby the production of any American producer or potential producer of carbon black is affected, deterred, forestalled, limited or prevented, or where the purpose or intent is to accomplish any of said results; and
- (3) Conduct its office activities on a basis wherein it shall not permit itself to be quartered in joint offices with any domestic trade association or statistical and advisory group; and that it engage and retain officer personnel which shall have no affiliation by way of employment, membership or honorarium with any such trade association or group; and

Ordered, That the association file within 30 days a report stating whether it has elected to comply with such recommendations, and, if so, the manner in which it has so complied.

As respects the specification in the bill of particulars which challenged the contracts between the member manufacturers and the Phillips Petroleum Co., which supplied one-third of the natural gas used in the manufacture of channel black, on the ground that the practice of making payment through a percentage of the carbon black produced therefrom required said company to export such carbon black thus acquired by it exclusively through the stockholders of the association and to refuse to quote or sell such carbon black for export to other American exporters—

It appeared from the evidence that the contracts in question, as carried out, amounted to a sale of natural gas by Phillips to the carbon-black producer, payment for which was made by the latter in cash on the basis of the average price received by the manufacturer for the black sold by him under the royalty arrangement; that the agreements concerned were between individual member producers and Phillips and not between the association and said corporation; and that regardless of said corporation's assurance in 1933 that it would export no black, it would not in any event have exported any since it was not then a producer of any kind of black; and that there was nothing in the situation disclosed that could or did restrain the export trade of independent competitors or effect any of the other restraints excepted in the proviso of section 2 of the Webb-Pomerene Law.

As regards the basic agreement among the members of the association which bound each one to confine its exports of black to those made through the association—except in the cases of Mexico and Canada, as to which the

producer agreed to use reasonable care to see that exports were for use and consumption therein and to prevent their diversion to other foreign countries—and under which each member agreed that the association should act as its exclusive agent for the sale of all its export carbon black and that it would export only through the association, whereby the association was enabled to control the channels of distribution for all the export carbon black which originated with the stockholder members—

- It appeared that while the association membership always represented the bulk of the production and most of the exports—though there had always been nonmember producers—investigation of operations under the association's contract with its members and its control over the distribution of its members' product disclosed that the principle requirements in its selection of distributors had been their financial responsibility, their willingness to adhere to suggested prices, and their technical skill and facilities—qualities found requisite in coping with certain practices of large foreign buyers, i. e., commission splitting, liberal credit terms, unwarranted rejection of shipments, and black-market operations; disclosed no evidence that the trade of bona fide American exporters, buying and selling in export trade, was restrained; and disclosed also that two nonmember producers had recently entered the export field in a substantial way, which materially changed the competitive situation from that which existed when the testimony was taken; and that the record as a whole did not disclose any of the effects prohibited by the provisos of the Webb Act in said connection or as challenged in the bill of particulars, and therefore afforded no basis for any recommendations to the association relative thereto.
- In said connection the association was not obligated to employ sales agents in this country to sell its black in foreign countries in which it already had agents rendering sales services, or to quote to agents in this country for foreign buyers who were being serviced by its foreign agents; nor was it obligated to designate distributors who lacked the technical skill or facilities required of those whom it did appoint for such service.
- As respects the foregoing conclusion that the record as a whole did not disclose any of the prohibited effects, such determination was provisional and did not constitute a ruling or determination of the question of the validity of practices or contractual arrangements similar to those used by the association, which, under other factual situations or circumstances might contravene the law; but was a provisional determination, and the Commission retained jurisdiction to take appropriate action should judicial authority with final jurisdiction hereafter hold that exclusive dealing contracts or arrangements, such as present in the instant proceeding, are illegal per se.
- In said proceeding the investigation developed no evidence of agreements with foreign producers or with associations of foreign producers, or evidence of regulation of sales to the country's insular possessions or any failure to file information required by the Commission.
- As respects the charge that contracts were entered into with manufacturers of carbon black which limited and restricted their production and sale of said products within the United States; appeared that in two cases considered nonmembers denied any such agreement and actually increased their production; and, as respects certain suggestions for curtailment in the midst of a bulk price differential war, made in certain letters between different concerns or their officers, that no evidence was adduced showing that the export association was involved therein, and that testimony was also given that curtailment, for various reasons set forth, was never practiced by any common concert.

In regard to the specifications of the bill of particulars which raised the issue of contracts with the association stockholders, other manufacturers and other owners which caused them to use care that domestic sales made by them were not for export and to take cautions to prevent the export of carbon black sold by them for use or consumption within the United States—

The investigation produced no evidence of such contracts with nonmembers or other owners of carbon black—excepting one nonmember who thereafter became a member; and,

As respects the agreement among members, testimony of officers of association members was to the effect that such restrictions, i. e., that the producer agreed to use reasonable care that exports made to Canada or Mexico were not diverted to other foreign countries; that carbon black sold by the producer in the United States should be exported only through the association; and that all of the obligations on the part of the producer were undertaken on its behalf and that of any and all subsidiary or controlled corporations in which the producer might then or thereafter directly or indirectly own or control 50 percent or more of the stock; were essential to the preservation of the cooperative effort.

As respects the investigation of a bulk differential price war, and the Cabot Co.'s price differential, under which carbon black was delivered to domestic users at an economy variously estimated at from an eighth to a quarter of a cent a pound, and there was precipitated "a price war in the domestic market, in the course of which, following November 1, 1937, the price of carbon black fell from 5 to 2¼ cents per pound," evidence failed to disclose that the association participated in or was a party to any dealings or arrangements which might have been made in said connection.

In said proceeding and investigation it further appeared that the association had operated on a nonprofit basis, and had had to call, from time to time, for pro rata assessments from its stockholders; that from the date of its organization, its prices for carbon black had been higher than those prevailing in the domestic market; and that the activities of six new producers indicated that competition to the association might soon assume considerable proportions.

In said proceeding the record contained information indicating the imminence of considerable competition from production potential located propitiously near seaboard in nine foreign gas and oil areas, and also indicated that the stockholders of the association were firmly convinced, as a result of their experience in export trade, that such an association as that herein concerned, was the best, if not the only practicable, means of dealing with such foreign nationals' groups as represented by the continued presence in this country, after the war, of former purchasing agencies for 10 nations, which continued to exist in Washington mainly in an advisory capacity for furthering the economic interests of their countries in home buying and for dealing with the Economic Cooperation Administration.

Before *Mr. John W. Norwood* and *Mr. Clyde M. Hadley*, trial examiners.

Mr. P. C. Kobinski, of Washington, D. C., for the Commission.

Mr. Henry Ward Beer, of New York City, for all respondents.

Mr. Fred C. Fernald and *Mr. Warren F. Rideout*, both of Boston; for *Godfrey L. Cabot, Thomas D. Cabot, Inc., and Godfrey L. Cabot, Inc.*

Mr. John W. Beveridge, of Borger, Tex., for *J. M. Huber Corp.*

REPORT OF INVESTIGATION

I. THE PROCEEDINGS

Under the provisions of an act of Congress approved April 10, 1918, entitled "An act to Promote Export Trade and for other purposes" (40 Stat. 516; 15 U. S. C. A., secs. 61-65) commonly known as the Webb-Pomerene Act, and by virtue of the authority conferred upon it by said act, the Federal Trade Commission did, on the 28th day of October 1944, issue its Notice of Investigation and Summons to Carbon Black Export, Inc. (hereinafter called the "Association"), its officers, directors, and stockholders, as named above, setting forth therein that the Commission had reason to believe that certain agreements made and acts done by the above-named parties may be in violation of law as more specifically set out in the bill of particulars thereto attached.

Thereafter, investigational hearings were held before trial examiners appointed for the purpose by the Commission, at Washington, D. C., February 5, 6, 7, and 8, 1945; and June 19, 20, 21, and 22, 1945; Philadelphia, Pa., January 15, 1946; New York, N. Y., January 16, 17, and 18, 1946; Boston, Mass., January 22 and 23, 1946; Akron, Ohio, January 29, 30, and 31, 1946; Chicago, Ill., February 4, 1946; Amarillo, Tex., February 7, 1946; Bartlesville, Okla., February 11 and 12, 1946; New York, N. Y., June 4, 5, 6, and 7, 1946; and Washington, D. C., August 20, 1946, at which sworn testimony and documentary evidence were received in the record. The parties were requested and permitted to make such statements for the record and submit such information to the Commission as they desired to offer. Trial Examiner John W. Norwood presided at the hearing held in Washington, D. C., from February 5 to June 22, 1945, and thereafter Trial Examiner Clyde M. Hadley presided at all the remaining hearings, closing the taking of testimony and admission of evidence at the conclusion of the Washington, D. C., hearing on August 20, 1946.

The proceedings were reduced to writing and the transcript of the record and exhibit were filed in the office of the Commission. The Commission, having examined and analyzed the record, makes this its report on the facts.

II. THE ASSOCIATION

A. *Description of Organization*

The association is a corporation organized with 1,000 shares of non-par common stock under the laws of Delaware on May 7, 1933. Pursuant to the Webb-Pomerene law, it filed with the Federal Trade Commission a statement accompanied by the requisite documents on June 15, 1933, which was formally accepted for filing by the Commission on

March 1, 1935. It is a so-called "full functioning" export trade association, and since organization has maintained its office at 500 Fifth Avenue, New York, N. Y. Stockholders at the date of issuance of the summons herein were: United Carbon Co., Inc., Charleston, W. Va.; Columbian Carbon Co., New York, N. Y.; Godfrey L. Cabot, Inc., Boston, Mass.; J. M. Huber Corp., New York, N. Y.; Panhandle Carbon Co., Inc., New York, N. Y.; and Chas. Eneu Johnson & Co., Philadelphia, Pa. Excepting for the last named, which became a stockholder on June 18, 1936, the others have been stockholders since incorporation of the association.

B. Officers and Directors

The officers and directors at the date of issuance of the summons herein were C. E. Kayser, president and director; Reid L. Carr, secretary and director; and F. R. Cantzlaar, treasurer. The remaining directors of a board of nine were, with company affiliation noted: Godfrey L. Cabot (Cabot); Thomas D. Cabot (Cabot); Oscar Nelson (United); R. H. Eagles (Huber); Hans W. Huber (Huber); Robert L. Wishnick (Panhandle); and L. C. Herkness (Johnson). These directors, with the exception of Mr. Herkness, who was elected in 1936, have served continuously since the association's organization. C. E. Kayser served as president from date of organization until December 31, 1945, when he was succeeded by the present incumbent, H. L. Titus, of the Cabot organization. Reid L. Carr served as secretary from date of organization until September 18, 1946, when he was succeeded by C. E. Kayser, the present incumbent. F. R. Cantzlaar served as treasurer from date of organization until December 31, 1945, when he was succeeded by the present incumbent, E. T. Villareal, who had served as assistant treasurer since 1936.

III. HISTORICAL BACKGROUND

A. Commodity Involved

"Carbon black is the commercial name of the soot of gas. The first carbon black that came into commerce was made about 80 years ago in Philadelphia, on a drum 3 feet in diameter, made of sheet iron, and by the contact of the flames from ordinary steatite burners impinging on the surface of the drum." With this brief characterization as an introduction, the second witness called in the inquiry, Dr. Godfrey L. Cabot, president of the Cabot Co., gave a history of the product. Dr. Cabot, employed in the industry since 1882, detailed the following highlights of its development.

Carbon black was first used to make glossing for printer's ink. From the year 1872, it was manufactured from natural gas on soap-

stone plates, in West Virginia. Production volume in 1887 was about a million pounds and its use confined to printer's ink and stove polish. By 1900, it was being used in paints, varnishes, coloring paper, sealing wax, putty, and carbon paper. About the year 1915, it began to replace lamp black in rubber manufacture because of its two very marked characteristics: intense color and mixing strength. It proved to increase the potential strength of rubber and to greatly increase its resistance to abrasion. This new use stimulated its manufacture so that production volume increased from 20 million to 25 million pounds in 1914 to 700 million pounds in 1944. At the present time, about 90 percent of carbon black goes into the rubber industry and 10 percent to inks and paints. The Appalachian area as a source of supply proved inadequate and between 1920 and 1930 the industry moved to Louisiana and Texas.

Dr. Cabot described improvements in the process of manufacturing carbon black that followed the use of soapstone equipment. The first use of iron plates consisted of circular plates, 24 feet in diameter, with revolving gas burners underneath which made the carbon black by "impingement of gas flame on a horizontal surface." In a later variation of this method, Dr. Cabot devised a roller-bearing base on which the circular plate revolved over fixed gas burners. Another method made use of revolving cylinders against which a flame was impinged, resulting in a product called "Peerless Black" which had good lengthening capacity, a quality desirable for certain paint trades.

A major development occurred about 1900 with the invention by Hoskins and McNutt of the channel method, in which channel iron beams of 6- to 8-inch widths are moved back and forth over fixed gas burners. While this method did not greatly increase carbon black extraction, it came into general use because of simplicity of its construction and adaptability to accurate upkeep and maintenance.

The retort method, devised by Mr. Cottrell, was the next great innovation. In this process, gas is burned in a large retort with an inadequate supply of air, resulting in precipitation of a smudge from which the carbon black is chemically removed. Its great advantage lies in the fact that carbon black recovery in the direct contact methods averages about 3 percent of the weight of the gas used whereas the retort method produces recoveries as high as 18 percent, or six times as much. This process, and a later one known as the thermatonic, which was not described, account for the term "furnace" black, applied to carbon black so produced.

The handling of carbon black has been materially improved by a process developed during the past 20 years, of molding powdered black into hard spherical pellets thereby permitting its packaging in smaller containers and eliminating dust from handling operations.

Dr. Cabot is a chemist by profession. He stated that the exact chemical formula for carbon black has never been derived, but that it is comprised of carbon, hydrogen, oxygen, and other elements, with the carbon percentage ranging from 84 to 96 percent. It is not soluble in anything except molten iron. It has no competitor in its quality of conferring tensile strength and abrasion resistance to rubber. He concluded his description with the statement that the Cabot Co. commenced carbon black exports to England in 1891, but that they were not the first such American exporters, Binney & Smith Co., who for years accounted for half of our carbon black exports, being already in the English market in 1891.

The physical movement of gas from the well to carbon black plants was traced by Mr. Carr, the association's secretary, as follows (Tr. 414):

Q. Would you for the record, if you are able to do so, trace in a general way the physical movement of the gas from the well to carbon black plants?

A. In general the procedure is something as follows: There are in the field certain gas wells which are owned and operated by producers or producing companies. The gas from these wells is sold in the first instance to the owner or proprietor of a natural gasoline plant under a contract, the general tenor of which is that the natural gasoline plant owner will pay to the producer a royalty measured by the amount and price of the gasoline extracted. He will return to the producer such gas as the producer may need for operating his properties, and will then have the right to sell the balance of the residue gas, dividing the proceeds, less expenses of sale, equally between the proprietor of the gasoline plant and the producer of the gas.

Q. That latter point you refer to is known as residue gas.

A. Residue of the gas after the gasoline has been extracted.

Q. After the gasoline has been extracted, what happens to this residue gas so far as the carbon black plants are concerned?

A. Well, if it is sold for carbon black purposes it is delivered to the carbon black plant. Sometimes it is delivered at the plant. It is delivered at the outlet of the gasoline plant according to the terms of the particular contract.

Q. The contracts we are referring to in general are contracts for the acquisition of this residue gas from the gasoline plants after they have extracted the gasoline from the hydrocarbons to be manufactured into carbon black?

A. That is right.

Trial Examiner Norwood. Is that residue gas used in pipes for illuminating?

The WITNESS. It might be, but under the law of Texas as it now stands, where most of the carbon black manufacturing is carried on, you can use lawfully for the manufacture of channel black only sour gas, gas which would not be suitable for domestic use, without purification or what is technically known as residue casing head gas, casing head gas being gas produced around the casing head of the oil well as distinguished from true natural gas.

Carbon black was subject to war-time emergency orders. Its manufacture, and sale upon allocation, was regulated under W. P. B. Order M-300 (exhibit 395). Under this order, furnace black was made subject to allocation on November 1, 1942, and channel black placed under similar restriction on August 1, 1944. These controls

were lifted on July 31, 1946. This product was likewise subject to price control under O. P. A. Order S. R. 14 (exhibit 396), which was in effect from March 31, 1942, until June 30, 1946. On April 1, 1946, the Office of International Trade ordered a limitation of 9,000,000 pounds per month on all exports of carbon black.

During the war period, furnace black production was greatly increased because of its adaptability in the manufacture of synthetic rubber, and it accounted for 40 percent of carbon black production by May 6, 1946, when application for export price was filed (exhibit 680 A). Four stockholders, Cabot, Columbian, United, and Huber, commenced manufacture of furnace black along with their channel black production. In addition, four outside manufacturers, i. e., non-members, engaged in furnace black production: Phillips Petroleum Co.; Thermatonic Carbon Co.; Jefferson Lake Sulphur Co.; and Crown Carbon Co. The Office of Price Administration accepted the association's filing of export prices on furnace black on behalf of the four stockholders above named. The resultant prices were 5.20 and 6.20 cents per pound for S. R. F. (semireinforcing black) in 50-pound paper and 300-pound wooden case containers respectively; and 6.80 and 7.80 cents per pound on similar weights of H. M. F. (high-modulation black). The Office of Price Administration, in acknowledging the May 6, 1946, filing, replied on May 17, 1946, in reference to furnace black as follows (exhibit 683): "Inasmuch as your new items are merely variations of carbon black upon which a premium is allowable this office has no objection to your applying to these new items those premiums which have been approved for your other types of carbon black." The prices filed are maximum F. A. S. prices, Houston, Tex. On April 1, 1946, the association entered into agency contracts with its four stockholders who produced furnace black (Cabot, Columbian, United, and Huber) on terms permitting it to set a C. I. F. price which would allow for payment of an 8 percent commission to distributors, "extra packaging cost, port transfer charges, loading charges, ocean freights, marine insurance, forwarding fees, cash discounts and the like." The contracts have no relation to stockholders' production capacities, involve no quota arrangement, run for a short term (first expiration date being December 31, 1946) and the association's compensation as agent is fixed at fifteen-hundredths of 1 cent (0.15) per pound of furnace black "consumed in foreign countries except Canada and Mexico." Mr. Titus, the association's president, who prepared and handled the O. P. A. application and data testified that the stockholders acted independently of each other and that the F. A. S. prices were rounded off at fractions of a cent under the permissible ceilings. He testified that 30,000,000 pounds of furnace black valued at \$2,000,000 had been exported be-

tween April 1 and August 1, 1946. He further testified that the association's directors had authorized execution of similar agency contracts with nonmember manufacturers of furnace black but that none had made application at the date of testimony, August 20, 1946. Likewise, no such manufacturer had made application for membership in the association, but that "if any one of them should ask to become members, we would immediately consider the problem of what would be an equitable share of the corporation for them to own."¹

There is no testimony or evidence along the lines of the specifications in the bill of particulars which in any way concerns export trade in the furnace type of carbon black, which, as above related, became such article of commerce in April 1946.

The engagement in furnace black business, however, necessitated action to draw the exact distinction between channel and furnace types of carbon black. The commodity was defined in the certificate of incorporation as follows:

1. In such export trade, to act as the agent, broker, consignee or factor, or otherwise for the account of others, in respect of the sale, purchase, or other acquisition, exchange, contracting for, handling, dealing in, trade and commerce in, transportation and disposition of carbon black and other pigments manufactured from natural gas, gasoline plant vapors, casinghead gas and/or residue casinghead gas, and other merchandise, commodities and articles or materials of commerce of every kind and nature.

The definition appeared in the original sales agreement of May 2, 1933, between the association and producer stockholders, as follows:

FIRST. Wherever used in this agreement, the term "carbon black" means all black pigments manufactured or produced in whole or part from natural gas, gasoline plant vapors, casinghead gas, and/or residue casinghead gas, except high grade carbon blacks as hereinafter defined; the term "high grade carbon blacks" means all black pigments manufactured or produced from natural gas, gasoline plant vapors, casinghead gas, and/or residue casinghead gas, sold by the Producer at a price exceeding by not less than 5 cents per pound the average market price at which ordinary carbon blacks are at the time sold; * * *.

The association's directors, by resolution adopted December 19, 1945, amended the foregoing first paragraph of the sales agreement, as follows:

By insertion in line 5 of paragraph FIRST thereof after the word "gas," the words "by impingement of a flame upon a metallic surface," and by insertion in line 9 of paragraph numbered FIRST thereof after the word "gas" the words "by impingement of a flame upon a metallic surface."

Mr. Titus testified that the purpose of this amendment was to limit dealings under the sales agreement to channel black, but not to limit or restrict "Carbexport's right to deal with other types of carbon black."²

¹ T. 2008-2033. Ex. 498, 679-684.

² T. 2032. Ex. 12, 15, 498.

B. *Carbon Black Export Association, Inc., (Former Group)*

Carbon Black Export Association, Inc., was incorporated under Delaware law on November 21, 1929, "to engage solely in export trade, as the term 'export trade' is defined in the act of Congress * * *." Capitalization consisted of 2,500 shares of non par common stock issued to 6 members: Godfrey L. Cabot, Inc.; United Carbon Co.; J. M. Huber, Inc.; The Palmer Gas Products Corp.; Binney & Smith Co.; and R. W. Greeff & Co., Inc. The first three named were manufacturers (or producers as more frequently described in the record) of carbon black, and the last three named were dealers and distributors of carbon black. Each member was represented on the board of directors and the Export Price Committee.

This was not a so-called "full functioning" association, each member selling carbon black in export trade through its agents on its own account at prices determined from time to time by the Export Price Committee. Annual reports were filed with the Commission's Export Trade Office for the dates January 1, 1931, 1932, and 1933. The last of these reports showed omission of Godfrey L. Cabot, Inc., from the membership list and its replacement by Wishnick-Tumpeer, Inc. No subsequent annual reports were filed since this corporation was formally dissolved on December 1, 1933.

C. *Transition period*

Mr. C. E. Kayser, the first president of Carbon Black Export, Inc., the association here under consideration, graduated from Columbia University in 1909 and was employed until 1923 by the American Metal Co., Ltd., in connection with the operation of its zinc smelter gas supply facilities in Kansas, Oklahoma, and Arkansas. From 1923 until May 1932, he operated his own prospecting company, the Mississippi Valey Oil Co., of which he was president. In late May 1932 Mr. Kayser undertook an independent survey of the export trade business of the carbon black industry. He was introduced to members of the industry by Mr. Clyde Alexander, an official of Phillips Petroleum Co., and testified that he undertook the survey for the following carbon black producers: Columbian Carbon Co.; United Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber, Inc.; and the Palmer Corp. He studied the records of the existing export association (described in par. B above), and the office records of its members, reaching two definite conclusions by the middle of November 1932. These were, first, that the then existing association was comprised of diverse interests, the outlook of producers and distributors on any problem being bound to be diverse and divergent; second, that the group was "an advisory board which attempted to use its rights to make regula-

tions for the export market for its members, attempted to enforce them, but had nothing to enforce them with."

The real problem of the existing association, he testified, stemmed from the existence in the export market of some 10 or 12 large rubber manufacturer consumers of approximately 80 percent of all carbon black exported. These consumers were large enough to be able to act independently and to tacitly threaten to go into the carbon black business on their own. The actions of these large consumers resulted in four bad practices: First, the terms on which sellers were required to sell export carbon black made it possible for carbon black to arrive in Europe before payment was due, thus placing the unpaid for commodity some three to eight thousand miles distant from the supplier; second, frequency of rejections by purchasers on some doubtful ground of inferior quality; third, the demand of buyers for excessive discounts on grounds that some competitor supplier had offered a similar discount; and fourth, a price decline clause in export sales contracts which forced the seller "to accept the buyer's statement that he knew of or had himself had an offer at a lower price." Contemporary correspondence offered in evidence appears to confirm these conclusions.³ Mr. R. H. DeGreeff, of R. W. Greeff & Co., Inc., a member of the first association, wrote member J. M. Huber, Inc., on October 5, 1932, as follows (exhibit 1):

Please be advised that we wish to resign as members of the association, effective immediately, and the writer at the same time desires to resign as an officer and director. Since the two important producers in the industry have withdrawn from the association, we can see no purpose in our continuing to remain as members, but we shall be pleased to resume our cooperation at any time a constructive plan covering the industry's export business is put forward.

We cannot see, however, how any plan can be successful which does not include a quota basis, uniform agency arrangements and sales contracts, as well as definite arrangements by which all sales are being handled by the association, thereby giving it the fullest possible control of the business.

D. *Carbon Black Export, Inc. (Present Group)*

A meeting was held in New York City in December 1932, attended by representatives of producers Columbian, United, Cabot, Huber, and Palmer, and presided over by Mr. Amos L. Beaty, then president of the American Petroleum Institute. At this meeting, it was concluded to form a new association comprised wholly of producers, and to consider the need of making such organization the exclusive agent of the producers. Thereafter, on May 16, 1933, the present association, Carbon Black Export, Inc., was incorporated under Delaware law, with 10,000 shares of capital stock without par value. The objects and purposes of the corporation are "to engage solely in export

³ T. 9-20. Ex. 1-5.

trade, as the term 'export trade' is defined in the act of Congress known as the 'Webb Act.'” The full functioning character of the association is revealed in the first two specific corporate purposes. The first, section 1, authorizing dealings in carbon black as an agent is set forth at page 1255 above. The second, authorizing buying and selling carbon black on its account, reads (exhibit 11) :

2. In such export trade, to buy or otherwise acquire, sell, exchange, contract for, handle and otherwise deal in, for its own account or for the account of others, carbon black and such other pigments and such other merchandise, commodities and articles and/or materials of commerce of every kind and nature.

The producers organizing the association and forming its first stockholders were: United Carbon Co.; Columbian Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber of La., Inc.; Century Carbon Co.; Panhandle Carbon Co.; Texas Carbon Industries, Inc.; and the Palmer Carbon Co.

Two of the above-named stockholders had some interest in the first association which was still “limping” along in early 1933. Texas Carbon Industries, Inc., was the producer-supplier for R. W. Greeff & Co., Inc., a distributor member of the first association. Mr. Kayser testified that the difficulty in this case was solved by “satisfying T. C. I. with the quota” of export business assigned to it and Greeff was “given the kind of assurance that he would not be eliminated” as a distributor. The Palmer Carbon Co.’s interest in the first association lay in the membership of its distributor therein, Palmer Gas Products Corp. However, it agreed to join the present association “if some substantial portion of its inventory were taken off its hands.” This was accomplished by the purchase in May 1933 of 5,016,500 pounds of carbon black at 2 cents a pound from the Palmer company by five of above-named producer members: Columbian, United, Cabot, Huber, and Wishnick-Tumpeer. Mr. Kayser acted as clearing house for this transaction but did not remember whether any of the purchased product was exported. He testified that Phillips Petroleum Co. acted as the ostensible purchaser from Palmer because Palmer “had gas relations with the Phillips Petroleum Co. and, knowing Phillips were not in the confidence of others because they were not sellers of carbon black, they chose to make the deal through Phillips so they would be certain as to being paid;” and further that Phillips did not acquire title or pay or receive money, merely accommodating Palmer. Mr. Reid Carr testified to the same effect giving as his impression that Phillips did not acquire title to the Palmer black and made no profit or loss on the transaction, but that the transaction was cleared through Phillips as a matter of convenience. He added that Columbian’s share of this purchase was sold in the regular course of business, some domestic and some export.⁴

⁴T. 45-61; 522; 1674. Ex. 6 A-F.

A copy of the bylaws of the association as adopted at time of organization is contained in the record as exhibit 10. There have been several amendments. Section 5 of article II, providing originally for three directors, was amended June 13, 1933, increasing the number of directors to 12, and later, by September 18, 1946, amendment, to 13. Two significant amendments, as revealed by the association's January 1, 1946, report to the Commission, were adopted on December 19, 1945. The first of these liberalizing the qualifications for president, repealed from article III, section 2, the sentence reading:

The president shall not at his election or during his tenure of office be or theretofore have been an officer (other than a member of the board of directors) or an employee or agent of any stockholder of this corporation.

The second consisted of a further demarcation between channel and furnace carbon black. To article VI, section 6, "Miscellaneous Provisions," there was added a sentence negating application to furnace black, the section, as amended, reading as follows:

SEC. 6. *Export prices.*—Export prices of all carbon black sold by the corporation shall be fixed and changed from time to time only (a) by the affirmative vote of the holders of a majority of those shares of the capital stock of the corporation entitled to vote present in person or represented by proxy at any annual or special meeting of the stockholders of the corporation at which a quorum thereof, as provided in section 3 of article I of these bylaws, shall be so present or represented, or by the consent in writing of the holders of a majority of the total number of shares outstanding, without a meeting: *Provided, however,* That the president shall concur in such affirmative vote or written consent, or (b) without such concurrence, by the affirmative vote of the holders of two-thirds of those shares of such stock so present or represented at any such meeting with such quorum or by the consent in writing of the holders of two-thirds of the total number of shares outstanding, without a meeting. Nothing in this section contained shall be deemed to apply to carbon black manufactured by the furnace process.

In the course of the year following its organization, the officers of the association prepared and submitted to the Commission a form of producer's contract which provided for a quota of export carbon black business to be handled exclusively through the association. The bill of particulars specified such exclusive contracts with stockholders, nonstockholders, and with Phillips Petroleum Corp. A form of distributor's contract was developed prior to 1940. The bill of particulars also further specifies restrictions on distributors' choice of agents; requirements that distributors deal exclusively in the association's carbon black; contracts fixing resale prices to distributors, agents, and consumers; and restrictive contracts with American manufacturer exporters who are not stockholders of the association. The investigation developed no evidence of agreements with foreign producers or with associations of foreign producers, nor any evidence of regulation of sales to our insular possessions, nor any failure to file information required by the Commission.

FEDERAL TRADE COMMISSION

IV. EXPORT TRADE OPERATIONS INVESTIGATED

A. *Association-Phillips Petroleum Co. Contract*

Mr. Reid Carr gave testimony as to the history of the royalty provision in contracts for purchase of gas by carbon black producers. His company, the Columbian, made its first contract for purchase of royalty gas from Phillips Petroleum Co. on December 10, 1936. He estimated that such royalty contracts were put in practice by members of the industry as early as 1928. He referred to exhibit 356 A-F as typical of a gas purchase contract at a definite price per thousand cubic feet. This particular contract was entered into on October 1, 1924, between Phillips Petroleum Co. (first party) and Columbian Carbon Co. (second party). Its first five paragraphs are here quoted in full, the last referring to price:

FIRST. That First Party is the owner of certain plants or factories for the extraction of gasoline from natural gas situated near the town of Pioneer, Eastland County, Texas, which plants are at present capable of handling thirty million cubic feet of natural gas per day.

SECOND. That First Party has entered into contracts with lessees under certain oil and gas leases covering land in the vicinity of said plants by the terms of which contracts First Party purchases gas from said lessees, which gas is used in and passed through said plants and gasoline extracted therefrom. That after the extraction of gasoline from the said gas by First Party it is necessary to return to the said lessees stripped or residue gas for development and operating purposes.

THIRD. That through the operation of said plants a large surplus of so-called tail, stripped, or residue gas is available at the exhaust of said plants after the extraction of gasoline from said gas and after the return of gas to the lessees for development and operating purposes. That Second Party is the manufacturer of carbon black and desires to erect a plant at or near the town of Pioneer, Eastland County, Texas, for the manufacture of carbon black from the aforesaid gas, pursuant to a permit heretofore issued by the Railroad Commission of Texas and assigned to the Columbian Carbon Company, or its nominee, and is desirous of purchasing, and First Party is desirous of selling, the aforesaid residue or stripped gas to be used in such manufacture.

FOURTH. Now, therefore, in consideration of the premises and of the terms, conditions, covenants, and agreements hereinafter set forth it is agreed by and between the parties hereto that Second Party shall ninety days after the execution of this agreement begin construction of pipe lines to convey the gas from First Party's plants and the erection of a plant of such size and capacity as may be necessary to consume not less than four and one-half million cubic feet of gas per twenty-four hours for the manufacture of carbon black, said plant to be in operation in at least one hundred and eighty (180) days from the date of this agreement.

FIFTH. The price shall be two and one-half ($2\frac{1}{2}$) cent per thousand cubic feet during the first two and one-half ($2\frac{1}{2}$) years of said contract, and three (3) cents per thousand cubic feet during the remaining two and one-half ($2\frac{1}{2}$) years thereof.

He referred to exhibit 358 A-J as illustrating the royalty mode of payment. This was a contract dated September 7, 1928, between Philtex Oil Co. and The Palmer Corp. of Louisiana, the price provisions reading as follows:

14. The price to be paid to Seller for gas delivered to Buyer shall be thirty (30%) percent of the carbon black production of Buyer's plant, which shall, at Buyer's expense, be placed in Buyer's warehouses in paper bags, uncompressed. In the event Seller's share of the production shall be sold in compressed form, then Buyer shall be allowed what would under all circumstances be a reasonable fee for compressing same. Seller's share of said production shall be stored in the warehouses of Buyer without cost to Seller, but shall be held subject to Seller's risk. In this connection, however, it is understood and agreed that Buyer may obtain insurance, if possible, guaranteeing it against loss by fire or from any other source that it may deem advisable to insure against, which insurance shall cover all carbon black in said warehouses owned by both Buyer and Seller, and Seller hereby obligates and binds itself to pay its pro rata part of any and all insurance premiums due under any insurance policy purchased by Buyer, said payment to be made by Seller immediately upon receipt of bill for its pro rata part of said insurance premium or premiums; Provided, however, that Seller shall have the right and option to carry its own risk as to its share of the said production, by notifying Buyer of its intention so to do.

15. It is understood and agreed that Buyer will sell Seller's stocks in at least the proportion that Buyer sells its own stock and Buyer will make monthly settlements with Seller for sales of Seller's carbon black. Seller shall pay Buyer the actual sales costs of selling Seller's share of such carbon black, which shall not exceed five (5%) percent of the sales price.

Mr. Carr expressed his belief "that the Phillips Petroleum Co. changed its basis from the sale of gas at a flat price per thousand to the royalty basis in order to encourage a wider sale of gas for carbon black purposes. The royalty contract offered very great advantages to the producer of the black as compared with the producer who paid at flat price for his gas, because the royalty, under the royalty contract if there was an overproduction and the producer had to stock his black, he didn't have to pay for the gas. He only had to pay for the gas as it was sold. In the second place, if the price went down, the price of gas automatically went down with it. Whereas, under a fixed price contract, the producer had to pay for his gas at the end of every month whether he sold his back or not, and he had no protection in the case of falling market."⁵

Mr. F. E. Rice, vice president of Phillips Petroleum Co., testified that he had been with the company over 27 years and was familiar with the practices surrounding gas supplies to carbon black plants, giving the following additional facts. Oil or gas leases with landowners provide for a royalty of one-eighth of the proceeds from sale of gas or oil. His company pays the landowner royalty for the amount of natural gasoline which they extract, and if it utilizes the

⁵ T. 433-435.

butanes and propanes (which are referred to as "heavier fractions") it pays a higher price. The gas which remains is called residue gas, which may be used for fuel and light or for carbon black production. A royalty of one-eighth of the proceeds of such sales must be paid the landowner. Residue gas from which the heavier fractions have been extracted furnishes a decreased production of carbon black. He testified further that Phillips company in 1944 sold 232 million cubic feet or 25 percent of the 910 million cubic feet of gas consumed by the carbon black industry; in addition it furnished 66½ million cubic feet to plants in which it held a half interest, making the total of gas furnished to the industry by Phillips, 33 percent. Total production of carbon black in 1944 was 431,721,000 pounds; its 30 percent royalty share of this amounted to 28,850,000 pounds, or 7 percent of the total; its share of production in half-owned plants was 27,500,000 pounds, or 6.6 percent, making its proportion of total carbon black production in 1944, 13.6 percent. These proportions had not varied substantially during the 10 or 12 years preceding 1944. Most of the major oil companies, including Skelly, Shell, Magnolia, Shamrock, Gulf, and Cities Service furnish gas to the carbon black industry.

Respecting the royalty paid by carbon black producers, Mr. Rice testified that certain changes had been made in its mode of computation. In the Philtex-Palmer gas contract of September 7, 1928, exhibit 358, quoted in paragraph IV A above, the royalty provision read "30 percent of the carbon black production of Buyer's plant." Mr. Rice referred to exhibit 466 in the record, photostat copy of a letter from Phillips Petroleum Co. to Palmer Carbon Co., dated April 6, 1934, modifying such royalty payment provision, and reading, in part, as follows:

1. The selling price of royalty black moving from the plant during any month shall be the average price f. o. b. plant, received by you on domestic sales during the month, without regard to actual destination.

This change, he testified, was done at the insistence of the company's accounting division whose auditors "in the chaotic condition of the export market were having a hard time determining just what payments should be made."

Later on, in 1939 and 1940, as these contracts were renewed, the basis of royalty computation was modified to include the export price for carbon black, because "we knew the export market was a higher priced market than the domestic market at that time, so we wanted to share in any sales of our black in that market." he testified. He added "we are kind of opportunists in a way, we try to get the highest price for our carbon black, and 1939 and 1940 it was to our advantage to change these back, and in instances we did." At a later date, Mr. Rice submitted a letter dated March 1, 1946, in the record as exhibit 524-A-F, which details contract extensions with six carbon black pro-

ducers, four of whom agreed to acceptance of export prices in royalty computation.⁶

The scope of the investigation necessarily did not include the landowner's interest in royalty charges on gas used in making carbon black, but covering the period of time just discussed there is in the record, as exhibit 324 A, a photostat copy of a letter dated April 10, 1939, from C. E. Kayser to Oscar Nelson, in which the pertinent portions, the second and third paragraphs, read as follows:

The Royalty Owners Association for the Texas Panhandle held a well attended meeting in Amarillo on March 8th. Ernest Thompson, Railroad Commissioner, and Senator C. C. Small were present. Much of the meeting was taken up on blaming the carbon black manufacturers for the low returns Royalty Owners receive on natural gas produced from their properties. The Amarillo News-Globe of the 9th reports on Senator Small's contribution to the meeting as follows:

"The Senator (Small) also took a rather significant fling at the carbon black companies, who he said were in a big way responsible for the low returns on gas royalty being paid for gas processed for carbon black, by holding the price to such a low level. He intimated clearly that a law shutting off carbon black manufacture might be a real remedy until such time that it became scarce enough to command a reasonable price."

The second specification in the bill of particulars reads as follows:

2. Contract with Phillips Petroleum Company, a petroleum producer which sells large quantities of natural gas to Carbexport's stockholders and other manufacturers of carbon black for the production of carbon black, and which is pair therefor in a percentage of the carbon black produced therefrom, which contract requires and causes said petroleum company to export such carbon black thus acquired by it exclusively through the stockholders of Carbexport and to refuse to quote or sell, directly or indirectly, such carbon black for export to other American exporters.

THE PHILLIPS CONTRACT IN QUESTION

Contained in the record are exhibits 25 A, B, and C. The first two recite the conditions of an escrow agreement entered into at the time of organization of the present association, and refer specifically to the receipt of an agreement by Phillips (exhibit 25 C) not to export royalty carbon black of association members with whom Phillips has royalty gas contracts. The exhibits are here reproduced:

EXHIBIT 25 A

MARCH 8, 1933.

REID, L. CARR, ESQ.,
120 Broadway,
New York City.

DEAR SIR: We hand you herewith two copies of the Sales Agreement and Subscription Agreement between our Company and Carbon Black Export, Inc., both duly executed by our Company.

⁶ T. 1464-1476.

You are hereby directed to hold said agreements in escrow and to deliver same only upon the following conditions, viz:

1. Receipt by you of sales agreements and subscription agreements of like tenor, duly executed by the following companies, respectively: Godfrey L. Cabot, Inc., United Carbon Company, Columbian Carbon Company, J. M. Huber Company of Louisiana, and Palmer Corporation.

2. Receipt by you of either (a) a letter signed by Phillips Petroleum Company agreeing for the term of five years from January 1, 1934, not to export carbon black except as part of the contract quota of United Carbon Company and Godfrey L. Cabot, Inc., or (b) a sales agreement executed by Phillips Petroleum Company of like tenor with that signed by the other companies above named, and fixing such contract quota as our company may approve.

Until the conditions above specified are performed, said agreements are not to be considered as binding or effective for any purpose.

Upon compliance with both the foregoing conditions, you are to deliver said agreements, and to return to our Company one copy of each duly executed by Carbon Black Export, Inc.

Yours very truly,

UNITED CARBON COMPANY,
By-----

RLC/Mac.

EXHIBIT 25 B

CLARK, CARR & ELLIS,
120 Broadway,
New York, May 5, 1933.

UNITED CARBON COMPANY,
Union Building,
Charleston, W. Va.

GENTLEMEN: Under date of March 8, you delivered to me executed copies of Sales Agreement and Subscription Agreement with Carbon Black Export, Inc., upon certain conditions, one of which was:

"2. Receipt by you of either (a) a letter signed by Phillips Petroleum Company agreeing for the term of five years from January 1st, 1934, not to export carbon black except as part of the contract quota of United Carbon Company and Godfrey L. Cabot, Inc., or (b) a sales agreement executed by Phillips Petroleum Company of like tenor with that signed by the other companies above-named, and fixing such contract quota as our company may approve."

The Phillips Petroleum Company have submitted to me a proposed letter, of which I enclose a copy, and would ask you to advise me promptly whether you will authorize me to accept the same as in satisfaction of the escrow condition above-quoted.

I might add that at the time the escrow agreement was signed it was considered probable that the Phillips Petroleum Company would purchase the plant of the Panhandle Carbon Company. I am informed that arrangements have since been made whereby said plant is to be purchased by Wishnick Tumpeer & Company or by some subsidiary corporation controlled by them, but they have agreed that the product of said plant shall be included in the quota of the Century Carbon Company.

Yours very truly,

(Signed) REID L. CARR.

EXHIBIT 25 C

MAY 2, 1933.

Mr. REID L. CARR,
120 Broadway,
New York, N. Y.

DEAR SIR: With reference to the marketing of carbon black which we receive in payment for gas, and with reference to this company taking stock in Carbon Black Export, Inc., this is to advise that the carbon black producing companies with which we have these contracts market our black along with theirs, and they are members of Carbon Black Export, Inc. Therefore we ourselves shall not export any of this black during the five-year period from January 1, 1934. For the same reason we do not consider it necessary for us to take stock in Carbon Black Export, Inc.

Yours very truly,

PHILLIPS PETROLEUM COMPANY.

By -----

Renewal of the contract (exhibit 25 C) dated May 2, 1933, was reported to a directors' meeting of the association held on March 25, 1936 (exhibit 99 A) in a report by the president, Mr. Kayser, which reads as follows:

He also stated that a new undertaking has been obtained from Phillips Petroleum Company extending to December 31, 1945, their original agreement not to export carbon black except through the quota of producer Stockholders of the Corporation.

The renewal itself is dated February 1, 1936, and is contained in the record as exhibit 462, reading as follows:

FEBRUARY 1, 1936.

File: R-42-36-61.

CARBON BLACK EXPORT, INC.,
500 Fifth Avenue,
New York, N. Y.

GENTLEMEN: Under date of May 2, 1933, we wrote a letter to Mr. Reid L. Carr, reading as follows:

"With reference to the marketing of carbon black which we receive in payment for gas, and with reference to this company taking stock in Carbon Black Export, Inc., this is to advise that the carbon black producing companies with which we have these contracts market our black along with theirs, and they are members of Carbon Black Export, Inc. Therefore we ourselves shall not export any of this black during the five-year period from January 1, 1934. For the same reason we do not consider it necessary for us to take stock in Carbon Black Export, Inc."

We now understand that the carbon black producers are ready to renew their contracts for export of carbon black through Carbon Black Export, Inc., for a term of ten years ending December 31, 1945, provided Phillips Petroleum Company will renew the agreement above quoted for said and extended term. This we hereby do.

We are further informed that an increased export quota has been awarded to Panhandle Carbon Company on the understanding that no black will be exported during said term, except under said quota, from the unit now being constructed

by us and Panhandle Carbon Company jointly. This understanding we also confirm.

Very truly yours,

(Sgd.) F. E. RICE.

C-C R. F. Hamilton.

During the period covered by the investigation, the Phillips company had royalty gas contracts with all association stockholders excepting Cabot and Huber.

Mr. Carr testified concerning exhibit 25 C as follows:⁷

At the time the escrow agreement was made, I understand that the Phillips Petroleum Co. was the owner of the Panhandle Carbon Co. plant and that it was the desire of the parties that if Phillips Petroleum Co. retained possession of that plant, it would obtain a quota or waive a quota, as the escrow letter expresses. In the interim period between March 8 and May 5, when the second letter was written, I am informed the Phillips Petroleum Co. sold that plant to Mr. R. I. Wishnick and Mr. Wishnick agreed to include the Panhandle plant under his Century Carbon Co. quota.

Phillips Petroleum Co. had contracts with various manufacturers of carbon black whereby in lieu of receiving a specified price per thousand cubic feet for the gas supplied by Phillips Petroleum Co. to such manufacturers for carbon black manufacture, Phillips Petroleum Co. would receive a specified percentage, I think in most, if not all the cases, 30 percent of the proceeds of the sale of black less a selling commission. These contracts required the manufacturer to sell the black pro rata or in the same proportion.

Q. That is, 30 percent of all black sold was considered to be a royalty on the sale of black?

A. Yes, less whatever sales commissions or other expenses were allowed in the agreement.

Q. Now, what did 25-C accomplish with respect to that so-called royalty on the black?

A. I should not think it accomplished anything because, as the letter says, the carbon black producing companies, it reads as follows, I should say:

"The carbon black producing companies market our black (that is, Phillips black) along with theirs and they are members of Carbon Black Export, Inc."

In other words, Phillips Petroleum Co., as I understand it, under these contracts had no right to market any black and never did market any black, was not in the business of selling black at all.

Q. But it says further:

"Therefore, we ourselves shall not export any of this black during the 5-year period from January 1, 1934."

What is meant by "this black"?

A. That means their pro rata share of the black which was to be the royalty on the black to be sold.

Q. To pay for the gas?

A. To pay for the gas?

At no time prior to May 2, 1933, when this letter from Phillips Petroleum Co. was written, had the Phillips Petroleum Co. itself marketed any carbon black either in the domestic or in the export trade. I further understand that no black has ever been segregated and set apart as belonging to the Phillips Pe-

⁷T. 145; 146; 150; 376.

troleum Co. under royalty contracts of this type, it being the practice to load, ship, or place in warehouses all the black produced from each plant without any attempt to earmark any particular part thereof as belonging to the Phillips Petroleum Co.

Attention is called to the following points in connection with the aforesaid gas contracts between Phillips and Columbian.

The contract dated December 10, 1936 (exhibit 369A-J) between Phillips and Columbian provides as follows:

"14. It is understood and agreed that Buyer will sell Seller's stock in at least the proportion that Buyer sells its own stocks, and Buyer is to make monthly settlements with Seller for the sales of carbon black.

"15. The price to be paid by Buyer to Seller for Seller's share of carbon black sold shall be the average price f. o. b. plant received by Buyer on domestic sales during the month of such sales without regard to actual destination of shipments. If carbon black moves from the plant, it shall be regarded as sold by Buyer even in the event of its going into storage elsewhere."

These clauses show:

1. That it was not contemplated that any particular black should be segregated or sold to Phillips, or that Phillips should have any *jus disponendi* over any black. Instead, all the black was to be sold by Columbian and Phillips' only right was to receive its proportionate share of the average price.

2. That the basis of settlement was not the amount actually received by Columbian but the average price on domestic sales f. o. b. plant, thus excluding from consideration the price received on export sales and on domestic l. c. l. sales ex warehouse. This is wholly inconsistent with the notion that 30 percent of the black was to be segregated and treated as Phillips' separate property. If the latter had been the intention, the contract would have required Columbian to account to Phillips for the actual amounts received on the sale of Phillips' black, not for the average price based on domestic sales f. o. b. plant.

3. There was nothing whatever to prevent Columbian from selling all or any part of the production of the plant in the export market, but Phillips by this clause deprived itself of the right to participate in any excess of the export price over the domestic price. This is hardly consistent with the theory that the Export corporation was a creature or creation of Phillips, designed for the purpose of enhancing Phillips' profit.

The contract between Phillips and Columbian dated May 17, 1940 (exhibit 373 A-R) provided:

"14. It is understood and agreed that Buyer will sell Seller's stock in at least the proportion that Buyer sells its own stocks, and Buyer is to make monthly settlement with Seller for the sales of carbon black.

"15. The price to be paid by Buyer to Seller for Seller's share of the carbon black sold shall be the average price (subject to the exception and to the deductions hereinafter specified) received by Buyer upon all sales of carbon black of like kind and quality, f. o. b. the various factories of the Buyer in the domestic and export markets, shipped in the calendar month preceding the month for which settlement is made. If carbon black is moved from the plant, it shall be regarded as sold by Buyer, even in the event of its going into storage elsewhere. In computing said average price, Buyer shall except and exclude all sales of less than carload lots in which delivery is made from any warehouse located at a place other than the location of a carbon black factory of Buyer."

Under this contract, export sales were to be taken into account in determining the settling price, but the price was to be the average received by Buyer upon all sales of black of like kind and quality f. o. b. all its plants. It was not the

price received for any particular black contemplated as belonging to Phillips or even the average price received from the black produced at this particular factory. Again, this is wholly inconsistent with the motion that 30 percent of the black was to be segregated and dealt with as Phillips' separate property.

The provisions of the contract of September 12, 1939 (exhibit 371 A-J), between Phillips and Columbian are essentially similar to those last above quoted, and the same comments generally apply to them.

The two contracts made by Phillips with The Palmer Corp. dated respectively September 7, 1928 (exhibit 358 A-K), and July 13, 1929 (exhibit 361 A-K), contain the following provision:

"It is understood and agreed that Buyer will sell Seller's stocks in at least the proportion that Buyer sells its own stock, and Buyer will make monthly settlements with Seller for sales of Seller's carbon black. Seller shall pay Buyer the actual sales cost of selling Seller's share of such carbon black which shall not exceed 5 percent of the sales price."

None of these contracts contains any clause whereby Phillips is given the right to require delivery to it of black in kind, instead of a share of the proceeds of the sale. None of said contracts contains any clause whereby the producer of the black is required to segregate or earmark any particular black as the specific property of Phillips. None of said contracts gives Phillips any right to dictate to what customers or in what markets or at what price the black shall be sold. The producer is perfectly free to sell or ship or deal with it as he pleases, subject only to his obligation to account to Phillips for its value determined in the manner that the contracts respectively provide.

The suggestion that the letter given by Phillips at the time of the organization of the Export corporation (exhibit 25 C) deprived Phillips of the right to sell royalty black in the export market is thus answered:

Phillips never had any right under these contracts to take any royalty black in kind, or to sell it in any market, whether domestic or foreign, but only the right to receive payment for the royalty black under the conditions and at the prices provided in said respective contracts. This right was neither enlarged nor diminished by the latter. The producing companies were still free to sell the royalty black along with their own either in the domestic or in the export market. They were still bound to sell royalty black proportionately with their own, though the price at which settlement was to be made with Phillips was not uniform but varied according to the provisions of each particular contract.

Mr. Carr testified that Phillips' transfer of its interest in the Pan-handle plant neither enlarged nor diminished its rights under the royalty contracts, they having no right to take the royalty black in kind or to export it. He gave his opinion that in reference to the royalty black the Phillips' letter (exhibit 25 C) was a nullity. He recalled no discussion on this subject with Phillips' officers but believed they construed the contract in the same way. He testified with respect to the extension (exhibit 462) as follows:⁸

My position in regards the extension of the agreement is the same as it was as regards the original agreement, namely, that it did not confer upon nor take away from Phillips any right of disposition over the black. It was still royalty black for which we were bound to account in dollars rather than in kind.

⁸ T. 420-424.

Testimony about the title to the royalty black was as follows:⁹

Q. Is it your contention, Mr. Carr, that the title to any black did not pass to Phillips?

A. That is a difficult question because the agreement provides that while—some of the agreements provide that while the black is in warehouse it is at Phillips' risk and to that extent the provision of the agreement is, the two provisions of the agreement are slightly inconsistent with one another. There are many cases, as you know in law, where agreements are drawn which look both ways.

For example, it is sometimes difficult to distinguish technically between a bailment and the sale, from the terms of the agreement itself. There have been many such cases in the courts.

Q. What is your opinion? Did title to the black pass to Phillips or not, according to these contracts?

A. I think that Phillips became the owner of an undivided 30 percent interest in the black. But with no right to assume specific possession of that 30 percent interest or to dictate how or to whom or where or at what price it should be disposed of.

Further on the same subject:¹⁰

A. So far as I know, in every instance, the black is sold by the black producer and the specified proportion of the proceeds is accounted for by the producer to Phillips Petroleum Co. Of course, I have direct personal knowledge only of the Columbian Carbon Co., but I believe that that practice was general throughout the industry.

Q. I think there is probably no debate about that. Is there?

A. I think not.

Q. That you sold Phillips black?

A. We sold all the black.

Q. Phillips, as well as your own?

A. Yes, if it was technically Phillips' title. I don't want to quibble about the question of legal title, their 30 percent in the black.

Mr. Oscar Nelson could not explain exhibits 25 A, B, and C, testifying that the transaction concerned organization of the association and was handled by his counsel.

Mr. Kayser testified that he understood that Phillips had no title to the royalty black which was merely reference "to a device for determining the price that Phillips are to get for their gas." He further testified that the original contract and the extension "can mean nothing." His testimony with reference to the extension reads as follows:¹¹

Phillips letter of February 1, 1936, exhibit 462, was written several months after the members of Carbexport had unequivocally agreed to extension of their Sales Agreements. The date of the said extensions was November 15, 1935. My recollection of the reason for the late date of the Phillips letter is that some time in January of 1936, my then secretary asked me if the Phillips undertaking,

⁹ T. 425.

¹⁰ T. 428.

¹¹ T. 1763; 1913.

which she had run across in the contract files, ought not be renewed whereupon I put in a telephone call for Mr. Rice at Bartlesville and, upon reaching him, asked him to have a renewal sent along.

A day or two later Mr. Rice phoned back to say his management couldn't see any reason for the need of the renewal and asked if I could see any in view of the fact that they no longer owned the Panhandle plant.

I agreed, but suggested that since the renewal would commit Phillips to nothing, its issuance could do no harm but might look like a gesture of good will from the principal gas supplier to his consumers. Mr. Rice agreed to put the matter before his management in this light and the letter of February 1, 1936, exhibit 462, resulted.

The appearance of an item in the minutes of the directors' meeting of March 25, 1936, exhibit 99, reporting the receipt by this respondent of the Phillips renewal was merely by way of routine. My recollection is that the announcement of the fact elicited no display of interest on the part of any director present.

Mr. K. S. Adams, president of the Phillips company, had had nothing to do with the organization of Carbon Black Export, Inc., nor has he had any correspondence or contacts with its officers. He further testified that since the formation of Carbon Black Export, Inc., in 1933, the Phillips company has neither produced independently nor exported any carbon black. He added that the company had, in 1943, constructed its own full-owned plant for manufacture of "Philblack," a furnace black, but that at the date of testimony, February 11, 1946, a department for the export of furnace black was still in process of formation.¹²

Mr. F. E. Rice, vice president of the Phillips company, gave testimony in reference to exhibits 25 A-C and 462, as follows:¹³

Q. I don't want to ask you to interpret an agreement we have in writing here, but nevertheless I will ask you what were you bound to do under this contract?

A. Well, as I understand it, we were bound to sell our royalty black to Carbon Black Export members in the export business only through Carbon Black Export.

Q. Now, you had royalty black, did you not, that was produced by carbon black manufacturers, other than those who were members of Carbon Black Export, did you not?

A. Yes, sir.

Q. Was that royalty black exported?

A. In some instances, yes, sir.

Q. How was it exported?

A. By the manufacturers.

Q. Through Carbon Black Export?

A. No, sir.

Q. Well, now what were some of the companies—there is no secret about it—you see the point I am after, do you not—what were some of the companies that you sold gas to and for which royalty black was due you during this period that was exported, do you know?

A. Crescent was one.

¹² T. 1400-1421.

¹³ T. 1486.

Q. And do you take it that that did not violate the contract, 462?

A. No, sir.

Q. In other words, 462 did not cover black that was produced by those manufacturers who were not members of Carbon Black Export?

A. That is correct.

B. *Exclusive Contracts With Stockholders*

The bill of particulars sets forth its third specification as follows:

3. Contracts with its stockholders, all of whom are manufacturers of carbon black, which require and cause them to sell carbon black for export exclusively to Carbexport, and to refuse to quote or sell, directly or indirectly, carbon black for export to other American exporters.

At the time of organization of the association, it filed with the Commission on June 15, 1933, certified copies of its by-laws and certificate of incorporation, and a copy of a proposed sales agreement dated May 25, 1933, a copy of which appears in the record as exhibit 12. Following correspondence with the Commission, certain changes were made in the contract, by amendments dated October 13, 1933, and May 18, 1934. As amended and finally executed, a photostat copy of the contract made with Columbian Carbon Co. is included in the record as exhibits 15 A-Q 16, 17 A-B, and 18. (The identical contracts of stockholders Cabot, Johnson, United, Texas Carbon Industries, Panhandle, Palmer, and Huber appear in the record as exhibits 565, 66, 67, 68, 69, 71, and 72.)

The relevant portions of said contract are here set forth. Paragraph First (in part):

The term "export carbon black" means all carbon black which is for export, or is in the course of being exported, or has been exported from the United States or any territory thereof, to any foreign nation or nations, country or countries, except that it shall not include (a) carbon black exported to the Dominion of Canada and intended for use or consumption in Canada, or (b) carbon black exported *by through railroad shipments* to Mexico and intended for use and consumption in Mexico; the term "Stockholders" means those, including the Producer, who have now entered into or shall hereafter enter into sales agreements with the Corporation substantially identical in form with this agreement; the term "pro rata" means in the ratio of the contract quotas of the Stockholders or so much thereof as shall at any given time be in effect; "year" means a calendar year and "month" means a calendar month.

The italicized phrase, "by through railroad shipments," was deleted by amendment dated October 13, 1933, exhibit 16.

THIRD. Beginning on the 1st day of January 1934, and ending on the termination of this agreement as prescribed in paragraph TWENTY-FIFTH hereof or on the earlier termination hereof as provided in paragraph numbered TWENTY-FIRST, the Producer shall not directly or indirectly sell or deliver any export carbon black except through the Corporation as hereinafter provided. The Corporation shall act as exclusive agent for the Producer in and for the sale of all the Producer's export carbon black. The Producer further agrees through-

out the term of this agreement to use reasonable care that exports made by the Producer to Canada or Mexico are intended for use and consumption in those countries and shall not be diverted to other foreign countries, and also that carbon black sold by the Producer in the United States shall be exported only through the Corporation.

(The last sentence embodies the amendment of May 18, 1934, exhibit 17 A.)

FIFTH (*in part*). The Corporation shall allot to the Producer, and the Producer shall have the right to supply, subject to the provisions of this agreement, in each calendar year during which this agreement shall be in force 25.933 percent (25.933%) of the total requirements of the Corporation of export carbon black. The "total requirements" of the Corporation as used herein shall denote the total quantity of export carbon black required by the Corporation for sale to its foreign customers and/or for consignment to its foreign distributors. Such percentage is hereafter referred to as the "contract quota." The Corporation reserves the right to purchase from persons, firms or corporations other than Stockholders, such part of its total requirements of export carbon black as the Corporation may in its discretion from time to time to determine, provided that the aggregate amount of export carbon black so purchased by the Corporation in any calendar year shall not exceed ten percent (10%) of such total requirements of the Corporation for such year. If and to the extent that such purchases shall be made, the contract quota of the Producer and of each of the other Stockholders for such year shall be reduced pro rata.

THIRTEENTH. On or before the twentieth of each calendar month, the Producer shall render to the Corporation in such form and manner, including detail, as shall from time to time be prescribed by the Board of Directors of the Corporation, a report showing the production, stock and shipments of carbon black of the Producer and its subsidiary and/or controlled corporations during the calendar month preceding.

SIXTEENTH. In case the President of the Corporation shall at any time determine that any carbon black produced by the Producer has been exported in any manner other than through the Corporation and that the Producer sold said carbon black for export or with knowledge that same was intended for export, or omitted to take reasonable precaution to prevent the same from being exported, the President of the Corporation shall charge the Producer with a commission on said carbon black so exported at the rate at the time in effect hereunder, and may, in addition, in his discretion, without action of the Board of Directors of the Corporation, deduct from the Producer's contract quota for the current year a quantity equal to double the quantity so exported. It shall be for the President of the Corporation to decide whether a given sale of the carbon black of Producer that was exported was or was not sold for export within the meaning of this paragraph, and the Producer agrees to be bound by such decision.

SEVENTEENTH. (*in part*). All the obligations of this agreement on the part of the Producer are undertaken on behalf of the Producer and of any and all subsidiary or controlled corporations in which the Producer may now or hereafter directly or indirectly own or control fifty percent (50%) or more of the stock.

Said obligations shall also extend to and cover the export carbon black of any factory which the Producer or any subsidiary and/or controlled corporation may now or hereafter directly or indirectly lease, operate or control, or in which the Producer or any subsidiary and/or controlled corporation may now or hereafter own a financial interest of fifty percent (50%) or more.

TWENTY-THIRD. The actual or potential productive capacity of Producer's carbon black factories is one important element in fixing Producer's contract quota

hereunder. Accordingly, it is agreed that in case during the term of this agreement Producer, or any subsidiary or controlled corporation, shall sell, transfer, lease, or otherwise dispose of any carbon black factory or part thereof now or hereafter owned by it, and the purchaser, assignee, transferee, or lessee thereof, as the case may be, shall not assume and agree to be bound by all the provisions of this agreement, then and in that case, the contract quota of the Producer for the remaining term of this agreement may be reduced without the Producer's consent, to such extent as the Board of Directors of the Corporation in its discretion may determine by majority vote, and none of the provisions of paragraph SIXTH hereof shall be applicable to such reduction. Provided that nothing in this paragraph contained shall apply to any case where the Producer or any subsidiary or controlled corporation shall in good faith abandon operation of any plant or part thereof and demolish the same and sell for scrap the materials salvaged therefrom.

Mr. Kayser testified that the original stockholders and parties to the contract, Columbian Carbon Co.; Godfrey L. Cabot, Inc.; J. M. Huber, Inc.; United Carbon Co.; Palmer Corp.; Texas Carbon Industries; and Century Carbon Co., represented roughly 85 percent of this country's carbon black production. He named as nonmember producers the following: Crescent Carbon Co., Imperial Oil & Gas Products Co., Magnolia Petroleum Co., and Herkness Carbon Co. He testified further that there was no requirement in the contract forcing the producer to supply carbon black but that the producer always retained the right to state whether he intended to fulfill his quota. The quotas, he testified, "were arrived at through what appeared to me to be plain, simple trading. When the attempt was made to arrive at an agreement on the quotas, each member made a guess." The three large members, Columbian, United, and Cabot "whacked up 75 percent among themselves and the lesser producers would attempt to arrive at a division of the remaining 25 percent. Eventually they got themselves squared around to a 100 percent division." His testimony on the factor of production was:¹⁴

Q. Now, I ask you to tell me whether or not it is a fact or was a fact at the time, that the actual potential production capacity was an important element in fixing the quota?

A. Well, I do not know how to answer that, to make a categorical statement like that about what took place in a horse trade. It is possible that there were some who felt that they would tend for a quota that would represent a share of the export market that was equal to their share of the total production. There were probably others who felt that that would not result in a figure that represented that share of the export market which they had enjoyed prior to Carbon Export, and they contended the opposite.

Mr. Reid L. Carr, who drafted the contract, testified that the language of the agreement "speaks for itself" on the requirement that producers sell for export exclusively to Carbon Export, and that it

¹⁴ T. 79; 230-234.

was not his "purpose in drawing the agreement to provide for any restraint of the domestic market."¹⁵

Mr. Oscar Nelson testified on this particular, as follows:¹⁶

For many reasons, I regard this exclusive feature as being essential to the maintenance and effective functioning of Carbexport. To allow producers' black to be indirectly diverted to export markets outside of the association and in excess of producers' quota makes the quota arrangement meaningless. Moreover, it enables the producer to sell in excess of his quota at prices slightly under Carbexport's fixed price, using that as an umbrella. It is my judgment that if Carbexport as the selling agent for the producers does not have authority that makes its agency exclusive, the Export Association cannot succeed.

Mr. Hans Huber's testimony on the exclusive provision of the contract was as follows:¹⁷

In this connection I feel I must emphasize the importance to the American carbon black industry, and no doubt to most American industries which export and which are threatened by foreign competition, of a feature which is the essence of Carbexport and without which Carbexport cannot hope to operate effectively.

Carbexport must be allowed to forbid the sale by its members of any carbon black obviously intended for export to anyone outside of Carbexport. An agreement among members of an association that they must sell abroad or for consumption abroad only in conformance with established prices and terms of sale is no agreement at all, if such members are free to sell to a class of persons at any price and on any terms. It is not possible to maintain established prices and sales terms when producers are required to sell through distributors not bound by such prices and terms and when a premium is placed on foreign consumers' purchasing from such distributors rather than from those distributors who have contracted to observe uniform prices and terms.

Mr. Thomas D. Cabot testified on the exclusive feature, as follows:¹⁸

I think it fundamental in an association such as ours that the members be restricted from exporting black directly or indirectly through other channels. Otherwise, quotas become meaningless. A member can get both his quota of the association's market and such additional market as he can attain through other channels.

His testimony on the negotiation of quotas reads as follows:

Q. In your opinion is there any way that Carbon Black Export could function in the absence of some quota device?

A. We tried that and it did not work. The trouble is that unless you have quotas there is always the urge on the part of individuals to increase their sales and also of the agents to increase the sales of the agents. The agents are difficult to control. If they cut commissions neither the principal nor the competitor can be sure that they have done it. They suspect that they have often when they have not.

We have found by experience that before we had quotas there was what we might call chiseling in the foreign market.

¹⁵ T. 137.

¹⁶ T. 627.

¹⁷ T. 752.

¹⁸ T. 1083; 1101.

Q. So that in your opinion a quota arrangement of some kind is essential to the smooth functioning of an organization such as Carbon Black Export?

A. I believe it is. That is our experience.

Q. What do you believe should be the factor which controls quota or the factors which control quota?

A. Quota is a matter of negotiation or compromise.

We based the quota originally partly on the relative producing capacities of the various people that went into the Carbon Black Export, Inc., and partly on the ratio of sales in the foreign markets of the various people who went into Carbon Black Export, Inc., but in the last analysis it was nothing but a horse trade. We sat down and each set down on paper a percentage he thought he ought to have, and we added it up and it came out 150 percent, and we had to trade that down until we got within 100 percent.

Q. Irrespective of what has happened in the past, I ask you whether or not you think quotas should be determined by productive capacity in this country?

A. In the long run I think it would approach productive capacity in this country, particularly if Carbon Black Export exists for a long time, because over a long period the question of export sales becomes less and less important.

Q. There may be some question as of this moment as to whether production should govern quota. Should that doubt, if it exists, be removed by ruling of the Commission or the courts, in your opinion?

A. In my opinion there are no dangers in having a quota if quotas are in direct proportion with producing capacity.

Q. When you say there are no dangers, you have what dangers in mind?

A. Dangers to the buying public in this country.

In the course of operations under the contract, Mr. Kayser, on June 5, 1935, "brought to all members' attention" information contained in the following letter (photostat, exhibit 41A) :

JUNE 5, 1935.

Mr. OSCAR NELSON,
United Carbon Co.,
Charleston, W. Va.

DEAR MR. NELSON: Clause Sixteen of the Sales Agreement between producers and the Corporation is producer's notice that he is obligated to see to it that none of his production goes into export except thru the Corporation. Clause Two of the agreement between distributors and the Corporation is distributor's notice that it is his responsibility to see to it that black which he sells in the United States, Canada or Mexico shall be sold for consumption in those countries, and shall not be exported to any other country.

We feel it necessary to remind both producers and distributors of their obligations in this respect because we discover that Crescent Carbon Company and/or Canada Carbon Black Company, the latter being the former's distributor in both the domestic and export markets, are attempting to make purchases of black from members of the Corporation which, though the intention is not expressed at the time the offer of purchase is made, are intended for export.

Very truly yours,

CARBON BLACK EXPORT, INC.

Mr. Nelson replied (exhibit 41 B) on June 15, 1935, writing "I am entirely in accord with your letter." Mr. Kayser testified in connection therewith as follows:¹⁹

¹⁹ T. 188.

Q. Was Crescent Carbon Co. referred to in these letters as a member or stockholder of the corporation?

A. No, Crescent Carbon Co. was not.

Q. Who is Canada Carbon Co.?

A. It was the distributor for Crescent Carbon Co. My brief explanation is incorrect. It had nothing to do with the situation I thought was being covered. In all probability it was reported that producers in the export corporation were selling to producers or distributors outside of the export corporation.

Q. This was to stop that?

A. This was the warning that that was contrary to the contract. That letter was probably circulated to everybody in the organization or connected with the organization in any way.

Q. Was either Crescent or Canadian, one or the other, or both, apparently trying to purchase black from members of the corporation?

A. One might have purchased it, I don't recall it.

Stockholding membership changes occurred as follows: In December 1934, the United Co. acquired the plants of the Century and the Texas Carbon Industry Cos.; and Columbian acquired the Palmer Carbon Co. Copies of documents of assignment effectuating these transfers appear in the record as exhibits 181 to 184. Chas. Eneu Johnson & Co. became a stockholder on June 18, 1936. On September 16, 1936, Keystone Carbon Co. became a stockholder but shortly thereafter it was acquired by Columbian Carbon Co. As the result of purchases of carbon black made by the association from Continental Carbon Co. beginning September 29, 1937, this company, in 1942, was given a quota of 5.58 percent, though a nonmember. (This transaction is further discussed in par. IV-C hereof.)

The foregoing membership changes were duly recorded in directors' minutes, as follows: Exhibit 95 B. April 24, 1935, meeting:

The president advised the board that Palmer Carbon Co. had officially announced that it had sold its plant and assets, including its stock in Carbon Black Export, Inc., to Columbian Carbon Co., that this fact was verified by Columbian Carbon Co., and that Palmer Carbon Co. asked permission to transfer its stock in this corporation to Columbian Carbon Co. On motion made, seconded and carried, the permission to make such transfer was unanimously granted.

Exhibit 97 A. July 24, 1935, meeting:

It was moved and the resolution was unanimously adopted that the transfer of the sales agreement between the corporation and Century Carbon Co. dated May 25, 1933, and the stock in the corporation owned by Century Carbon Co. to United Carbon Co. be approved.

It was moved and the resolution was unanimously adopted that the transfer to United Carbon Co., Inc., of the sales agreements with the corporation held by United Carbon Co. dated May 25, 1933, and the shares of capital stock of the corporation held by United Carbon Co. be approved.

It was moved and the resolution was unanimously adopted that the transfer to United Carbon Co., Inc., of the sales agreement between the corporation and Texas Carbon Industries, Inc., dated May 2, 1933, and the shares of capital stock of the corporation held by Texas Carbon Industries, Inc., be approved.

Exhibit 100 A. April 30, 1936, minutes:

The president further reported that he had arranged with Chas. Eneu Johnson & Co., successor to Herkness Carbon Co., to become a stockholder in the corporation and to accept a sales agreement with a quota of 4 percent.

Upon motion duly made and carried, it was

Resolved. That upon execution and delivery of the same standard sales agreement between Chas. Eneu Johnson & Co., and the corporation as exists between the corporation and the producers who are at present stockholders, such sales agreement providing for an export quota of 4 percent, the president and secretary be and they are hereby authorized to issue to Chas. Eneu Johnson & Co. against its check for \$29,200, 292 shares of capital stock of the corporation.

Exhibit 101 B. November 13, 1936, meeting:

The president further reported that Columbian Carbon Co. has purchased the stock of Keystone Carbon Co. and has requested the approval of the transfer of Keystone's shares of the capital stock of Carbon Black Export, Inc., to Columbian Carbon Co. and also approval of the assignment of the sales agreement between Keystone Carbon Co. and Carbexport dated September 16, 1936, to Columbian Carbon Co.

Upon motion duly made, seconded, and carried, the following resolutions were adopted:

Resolved. That the transfer to Columbian Carbon Co., of 216 shares of capital stock in this corporation owned by Keystone Carbon Co., be and is hereby approved.

Resolved. That this board hereby approves the assignment to Columbian Carbon Co. by Keystone Carbon Co. of its sales agreement with Carbon Black Export Inc., dated September 16, 1936.

In explanation of earlier testimony (Tr. 233) concerning the relation between production and quotas, Mr. Kayser gave the following history of quota changes, reflecting the aforementioned membership changes:²⁰

Regardless of the language Mr. Layton quotes from a sales agreement amendment in his question on page 233, lines 12-18, the fact is that export quotas were never on the basis of member production ratios until January 1942. This will readily be seen from the following comparisons of quota ratios with production ratios.

	<i>Export quotas (percent)</i>	<i>Production ratios (percent)</i>
Cabot.....	18. 103	22. 386
Columbian.....	25. 933	26. 032
Huber.....	13. 000	13. 855
Panhandle Century.....	4. 400	6. 692
Palmer.....	2. 400	3. 361
Texas Carbon.....	3. 000	4. 255
United.....	33. 164	23. 419
	100. 000	100. 000

²⁰ T. 1702-1705.

In the fall of 1935 the expiry date of sales agreements was extended from December 31, 1938, to December 31, 1945. Quotas were then altered as of January 1, 1936, to meet the request of Panhandle Carbon Co. mentioned (R. 22) above. The relationship of resulting quota rearrangements to production ratios of members then became as follows:

<i>Jan. 1, 1936</i>		
	<i>Export quotas (percent)</i>	<i>Production ratios (percent)</i>
Cabot.....	18. 103	23. 063
Columbian.....	28. 333	30. 257
Huber.....	12. 800	10. 767
Panhandle.....	2. 500	2. 546
United.....	38. 264	33. 367
	100. 000	100. 000

Quotas were again revised with the consent of all holders of sales agreements as of October 1, 1936, to make room for two as to Chas. Eneu Johnson and Keystone Carbon. The relation of the new quotas to production ratios at the time was as follows:

<i>October 1936</i>		
	<i>Export quotas (percent)</i>	<i>Production ratios (percent)</i>
Cabot.....	16. 858	22. 350
Columbian.....	29. 384	29. 648
Huber.....	11. 919	10. 939
Johnson.....	3. 880	1. 109
Panhandle.....	2. 328	2. 491
United.....	35. 631	33. 463
	100. 000	100. 000

As of January 1, 1942, there was another general revision of quotas incident to the extension of sales agreements beyond December 31, 1945, the then terminating date, to December 31, 1951. Export quotas were then established on a closer relationship to production ratios, as I argued that they should be in the memorandum of April 21, 1941, which is exhibit 113 (b) and (c). The comparison of the two ratios is as follows, treating the percentage allowed Continental Carbon Co., a nonmember, as a quota percentage:

<i>January 1942</i>		
	<i>Export quotas (percent)</i>	<i>Production ratios (percent)</i>
Cabot.....	21. 245	22. 097
Columbian.....	28. 403	28. 170
Huber.....	10. 050	10. 079
Johnson.....	2. 965	1. 777
Panhandle.....	2. 198	2. 119
United.....	29. 459	29. 179
Continental.....	5. 580	6. 579
	100. 000	100. 000

There is further evidence in the record relating to the exclusive feature of the contract. The directors, on May 25, 1937 (exhibit 102 A-C), adopted a resolution reading as follows:

Resolved, That producers who are stockholders in Carbon Black Export, Inc., report to said corporation monthly all sales of carbon black made by them to producers who are not stockholders and all sales of carbon black to any other person or persons for account of such producers who are not stockholders.

Mr. Reid Carr testified that the purpose of the resolution was "to see whether we were living up to that clause of the producers' agreement with Carbexport with reference to using reasonable precaution to see that sales were not made in the export trade than through Carbon Black Export."

Mr. Kayser, on May 28, 1937, following passage of the foregoing resolution, addressed a letter to Mr. Oscar Nelson reading as follows (exhibit 185-A):

Mr. OSCAR NELSON,
United Carbon Co.,
Charleston, W. Va.

DEAR MR. NELSON: It was agreed at the last meeting of the directors of Carbexport that producers who are stockholders in Carbon Black Export, Inc., report to us monthly all sales of carbon black made by them to producers who are not stockholders, and all sales of carbon black to any other person or persons for account of such producers who are not stockholders.

It was not the purpose of this agreement to release producers under contract to Carbexport from their obligation not to permit their black to go into export through any other source than Carbexport. Its purpose was to establish a record of all sales made by members of Carbexport to nonmembers of black for domestic use only, and to make that record available to members. The reports to be made are entirely separate from the reports made by members to National Gas Products Association. The records of N. G. P. A. are, of course, not available to Carbon Black Export, Inc.

Very truly yours,

CARBON BLACK EXPORT, INC.

This exhibit was accompanied by exhibits 185 C and D, photostats of correspondence between the association and Columbian which disclosed sales to outsiders in March 1940, by Cabot, Columbian, United, and Johnson.

Mr. Carr was of the impression that he had not received a copy of the foregoing letter, but testified that "the purpose of obtaining these reports was to furnish the information on which he (Kayser) would be able to check up if he thought that the members were not living up to their obligations to Carbon Black Export."²¹

Mr. Kayser testified as follows:²²

Q. What was the purpose of that reporting of these sales by members to non-members?

²¹ T. 532.

²² T. 268-269.

A. The sales agreement obliges the signers, the members, to take reasonable care that the carbon black they sell domestically shall not be exported otherwise than through Carbexport. At that time this question came up—

Q. As to whether or not they should report, you mean?

A. Yes. Or I will put it this way: In May 1937, or in the month before, I do not remember, which, the question arose, or it was brought out, rather, that sales were made by members in the domestic market to nonmembers and others. This was simply out of the discussion that a resolution came to the effect that the only action that should be taken to remind members of their obligations under the sales agreement was to report to the corporation such sales as they made to outsiders, nonmembers particularly.

Mr. Hans Huber testified as to exhibits 185 A-C and D, as follows: ²³

Q. Are you familiar with the requirement of exports that producer members should report their domestic sales to nonmembers?

A. Yes.

Q. What is the purpose of that reporting, Mr. Huber? Does that have anything to do with the subject matter of paragraph 11?

A. The entire strength of Carbexport rests upon the fact that each producer had a quota. Now, if he could circumvent his quota, or add to his quota by selling his black to somebody else, and he selling it, and in that way getting a much larger share of the export market than he was entitled to, that obviously would undermine all of Carbexport.

I believe I pointed out in my previous testimony that the reason the old association, or one of the principal reasons, it failed, is because there was no quota system, and there was nobody that stood between the producer and the distributors.

Q. My question is, without referring to a specific example, if you sold X pounds to a nonmember producer and you reported that to Mr. Kayser, how could that be utilized in aiding and protecting the exporting of black outside the corporation? How was it used?

A. How was that knowledge used?

Q. Yes.

A. Each producer was responsible to see that all his export carbon black went through Carbexport. Now, this would have been a route to circumvent it, and Carbexport certainly must know if any routes to circumvent the quota to go through Carbexport were in effect.

Q. I don't want to appear too persistent. I want to direct your attention to exhibit 185-A.

If you will please just turn for a moment to 185-C which shows the reports being made in conformity with that. For instance, on 185-C, of what value was it for Carbexport to know that Cabot sold 360 pounds to Imperial, or that Columbian sold 80,000 pounds to Imperial, or United sold 184,000 to Imperial in domestic sales?

A. These particular quantities would be of no value, but if the quantities had been substantially larger, it would have been of value.

Q. Tell me how it works. How does the value attach to it?

A. Let's suppose a hypothetical producer outside of Carbexport has a production of 3 million pounds. The most he can export, then, would be 3 million pounds, but he probably had some domestic business too. So it would be less than 3 million pounds.

²³ T. 769.

Now, let's suppose the outside producer buys 6 million pounds. Now he can potentially export 9 million pounds. Or, let us suppose that he merely realizes all of the black that he sells in the domestic market by black he purchases. It makes him that much larger an exporter. And by the same token it allows the producer member to sell black which eventually finds its way to export in addition to his quota.

Exhibit 120, is a photostatic copy of a letter from Mr. Kayser to Mr. Nelson dated January 16, 1935, the first two paragraphs of which read as follows:

I now have before me the completed statistics for the year 1934, and I am able to give you the information you requested of me last Saturday.

Stocks on hand at December 31, 1934, exceeded stocks on hand as of the same date in 1933 by approximately 21,800,000 lbs. The largest tonnage increase was on the part of United Carbon Company. In the following order of importance increases occurred with other members: Huber, Columbian, Texas Carbon Industries, Century and Panhandle (Combined) Palmer, Keystone, and Crescent. Decreases in stocks took place in the operations of Cabot, Magnolia, and Imperial. The Cabot decrease was large if viewed from the standpoint and most other members of the industry had increases. But from the standpoint of the effect on Cabot's total stocks, it was not very great.

Mr. Kayser questioned about the reference to "stocks on hand," testified:²⁴

The WITNESS. Our members did not report anything to us in a statistical way. Our statistics were built up on what we got in the way of bills and evidence of shipments, and so on, the information we had as to the movement of carbon black from United States shores abroad, and the reports we got from agents and distributors.

Q. I was under the impression, Mr. Kayser, I may be wrong, and this is the reason I brought it out, that the stockholders in Carbexport, reported to Carbexport, as such, certain data as to their production and stock.

A. The agreement which I imagine you have in your hand allows Carbexport to collect such data from its members, but it never did, except perhaps in the first instance, I do not know that even to be true, that would be the only exception, when the subscription agreements were under consideration, or rather, when they were in operation.

Q. Then I shall not attempt to find it because we have isolated the point now. You are stating, am I correct, that although Carbexport had the authority under its agreement with the producers to require production and other statistics with reference to stocks, it never exercised that right?

Q. As to exhibit 120 A and B, a letter addressed by you to Mr. Oscar Nelson, dated January 6, 1935, it discusses in part, at least, does it not, Mr. Kayser, stocks on hand as of a certain date?

A. It does.

Q. Where did you gain the information as to stocks that you refer to?

A. At that time I was secretary of the Code Authority and secretary of the National Gas Products Association as well.

²⁴ T. 240-244.

Q. And the National Gas Products Association, what is that? I think it is already in the record, but I am not sure.

A. It is a statistical agency for the industry.

Q. Commonly known as the Domestic Trade Association of the Industry?

A. Yes.

* * * * *

Q. Mr. Kayser, can you explain why you wrote this letter concerning such a matter on the stationery of Carbon Black Export, Inc.?

A. Well, it probably arises out of the fact that either my secretary or I did not realize it was either a Code Authority matter or a National Gas Products Association matter. I notice it is not signed Carbon Black Export by me, it is a personal letter from me to Mr. Nelson on a Carbexport letterhead. It would indicate carelessness in distinguishing between the functions.

Q. Was it a practice of yours to attempt to aid producer companies in the disposition of their stocks to other companies on the letterhead of Carbexport?

A. I would be surprised if you find any such letters, other letters in the files. It was not a practice.

Q. Nevertheless, to make it doubly clear, at this time you held three positions?

A. That is right.

Q. With Carbexport, the Domestic Trade Association and the Code Authority?

A. That is right.

Q. And there was no fine differentiation in at least the clerical work or the use of stationery?

A. I think probably there was considerable confusion of this on the part of the office personnel before it got the distinctions that I was aware of and I would not be a bit surprised if there were in the early part of my functioning in these three capacities, National Gas Products Association letters in the Carbexport file and vice versa, as well as the Code Authority.

Q. Again, I want to say, if I am not mistaken in the matter, I noted in the sales agreement this power of the corporation to gather these statistics and I saw, of course, here in this letter apparently your use of them but nevertheless, you have given your explanation of it, is that right?

A. That is my explanation. I would like to elucidate a bit more for your benefit. These three capacities in which I functioned and which we have just mentioned, fell as mantles on my shoulders within a very short period of time, between May 1933 and I think September of the same year, so that it probably took some application on the part of the personnel in my office to make these distinctions in the files that I was aware of.

Q. Of course, when the code went out, you went out with it?

A. That is right.

Q. You have maintained your position with the Domestic Trade Association?

A. I am still its assistant secretary and treasurer.

Exhibits 113 to 118 consist of photostats of correspondence between Kayser and Messrs. Nelson and Treadgold, officers of United, which took place between April 21 and November 10, 1941, interchanging information preliminary to the 1942 contract quota changes above related. The following eight paragraphs are reproduced from a lengthy memorandum by Mr. Kayser, dated April 21, 1941 (exhibit 113 B-C):

The Cabot Company intends, perhaps at the very next meeting of Carbexport, to open up the question of member export quotas by proposing a revision, at least

as far as it is concerned. I understand that it will contend that its own quota, which is in fact 15.917% although nominally 16.858%, is unreasonably low.

In my estimation such a contention has merit. If that is correct the entire percentage arrangement is entitled to revision.

Quotas were originally arrived at in probably the only effective way then available, namely by "horse trading." There was no experience, or at least no recorded experience, by which the effects or influences of any set-up could be gauged. Such experience exists today, not only in the years of records collected by the Corporation which has administered this quota system but also in the more complete general statistics with which the industry has occupied itself in the same period.

It seems to me that an objective study of tonnage and price movements in the last several years in the light of these records indicates that, notwithstanding evident deficiencies, quota allotments to Carbexport producers in some relationship to their respective ratios of production is a sounder, and therefore better, arrangement than the present one.

This disadvantage can be statistically demonstrated. If quotas had been equivalent to production ratios during, say, the years 1937-41 inclusive (production for 1941 being calculated on the basis of the production for the first quarter to get an approximate figure for that year) they would compare with actual average quotas as they have been for the period as follows:

	Production (pounds)	Ratios	Actual average (per- cent)
Cabot.....	504,772,070	22.126	15.917
Columbian.....	673,157,739	29.507	27.744
Continental and Panhandle.....	5.58 2.328 } 199,457,216	8.743	7.778
Huber.....	214,057,835	9.383	11.254
Johnson.....	28,075,935	1.231	3.664
United.....	661,821,531	29.010	33.643
	2,281,324,326	100.000	100.000

The present arrangement therefore forces those stockholders whose export quota is less than their production ratio to find a place in the domestic market for the black represented by the difference. In other words they have to dispose in the domestic market of an amount in excess of their production ratio applied to domestic volume and have to do so, additionally, for the less of the two price benefits.

The effect of that situation over the last 5 years on the Cabot Company, for instance, has been that they have had to find extra place in the domestic market for a total of approximately 39 million pounds, or some 8 million pounds per year (calculation: Total exports for 5-year period 631,065,779 lbs. of which 22.126% is 139,629,614 lbs. and 15.917% is 100,446,740 lbs.). Furthermore they have had to dispose of this quantity at from $\frac{3}{4}\text{¢}$ to 1¢ per pound less than the net price received by their fellow-stockholders in Carbexport from export sales. By this same process of calculation the total amount of member black in this "distressed" position for the same period has been approximately 56,500,000 lbs., or an average of approximately 11,000,000 lbs. per year.

It seems to me that the policy of continuing the present quota set-up is unsound. Carbexport is in the position of deliberately thrusting a competitive hurdle into a situation where it has no legal right to interfere and where, by its own declaration of intent and under its general conduct, it has never wanted

to interfere. The effect of the present arrangement is also a handicap in some respects to Carbexport itself. One such respect is that no formula can be established for the acceptance of non-Carbexport operators into stockholdership that will affect stockholders with self-evident equity.

Exhibit 180 consists of a list of the membership of the National Gas Products Association, being the following: Godfrey L. Cabot, Inc.; Columbian Carbon Co.; Crescent Carbon Co.; J. M. Huber Corp.; Imperial Oil & Gas Products Co.; Chas. Eneu Johnson & Co.; Continental Carbon Co.; Panhandle Carbon Co.; United Carbon Co. Inc.; and Crown Carbon Co. (a reporting nonmember).

Contained in the record are copies of statistical records of the National Gas Products Association, identified as exhibits 124 to 141. Exhibits 124 to 132 consist of carbon black production records of the membership for the years 1934 to 1942. Exhibits 132 to 141 consist of monthly carbon black production, sales, and inventory records of the membership on charts containing previous annual totals on the same subjects for comparative purposes.

Testimony of Mr. Kayser with reference to exhibits 124 to 141 was as follows:²⁵

Q. Can you identify those documents, exhibits 124 through 141?

A. Yes. These are the monthly statistical reports or they are typical of the monthly statistical reports which the National Gas Products Association supplies to its members or to members of the industry who participate in supplying the data.

Q. Now, what was your function, if any, as secretary in the preparation of exhibits 124 through 141?

A. As secretary of the National Gas Products Association, questionnaires were sent monthly to the members of the industry who were members of the National Gas Products Association, and that was, I believe, all of them, on which they made returns of their monthly production, sales and stocks on hand. These individual reports were consolidated into industry reports, which you have here. These reports I recognize as our own and I volunteered them to the examiner.

Q. Who called on you?

A. Yes.

Q. So that the statement that you do make is that these exhibits, 124 through 141, were the result of your activities as an official of the Domestic Trade Association and not in exercise of your power under the sales agreements with the stockholders of Carbexport, is that right?

A. That is exactly right.

Contained in the record are exhibits 379 and 380. These are statistical charts described by Mr. Reid Carr as having been prepared from official data published by the United States Bureau of Mines. Exhibit 379, titled "Stocks," is a statistical record in millions of pounds of carbon black stocks at the end of each year from 1923 to 1941. Exhibit 380 consists of a statistical record of domestic and export sales

²⁵ T. 246-247.

in millions of pounds of carbon black for the years 1925 to 1941. These charts are here reproduced (exhibit 379).

Stocks

1923-----	38,320,814	1933-----	155,969,000
1924-----	95,671,246	1934-----	171,799,000
1925-----	96,023,448	1935-----	136,086,000
1926-----	108,378,101	1936-----	79,582,000
1927-----	82,831,000	1937-----	100,497,000
1928-----	50,240,000	1938-----	166,159,000
1929-----	132,203,000	1939-----	130,792,000
1930-----	259,245,000	1940-----	169,587,000
1931-----	281,667,000	1941-----	118,847,000
1932-----	257,998,000		

EXHIBIT 380

Sales

Year	Domestic	Export	Total
1925-----	132,448,691	43,182,635	175,631,326
1926-----	128,294,321	39,210,389	167,504,710
1927-----	168,999,000	54,431,000	223,430,000
1928-----	202,676,000	77,903,000	280,579,000
1929-----	191,977,000	91,829,000	283,806,000
1930-----	167,279,000	84,260,000	251,539,000
1931-----	161,712,000	96,714,000	258,426,000
1932-----	161,483,000	100,072,000	261,555,000
1933-----	222,182,000	152,286,000	374,468,000
1934-----	191,992,000	120,620,000	312,612,000
1935-----	245,351,000	142,185,000	387,536,000
1936-----	313,018,000	154,718,000	467,736,000
1937-----	305,362,000	184,253,000	489,615,000
1938-----	243,474,000	167,968,000	411,442,000
1939-----	356,705,000	203,828,000	560,533,000
1940-----	352,156,000	177,618,000	529,774,000
1941-----	¹ 532,009,000	² 112,735,000	644,744,000

¹ Exports for October to December 1941 included under "Domestic" to avoid disclosing export figures.

² Figures cover January to September, inclusive.

Mr. Kayser's testimony concerning exhibits 120 and 185 A-D reported above at footnote 24, was given at the Washington, D. C., hearing held on February 7, 1945, at which time he still held the office of assistant secretary-treasurer of National Gas Products Association, sometimes referred to as N. G. P. A. The record contains the following additional information on this intermingling of offices.

Exhibit 177 is a photostatic copy of a letter dated December 29, 1942, from Mr. Kayser to Mr. Nelson, on N. G. P. A. letterhead, reading as follows:

No meeting has been held of this Association since November 13, 1936. A number of its members have lately suggested the desirability of such a meeting at an early date, so that all adherents may have a report on Association activities since 1936 and may have the opportunity to discuss what, if any, additional activities could be undertaken for the industry's benefit and to assist in the nation's war program. Mr. Godfrey L. Cabot having resigned as President some time since, his successor should be elected.

A meeting of the Association is therefore called herewith for 10 A. M. Wednesday, February 3, 1948. Will you kindly arrange to attend.

Exhibit 178 B is a photostatic copy of a letter dated December 16, 1943, from Mr. Kayser to Mr. Nelson, on N. G. P. A. letterhead, reading as follows:

Since 1934, when Carbon Black Export, Inc. and National Gas Products Association became domiciled in the same office, Carbexport personnel has handled the Association's work free of cost to the latter. The only items collected for have been extraordinary ones, such as traveling expenses advanced and an occasional telephone call that has definitely been identified at our switchboard as Association business. The arrangement meant little in the way of expense to Carbexport in the early years of the mutual domicile. The principal Association business was then the collection of statistics and the issue of monthly reports. In late years, however, the Association's interests have enlarged to the point where appreciable time by Carbexport personnel and money are expended in handling its activities. There are other reports than the usual monthly statistics. There is more correspondence. There is more telephoning on matters of purely Association interest. The use of supplies and equipment is greater.

Since it is impossible always to determine (1) just how personnel time should be divided between the two organizations, (2) what telephone calls are essentially either Associated or Carbexport business or, (3) how the use of general office supplies and equipment should be distributed, I think the Association should pay Carbexport a fixed monthly fee which would cover use of space, general office supplies, postage, telephone and personnel service, in fact everything except cost of stationery and the rare item of traveling expense.

Our recommendation is that the fee be fixed, until further agreement, at \$100 per month. We are addressing you, simultaneously with all other members, to ask if you will approve such a fee.

Mr. Nelson replied to this letter on December 23, 1943 (exhibit 177 A), writing "I approve your recommendation that a fee of \$100 per month be fixed as payment to Carbexport for this work."

Mr. Kayser's testimony given on June 6, 1946, at the New York City hearing, in further explanation of these exhibits, reads as follows:²⁶

The only ordinary activity of National Gas Products Association from the time I became its association secretary late in 1933 up to December 1942, the date of exhibit 177, was that of collecting statistics as to monthly production, shipments and stocks from each of the members and consolidating them into an over-all monthly report, of which exhibits 124 to 141 in this case are examples, for circulation among the members. Occasionally routine matters such as freight rates, minimum carload regulations, general tax questions, etc., were handled by this respondent as executive secretary of the association. When necessary I would use some of the stenographic and clerical personnel in Carbexport's office, the mimeograph machine located there and a small amount of mimeograph paper to assist in association work. The cost of this assistance and material would not average over \$20 per month. That is the reason this respondent used the word "nominal" in exhibit 178 (b) to describe the expense prior to 1942. The actual work of the National Gas Products Association was done by this respondent who received \$250 per month for doing it.

²⁶ T. 1766; 1933.

fact and asked permission of the board of governors of N. G. P. A. to pay Carbexport from the N. G. P. A. funds an amount which he felt represented the value of the services he obtained from Carbexport, pointed out that, whereas heretofore the demands of N. G. P. A. on Carbexport had been negligible, they had as a result of the war become a considerable burden.

As early as 1937 N. G. P. A. began a continuous study of the operation of the hopper cars employed in carbon black service. This developed into an important activity after the outbreak of hostilities in 1941. From the beginning of the war until October 1943, when the "Carbon Black Pool Authority" established by O. D. T. special order R-6 took over this activity in its own name, the purpose of the association study and of the O. D. T. order was to bring to greater efficiency the employment of the limited number of hopper cars available for carbon black service. This and other studies by N. G. P. A. have been referred to in the record.

From February 3, 1943, no meeting of the association was held until December 19, 1945, at which time the association accepted the resignation of Mr. Kayser as assistant secretary, effective January 1, 1946, and adopted a resolution to the effect that the association should be removed from the quarters of Carbon Black Export, Inc., "promptly after January 1, 1946." At this time I was authorized to make arrangements for other office space and to employ such service as the association might need. On March 7, 1946, after considerable difficulty, I engaged the services of the law firm of Beer, Richards and Haller, 70 Pine Street, New York City, to take over the statistical work of the association. Mr. Richards of that firm on May 22, 1946, accepted the appointment as paid assistant secretary of the association. His offices at 70 Pine Street are now the offices of the association.

C. Exclusive contracts with nonstockholders

1. Ten percent purchases from outsiders

The first specification in the bill of particulars reads as follows:

1. Contracts with manufacturers of carbon black, who are not stockholders of Carbexport, which require and cause them to sell carbon black for export exclusively to Carbexport, and to refuse to quote or sell, directly or indirectly, carbon black for export to other American exporters.

The sales contract hereinbefore referred to (exhibit 15 A-Q) provided for purchase by the association of not to exceed 10 percent of its requirements, in any year from nonstockholders. Mr. Cabot's testimony on this provision of the contract reads as follows:²⁹

I believe the reason why the sales agreements permitted Carbon Black Export, Inc., to buy 10 percent of its requirements from nonmember producers was due to the desire of all members that those outside producers who were not original members, and who represented about 10 percent of production, accept the invitation to join.

It was obvious that the main consideration in connection with getting any nonmember to join would be the quota they would be assigned. Had we assigned all of the requirements of Carbon Black Export, Inc., to member producers, then

²⁹ T. 1080.

we could not have taken in any new member without unanimous consent that the quota assigned to the new member was a fair one (unless some members were willing to suffer more than their share of the cost in terms of quota).

Leaving 10 percent of the requirements free meant that by a majority vote we could appoint someone plenipotentiary to negotiate a quota arrangement with a new member.

Mr. Kayser testified that there never was a time when the stockholders did not have an ample supply to meet the association's requirements, but that from time to time "some odds and ends in the way of hundreds of thousands of pounds here and there" were purchased from nonmember producers. He testified further, as follows:³⁰

The clause was never intended or used as a means of influencing the domestic market.

In fact, it was never employed to anything like 10 percent of our export requirements, as is shown by the following table of shipments:

Year	Total exports of Carbexport (pounds)	Total shipments by Carbexport of Non-member Black (pounds)	Percent
1934.....	87,748,210½	None	None
1935.....	103,610,487	301,050	0.291
1936.....	117,345,522	880,387	.750
1937.....	142,786,515	3,249,537	2.276
1938.....	125,339,817	9,433,862	7.527
1939.....	156,698,268	7,096,279	4.529
1940.....	122,241,179	6,098,225	4.989

At a subsequent hearing, Mr. Kayser testified as follows concerning the 10-percent clause:³¹

Q. What was the purpose of that 10-percent clause?

A. While I didn't write it, my understanding of the purpose of it was to permit the purchase of carbon black from nonmembers in order to demonstrate to them how they would be advantaged by joining Carbexport.

I am not hesitating to try to recall all of the purchases that were ever made in order to elaborate on my statement. The only purchases made that in the course of the years did not—say from nonmembers who did not become members—were from the Magnolia Petroleum Co. which eventually decided not to produce carbon black and from the Continental Carbon Co. which prior to January 1, 1946, was not a member, but which is now about to sign a contract as Mr. Wishnick testified yesterday to become a member.

* * * * *

Q. Your statement, then, as I understand it, is that the purpose of the 10-percent clause was merely to give the export corporation an opportunity to demonstrate to nonmembers.

A. On any sale necessary up to 10 percent of its requirements.

Q. To demonstrate to them the advantages that would accrue to them by marketing under your methods and by adherence to your policy?

A. That's right. A particular advantage being which was in my estimation and probably in the estimation of those who wrote the clause that they could

³⁰ T. 229; 1701.

³¹ T. 1823-1826.

net a greater price as members of the export corporation than they could as competitors using a lower price to compete.

Q. Now when you say that the clause was never intended or used as a means of influencing the domestic market, what is the basis for that statement?

A. I don't understand what you mean by the basis.

Q. You say it was never used. How do you know it was never used as a means of influencing the domestic market?

A. By carbexport which meant by its management which did the purchasing and by its board of directors as the directors of that management.

Q. If you had purchased 10 percent of your total export requirements from outsiders, would that not have approximately absorbed all of the production of nonmembers.

A. No.

2. Herkness negotiations

The association's first negotiations with a nonmember manufacturer were with Herkness Carbon Co., and commenced shortly after the association's organization. Contained in the record are photostatic copies of directors' minutes recording the passage of resolutions referring to the negotiations as follows:

Meeting of June 7, 1933 (exhibit 78-C) :

On motion made and carried, Mr. Oscar Nelson was authorized to negotiate with the Herkness Carbon Co. with a view to reaching an agreement under which—

(1) United Carbon Co. will supply or cause to be supplied all the gas that said Herkness Carbon Co. may purchase for use in its present plant,

(2) Herkness Carbon Co. will undertake in the sale of export carbon black to adhere to such schedule of export prices as may from time to time be fixed by Carbon Black Export, Inc.,

(3) Carbon Black Export, Inc., will undertake to purchase at a stipulated price such surplus of carbon black as Herkness Carbon Co. may have for export but may not succeed in selling at the schedule of prices fixed by Carbon Black Export, Inc.

Meeting of July 10, 1933 (exhibit 79 A-B) :

Mr. Nelson reported that he had entered into negotiations with Mr. Herkness in accordance with the authority conferred by resolution at the last meeting of the board of directors, and that negotiations had reached a point on which the only matter left open for argument was whether Mr. Herkness should market 3,000,000 or 4,000,000 pounds in the export trade. Upon motion made and carried, it was

RESOLVED. That Mr. Carr be made a committee with Mr. Nelson to complete said agreement and that the committee be authorized to enter into an agreement with Mr. Herkness on the basis of approximately 3,500,000 pounds per annum.

Also contained in the record are photostatic copies of correspondence of the initial negotiations, reading as follows: Exhibit 194, dated June 16, 1933. C. E. Kayser to Oscar Nelson :

In a letter from Mr. Cabot today, acknowledging receipt of the minutes of our last board of directors meeting, the following comment appears regarding the authority given United Carbon Co. to negotiate arrangements with the Herkness Carbon Co. :

"With regard to the agreement that we had suggested that the United Carbon Co. supply gas to the Herkness Carbon Co., it was further stipulated by myself and agreed to, I think, by the meeting, that the United Carbon Co. should stipulate that no gas should be bought by the Herkness Carbon Co., outside of the supply bought from the United Carbon Co., the idea being that in this way we would be reasonably sure that the output of the Herkness Carbon Co. wouldn't increase in the State of Louisiana."

It is my recollection that this stipulation was in the resolution presented by Mr. Cabot but, like him, I am not sure that it was in the motion as reread to the meeting by the secretary.

I forward to you this comment of Mr. Cabot, not to make the point which he raises, but so that you may be aware of the fact that it may be one of the necessary terms to obtain Mr. Cabot's vote to an arrangement.

Exhibit 196, dated July 21, 1933, C. E. Kayser to Osman E. Swartz:

Mr. Herkness is sailing without accepting either of the expressions of agreement between himself and Carbon Black Export, Inc., which you have presented. Mr. Carr voted, as you did, to deal on the basis of making his plant capacity the limit of his sales in exports and sent me a revision of the last page of the form you drew. I enclose a copy of this revision, together with Mr. Carr's letter to me. He felt, as I did, that under this choice of agreement the last sentence in paragraph 2 of your contract would have to be eliminated.

I called Mr. Herkness yesterday afternoon to express our choice and to obtain his consent to sign the agreement covering that choice. He refused to do this because he will not agree to the obligations expressed in clause 7, after the words "like period" in your draft, and restated, though changed, in Mr. Carr's draft. Mr. Herkness' position is that there is no mutuality in this contract; that he obligated himself to everything while we give nothing in return. He points out that—

1. He limits his sales to the production of the present size of his plant;
2. To deliver his trade information to a body in which he has no voice;
3. To submit his agents to that body's control;
4. To maintain the standard of his black.

In return for that the corporation obligates itself to nothing, except to let him continue as he is doing now in the event it chooses not to buy the black he had not been able to sell in competition with it. He states that if the agreement to help him sell his black at our price does not work, he wants to be free to cancel the whole arrangement and will not be restricted, as above pointed out, for 5 years. If we want to bind ourselves definitely to buy what he does not sell, that is something else again, and he is willing to operate under the other alternative with a 4,000,000 maximum.

Mr. Herkness repeated to me, over the telephone, voluntarily, that he is not willing to consider the gas contract under consideration between himself and United as a quid pro quo for the export sales contract we suggest. As an aside, he mentioned that he was returning the proposed gas contract to United as unsatisfactory also.

Mr. Herkness expects to meet Mr. Nelson in London. He feels that conclusion of both contracts can be left until his return.

Mr. Osman E. Swartz, counsel for the United Carbon Co., acting in the absence of Mr. Nelson, in July 1933, had two meetings with Mr. L. C. Herkness, vice president of Chas. Eneu Johnson & Co. Inc., concerning the sale of natural gas by United to the Johnson company.

The amount of gas to be supplied was 5,000,000 cubic feet daily, roughly equivalent to a carbon black production of 2,700,000 pounds annually. Mr. Swartz prepared a draft of a contract to carry out such purpose, a photostatic copy thereof appearing in the record as exhibit 413 A-F. The proposed contract was not acceptable to Mr. Herkness and no written contract for such gas sale was made. United company did, however, sell natural gas to the Johnson company pursuant to a verbal arrangement between Messrs. Nelson and Herkness. Sales under this arrangement commenced October 1, 1933, and were billed to J. S. Herkness Carbon Co. Exhibit 417 consists of a record of these sales between October 1, 1933, and June 30, 1936, totaling 3,226,559 M cubic feet for a cash consideration of \$58,460.80. Mr. Swartz testified further that he assumed that Mr. Herkness had other sources of supply of natural gas; that the verbal agreement placed no limitation on the amount of his production; and that such production "was not tied in with the export of carbon black."

Mr. Swartz testified further that he had no independent recollection of seeing the June 16, 1933, letter from Kayser to Nelson (exhibit 194, above), nor did he recall being present at the June 7, 1933, directors' meeting (exhibit 78) at which Mr. Nelson was authorized to negotiate with Mr. Herkness. He testified that he did not believe that he had discussed this matter with Mr. Carr; and that, likewise, Mr. Carr had not taken part in the negotiations with Mr. Herkness other than to suggest an amendment to a contract drawn for Mr. Herkness, in evidence as exhibit 414 A-D, a draft of which Mr. Kayser had mailed to Mr. Carr.³²

This contract, like the proposed written contract for purchase of gas (exhibit 413 A-F), was never executed. Contained in the record are exhibits 413 A-F to 418 A-D relating to the two unexecuted contracts just mentioned, and in addition, exhibits 194 to 216, consisting of correspondence involving dealings with Mr. Herkness and the Johnson company. The proposed contract exhibit 414 A-D; also drafted by Mr. Swartz, between the association and Charles Eneu Johnson & Co., Inc., was to run 5 years from January 1, 1934, and contained, among others, the following provisions: That Johnson "maintain the uniform prices, conditions and practices" of the association with respect to sales of its export carbon black; that Johnson not sell more than 4,000,000 pounds of carbon black annually nor augment said quantity by any "increase in plant capacity or by the purchase of carbon black for export or for its own consumption;" that Johnson furnish the association information similar to that required by it from its members under its sales agreement with them; that Johnson con-

³² T. 591-598.

form to the association's regulations and commission practices governing its distributors; and that the association would purchase from Johnson annually carbon black representing the difference between the amount sold by Johnson in export and 4,000,000 pounds. It was the last provision which Mr. Carr, upon receipt of the draft from Mr. Kayser, amended to provide that the association either purchase such difference or "notify Johnson of its election not to purchase said carbon black. In the latter case Johnson shall be free to sell at such price as Johnson may in its discretion see fit said amount of carbon black which Export elects not to purchase" (exhibits 415 A-B).

The relation between the two drafts is apparent in paragraph 10 of the gas sale contract (exhibit 413 A-F) which reads as follows:

10. The party of the third part has entered into an agreement in writing, bearing even date herewith, with Carbon Black Export, Inc., regarding the sale of its carbon black in the export trade. Should the party of the third part violate its said agreement with Carbon Black Export, Inc., or should Buyer violate any of its obligations hereunder, Seller shall have the right to terminate this contract and cease delivering gas after having given thirty (30) days notice in writing to Buyer, which notice may be mailed or delivered to him at his office, 10th and Lombard Streets, Philadelphia, Pennsylvania, in which notice the alleged violation shall be specified.

On July 20, 1933, Mr. Herkness wrote Mr. Swartz as follows (exhibit 416):

Mr. OSMAN E. SWARTZ,
1002 Union Building,
Charleston, W. Va.

DEAR MR. SWARTZ: I have your letter of July 15 inclosing copies of proposed contract for the purchase of gas.

The language in paragraph 10 is not satisfactory to us and in looking over my correspondence with Mr. Nelson and my memorandum of our conversation on the train I cannot find anything to indicate that such conditions were contemplated in our discussion.

The draft of the contract with the Export Association in its last paragraph is likewise not satisfactory and seems to me to differ considerably from the basis we discussed. I talked with Mr. Kayser over the telephone about this contract and explained my objections to him. He is going to discuss the matter with Mr. Carr and advise me how Mr. Carr feels about it in the morning.

I am sailing in the morning and it will be impossible to conclude these matters before I leave but this does not seem to me to be very important as the contracts are not to become effective until the end of the year in any event. Furthermore the contracts have become so involved and some of the conditions have departed so far from our original intentions I think perhaps it will be just as well to let the matter rest for a while and then try to see if we cannot get together on a simpler basis. I hope to see Mr. Nelson in London and I will discuss it with him then.

Very truly yours,

CHARLES ENEU JOHNSON & Co.,
(Sgd.) L. C. HERKNESS, *Vice President.*

When the part the National Gas Products Association was called upon to play in the furtherance of successful prosecution of the war the load on this respondent stepped up; he had to lean on Carbexport personnel in the office which the association shared with Carbexport to a point beyond nominal. That fact was the occasion for the letter marked "Exhibit 178 (b)".

Carbon Black Export, Inc., and National Gas Products Association never were one and the same thing during my period as implied by Mr. Layton's question in lines 13 to 16 at page 566. The reason the latter was housed in the same office with Carbexport was that its activities were so limited that it was deemed an extravagance to stand the expense of housing it separately. National Gas Products Association never engaged in the widespread activities which are associated with the term "Trade Association," nor does it do so now. Since this joint domicile has become subject to attack by Mr. Layton it was decided in December 1945 to submit to the extravagance of separate housing. Since February 1946 the statistics have been farmed out to an individual with no connection with the carbon black industry. No reason for any being foreseeable at present, the association has no address.

* * * * *

I dont think they (board of governors of N. G. P. A.) deemed the present investigation a pressure. They doubtless felt, as I have for some time, that it seemed inconsistent to those who were investigating the case that a domestic association regardless of its functions, and an export corporation under the Webb-Pomerene Act should be housed together.

Mr. Reid Carr testified that he was sure Mr. Kayser's recommendation contained in exhibit 178 B was carried out, and also gave the following additional testimony:²⁷

A. Well, the National Gas Products Association was an organization of producers having no reference whatever to the export trade. It was a voluntary association, not a corporation. It was formed many years before Carbon Black Export was formed and there were members of the National Gas Products Association who were not members of Carbon Black Export, and the officers of the National Gas Products Association were not the same as the officers of Carbon Black Export, and I should say the functions of the two organizations were very different.

Q. Now, during this period they were domiciled in the same quarters, were they not?

A. Yes, they had the same offices.

Q. And according to these exhibits, all of the expenses incident to the handling of the domestic association's work, except very, very extraordinary ones, were paid by Carbon Export. I refer to exhibit 178-B.

A. Well, 178-B says in substance that in the early days the expenses of the National Gas Products Association were nominal and only the extraordinary expenses were paid for by the association. It says the arrangement meant little in the way of expense to Carbexport in the early years, but this letter indicates the time has come when the expense of the National Gas Products Association should be independently paid by the members.

Mr. Hans Huber, at the New York City hearing, held June 4, 1946, gave testimony concerning N. G. P. A. as follows. He had been its

²⁷ T. 566-567.

president since February 3, 1943. It was a voluntary association organized December 28, 1920, under New York law with stated purposes to extend markets for natural gas products; legitimately oppose unreasonable legislation; support conservation; maintain a credit information exchange; compile trade information concerning depletion, pipelines, and production problems; and to take concerted action in the matter of freight rates, classifications, and container requirements. A copy of its articles appears in the record as exhibit 500. He listed as members of N. G. P. A., the following: Cabot Carbon Co., Columbian Carbon Co., Coltexo Corp., Columbian-Phillips Co., Continental Carbon Co., J. J. Huber Corp., Crown Carbon Co., Imperial Oil & Gas Products Co., Panhandle Carbon Co., United Carbon Co., Kosmos Carbon Co., Eastern Carbon Co., and Charles Eneu Johnson Co. Of this group, he testified, Crown, Continental, and Imperial are not affiliated, directly or through parent companies, with Carbon Black Export, Inc. The witness made the following statement on the group's operations:²⁸

It was not until 1927 that a salaried employee of the association undertook the statistical work. A so-called "statistical secretary" was engaged at that time and performed this work until September 6, 1933, when, by resolution of the members of the association, the statistical work was transferred to the office of C. E. Kayser who then was president of Carbon Black Export, Inc. This was a very natural action to take at that particular time: During the summer of 1933 the association was intent upon getting an N. R. A. code formulated and approved and there was little other association work of any continuing importance at that time. C. E. Kayser was engaged by the association at that time as its paid assistant secretary, chiefly for the purpose of assisting the industry to obtain a code of fair competition. Mr. Kayser was the logical choice since he knew the industry, had the office facilities to perform the other necessary association functions and was known to the industry members as being impartial. His office collected, compiled, and disseminated the statistics. He continued to perform that work even after the N. R. A. codes went out of existence.

Meetings of the association through 1933, 1934, and 1935 were, as might be expected, chiefly concerned with the formulation and operation of the code of fair competition under the N. R. A. Thereafter and until the recent war, the association was not very active. It sponsored a program for standardizing paper packages used in the industry, successfully opposed certain proposed excessive domestic freight rates before the Interstate Commerce Commission, and its traffic committee met fairly often for this purpose during this period. During the war, the association at the request of Government officials, made its services and its paid assistant secretary available to the War Production Board and to its industry advisory committee and throughout the war continued to cooperate fully with the Government. Mr. Kayser served on the industry advisory committee as a representative of N. G. P. A. and in that capacity was called upon for many kinds of unusual data. The extraordinary demands made on N. G. P. A. as a result of the requests of W. P. B. and its industry advisory committee required Mr. Kayser to make severe demands on the office personnel of Carbon Black Export, Inc. He informed the members of N. G. P. A. of this

²⁸ T. 1547-1556.

Mr. Carr testified that he had no recollection of a proposal which Mr. Kayser attributed to Mr. Thomas D. Cabot in exhibit 194, requiring Herkness to purchase all of his gas supplies from United, but that he stood on the minutes (exhibit 78) as correctly recording the directors' reference to the Herkness matter. Its inclusion in the minutes arose from the fact that United's sale of gas was an inducement to Herkness to join the association. He likewise recalled no meeting with Mr. Swartz (as referred to in exhibit 194) having dealt only with the Association-Herkness contract (exhibit 414 A-D) drafted by Mr. Swartz, which was submitted to him as the association counsel by Mr. Kayser. Respecting the proposed plant capacity limit on exports referred to in exhibit 196, Mr. Carr testified that at the time, July 1933, it was a legal proposal because under the N. R. A. limitations on production were encouraged. He continued that the limitation was on "the amount of export, it was not a limitation on production at all. It was a limit of what the company could export but he was perfectly free to produce as much as he wanted to on the domestic market."³³

Mr. Kayser testified that he did not meet Mr. Herkness until the fall of 1933, and that "there never was any pressure brought to bear on him or his company to join Carbexport."

He cited article IV of the N. R. A. Code for the carbon black industry approved June 16, 1933, directing "each member to so regulate its current production as to prevent the same from exceeding its current deliveries." The board of directors, in its meeting of July 10, 1933 (exhibit 79), appointed a committee to investigate application of the code to export trade, he added. Referring to the word "voted" in exhibit 196, he testified as follows.³⁴

I can and do state categorically that there was no such meeting. The first paragraph of my letter of July 21, 1933, which letter is exhibit 196 A-B, is a report to Mr. Swartz of a conference I had with Mr. Carr over the telephone after I had received from him the revision, also reported in that paragraph, of the contract draft which Mr. Swartz had sent me for submission to Mr. Carr. I used the suspect word "voted" as meaning "expressed himself to me as in favor of."

Mr. L. C. Herkness testified as follows: He is president of Charles Eneu Johnson & Co., Inc., a printer's ink manufacturer in existence since 1804. There is no Herkness Carbon Co., the Johnson company being sometimes referred to as "Herkness." Prior to 1926, it purchased carbon black used in ink manufacture from producers United, Columbian, Palmer, Keystone, and Magnolia. In 1926, it commenced manufacture of carbon black, producing about 1 million pounds a year. It did not engage in sale of carbon black in the domestic market until 1940, but prior to 1933 was selling carbon black in export through foreign agents. It purchased up to a million pounds of carbon black

³³ T. 481; 501.

³⁴ T. 1716; 1765.

from other producers, but this amount added to its own production did not make the company an important factor and it did not join either of the export associations. Between 1933 and 1936, the company purchased carbon black from the Cabot, Keystone, and Magnolia companies. Natural gas was purchased from the United company following June 7, 1933, for 2 or three years, first at 1½ cents per thousand cubic feet and toward the end at 2 cents per thousand cubic feet, when the purchases were stopped. He was "very firm" about such gas purchases being free from any conditions involving the association. There was no provision requiring all such purchases exclusively from United. Referring to exhibits 194 to 216, Mr. Herkness testified:

No, I have no recollection of it at all. I saw those letters but I have no knowledge of that at the present time. As you see, they are somebody else's letters, not mine, I have no knowledge of that at all.

Mr. Herkness examined the Kayser-Swartz letter (exhibit 196) in which Kayser mentions telephoning Herkness, but could not recall any conversions with Kayser at about that time, July 21, 1933. His testimony reads that he "was negotiating with Carbexport with the thought of maintaining Carbexport prices. I had been selling and continued to sell for a certain length of time below Carbexport prices." He testified that he had an agreement with Carbon Black Export that they should buy black from him to the extent that he did not sell abroad under their prices. He did have conversations with Mr. Swartz relating to purchase of gas from United and concluded his first testimony, in hearing held February 8, 1945, when asked if he had any additional statement, as follows: "No, except to emphasize again that there was no connection between the purchases of gas from United Carbon and my agreeing to maintain Carbon Black Export prices."³⁵

At a subsequent hearing held January 15, 1946, Mr. Herkness further testified as follows: In the period between formation of the association, 1933, and the date of his acquisition of membership, June 18, 1936 (exhibits 215, 6), he purchased carbon black from Binney & Smith, United, Wishnick-Tumpeer, and Cabot. A search of his files disclosed "no evidence of any refusal on the part of any concern to sell us carbon black during that period, nor any other period." Gas purchases from United were discontinued in June 1936, because of an increase in price to 2¼ cents per thousand cubic feet, and at that time a switch was made to Farrell & Co., who charged 2 cents per thousand cubic feet. In reference to his earlier testimony of an agreement by the association to purchase from him carbon black which he did not succeed in selling in export, his testimony reads as follows:³⁶

Upon looking over my files, I find that my memory was at fault. The time referred to was 12 years ago. The correspondence indicates that when offered

³⁵ T. 289; 298.

³⁶ T. 838-839.

such an agreement, I declined to accept it. It appears, however, that I did undertake to go along in an effort to maintain Carbexport's prices, reserving the right to myself to depart from this policy at any time. It also appears that at my request Carbexport did buy 600,000 pounds of black from me in October 1934.

I have nothing to add to my testimony beyond a repetition of a fact that I have already tried to make clear, namely that insofar as Charles Eneu Johnson was concerned, there was no coercion or intimidation involved in our joining Carbon Black Export, Inc., but on the other hand, we joined it solely because it appeared to be a profitable undertaking and it has proved such. By becoming a member of Carbexport we were sure of disposing of our entire export quota at full prices with a consequent improvement in profit. Moreover once our contracts were at full market prices, we could afford to buy additional black and resell. This was important to us since our export quota was in excess of our total production.

During the period 1929 to 1940, the Charles Eneu Johnson Co. sold no carbon black in the domestic market for the reason that "we got more money for it abroad," he continued. Referring to the proposed contracts, exhibits 413 and 414, he testified that he never became "a party to any contract either oral or written, that in substance was the same, or that covered the points mentioned in those contracts." He recalled no discussions with Messrs. Carr, Nelson, or Kayser about these contracts. He recalled the meetings with Mr. Swartz and discussions with Mr. Kayser about joining the association. On his London visit in the fall of 1933, he met Mr. Nelson and discussed adherence to the association's prices by the Johnson company's London agent. Upon being shown exhibit 78 C, the directors' minute for June 7, 1933, Mr. Herkness testified: "I know nothing at all about it. I wasn't a member. I wasn't present. The first time I ever knew anything about that was when it came up at the hearing in Washington." His testimony on these particulars reads as follows: ³⁷

Q. Although you entered into none of these contracts, I'd like to have you confirm these things if they are so. Nevertheless, immediately after this time, beginning somewhat in 1932, did you purchase gas from Nelson, didn't you?

A. Yes, for 3 years.

Q. And you did adhere to Carbexport's prices, did you not?

A. Yes.

Q. And Carbexport did purchase at least one amount of 600,000 pounds of black from you, did they not?

A. Correct.

Q. But those three things that you have just confirmed have no relationship to each other, weren't contingent upon each other, weren't tied up with each other, is that correct?

A. Yes, it is correct. Of course, when you say no relationship to each other, they were all carbon black.

Q. Let's put it this way. When you purchased gas from United Carbon Co., that was not contingent upon your contract, Carbon Black Export's agreement to purchase black from you?

³⁷ T. 847 ; 852.

A. It definitely was not, and I ceased to purchase gas from the United Carbon Co. when I was able to make a more advantageous arrangement elsewhere, and I kept on adhering to Carbexport's prices, after I ceased buying gas. The two were not connected in any way.

Q. Was it a condition of the gas agreement—you must have had an agreement with Nelson at some time, that you not purchase gas from any other source.

A. It was not.

Q. Was that subject approached to you?

A. No. You see, the question of purchasing gas, the problem involved in purchasing gas was to find someone who had gas that was accessible to my plant, which was low pressure gas that I could buy cheap enough and use for carbon black. The reason United Carbon sold it to me was because they had sold this plant, and had that low pressure gas for which they had no other use.

The quota under which his company joined the association in 1936 was a percentage of 3.880 and worked out roughly to about $4\frac{1}{2}$ or 5 million pounds of export carbon black. The plant capacity at that time was 5 million pounds, all of which, after using up to a million pounds for ink manufacture, was exported. The company's plant capacity was $2\frac{1}{2}$ million pounds from 1924 to 1927; 5 million pounds from 1927 to 1940; and 13 million pounds since 1940.

Mr. Oscar Nelson recalled seeing Mr. Herkness in London in the fall of 1933, but on a social basis and not for discussion of business. He denied the making of any arrangement, contract or understanding with Mr. Herkness linking the gas transaction with any association program, testifying that the amount of gas purchased from United by Herkness was but "a drop in the bucket" and necessarily indicating gas purchases from other sources.³⁸

There follows a brief description of exhibits not heretofore described in the group numbered 194 to 216. Nos. 197 A-B and 198 A-G, dating from August 25 to October 16, 1933, are copies of correspondence between the association and member Cabot relative to certain Herkness business in Calcutta and the granting to Herkness benefit of the lower of two freight rates in computing Cabot's c. i. f. price to Herkness. Nos. 199 A-B to 201 A-B concern requests to the association for price information made by Herkness between January 9 and May 21, 1934. Nos. 202A-B to 214 E-F dating from April 20, 1934, to June 25, 1935, consist of correspondence reciting Herkness' difficulty in holding business in England as the result of maintenance by his agents, Typke & King, of the association's prices. Exhibit 215 A-E consists of photostat copy of a letter from the association to Mr. Herkness dated March 27, 1936, and a statistical comparison of export prices of both. This indicated a \$2,700 advantage to Herkness if he joined the association as a producer coupled with the additional incentive of procuring a distributor's contract. Returning to the preceding group, the follow-

³⁸ T. 734.

ing excerpts are reproduced from exhibit 207 B-C, photostat of a letter dated July 6, 1934, from Kayser to all association members:

After some discussion, the directors determined that the only positive assistance Carbexport could give Mr. Herkness was to undertake to buy some black from him and permitted me to approach him with an offer to do so. It was the opinion, and I believe correctly so, that assistance to the firm of Typke & King could come only from our distributors. I called on Mr. Herkness and laid our point of view before him, emphasizing my own curiosity as to why he should be so insistent on pulling the coals out of the fire for an agent who insisted that he could not sell a standard product except at a cut price. Herkness' agent in France maintains the price and gets his share of the business. Mr. Herkness, while admitting the inconsistency of his support of such an agent, insists that, as long as distribution of black remains on such a highly competitive basis, he must support even a poor distributor who is responsible for developing the market for the Herkness brands, at least until he can get another one more satisfactory. In other words, concern for his own distribution ranks, to say the least, equally with his concern for price. Consequently, Mr. Herkness feels that the solution of the problem which he needs would not occur by selling black to the Corporation. That point of view appears also in his reaction to my invitation to him to join Carbexport. He is willing to be a member beginning 1935, agreement on quota being taken for granted, if Carbexport's existence beyond 1938 is assured and if either distribution is made less competitive or his agents are taken over.

With respect of the present problem, Mr. Herkness asked me to reconsider his request that room be made in the United Kingdom program for Typke & King to sell a reasonable amount over the balance of this year. His request is in the best of temper, even when he asks for promptness of action on the ground that selling for 1934 will soon be spent.

It seems to me that the Corporation should take some definite action to help Mr. Herkness out. His point of view with regard to his problem is in line with that of most members of the Corporation on questions of distribution. There can be no virtue in insisting that that point of view is wrong until the Corporation conducts its affairs according to the contrary view. Besides, we and our distributors have gained what Herkness has lost; consequently, to make it possible for Typke & King to recover Herkness' customers entails no sacrifice on our part. Finally Mr. Herkness is both an able and a fair man, who should, in my opinion, be drawn closer to us.

The association did purchase 600,000 pounds of carbon black from Mr. Herkness on October 25, 1934, photostat of letter confirming this purchase is exhibit 212 A-B in aforesaid group. Relative to the Typke & King matter, Mr. Huber, questioned for explanation of the phrase in exhibit 207 B-C (quoted above) about the association's distributors gaining what Herkness had lost, testified as follows:³⁹

There, of course, was no legal obligation on Herkness to observe Carbexport prices. If he had not observed Carbexport prices, it would have certainly been better for him to have had Carbexport in existence, having a definitely known price level, than competing against a number of larger competitors with unknown price levels, unknown terms, and so on. This merely says that when Herkness brought his price up to Carbexport price that then he lost the business which he had gained during the period when he did not observe Carbexport prices.

³⁹ T. 768.

Now, why he lost it, I don't know. It may have been quality; it may have been lackadaisical agents. I don't know the reason why he lost it. I don't see any inconsistency.

Mr. Thomas D. Cabot explained the same phrase as follows:⁴⁰

In 1934 Mr. Herkness, who was then principal owner of Charles Eneu Johnson Co., was a very small producer of carbon black and had no adequate technical facilities for either controlling the quality of his product or giving service to his customers, and I think it probable that on an equal price basis Carbexport (i. e., Carbexport's distributors) would take business away from Charles Eneu Johnson Co.

The concluding testimony on the Herkness episode was that of Mr. C. E. Kayser, reading as follows:⁴¹

I know that Mr. Herkness made no contract with Carbexport at any time prior to June 18, 1936. I know that from the time Mr. Herkness returned from Europe in the fall of 1933, when I met him for the first time personally, there was never any pressure brought to bear on him or his company to join Carbexport. Exhibits 199-a to and including 215-e clearly show that Carbexport conducted itself in a manner to demonstrate to Mr. Herkness that Carbexport's operations were in no way hostile to the interests of nonmembers and to bring to his notice the benefits his company would obtain from membership in Carbexport. I know these things because from October 1933 to June 1936 I carried on all negotiations and contacts with Mr. Herkness in regard to exports alone and personally.

Mr. Herkness stated to me at the time his company became a member of Carbexport, and has repeated the statement on occasion since, that the only reason Chas. Eneu Johnson & Co. became a member was that it was convinced that it could export more carbon black and make more money as a member than as a nonmember.

3. Invitation of October 24, 1935

The question of nonmember producers next came to the foreground as the result of a trip to Europe taken by Mr. Kayser in the summer of 1935. He testified that he made the trip "to inform myself how the sales in the export market were being conducted and what problems the agents and distributors had." His original purpose was to determine how to "meet the problem of blocked currencies and how to take care of our largest customers in Germany and in the blocked currency countries." In the course of his travels in Europe, he observed the "growing inroads of outsiders" upon the export business of the association. Upon his return to the United States in the fall of 1935, he prepared a document recording certain observations made and conclusions reached in the course of the travel. Copies of this document were circulated "among all the directors in preparation for a meeting, for a discussion to take place several days later than the date of this." A photostatic copy of the document is in the record

⁴⁰ T. 1137.

⁴¹ T. 1717.

as exhibit 193 A-T. At its submission, Mr. Kayser testified that in view of impending purchase by United, the Combined Carbon Co. and Texas-Louisiana Producing & Carbon Co., the last two of seven firms listed in exhibit 193 B (p. 2 of the memorandum) could be eliminated from consideration. This left as outsiders the following: Herkness Carbon Co.; Crescent Carbon Co.; Imperial Oil & Gas Products Co.; Keystone Carbon Co.; and Magnolia Petroleum Co. Officers of these companies known to Mr. Kayser were Mr. L. C. Herkness, Mr. F. W. Ingraham of Crescent; Mr. Robert Hartman and Mr. Joseph Hartman of Imperial; Mr. C. K. Williams of Keystone; and Mr. Farnham and Mr. West of Magnolia.⁴²

The first five pages of the report (193 A-E) are devoted to description of the seven outsiders above named, the quality of their products, their sales methods, and a recital of their "inroads" on Engelbert of Belgium, Bata of Czechoslovakia and Michelin of France, association customers. The remaining pages recite: 193 F, that outsiders sold 2 million more pounds in 1935 over 1934, increasing their percentage of the market from 9.42 to 14.64 percent. 193 G, increased exports will lead outsiders to expand their production. 193 H, a price war would be costly and could not be confined to the export market. A 1-cent per pound price reduction would cost the membership \$2,750,000. 193 I, sketches "control of outsiders" by contracts with Herkness and Magnolia and negotiation with Crescent and Imperial. 193 J, Keystone quota is dependent on their tie-up with Imperial. "As to DeSmet, the more outside producers we tie up the less necessary it will be to consider him." 193 K, exchange problems discussed. 193 L, exchange problems in Italy. 193 M and N suggestion of 5 percent price increase and adoption of 5 percent cash discount. 193 O and P, conditions in Italy and Germany are going from bad to worse. 193 Q, six new plants in Germany and order requiring German customers to purchase 20 percent of home production. 193 R, in view of policy giving eight distributors the world market, restriction in number of agents is not advisable.

193 S-T, consist of "Agenda-Directors' Meeting Scheduled October 24, 1935," in which item II reads as follows:

ITEM II

PRESENT CARBON BLACK PRODUCERS WHO ARE NOT MEMBERS OF CARBON BLACK EXPORT, INC.

With respect to this topic I request that the following resolution be offered and adopted:

Resolved, That the president be and is herewith authorized to invite Herkness Carbon Company, Crescent Carbon Company, Imperial Oil & Gas Products Com-

⁴² T. 273; 277; 1924.

pany, Keystone Carbon Company and Magnolia Petroleum Company to take out full membership in this corporation under the same terms and conditions enjoyed by present members and, in case of acceptance of said invitation by any or all of said companies, in his sole discretion to allot quotas and close all necessary contracts requiring no changes in the standard contract forms of the Corporation without previous reference to this board for approval.

For discussion of this topic please refer to my letter of October 21st to all directors, under subject "Outsiders."

The directors held a meeting on October 24, 1935, at which the following resolution was adopted (exhibit 98 B) :

Resolved, That the president be and he is hereby authorized to invite Herkness Carbon Company, Crescent Carbon Company, Imperial Oil & Gas Products Company, Keystone Carbon Company and Magnolia Petroleum Company to become stockholders in this corporation, under the same terms and conditions as its present stockholders, and, in case of acceptance of said invitation, by any or all of said companies, to negotiate with such companies sales agreements for the term of ten years from January 1, 1936, such agreements to be identical in form one with another and with the agreements negotiated with the present stockholders and to be subject to approval by the board of directors of this corporation, and be it

Further resolved, That in case such agreements shall be negotiated with any or all of said companies, the quota of the present stockholders under their sales agreements be reduced pro rata.

Mr. Reid L. Carr, Secretary of the association at the date of the foregoing episode, testified that he had prepared and signed the minutes recording the October 24, 1935, directors' meeting (exhibit 98 A-B), his testimony on this matter reading as follows:⁴³

At the directors' meeting on October 24, 1935, when Mr. Kayser brought up item II of the agenda alluding to his letter (exhibit 193 A), I objected to consideration of the letter by the board because it contained a discussion of policy in respect of matters which it was obviously improper for Carbexport to discuss or consider. However, I advised the board not only that it was perfectly lawful and proper to invite all nonmember producers to join, but that in my judgment it was good policy to do so. Accordingly, no consideration was given to the letter, and no action taken thereon, but a resolution was adopted inviting nonmembers to join, which resolution was differently phrased than that proposed by Mr. Kayser in the agenda. In this disposition of the matter, Mr. Kayser acquiesced.

To the best of my knowledge no further consideration was ever given by the board to Mr. Kayser's letter at any subsequent time.

* * * * *

A. I thought that letter, particularly the portion beginning on page 7 and running onto the top of page 11, contained many features that were not proper for the board of directors of Carbexport to consider. For example——

Q. Let me interrupt, if I may there. You are citing the language beginning "should anything be done about that? If so, what?"

A. Yes.

⁴³T. 381 ; 472 ; 479.

Q. All right. Continue. I just wanted to be sure we knew where you are.

A. Particularly the reference to taking action that would affect the domestic price and particularly the statements about acquiring control of these companies or aiding Imperial to purchase Crescent. In short I felt that and advised the board that it would be perfectly lawful and proper to invite all nonmembers to become members of the association, and in fact it was our moral duty to do so, but that would be the point where we would better stop.

Q. You have a firm recollection of having made a somewhat similar statement you have just made to the board?

A. Yes. I cannot recall the exact words I used but that was the substance of my position, that the letter contained objectionable features that I did not think they ought to consider.

Q. Upon your so stating, what then occurred, if anything?

A. The board adopted a resolution which I think is already in evidence, if I remember correctly it is exhibit 98 B.

* * * * *

Q. You felt, I take it, it was your duty as counsel to call to the attention of your conferees any legal matters, any illegal action they might get into and warn them against it, is that right?

A. Yes, I thought that they were matters in this letter they ought not to consider.

Q. You gave us a legal opinion this morning. I wonder if you will give us one this afternoon. In what respect would you think the recommendations of Mr. Kayser were illegal?

A. I told you I thought we ought not to consider domestic price and I thought that we ought not to consider obtaining control of those companies insofar as he spoke of obtaining control or assisting other people in obtaining control. I did not think that was a matter for the Export corporation to have anything to do with. The farthest I thought we had the right to go would be to deal with them in respect of the purchase of some of their black possibly or making them members of the corporation for export purposes.

Q. In other words, you thought, if I understand you correctly, that the contemplated action might violate the antitrust laws, is that right?

A. It would certainly be outside the scope of anything that an export corporation had the right to do.

Mr. Nelson testified, by way of a written statement, as follows: ⁴⁴

I have been asked to comment on exhibit 193 A to T, which is a report by Mr. Kayser to the board of directors of Carbexport dated October 21, 1935. There is a copy of this letter in our files but I cannot recall ever reading it. I attended the meeting on October 24, 1935, and according to my records had left for New York on October 21 before this letter reached Charleston. I recall Mr. Carr making pointed objections to this report and I gave the matter no further thought and have not to this day. I had nothing to do with getting these small companies to join Carbexport, except that I have on occasion talked to my friend Ingraham about it.

Mr. Kayser, also in a written statement, testified as follows: ⁴⁵

I testified, as shown in lines 11-14 on page 275 of the record, that exhibits 193 (s) and (t) represented announcements of agenda to be discussed at a

⁴⁴ T. 643.

⁴⁵ T. 1712.

meeting of the board of directors of Carbexport called for October 24, 1935. At the close of item II on this agenda report (exhibit 193 (s) recipients thereof, namely, directors, are referred to in a report of mine dated October 21 as a background for discussion of the recommendation made in agenda item II. Exhibits 193 (a)-(r) inclusive are copies of the report referred to.

Exhibit 98 (a)-(c) shows that a meeting of the board of directors took place on October 24, 1935. The said exhibit is a copy of the minutes of that meeting.

When in the course of the meeting I as chairman, brought up item II of the agenda for discussion Mr. Reid L. Carr, a director of Carbexport, promptly expressed his disapproval of my report as the basis of a policy to be adopted by Carbexport and recommended that the board decline to discuss or give consideration to anything therein which was of the nature of a proposal of policy for Carbexport.

Several board members present indicated that they had not read the report but all, including myself, accepted Mr. Carr's opinion and recommendation.

Thereupon I asked if there could be any objection to the resolution which I proposed under item II of agenda, exhibit 193 (s), suggesting that, while it had been continuous policy of Carbexport's directors to hold membership open to nonmembers, it might aid in obtaining more favorable reception of renewed invitations to join if it could be brought out that the board had again gone on record as extending such invitations.

None objected to the board again going on record as holding membership in Carbexport open to any and every nonmember. Therefore a resolution expressing this sentiment was drawn to conform to the ideas of the board. It was offered for vote and was passed without dissent as recorded in exhibit 98 (b).

4. Magnolia correspondence

There were introduced into the record during the investigation 41 photostats of correspondence between the association and Magnolia Petroleum Co., of Dallas, Tex., or between others on behalf of Magnolia. These are identified as exhibits 230 A-B to 247 and 590 A-W. These consist of transmittals of export price lists, references on foreign agents, a sale of 700,000 pounds of carbon black, and discussion of possible membership by Magnolia. Exhibit 590 E, dated September 5, 1934, from the association to Magnolia, contained an invitation to join in the following language:

At the time of our meeting I informed you that it was my intention to invite Magnolia Petroleum Company to become a stockholder in Carbon Black Export, Inc. and to ship black for export thru it. That invitation is herewith cordially extended. Although Magnolia Petroleum Company has never exported black, the members of Carbexport will be glad to "move over" and make room for Magnolia, so that the Corporation can assign it a representative quota of the total export requirements.

Magnolia, by its officer C. E. Farnum, on September 21, 1934, replied to the association as follows (exhibit 590 G):

Mr. Miller has asked the writer to express to you his appreciation of your letter of September 5th sending us the documents covering Carbon Black Export, Inc. We feel that it would be to the advantage of our Company to participate in this Corporation and are very much interested, but in presenting the matter

to the management for final approval and authorization there seem to be several things that are not quite clear, and we are taking the liberty of asking you for a little additional information. How many shares would we be required to purchase, and how much per share will have to be paid at time of purchase?

The invitation was not accepted, Magnolia on October 29, 1934, writing the association as follows (exhibit 590 K) :

Your letter of October 3d, in reference to participating in Carbon Black Export, Inc., is received and, after consideration of the matter, wish to state we believe that we will not take advantage of your kind invitation at this time.

Assuring you of our desire to continue to cooperate with you for the best interests of all concerned, and with kind personal regards, beg to remain, * * *

Correspondence on the association's purchase of carbon black from Magnolia, is as follows :

Magnolia to association, January 31, 1936 (exhibit 590 L) :

We have at our Magic City and Faulkner, Texas, plants between 800,000 and 1,000,000 pounds of black produced under the old grinder process of bolting ; May we inquire if the Export corporation would be interested in purchasing any of this black?

Association to United Carbon Co. February 27, 1936 (exhibit 230 A) :

Magnolia Petroleum Company have inquired whether or not we would be interested in buying between 800,000 and 1,000,000 lbs. of black produced under the old grinder process of bolting, and in their stock at Magic City and Faulkner, Texas. The purchase does not sound very inviting but it will be to our interest, until the outsider situation is cleared up, to keep Magnolia well disposed toward Carbexport. Therefore, altho it does not occur to us to buy this material, we would prefer keeping the question of purchase in a friendly status of negotiation to making a final refusal now. With this intention, we have asked Magnolia to permit us to take samples and test the black in question, and they have advised us that Mr. C. V. Edwards, Superintendent of Carbon Black Plants, Magnolia Petroleum Company, Pampa, Tex., has been instructed to make available whatever samples your representatives might want.

We address you to enlist your aid. We would appreciate it if you would have your producing division take samples, test them thoroughly and send us a full report of the findings, together with an opinion as to the type of customer to whom we could afford to deliver the goods if we should buy it. We will, of course, expect to reimburse you for whatever costs such services will involve. Please advise us if you can and will accommodate us. If so, will you also instruct your plants to do the necessary.

United to Association, February 29, 1936 (exhibit 230 B) :

I have your letter of the 27th inst. and I am entirely in accord with you on the purchase of black from Magnolia Petroleum Company, as long as they are willing to cooperate with the Export Corporation. Naturally we want to purchase little black as possible, but I presume you know what stock they have on hand and therefore, it would be satisfactory with us for you to handle as you think best at this time. If this black is not up to the standard specifications of the Export Corporation it is, of course, a very difficult matter to handle. I am turning the matter of samples over to our Mr. A. G. Treadgold for handling, and you will hear from him in due time.

Association to Magnolia, July 9, 1936 (exhibit 590 R) :

We have completed our tests of the samples of black you sent us from the 700,000 lbs. previously made up by you for, but not accepted by, Firestone. We find that they satisfy our minimum requirements for export and I am, therefore, now glad to formally make the purchase of this material from you.

Magnolia acknowledged, and in its reply, dated July 17, 1936, wrote (exhibit 590 U) :

It is also our desire that this material be *not* subject to rejection after shipment from our plant at Magic City. The export market has never been attractive to us because of the methods employed at times by customers to secure reduction in price, and we therefore wish to make this plain to you.

Another purchase transaction is indicated in the following year, 1937, in the following correspondence involving Magnolia's inquiry about agents located in England and Germany. Under date August 17, 1937, Magnolia wrote the Association (exhibit 243) :

Lind, Mayer & Company of 110 Fenchurch Street, London, have addressed inquiry to us, requesting permission to represent us in the sale of Carbon Black in England.

No doubt you are familiar with this concern, and we ask your advice whether or not you think they would make good representatives.

The association's reply, dated August 27, 1937, reads as follows (exhibit 244) :

Unfortunately I am not acquainted thru personal contact or by report with the firm Lind, Mayer & Company of 110 Fenchurch Street, London, and can, therefore, not give you an offhand estimate of them. However, I have initiated inquiries with instructions that they be discreet.

It will not surprise you that I wonder over your inquiry. You have repeatedly given me to understand that Magnolia Petroleum Company had no desire to go into the export market. Altho you have never stated so, I had felt sure that whenever you determined to do so you would consider joining the Export Corporation, since you have been repeatedly assured that you would have a quota which would represent a fair share of the market and relieve you of the necessity of troubling with distribution. Would you mind informing me whether or not there is a change of policy with regard to exporting in your company.

This was followed by the association's letter of October 4, 1937, in which is indicated the purchase of 250,000 pounds of carbon black. The letter reads as follows (exhibit 246) :

As your letter of October 1st states, we are a long time getting around to the purchase of 250,000 lbs. of carbon black. You will see by the order enclosed that we have finally gotten to it. It is a small quantity we are discussing but, under present conditions, it hasn't been the easiest thing for us to handle.

In an earlier reference to the proposed purchase, you asked us what we might know about Lind, Mayer & Co. of London, who had solicited an agency from you. My reply was that we would make inquiries regarding them. We now have a report from London, copy of which I am pleased to enclose.

Your letter of October 1st states that you have a similar inquiry from Wilhelm Priem & Company, Magdeburg, Germany. This concern used to be an agent of one of our distributors. The agency arrangement was cancelled after a couple of years because of continuous evidence that Priem & Company operated entirely in its sole interest and without consideration for its supplier. When you seriously want to take a flier in exporting carbon black directly, I have in mind recommending that you tie up with Priem to get a taste of what difficulties and costs there are connected with selling this commodity outside of our fair land.

The last dated correspondence, Magnolia's letter of July 29, 1938, indicating their desire to sell additional black, is here reproduced in full (Example 590 W) :

MAGNOLIA PETROLEUM COMPANY

A Socony-Vacuum Company

DISTRIBUTION DEPARTMENT

DALLAS, TEXAS, *July 29, 1938.*

CARBON BLACK EXPORT, INC.,
500 Fifth Ave.,
New York City, N. Y.

GENTLEMEN: This is to acknowledge Mr. Villareal's letter of July 22d attaching copies of price schedule No. 2 for various countries, for which we thank you.

If you find it possible to order any black from us to fill commitments for shipment abroad, we should be very pleased to receive any orders you can consistently place with us.

Thanking you, we are,

Yours very truly,

(Signed) C. E. FARNUM.

Mr. Kayser testified that with the permission of the association's directors, he had invited Magnolia to take membership in the association as early as 1934. From time to time, purchases of carbon black were made from Magnolia and he was positive that there was no arrangement with Magnolia "that they should not operate in foreign fields for export." He thought they ceased carbon black operations in 1938 and knew nothing of their acquisition by Phillips Petroleum Co. He testified further by way of written statement, as follows:⁴⁶

I should like to add to the record additional copies of correspondence between Magnolia Petroleum Co. and Carbexport which clarify and support my statements on pages 336-338 of the record and which throw more light than the said statements on the relationships between the two companies. I have numbered these exhibits 590 a through w. The first carbon black which Carbexport purchased from Magnolia was in July 1936 and the purchase was initiated by Magnolia's own inquiry of January 31, 1936, marked "Exhibit 590 L," as to whether or not Carbexport cared to buy. You will note that the black finally offered to and purchased by Carbexport was a lot which a domestic customer of Magnolia had rejected because it did not fit the customer's specifications. Carbexport was able to find export buyers whose specifications the black did fit and

⁴⁶ T. 336 ; 1720.

helped Magnolia get it out of stock at the best price. Please note in the last paragraph of Magnolia's letter of July 17, 1937, marked "Exhibit 590 T," a reference to the habit of customers in the export market of using the threat of rejection as means of getting price reduction. I quote the reference:

"It is also our desire that this material be not subject to rejection after shipment from our plant at Magic City. The export market has never been attractive to us because of the methods employed at times by customers to secure reduction in price, and we therefore wish to make this plain to you."

Magnolia's experience as a nonmember of an effective Webb-Pomerene Association was apparently the same as that of Carbexport members prior to May 1933, the date Carbexport came into being.

An earlier letter dated December 30, 1936, from Phillips Petroleum Co. to United Carbon Co. (Exhibit 231) reads as follows:

I have your recent letter asking for information concerning the Magnolia's carbon black operations.

When we took over Magnolia's equipment we did not include one small plant which they had south of Pampa in the Bowers Pool Texas. This plant is capable of burning up to 10 million feet per day, although apparently it is not doing this good at this time as their use for carbon black in November was 4,880,000 cubic feet of gas per day. The gas supply is being depleted around this plant.

This is the only carbon black operation which the Magnolia have. As far as I know, they have practically withdrawn from the carbon black business. I believe this will answer your inquiry.

Although Magnolia's letterhead (exhibit 590 W) indicates affiliation with a large Petroleum organization, Socony-Vacuum, the investigation resulted in no further information on its last operations. Mr. Hans Huber testifying at the June 22, 1945, hearing, gave only the following information:⁴⁷

Immediately prior to 1933 Magnolia Petroleum Co. owned three or four carbon black plants. In late 1933 or early in 1934 we leased a carbon black plant from the Magnolia Petroleum Co. located at Skellyton, Tex. After about 3 years of operation, the lease was canceled and we understand that they sold the plant, dismantled and moved it elsewhere.

5. Continental quota

Mr. Robert I. Wishnick testified that he is the president of the following four corporations: Panhandle Carbon Co., a producer of carbon black and member of the association since 1933, selling its export black through the association; Continental Carbon Co., a producer which in early 1937 became the successor of Witco Carbon Co.; Crown Carbon Co., a producer which sells its production through a distributor in Canada known as Canada Carbon Black Co.; and Witco Chemical Co., successor to Wishnick-Tumpeer Co., which is a distributor for Carbon Black Export, Inc., the association herein. Phillips Petroleum Co., about 3 or 4 years after 1933, became owners

⁴⁷ T. 757.

of a half interest in Panhandle Carbon Co. There is no interownership of each other's stock among the four corporations.

Continental's plant was constructed in 1936 but he could not recall whether it had any production in 1936. In 1937, it may have produced up to its capacity which was 33,000,000 pounds of carbon black per year. Continental entered into a contract to export exclusively through the association, Mr. Wishnick's testimony on this particular reading as follow.⁴⁸

Q. As a part of Continental's agreement with Carbexport, did Continental agree not to export through the Crown Carbon Co. and Canada Carbon Co.?

A. Well, we had an exclusive agreement with Carbexport which we certainly intended to live up to and restricted our exports through that agreement.

Q. Did your understanding of that contract mean that Continental was not to export through Crown Carbon Co.?

A. Yes, sir.

Q. Was it also true that you were not to export through Witco Chemical Co.?

A. Excepting as a distributor for Carbexport.

The contract referred to, its modification and extension is contained in the record in the form of photostatic copies identified as exhibits 218 A-B to 229; 436; 570 and 589. It will be noted that only exhibit 218 A-B refers to Continental as Witco Carbon Co. Exhibit 570 consists of a folder containing 20 photostat copies of Continental's file copies of the contract. In this group, a letter dated February 15, 1937, appears to be the last use of the Witco Carbon Co. letterhead and a letter dated March 23, 1937, is the first use of the Continental Carbon Co. letterhead and designation. Mr. Wishnick testified that Witco Carbon Co. and Continental Carbon Co., "for all intents and purposes," are one and the same. A summary of the exhibits follows:

Exhibit 589, photostat copy of Wishnick telegram to Kayser dated February 9, 1937, and reading as follows:

Directors have authorized me to accept for Witco Carbon your offer to purchase five million pounds delivery this year accordance our conversations stop desire however go on record in stating this quantity not to set precedent for future quota negotiations as we feel it too small for our plant however are accepting for this year to show willingness cooperate with industry all directors joins me in wishing you bon voyage safe return regards.

Exhibit 218 A-B is a photostat of the first contract of purchase. It is in the form of a letter from the association dated February 9, 1937, signed by Mr. Kayser, addressed to Mr. R. I. Wishnick, Witco Carbon Co., and on its second page bearing the caption "accepted February 11, 1937, Robert Wishnick, President, Witco Carbon Company." The first two and last two paragraphs are here set out in full, the intervening five paragraphs relating to quality standards and packaging requirements. The four paragraphs read as follows:

⁴⁸ T. 304; 314.

Thanks for your telegram of today advising me that Witco Carbon Company accepts the offer of Carbon Black Export, Inc., which I made you to purchase five million pounds of carbon black for delivery during this year, in accordance with the terms discussed by us. The offer which is now to be formalized as an agreement is as follows:

Carbon Black Export, Inc., agrees to purchase from you and Witco Carbon Company agrees to sell to it, 5,000,000 lbs. of heavy compressed ordinary carbon black in 12½ lb. plain bags sealed with plain tape, packed 4 each in heavy standard paper bags; price to be the same as paid by Carbon Black Export, Inc., to its member producers, f. a. s. Gulf ports, less 10% commission.

* * * * *

Carbon Black Export, Inc., will attempt to call for delivery by you to Gulf ports at the rate of 500,000 lbs. per month beginning with the month of March 1937. You agree to hold any balance not taken under the above monthly rate without storage charges and at your risk until you make delivery to us at Gulf ports. In April, May, and June we will pay you at the price due for the 500,000 lbs. contracted to be taken in each of the preceding months, the portion of such payment not representing actual deliveries to you to be an advance on account. Beginning with July we shall pay you in each month for the actual quantities taken in the preceding month. In consideration of our undertaking to purchase, you agree that for the year 1937 none of the carbon black produced by Witco Carbon Company will move into the markets outside of the United States, Mexico and Canada directly or indirectly otherwise than thru Carbon Black Export, Inc.

If you find that the above is a correct statement of our agreement, will you kindly indicate your approval thereof by affixing your signature and the date thereof on one of the two copies herewith and return it to me. Of course, if it does not state the agreement correctly, I shall expect you to point out the error so that it may be corrected on my return.

Exhibit 220, dated April 19, 1937, addressed to Continental Carbon Co., consists of a modification of the contract (exhibit 218 A-B), under which "any portion of the 5 million pounds remaining untaken by us as of December 31, 1937, to be billed to us and held for our account without storage charges and at your risk until we call for it to be delivered to us at Gulf ports."

Exhibit 221 A-C, addressed to Continental and dated September 29, 1937, is a similar contract for the purchase of 7 million pounds of carbon black in 1938, and bearing quotation "accepted: September 30, 1937, Continental Carbon Company, by Robert Wishnick, Pres." This contract, after detailing quality, packing, payment and warranty provisions, contained three paragraphs reading as follows:

(5) During the term of this agreement Continental shall not directly or indirectly sell or deliver any carbon black for export except thru Carbexport.

(6) Throughout the term of this agreement Continental shall take all reasonable precautions to prevent carbon black sold by it in the United States, Canada and/or Mexico from being exported except thru Carbexport.

(7) The restrictions under (5) and (6) above on the sale of carbon black by Continental for export are the same restrictions binding the member suppliers of Carbexport and shall be interpreted and applied in the case of Continental exactly as they are interpreted and applied in the cases of Carbexport's member suppliers.

Exhibit 223, is an extension, date June 27, 1938, and duly accepted, of the 1938 contract for the year 1939, on the same terms and conditions.

Exhibit 224, letter dated May 26, 1939, from Mr. Kayser to Mr. Nelson of United, revealing Continental's overtures to take membership in the association, reads as follows:

Sales Agreements with Continental Carbon Company have heretofore been concluded approximately six months prior to their effective date. Such early agreement has been reached in order to prevent the disturbance in our distribution which would be created by preparations for eventual separate marketing Continental might think it necessary to make, if uncertainty as to their relationship to us after the expiry of an existing contract should exist any longer.

The subject of a Sales Agreement with us for 1940 has now been broached by Continental. They have notified us of their willingness to extend the contract in effect for this year to cover 1940 or to become a stockholder of Carbexport if granted a quota of 7%.

The present contract bars Continental from selling carbon black for export except thru Carbexport. We are committed to purchase from them an amount of black which figures 5.58% of our requirements at the price allowed and the discount charged our stockholders.

I believe it to be Carbexport's best interest to extend the present contract thru 1940. However, in view of market and other conditions, I do not consider it to Carbexport's best interest that I take any action without benefit of the views of its directors. Will you please write me the ideas on this subject of your company's representatives on the board.

Exhibit 224 B is Mr. Nelson's reply dated May 29, 1939, reading "It is satisfactory to us for you to extend the present contract with Continental to cover the year 1940."

Exhibit 225, dated July 11, 1939, records an interoffice memorandum of a telephone message, transmitted by Mr. N. L. Smith of Binney & Smith Co. to Mr. Reid L. Carr, and reads as follows:

Memorandum to Mr. Reid L. Carr:

At the export meeting last Friday, you, Mr. Cabot and Mr. Huber were appointed a committee of three to negotiate a new sales contract with the Continental Carbon Company.

Carl Kayser has requested me to ask you to *telephone him this morning, before the Columbian meeting*, to let him know if you would be willing to serve on this committee and attend a meeting this coming Thursday.

I understand that Mr. Wishnick is leaving town on Friday, to be absent for a week, and sails the following Friday for Europe, so that Thursday of this week is about the last day this meeting can be held.

Mr. Kayser of course wants to hear from you so that he can telephone the other two members.

Exhibit 226, July 13, 1939, Continental contract for the year 1940, in the customary letter form, embodying the same terms and conditions of the 1939 contract but with the addition of a 60-day cancellation clause. The whole contract is here set forth:

This is to confirm the understanding reached between us verbally today that Carbon Black Export, Inc., and Continental Carbon Company shall be and are

bound to each other for the purchase and sale of carbon black for export for the year 1940 under the same terms and conditions which bind them for the year of 1939, which conditions are set out in agreements dated September 29, 1937, and June 27, 1938, except that the following cancellation clause shall apply for the year 1940.

"Either party shall have the right to cancel this contract at any time on not less than sixty (60) days' previous written notice to the other, such cancellation to be effective on the date specified in said notice, and after such date each party shall be relieved of all further obligation hereunder."

Will you kindly affirm this as your understanding of the said arrangements between us by signing and dating the enclosed duplicate hereof in the space provided thereon, and by returning it to us promptly.

The foregoing contract was accepted on July 25, 1939, following acceptance by the association of an amendment suggested by Continental, reading as follows (Ex. 436) :

We are returning herewith original letter of July 13th from you to us confirming the verbal understanding arrived at covering the purchase and sale of carbon black for export for the year 1940.

We have signed the acceptance of the proposal as outlined in your letter, but in accordance with the conversation which Mr. Schwartz and the writer had with you yesterday, this acceptance is upon the understanding that in the event of a cancellation pursuant to the provision contained in your letter of July 13th you will purchase and we will sell such an amount of black as will bring the total sold by us to you for the period up to the effective date of the cancellation of the contract, to 5.58% of the total carbon black shipments for export by Carbon Black Export, Inc., to and including the effective date of the cancellation.

Mr. Kayser by letter dated July 20, 1939 (in the interim between the July 13 and 25 dates of the above contract), wrote Mr. Oscar Nelson as follows (Ex. 227) :

I have just awakened to the fact that I have not informed you what was arrived at between the committee and Continental Carbon. The present contract was renewed for 1940 with only one change. The latter was the addition of a 60-day cancellation clause. Mr. Wishnick left the meeting with the clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if present outside capacity were increased a pound.

Your letter giving your views did not reach me as early as I had wished. It was delivered to me at about 1:00 P. M. Thursday, just as the meeting came to a close. The committee did not meet with Continental, however, without knowing what you thought. I informed its members in a preliminary meeting.

In performance of the contract for the year 1939 (exhibit 223), the association, at the conclusion of that year, purchased an unshipped quantity of carbon black for \$74,133.11, as evidenced by exhibit 228, dated January 10, 1940, reading as follows:

In spite of strenuous efforts to move the percentage share of our total 1939 shipments due you under our contract of June 27th, 1938, we have failed to do so by 1,744,308½ lbs. Consequently we enclose our check in your favor for the sum of \$74,133.11 as the purchase price of that unshipped remainder, based on the price per pound f. a. s. Gulf ports of 4.25¢ for fully compressed black in

bags. Please confirm to us that you will hold this quantity of fully compressed or dustless in bags in warehouse to our order and subject to our shipping instructions.

The 1940 contract (exhibit 226) was extended 1 year to cover the year 1941 by two documents: November 22, 1940, letter to Continental of that date reading as follows (exhibit 229):

This is to confirm the verbal understanding previously reached by us that Carbon Black Export, Inc., and Continental Carbon Company shall be and are bound to each other for the purchase and sale of carbon black for export for the year 1941 under the same terms and conditions which bind them for the current year 1940, which conditions are set out in agreements dated September 29th, 1937, June 27th, 1938, and July 13th, 1939. Will you kindly affirm this as your understanding by signing and dating the enclosed duplicate herewith in the space provided thereon and by returning such executed duplicate to us promptly.

The second document, Continental's letter of November 27, 1940, to the association, relating to this extension, along with practically identical letters dated December 8, 1941 (for year 1942), and December 29, 1942 (for year 1943), is included in the group of 20 photostats comprising exhibit 570. It reads as follows:

We are returning herewith original letter of November 22, 1940, from you to us confirming the verbal understanding arrived at covering the purchase and sale of Carbon Black for export for the year 1941.

We have signed the acceptance of the proposal as outlined in your letter but in accordance with conversation between us, this acceptance is upon the understanding that in the event of a cancellation pursuant to the provision contained in your letter of July 13, 1939, you will purchase and we will sell such an amount of black as will bring the total sold by us to you for the period up to the effective date of the cancellation of the contract, to 5.58% of the total carbon black shipments for export by Carbon Black Export, Inc. to and including the effective date of the cancellation.

Testimony in explanation of the foregoing exhibits was given as follows: Mr. Robert I. Wishnick, at the February 8, 1945, hearing, questioned specifically about exhibit 226, dated July 25, 1938, for the reason why the cancellation clause was inserted, testified:⁴⁹

A. Well, we had never been satisfied with the quota and had been negotiating for increased quota subsequent to the contract, when we constructed another plant which we had acquired from another company that closed down. We rebuilt it on our own location and we wanted to be in a position to demand an increased quota when that additional capacity was made available, and we therefore thought it advisable to have the right of cancellation on 60-days notice so we could renew negotiations for increased quotas.

Q. Where was this plant that was in the process of construction at this time?

A. It was a shut-down unit which we acquired.

Q. You mean Continental or this whole group?

A. I am talking about Continental.

Q. You acquired it from whom?

⁴⁹ T. 315; 323.

A. From a firm, Imperial Oil & Gas Products, and I believe they had originally purchased it from Magnolia corporation and it had been shut down due to lack of gas or some other reason and we acquired it and moved it to our plant site and reconstructed it.

Q. You have that date very firmly fixed in mind? That was sometime prior to July 13, 1939?

A. I would have to refresh my memory as to exact dates.

Q. Do you recall the extent to which you had proceeded with the development or opening up of this plant you refer to?

A. You mean the acquiring of the plant? I do not know at this time.

Q. Nevertheless, at this time you were not in the process, or were you in the process of putting that plant into commission?

A. I would really have to refresh my memory on exact dates of negotiations for the purpose of that plant.

Q. Well, then, do you withdraw your testimony as to whether or not this situation existed and was the reason for the insertion of the cancellation clause referred to?

A. Repeat that question.

Trial Examiner NORWOOD. Read the question.

(Question read by reporter.)

A. I would say in addition—

Q. Then you do not want to withdraw your testimony?

A. No, sir. I might add this, that not only were we interested in keeping the quota open from the viewpoint of further expansion in production of our plant, but also we were constantly negotiating for increasing our quota on our old production.

Q. By quota you refer to the amount covered by this contract between Continental and Carbexport?

A. That is right. Our directors were not satisfied with the quota we had and were constantly attempting to have it increased and we deemed it advisable to have that kind of cancellation clause inserted in all future contracts.

Q. In other words, you are definitely certain at this time that, namely, on or around or about July 13, 1939, that Continental Carbon Co. was in the process of growth and attempted growth, is that right?

A. That is right.

Q. You are positive about that?

A. Yes, sir.

Q. I hand you exhibit 227, in evidence, which is a letter from Mr. Kayser to Mr. Oscar Nelson, which refers to the transaction set forth in exhibit 226. Calling your attention to the first paragraph in letter 227, is Mr. Kayser correctly stating your understanding when he said that: "Mr. Wishnick left the meeting with a clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if Continental's present outside capacity were increased a pound?"

A. I think I expressed my understanding previously. What transpired between other companies I would not be familiar with.

Trial Examiner NORWOOD. I will ask the reporter to read the question and ask you to answer it, please, sir?

(Question read by reporter, as follows:)

"Q. I hand you exhibit 227, in evidence, which is a letter from Mr. Kayser to Mr. Oscar Nelson, which refers to the transaction set forth in exhibit 226. Calling your attention to the first paragraph in letter 227, is Mr. Kayser correctly stating your understanding when he said that 'Mr. Wishnick left the meeting

with a clear impression that Carbexport would exercise the right to cancel without hesitation or discussion if Continental's present outside capacity were increased a pound?"

A. My answer to that is that my understanding was expressed in the contract which the Continental Carbon Co. entered into with Carbexport.

Trial Examiner NORWOOD. Does that answer the question?

Mr. LAYTON. No.

By Mr. LAYTON :

Q. Did you have a meeting with Mr. Kayser prior to the entering into of this contract referred to in exhibit 226?

A. We usually had meetings concerning our export quota for the succeeding year.

Trial Examiner NORWOOD. He did not ask you what was usual. Now, did you have this meeting or did you not, tell us?

The WITNESS. In order to arrive at a quota, Your Honor, you have to have some discussions about what the quota would be and we have had a number of meetings discussing it.

Trial Examiner NORWOOD. Do you recall a meeting?

The WITNESS. If you will ask me specifically what meeting we had—

By Mr. LAYTON :

Q. Mr. Wishnick, this is the first contract that you entered into with Carbexport that had this cancellation in it?

A. Yes, sir.

Q. And you have testified that you put that clause in there because you were attempting to expand. That ought to fix the meeting fairly well in your mind, the negotiations. Now, I am asking you if you had such a meeting with reference to this contract that contained the cancellation clause, exhibit 226?

A. We certainly had a meeting to fix our quota and at the same time, if the cancellation clause was part of the agreement it certainly was discussed at that meeting.

Q. Did Mr. Kayser at any time at which you had a meeting, if you did have one, prior to the entrance into the contract, exhibit 226, tell you by word or action or in any other way that Carbon Black Export would cancel its contract with you, Continental, if you increased the present outside capacity a pound?

A. I think we had discussed the quota not being satisfactory to Continental Carbon Co. and that we wanted to be free to extend that quota and my understanding was at that time, if we had that privilege, that Mr. Kayser on behalf of Carbexport would want the same privilege.

Q. I want to give you another opportunity to answer the question I asked.

Trial Examiner NORWOOD. Read the question.

(Question read by reporter, as above recorded.)

Trial Examiner NORWOOD. Is that true or not true?

The WITNESS. I tried to clear it up by indicating there was a mutual understanding that if Continental Carbon Co. increased its capacity we would be free to renew negotiations for the increased quota, and that was my understanding of the agreements we arrived at and it was so expressed in the contract which Continental Carbon subsequently drew with Carbexport.

By Mr. LAYTON :

Q. You will not state, then, whether or not it is true, the statement I made with reference to Mr. Kayser, is that right?

A. I am in no position to say that inasmuch as you are trying to tie me down to some correspondence I have no knowledge of.

Q. No, I am not trying to tie you down to any correspondence at all. I am just asking you a plain, simple question as to whether or not Mr. Kayser told you or brought home to you in any way at all that Carbexport would cancel the agreement without hesitation under the circumstances set forth.

A. I still say that my proper answer is that Carbexport, we each had the privilege of cancellation on 60 days notice for any reason.

Q. Will you answer that question, Mr. Wishnick, did Mr. Kayser do that or didn't he?

Mr. BEER. If Your Honor please——

Trial Examiner NORWOOD. Off the record.

(Discussion off the record.)

Trial Examiner NORWOOD. Read the question, and I will ask you to answer it.

Mr. LAYTON. Is it clear what I asked you?

Mr. BEER. May the last few questions and answers be read back?

Trial Examiner NORWOOD. No, sir. Please do not interfere until we see if he will answer this question.

By Mr. LAYTON :

Q. Do you understand the question I am asking you?

A. The difficulty I have in answering it is because you showed me a letter I had no knowledge of. If you had not shown me that, I would have been very clear about it.

Q. Ignore any letter you have seen and I ask you whether or not at the time that this cancellation clause was inserted into the Continental contract whether or not Mr. Kayser told you or made known to you, or brought home in any other way, the fact that Carbexport would exercise the right to cancel that contract without hesitation or discussion if Continental's present outside capacity were increased a pound?

A. My understanding was that Carbexport had that right if they elected to do so, that would be my answer.

Q. That is your understanding?

A. That is right, if they elected to cancel it when we expanded production, they had a right to.

Trial Examiner NORWOOD. Off the record.

(Discussion off the record.)

The WITNESS. I should like to add one explanation. Subsequently, the fact remains we did increase, that is, Continental's production did increase and Carbexport did not take advantage of the cancellation clause.

By Mr. LAYTON :

Q. When did it increase production?

A. At the time that we acquired that additional plant.

Q. When was that?

A. Well, the exact date I would like to refresh my memory on. It was subsequent to that agreement, however.

Trial Examiner NORWOOD. Was that after these meetings?

The WITNESS. Yes, sir.

Trial Examiner NORWOOD. Then his bark was worse than his bite?

The WITNESS. That is what I tried to explain.

At the January 18, 1946 hearing, Mr. Wishnick testified that he and his associates purchased the Panhandle Carbon Co. from Phillips Petroleum Corp. on May 1, 1933, and on October 1, 1936, resold to Phillips a one-half interest in the Panhandle company. The Con-

Continental Carbon Co. was organized November 5, 1936, and produced its first carbon black on February 15, 1937, producing in that year 23,800,000 pounds. Its greatest production was 32,400,000 pounds, made in 1940. An expansion took place in 1944 indicating an expected production of 36,000,000 pounds for 1945. Continental has sold all its export carbon black through the association. He testified further in explanation of exhibit 226, as follows:⁵⁰

In the spring of 1939 the directors of Continental Carbon Co. agreed with me that the outlook for the carbon black business was improving and that, if it continued, some expansion of capacity by Continental would be warranted. I informed them that it might be possible to expand cheaply because there were some units lying around the Southwest which were idle on account of lack of gas and which I might be able to buy and remove to Continental's plant for relatively little money. I mentioned some old units in Louisiana and the shut-down Magnolia plant at Pampa, Tex. While I was watching developments and waiting for a right time to make an offer I lost the opportunity to purchase the Magnolia plant. Imperial Oil beat me to it and purchased the plant for its own account. Imperial did not operate or move the purchase to an available gas supply at any time. In December 1941 I succeeded in buying the Magnolia plant from Imperial at a price satisfactory to me and immediately moved it to the Continental site. It was added to the Continental plant and was operating in April 1942.

I approached Mr. Kayser about the 1940 contract in April 1939. I advised him against making the contract on his own responsibility. I advised him in that manner a number of times both before and after 1939. I gave him that advice because I did not feel that he ought to leave himself open to criticism for negotiating with me as a nonmember in the same manner he could negotiate with me as a member. I thought that Carbexport's directors should know our intentions before the 1940 contract was made. I urged Mr. Kayser to get the matter before his board of directors as early as possible and suggested settlement before June 30. I wanted to have plenty of time to make other distributing arrangements for 1940 if necessary. I remember that the matter was put before the board in July because I withdrew from the room to allow free discussion.

I don't have any clear recollection of the details of the meeting with the committee appointed by the board, even regarding all who might have been present. However, there were no threats from anyone nor any pressure brought on me about expansion. I do remember that the meeting was short and that the cancellation clause was mutually agreeable to all of us.

Referring to the letter, exhibit 227, from which Mr. Layton quoted on page 318, I cannot be responsible for the impression that others believed I might have at the time. As I stated in my testimony I wanted a cancellation clause and it was agreed to. My production increased after 1939 and I added capacity to both Continental and Crown later without losing my rights.

While I don't remember quantity being discussed with the committee, I have been reminded by a letter (exhibit 436) in my office contract files, that I called on Mr. Kayser accompanied by one of Continental's directors a short time after the committee meeting and called his attention to the fact that my proposition had been that quantity should be expressed in quota percentage instead of in a fixed number of pounds. He remembered that and we agreed on 5.58 percent.

In spite of increases in the capacity of Continental and of my other nonmember interest, Crown Carbon Co., since 1939 I have never heard a word from Carbexport or any of its members about cancellation of their arrangements with Continental.

⁵⁰ T. 987-989.

Referring to the modification of the contract (exhibit 436) which gave Continental a quota of 5.58 percent, he testified that such quota placed him in "substantially the same position as a producer member stockholder of Carbon Black Export," excepting that Continental had no investment in the association.

Mr. Kayser, in further explanation of the Continental contract, testified that in the spring of 1937, when Continental commercial production, Mr. Wishnick asked him if it were possible for Wishnick-Tumpeer Co., under its contract as distributor for the association, to sell the export carbon black of the Continental company. His testimony continues:⁵¹

A. * * * to which I replied in effect that the distributor's agreement made Wishnick-Tumpeer the exclusive distributor of Carbexport, and that there was nothing to stand in the way, that if Wishnick-Tumpeer wished to give up its distributorship it was entitled to take a distributorship for Continental. Mr. Wishnick then felt that it would be necessary for him to establish a separate selling organization for Continental and he preferred not to do that and he wanted to know if there was not some way in which to bring Continental into the Carbexport picture and the first reply, of course, was there was a way, Continental could become a member of Carbexport by becoming a stockholder. The other possible way was for Continental Carbon Co. to make a contract with Carbexport, which would make Carbexport its exclusive agent.

At that time the matter of quota was simply one of what Mr. Wishnick thought he would like to have as an export volume and as one does, one bats things of that kind back and forth, and I do not recall that we arrived at anything, at any figure, either as a quota if Continental became a member of Carbexport or the equivalent of a quota if it became its sales agent by contract.

Mr. Wishnick thereupon went to what he said was a directors' meeting of Continental Carbon Co. in Chicago and he would let me know which of these two alternatives, if either, his board of directors would prefer. I think I received a telegram from Mr. Wishnick, although I cannot certify to that without finding it, in which he stated that he would prefer the contract for the time being.

Thereupon, we made, on his return we made a contract which I believe this to be.

Q. Will you read the number of that?

A. It is 218 A and B.

Q. That is the 1937 contract for 5,000,000 pounds?

A. That is right. Under this contract we agreed to purchase, the Witco Carbon Co., and I want to make a correction in Mr. Wishnick's statement here and now—the Continental Carbon Co. was first called Witco Carbon Co. and eventually it became Continental Carbon Co.

This contract by its terms stated that in consideration for this purchase Carbexport is to be the exclusive agent of Witco Carbon Co. for the year 1937.

Now, that made it possible then for the then Wishnick-Tumpeer, I believe, to distributed in the export market because Wishnick-Tumpeer had the distributor's contract.

One thing I want to call attention is that all these contracts are merely for a year's time, which made it necessary for either Mr. Wishnick or me to get together and I do not recall who brought the subject up as to next year, whether

⁵¹ T. 326 ; 335.

or not this contract was to be renewed, a new one to be negotiated or what the situation might be.

* * * * *

We now come to the year of 1939. After 1937 I renewed these contracts or rewrote them, whatever the proper expression is, without reference to my directors until after the event.

Q. And the minutes will show that?

A. I think they should say they confirmed. In the spring, and I am not going to attempt to fix the date, because I do not know whether it was January, February, or March, or whatever it may be, of 1939, Mr. Wishnick himself said to me he thought I was making a mistake doing these things on my own responsibility, that I should have the approval of the board of directors and the reason he gave for that was that he either was or had acquired or negotiated some additional units which he was going to do something with. I have no recollection as to whether I thought it was sound advice or poor advice, but I did that and Mr. Wishnick, being a member of the board through his Panhandle contract and his previous Century contract, withdrew from the room during the discussion of this matter. The only action taken by the board was to instruct the president to appoint a committee to discuss the matter with Mr. Wishnick. I see here more information than I have been able to recollect, on exhibit 225, and refreshing my memory from this number 225, I appointed Mr. Nelson, Mr. Carr, Mr. Huber, as a committee, and Mr. Cabot.

Now, I have no recollection of which Mr. Cabot I had appointed.

Up to my seeing this memorandum the only one whom I could identify as actually being on that committee was Mr. Nelson and I believe also that Mr. Carr was on it.

Now, this committee dealt with renewal of Mr. Wishnick's contract, with Mr. Wishnick. While I do not have to use an expression I heard this morning, an independent recollection of the thing, I believe that I probably was there or in and out of the meeting.

I do know this, that Mr. Wishnick is correct when he makes the statement that he repeated to this committee what I had probably told them before, that he felt that I should not renew the contract without calling attention to the fact that he either had or intended to, or was going to buy, or had bought, some extra production unit.

Now, what I recall that meeting to have done was simply this, when Mr. Wishnick stated that he did not want to have a full years' renewal without an ability to cancel, because if he canceled he would want more of a quota than the 7,000,000 pounds represented, as he would then have a larger production, no one could quarrel with him about that. However, it was the sentiment that if he should have that right to withdraw, it should be a mutual right and that it was quite probable, if he were going to add units yearly, we would much prefer to have him sell his own black rather than sell it through Carbexport.

Now, that is the whole story, and there is nothing more to the story, nothing less nor more to that story.

Now, as to this expression which you have read into the record and which appears in here, you force me to make a confession about the politics I play with my directors.

Q. That is the statement on 227 as to the impression you gave Mr. Wishnick?

A. I did not say in this letter I gave him the impression. The language of this thing states: "Mr. Wishnick left the meeting—." Now, I noticed that you attempted to say to Mr. Wishnick, or I think you did, that Mr. Kayser

had said to him, if you do not do this, we will do that, and certainly no such thing took place. What actually happened after this meeting, I am going to bring the story down to date so we will have it all on the record, is that without any reference to my directors again, I think within 2 or 3 months we amended this contract and instead of making it for 7,000,000 pounds, he and I agreed to put it on a percentage quota basis, our total requirements, which still exists, which is 5.58 or something of that kind. I may have the decimal fraction wrong, but it was something over 5½ percent.

That is the only conversation I can say we had and I do not remember whether that 5.58 was arrived at over the telephone or by personal meeting. I think that Mr. Wishnick felt at that time that 5.58 would give him a nicer break than a fixed quantity because as the total requirements of Carbexport would rise he would have more than 7,000,000 pounds.

These negotiations are all on a friendly, reasonable basis. It looked reasonable to me that he ought to have more, as our members did, of that quantity.

Q. Just to clarify, amended to 5.58 of what?

A. 5.58 percent of what our actual or total requirements were, that is what the market requires us to ship to it.

In 1939 it was renewed for the year 1940 by letter and for the year 1941—

Q. You referring to 229?

A. Yes. Although it does not appear here, I think there was a letter renewal for 1942. The contractors carried on without any renewals and it is still in force and effect, I do not know what you would call it, I suppose by common understanding without anything binding on either party, but it continues to operate.

Q. What is the essential difference, if any, between the arrangements here entered into with Continental and those entered into with the stockholder members?

A. It requires no investment on the part of Continental. The member contracts are binding for a long term and these letter agreements bind both parties only for a year. Now, there may be some other differences.

Q. So far as the control over his export activities is concerned, it is identical, you say, with the members, the stockholder members?

A. It has been, yes. I think the word "exclusively" is used in the language just as it is in the member contracts.

Q. How did you speak, or how did you act so that you were able to say that Mr. Wishnick left the meeting with a clear impression that Carbexport would exercise the right to cancel without limitation, and so forth?

A. I said to you a moment ago I made two statements, one of them was that the mutuality of this was agreed to, the right to cancel either way.

Q. That appears on the face of it?

A. Yes, and that it was more than likely that if Mr. Wishnick chose to increase his capacity and come back for an additional quota, that we should prefer to have him sell his own carbon black, have the Continental Carbon sell its own black.

Q. In other words, you told him Carbexport would cancel?

A. I do not recall anybody saying that, now, Mr. Wishnick, if you do so and so, we will do so and so. It probably had that effect.

Mr. Kayser in his testimony concerning Continental's production referred to N. G. P. A. production statistics contained in the record as exhibits 124 to 141. The statistics for the years 1938, 1939, and

1940 disclose Continental's carbon black production at 29,551,590, 32,116,798, and 32,476,625 pounds respectively (exhibit 128-30).

At the June 6, 1946, hearing, Mr. Kayser produced the telegram received from Mr. Wishnick on February 9, 1936 (exhibit 589), and testified further:⁵²

The point I tried to emphasize and which I failed to make clear as I wished in my statements between line 12 of page 332 and line 15 of page 335 was that the right to cancel the Continental contract on 60 days notice for any reason whatever was a mutual right and that the exercise of that right by Carbexport would in no way interfere with the freedom of any nonmember interest of Mr. Wishnick to sell all the carbon black it was producing or might produce at any time in the export market or anywhere else. The exercise of the right by Carbexport would simply mean that Carbexport preferred to have Wishnick sell his nonmember black in export himself, independently of Carbexport, a procedure which would not handicap such interests at all.

The last extension of the contract between Continental Carbon and Carbexport was for the year 1943. Since that time the terms thereof have governed the relationship of the two companies by tacit consent except that it has been mutually understood that cancellation can be invoked by either party without prior notice.

The committee to deal with Mr. Wishnick referred to by Mr. Kayser, was appointed at the directors' meeting of the association held on July 7, 1939 (exhibit 105 A-B), but not designated by name. Mr. Carr, association secretary, who was not present at the meeting, testified as follows:⁵³

Q. Again going to the authenticity and accuracy of the minutes.

You will find in there, nevertheless, and I wish you would refresh your recollection, that it was at that time that the Continental contract was discussed. Just read those minutes carefully.

A. "The president reviewed the relations between the Corporation and Continental Carbon Co. and recommended the present contract with the company be extended to the year 1940. Mr. Wishnick withdrew during the ensuing discussion and returned to vote on the following motion adopted:

"*Resolved*, That the president be and is hereby instructed to appoint a committee empowered to negotiate and conclude a sales agreement with Continental Carbon Co. covering the year 1940."

Q. Is there any record there that you see about your having been made again a committeeman to negotiate that contract?

A. There is nothing in the minutes of the meeting to that effect.

Q. Nevertheless, looking at exhibit 225, such was the fact, is that not so?

A. Yes, this memorandum states that Mr. Cabot and Mr. Huber and I were appointed a committee of three.

Q. Who was the sender of that memorandum, who was the author?

A. Norman Lee Smith.

Q. Who is he?

A. He is an officer of Binney & Smith Co.

* * * * *

⁵² T. 1719.

⁵³ T. 504-506.

Q. Did you undertake the duties of a committeeman, as pointed out there?

A. I have no recollection whatever of doing anything about the matter. At this time I was away on my vacation. That explains my absence from the meeting.

Mr. Huber, who is referred to in exhibit 225 as a member of the committee, testified on this particular and also with respect to exhibit 193 A-T (the subject of sec. IV-C-3 above), as follows:

Q. That is an interoffice memorandum in the Columbian Carbon Co. addressed to Mr. Carr informing him of his appointment. Your appointment does not appear in the minutes but it appears there on 225.

A. Exhibit 225 states that Mr. Carr, Mr. Cabot, and I were appointed a committee of three to negotiate a new sales contract with Continental Carbon Co. I neither remember the appointment to the committee, nor did I ever help to negotiate a new contract with the Continental Carbon Co.

Q. That is fairly definite, but let me make it a little more definite, after directing your attention to exhibit 227, a letter addressed from Mr. Kayser to Mr. Nelson.

Do you know to whom Mr. Kayser refers in 227, as the committee?

A. No.

Q. Didn't include you?

A. It did not include me, to my best knowledge.

Q. I now want to direct your attention to exhibit 193 A to R, which is a memorandum from Mr. Kayser, one that he wrote after returning from a trip to Europe, in which he makes an analysis of the problems confronting carbon export.

A. Do you want me to read it all?

Q. Do you know what it is about?

A. Generally, it seems to be a report on his trip, with recommendations.

Q. Were you one of the recipients of that memorandum?

A. I don't remember receiving the memorandum. It is very probable that we did.

Q. Did you attend the meeting for which exhibit 193 S is the agenda?

A. I very probably did. The minutes will show whether I was at the meeting.

Q. Do you remember if there was any discussion held concerning that memorandum and its recommendations at the meeting subsequent to its being sent to the directors?

A. I believe there was, and I believe that Mr. Carr stated that this was beyond the scope of the association.

Q. You have any independent recollection of that, Mr. Huber?

A. No. I remember comparatively little from 1935.

Q. What aided your recollection then that there was such a discussion?

Mr. BEER. You mean what refreshed his collection.

Mr. LAYTON. If you prefer.

By Mr. LAYTON:

Q. That Mr. Carr made the statement that you believed he made?

A. We have generally reviewed the minutes of Carbexport since this hearing has been inaugurated.

Q. And having made that review, it is based on the discussions you had with other people, is that correct?

A. Yes.

Contained in the record is exhibit 682 A-H, being a mimeographed copy of minutes of a directors' meeting of the association held May 29, 1946, from which the following is set forth:

The president stated that Imperial Oil & Gas Products Co. had expressed its readiness to accept a sales agreement quota of 1 percent and to subscribe to 82 shares of the capital stock of the corporation at said price of \$66.66½ per share.

The President stated that Continental Carbon Company had expressed its readiness to accept a sales agreement quota of 7.190 percent and to subscribe to 589 shares of the capital stock of the Corporation at a price per share, to wit, \$66.66½, equal to the present cost per share of said stock to the existing stockholders of the Corporation. He pointed out that allocation of any quota percentage to a new stockholder of the Corporation would mean that all existing stockholders would be under the necessity of accepting a reduction in their present respective quotas.

Thereupon, upon motion duly made, seconded and carried, the following resolutions were unanimously adopted:

Resolved, That the President of the Corporation be and hereby is authorized and empowered, for it and on its behalf and under its corporate seal attested by its secretary, to enter into agreements with all existing stockholders of the Corporation amending their respective Sales Agreements, as heretofore amended, with the Corporation so that the respective export quotas now provided in such Sales Agreements, as so amended, shall be respectively as follows; effective on and from and after April 1, 1946:

Stockholder:	<i>New quota (Percent)</i>
Godfrey L. Cabot, Inc.....	20.657
Columbian Carbon Co.....	27.618
J. M. Huber Corp.....	9.870
Charles Eneu Johnson & Co.....	2.888
Panhandle Carbon Co., Inc.....	2.137
United Carbon Co., Inc.....	28.645

The association's report to the Commission filed on January 6, 1947, discloses among members as of January 1, 1947, Continental Carbon Co., 295 Madison Avenue, New York, N. Y., 589 shares of stock, and represented by Mr. R. I. Wishnick on the board of directors; and Imperial Oil & Gas Products Co., 330 Grant Street, Pittsburgh, Pa., 82 shares of stock, and represented on the board by Mr. Paul A. Hartman. At the concluding hearing, held August 20, 1946, the association's new president, Mr. H. L. Titus, testified on the foregoing new memberships, as follows:⁵⁴

Q. How were their quotas arrived at, Mr. Titus?

A. The figure of 7.19 percent—

Q. For Continental?

A. Continental; was arrived at, as I understand it, by negotiation between the former president of Carbexport and Continental Carbon Co.; at least, I found that figure generally agreed upon, when I became president.

⁵⁴ T. 2034-2035.

The figure of 1 percent which has been agreed upon for Imperial was arrived at by negotiation between myself and the executives of Imperial.

Q. How did you fix upon that 1 percent?

* * * * *

The WITNESS. After considerable discussion with the executives of the Imperial Oil & Gas Products Co., they believed that a 1 percent quota would be fair and reasonable for them, and Carbon Black Export, Inc., agreed.

By Mr. LAYTON:

Q. Could you tell me what factors were considered, what considerations guided you, or what considerations were mentioned?

A. Well, the only considerations that were mentioned were the long-standing friendly relationship between Imperial and Carbon Black Export; the number of years that Imperial had been in the carbon black business; the important position which they had at one time in the export market, several years prior to the war; the important position which they expected to assume in the years to come, in the carbon black industry.

Q. Was production considered?

A. Well, you are asking me, did Carbon Black Export consider production?

Q. Yes.

A. I am sure that the various directors did; I know that I did.

I do not know Imperial's production, but I believe it to be somewhat less than 1 percent of the total production of the carbon black industry.

If you are asking me whether it was considered by the Imperial company, I can say that it was mentioned by them, several times.

6. Invitation of June 6, 1940

The board of directors in a meeting held June 5, 1940, again considered the question of outsiders, as evidenced by the following quotation from the minutes thereof (exhibit 108):

By motion duly made, seconded, and carried, the president was authorized to negotiate with Crescent Carbon Company, Crown Carbon Company, and Continental Carbon with a view to an arrangement under which each of the said companies shall become stockholders of Carbon Black Export, Inc., with obligations as to quota, etc., such that he can recommend their acceptance by this corporation.

The record contains no evidence of negotiations pursuant to this authorization other than those with Continental, above recorded. The record, however, contains additional testimony on the question of outsiders. Mr. Kayser, at the June 7, 1946, hearing, testified as follows:⁵⁵

A. * * * There were times when shipping space was scarce that buyers to whom sellers were to make shipments would go out and engage the space on a boat available for carbon black for themselves.

Carbexport was in the position to say meaning—intending thereby to see to it that their own individual shipment got to destination regardless of what might happen to either carbon black shipments.

⁵⁵ T. 1898-1900.

On occasions of that kind, we took the position that it was our function to engage the space because we were selling c. i. f. and that if we accept the proposition of the buyer that what we were shipping him should fill the space that he had engaged we would be doing an injury to everyone also who may have cargoes intended for that same general destination and thus we were able to see to it that all buyers got a proportionate share of the space that was available for carbon black.

Q. What about seeing to it that the nonmembers had a proportionate share of the space. Did you see about that, too?

A. Well, I have an illustration already in the record where on an occasion when space was available and where we thought that we had a stronger relationship with the buyer than they, we offered to take care of them proportionately.

Q. How many times did that occur?

A. I can't state because I didn't handle the shipment myself except in this particular instance where it was acute. But I can't recall a time when we did not undertake to limit the space available if space were short.

I mean if there wasn't room for anything, to a proportionate share of the outsiders shipments. That was a matter of policy, that is what I am trying to say, and the direction would have gone to our shipping department and then to forwarders if they had anything to do with the engaging of any particular space.

We not only are not interested in excluding outsiders but it is our definite policy not to do so wherever they need space and have difficulty.

Q. When was that policy developed, Mr. Kayser?

A. I can't make a categorical statement but from the very beginning of my management of Carbexport that was my policy and I didn't discuss it with directors. That is the way I operated Carbexport.

Mr. Thomas D. Cabot, at the January 23, 1946, hearing testified as follows:⁵⁶

I see no fundamental difference between the admission of new stockholder members with a quota and contracting with a nonmember who is given a similar quota with similar limitations except that the latter arrangement does not require the producer to put up the funds necessary to become a stockholder, which in some cases has been a deterrent from accepting our invitation to join the association.

* * * * *

Q. Again I am going to ask as a matter of opinion from you: Do you believe that any harm results to the domestic economy by the purchase of supplies from nonmembers by the Export association?

A. No. I should think it would help the domestic economy.

Q. You do not believe, however, that outsiders should be forced into an export association, do you?

A. No. I do not see how that could be except by legislation.

* * * * *

Q. How would you support the statement that "Unquestionably nonmember producers have benefited the most?" How does that work out?

A. The nonmember producer is not limited in the amount of the black which he exports by any quota, and if Carbon Black Export, Inc., maintains a foreign price which is somewhat higher in net return to the producer than the domestic price, then the nonmember producer benefits by, to use a common

⁵⁶ T. 1084 ; 1134 ; 1139.

expression, standing under the umbrella. He can sell in the foreign market at a price below Carbon Black Export, but at a higher market price than he would get from selling in the domestic market, and there is no quota limitation to the amount that he sells in the foreign market and, therefore, he may sell up to his whole production in the foreign market and may thus perhaps sell his whole production at a higher net price than other member producers receive, and the member producers ordinarily cannot sell their whole production.

Q. You are familiar, are you not, with the efforts of Carbon Black Export to induce nonmembers' adherence to Carbon Black Export's prices, say with reference to Mr. Herkness, before he became a member?

A. I do not believe Carbon Black Export, Inc., had any means by which it could induce nonmembers to adhere to Carbon Black Export, Inc.'s prices.

I think Carbon Black Export, Inc., did make a practice of informing nonmembers as to the prices at which it sold.

* * * * *

Q. In this problem of nonmembers going along with the association, one of our problems is how to handle that. I am merely asking you as a practical matter if they are in substantially the same relation and whether or not you as a member do not believe they should be reported as members, as a practical matter, not as a legal matter?

A. That would be telling a lie to report as a member a man who is not a member. I do not see why I should say they should be reported as members when they are not members. Mr. Beer is quite right. I have not familiarized myself with all of the rules of the Federal Trade Commission.

Q. I just wanted to get your reaction to it. Although you say they are substantially the same as members, still they are not members?

A. They are not members.

Q. So that if your advice were asked as a member of Carbon Black Export, as to whether they should be reported as members, you would express yourself in saying that you did not think they should be reported?

A. I should say they should not be reported as members, but if somebody were to ask a question in such form that it was quite evident that they wanted to know all who stood in the position of members and had any of the privileges of members I would then say that we should tell the whole story with respect to those people.

D. Price Dealings With Nonstockholder Manufacturers

The seventh specification in the bill of particulars reads as follows:

7. Contracts with American exporters who are manufacturers of carbon black but are not stockholders of Carbexport, which restrict the volume of their export sales of carbon black and which fix the minimum price and most favorable terms and conditions of such sales.

Evidence was introduced in support thereof in connection with three nonmember producers.

1. Crescent correspondence

Exhibits 257 A-B to 267 and 592 to 603 in the record consist of 27 photostatic copies of correspondence with, or relating to, the

Crescent Carbon Co., Point Pleasant, W. Va., and its distributor, Canada Carbon Black Co., Ltd., Toronto, Canada. Mr. F. W. Ingraham handled correspondence for the former and Mr. A. C. Ransom for the latter. Only three of the exhibits are from the nonmember, two from Crescent (exhibits 592 and 600) and one from Canada (exhibit 259). Most of the remainder, particularly exhibits 260 A-B to 262, and 592 to 603 relate to transmittal of information on prices, terms, packaging, and ocean freight rates. Pertinent to the inquiry, the following are here set out:

Exhibit 258, letter dated February 15, 1934, Mr. Kayser to Mr. Nelson, reading as follows:

I acknowledge your request dated February 13th, that copy of our export price schedules be sent to Crescent Carbon Company. This request is in line with my own thought. Reports of the under-selling of our price by a large margin by both Crescent and Imperial have convinced me that the better course for Carbon Black Export, Inc. to pursue is to advise these people of what we are doing.

As soon as the schedules are mimeographed I shall also send Mr. Hartman a copy.

Exhibit 259, letter dated March 14, 1934, Mr. A. C. Ransom to Mr. Kayser:

I thank you very much for your favor of the 9th, inst., enclosing complete list of price schedules on Carbon Black and while we will follow these along very closely you understand that practically 60% of our output is taken up among our associates and, therefore, the amount of Black we have for export is a very small item, and the writer has no desire to build any larger Carbon Black business once he can dispose of the product we have for the Crescent Carbon Company, beyond this his ambitions cease.

Exhibit 265 A, letter dated March 29, 1935, from Mr. Kayser to Mr. Nelson, in which the second paragraph reads as follows:

I was in Toronto again last Monday. The idea of selling us black until the end of 1936 and withdrawing from the export market during that period did not appeal to Mr. Ransom at all. However, I have a very strong feeling that the idea of joining the export corporation as a full-fledged member with a quota of say 2½% has his strong sympathy. Mr. Ingraham and the other directors of Crescent were due to be present in Toronto yesterday for a meeting, and this idea was to be thoroughly discussed. I hope shortly to hear from either Mr. Ransom or Mr. Ingraham about the subject of their joining us, and will be disappointed in my own judgment if considerable progress in that direction did not result from yesterday's meeting. I sincerely believe that Mr. Ingraham is entirely in favor of Crescent taking a membership.

Exhibit 267, letter dated May 22, 1940, from Mr. Kayser to Mr. Ingraham, transmitting information about the association's net return from the sale of carbon black, the second paragraph reading as follows:

This kind of statement will make it possible for you to compare your net return over the same period of time with that of Carbexport's members. The

following figures are per pound and represent the average for all packings and qualities handled by Carbexport:

1935.....	\$0.0507
1936.....	.0494
1937.....	.0487
1938.....	.0410
1939.....	.0409

Exhibit 262, dated May 21, 1934, Carbon Black Export to Canada, is a letter of transmittal of price information, typical of the remaining exhibits, and reads as follows:

Exact copies of resale Price Schedules, as issued by Mr. Kayser, and referred to in our letter of May 19th, are enclosed as follows:

1. Germany.
2. Holland.
3. Poland, Lithuania, Latvia, Estonia, Roumania, Bulgaria, Turkey, Greece, Albania, Jugoslavia.
4. Czechoslovakia, Austria, Hungary, and Switzerland.
5. Belgium.
6. Norway, Sweden, Finland, and Denmark.

In the meantime, our action on May 18th reduced to 30 days the terms of 45 days stated in the first four (4) Schedules listed above.

Since there are now in each of the newly established resale Price Schedules, listed above, wide margins between shipments over 50 cases to one customer and shipments under 50 cases, the following rule has been added to all such Schedules:

"If shipments of 50 cases or more are made to merchants or nonconsumers of carbon black, the prices made shall be on the basis of less than 50 case lots."

This rule is made to prevent merchants and nonconsumers from competing under more favorable conditions than the agents in the respective markets are able to employ.

Mr. Ingraham's letters to the association read as follows: Exhibit 592, dated May 23, 1934:

If you have not already done so, we request that you please forward a copy of the price schedule mailed us on May 21st to the Canada Carbon Black Company at 82-90 Peter Street, Toronto 2, Ontario, Canada, addressed to the attention of Mr. A. C. Ransom, President.

The Canada Carbon Black Company are our sales agents, and in the future we would appreciate your sending copies of price schedules to them as well as to this office.

With our thanks for your cooperation in this matter, we are, * * *

Exhibit 600, dated December 3, 1937:

Just prior to receipt of your wire with reference to ocean rates, we received a wire from our agents at New Orleans advising us that conference worked out a rate of 19¢ to Continental points, and 21¢ to the United Kingdom, to be effective from January through June 1938.

We appreciate your courtesy in advising us that rates are not yet agreed upon, and we request that you please advise us the outcome of the negotiation.

The Crescent Carbon Co. did not take membership in the association but was, on April 1, 1944, purchased by United Carbon Co., as appears from Mr. Oscar Nelson's testimony:⁵⁷

The background of these letters lies in the fact that Crescent Carbon Co., and more especially, Canada Carbon Co., its export agent, had been at all times active in the export market, selling Crescent's product there under Carbexport's prices. It was my own desire and I believe of all concerned to secure Crescent as a member of Carbexport or make a purchase contract with it whereby Carbexport's (M. S. p. 7) prices would be maintained in the export market.

It so happened that Messrs. Ingraham and Weissenburger, principal officers and stockholders of Crescent, reside at Point Pleasant, W. Va., which is about 60 miles from Charleston. I have had a long and very pleasant business relationship with both of these gentlemen and have done a lot of business with another company which they operated under the name of Marietta Manufacturing Co. It was natural that efforts to bring Crescent into the Carbexport fold should be made through me. It was for that reason that correspondence on this subject has largely been between me and Mr. Kayser. I believe that if anyone could have brought this about, probably I could have done so.

After Carbexport was organized and we were functioning, we of course knew there were a number of people outside the association that were selling their black for less and obtaining orders that we could not obtain at the price we sought to sell it. On the other hand, if a small company such as Crescent felt that it would be to its advantage to become a member, we would welcome that membership. I knew these gentlemen who were operating the company. Not only did they operate a carbon black company, but they were also operating a company which furnished supplies to the carbon black industry generally, with which we also had a very friendly relationship.

About January 1, 1944, or possibly a little earlier, I was approached by Mr. Harold Woods of Monroe, La., who was a stockholder in Crescent Carbon Co., and asked to consider the purchase of its property, which at that time was more or less in ruins as the result of a fire and deterioration from sulphur corrosion. As a result of Mr. Wood's intervention, the officers of Crescent Carbon Co. visited me at my country home where we agreed upon terms. The purchase was consummated about April 1, 1944. The rehabilitation of the plant was completed in August 1944.

Mr. Kayser testified as follows:⁵⁸

A. The only comment I have to make at this time is that the correspondence indicates that the relationship between Carbexport and Crescent Carbon Co. and its distributor, Canada Carbon Co., were very pleasant and agreeable. We supplied them with information about our activities for which they appeared to be very grateful.

Q. Did you enter into an agreement with them whereby they would maintain your prices and conditions of sale?

A. No, we did not.

Q. Did you make any effort to do so?

A. Yes, on numerous occasions we attempted to make an agreement or to bring Crescent Carbon Co. into membership of the Carbexport and to make Canada Carbon a distributor.

⁵⁷ T. 629-630.

⁵⁸ T. 346.

Q. Is Crescent Carbon Co. still outside of the Carbexport?

A. No; it is not. To my knowledge it has in the last several months been bought or there has been a merger with United Carbon Co.

2. Imperial Correspondence

Photostatic copies of 20 letters dating from September 8, 1937, to November 7, 1940, between the association and the Imperial Oil & Gas Products Co. of Pittsburgh, Pa., or relating to them, are contained in the record as exhibits 268 A-B to 283. Excepting for the last three (exhibits 281 A-B, 283 quoted below) the correspondence concerns prices and terms of export carbon black. Pertinent quotations follow:

Exhibit 268 A, dated September 8, 1937, Imperial to association:

From one of our agents in Poland we have information that the members of the Carbon Black Export, Inc., are underquoting us on the ordinary grades of Black. We do not understand how they can underquote us unless they are splitting their commission with the buyer.

We would be pleased to know if the Carbon Black Export, Inc., has increased the rate of commission to agents.

Exhibit 268 B, dated September 9, 1937, association's reply to foregoing:

Neither our price to Poland nor the rate of commission paid agents there has changed from what you last understood them to be. It seems unlikely to me that your agent is correctly informed when he charges ours with selling at less than our schedule. My belief is not based on any unshakable confidence in the virtue of our agents but on the knowledge that margins of profit in our commission are so low in Poland that no agent can afford to give away anything. Further, unless all of them were cutting exactly the same amount so as to equalize the effect we should have had complaints within our own organization about our own members. This has not occurred.

How much simpler the whole situation would be for you if you were in our group instead of outside. You would not have to be bothered with these complaints for you would consider them unimportant.

Exhibit 271 A, dated July 28, 1938, association to Imperial:

We have recently seen an invoice rendered by Mr. V. G. Martins, your agent in Sao Paulo, to a customer in Brazil on basis of \$5.95 per 100 pounds, no charge for consul fees.

The quantity involved in the above transaction, under our schedule, would call for a price of \$6.40 per 100 pounds, plus consul fees.

Price reductions of this kind tending to increase the difficulty of maintaining the present differential between the export and domestic price in which we are both equally interested, we wonder if price cutting to this extent, or any price cutting at all is necessary to obtain business.

Exhibit 271 B, dated August 4, 1938, Imperial's reply to foregoing:

In answer to your letter of July 28 with regard to sales of Carbon Black made by Mr. V. G. Martins, we might mention that Mr. Martins is a new agent of ours and that shipments made so far have been principally for trial purposes.

We believe that the low price charged by Mr. Martins can be accounted for by the fact that he was not thoroughly familiar with our price lists, particularly where it refers to prices for small lots.

Our prices for Brazil are practically the same as Carbon Black Export's and we feel sure that such sales as the one you refer to will not be made in the future.

Exhibit 272, dated September 15, 1938, Imperial to association:

We have information from three sources that the agents of Carbon Black Export in Brazil and Argentina are absorbing consular fees and not charging these to the customer.

Information has been received from Argentina that certain competition is allowing 5 percent to one of our customers in order to help make up for the exchange loss encountered by the necessity for purchasing exchange at the free market rate, the premium for which we understand is now approximately 21½ percent.

These matters are being called to your attention in a friendly way and we would like to have word from you, if we may, as to whether or not you are aware of these allowances.

Exhibit 273 A, dated November 2, 1938, Cabot company to association:

I am enclosing a copy of a letter just received from Mr. Reinaldo Graupner dated October 17 which indicates that price cutting by Imperial Oil & Gas Products in Brazil continues to threaten that market seriously.

I know there is not much you can do but I thought you would be interested in having this letter since your earlier conversations with Imperial seemed to result in an implied agreement on the part of Imperial to attempt to stabilize prices and conditions there.

Exhibit 274, dated November 7, 1938, association's reply to the foregoing:

Thank you for passing on to us with your letter of November 2 a copy of communication to you from your agent in Brazil dated October 17. As you point out, there isn't much we can do about the complaint registered other than to recall to Imperial previous undertakings to slow down the pace of their representative. We are doing that.

Exhibit 276, dated November 5, 1938, association to Imperial:

One of our agents in Brazil complains that your agent there is doing a job of price cutting right and left that is extremely disturbing. It is a relatively small market where any reduction below our prices is particularly noticeable and disturbing. We realize that it is not your policy to maintain our prices anywhere, but we would appreciate whatever you can do to hold your agent in Brazil down to a moderate tempo with respect of prices.

Exhibit 277 A, dated November 9, 1938, Imperial's reply to the foregoing, after stating that "our sales in this market are made at prices very close to yours," concludes:

We feel that our price policy in the export trade at the present time is very little different from yours and that we have given you little, if any, trouble recently in the foreign markets. It is our intention to cooperate with you as well as possible on all export business, and as regards the subject of this letter

we might mention that, if any price cutting is to be done, it is not our desire to do it in Brazil.

It is difficult for us to determine what business you are referring to in your complaint regarding our prices in Brazil and we can therefore hardly explain the situation to you any better than we have above. If you are able to give us more definite information with regard to the alleged price cutting, together with names of customers, perhaps something could be done to rectify any violations of our price policy by our agent in Brazil.

Exhibit 278, dated November 17, 1938, association to Imperial:

My very best thanks for your letter of November 9, in reply to mine of the 5th, which covered so completely your selling policy with the Brazilian market.

Please don't understand from my comments that I am being critical of the fact that you find it desirable to underquote us. Nor do I, when writing you, mean for a moment to imply that you have ever agreed to quote our prices, terms and conditions. I have always felt that you accept at face value my assurance that Carbexport has no desire to interfere with your market position anywhere, just as I have always accepted your assurance, repeated in your letter of November 9, that it is your intention to cooperate with us as well as possible on all export business. All my letter of November 5 wished to do was to suggest that you check into the activities of your Brazilian agent and see to it that he doesn't jeopardize the price structure by offering more than is necessary to get a reasonable share of the business.

Exhibit 281 A, dated February 13, 1940, association to Imperial, after detailing certain ships and their sailing dates:

At this writing the allotments arranged for you are S. S. *Orion* 150 tons and S. S. *Georgis Kyriakides* 30 tons.

We wish to emphasize that shipping programs should not be definitely laid out in the expectation either that the sailings will take place as announced or that the space notified will actually be available. Our experience has been that no ship can be counted on until it is in port. Furthermore space definitely promised can be and is frequently withdrawn in favor of some other commodity.

We pass this information on to you as prelude to a suggestion with respect of the allocation of shipments in which we have been cooperating, as well as to keep you informed. The suggestion is that you now notify us of the quantities you desire to ship in this month (February) with the names of the consignees; furthermore that hereafter you send on to us similar information early in each subsequent month. We are very anxious to handle this shipping business so that you shall always have proportionate access to the same facilities as we and that you shall always have your share of allotments at times no less favorable than our assignments secure. Without knowing definitely in advance what you want and need to move we will find it difficult to take care of you properly in the constant juggling of lots and orders which the schedule and space revisions necessitate.

Exhibit 282, dated February 15, 1940, Imperial's acknowledgment of the foregoing:

We have your letter of February 13 and wish to thank you for the information given us with regard to the French situation and the schedule of steamships for France to go forward within the near future.

We have made particular note of your comments in the latter part of your letter, and at this time can confirm that we do have special confidence in your

fairness, and we know you would not undertake such a program with regard to arrangements for shipments to France unless you felt that it would be of equal benefit to all parties concerned. We therefore have no hesitancy in reporting to you the quantities we expect to ship to France in the near future.

Exhibit 283, photostat of telegram dated November 7, 1940, Imperial to C. E. Kayser:

WE HAVE BEEN EXPECTING TO HEAR FROM YOU REGARDING CONTRACT WITH CARBEXPORT ON YEAR TO YEAR BASIS. OUR QUOTA BASED UPON FIGURES YOU GIVE US OF TOTAL EXPORTS FOR FIVE CALENDAR YEARS ENDING DECEMBER 31, 1939, IS 4.14 EXCLUDING HIGH GRADES FROM TOTALS.

Upon the introduction of exhibits 268 A-B to 283 at the February 8, 1945, hearing, Mr. Kayser testified as follows:⁵⁹

Q. The exhibits just received in evidence I hand to you, Mr. Kayser. Mr. Kayser, the Imperial company is another one of the so-called outsiders that you referred to in your memorandum that you wrote after you got back from Europe, in evidence as exhibits 193-A to R?

A. Yes.

Q. Did you answer that?

A. Yes.

Q. Did you have an agreement or an understanding with Imperial company that they should adhere to the Carbon Export prices in terms of sale and their export business?

A. We did not.

Q. Of no kind?

A. Of no kind.

Q. I am calling your attention, Mr. Kayser, especially to exhibit 283, and I ask you if the Imperial company has become a member of Carbon Export?

A. No; it has not. We have negotiated with them a number of times, but up to this time they have not become a member.

Q. What was your arrangement, if any, with Imperial in connection with securing shipping space for them?

A. When the war broke out we had difficulty in getting space, anybody shipping anything, and we being the largest shipper in export of carbon black, the French shipping control offered us space more frequently than we thought they might offer to Imperial and we undertook to protect them in securing their share of the space if they would let us know what space they needed in time to make such arrangements.

Q. Did you operate on behalf of any other outsider in such way?

A. My belief is that we made the same offer to everyone, to let them get the advantage of our better position to deal—because of the quantities of goods we had—with shipping companies. They were more or less controlled by their own War Shipping Administration.

* * * * *

We conscientiously attempted to help all of the outsiders to make all they could out of the business, make it unnecessary for them to cut each other's throats or to go too far under our prices by giving them our schedules regularly and discussing mutual irritations, with the idea of ironing them out to their advantage.

⁵⁹ T. 348; 352.

By Mr. LAYTON:

Q. Attempting to work as closely with them as you could, is that correct?

A. That is right.

At the June 6, 1946, hearing, Mr. Kayser testified as follows:⁶⁰

I want to emphasize here that all of the exhibits already in the record from No. 258 to and including 283, and the 12 additional exhibits 592-603, demonstrate that Carbexport policy has consistently been friendly and as cooperative as legitimately possible.

One such legitimate of means of cooperation has been to keep nonmembers posted on all negotiations with steamship conferences. Another has been to post them on such measures as Carbexport took to protect its export business against the extraordinary risks lurking in all export business because of war scares, of exchange, currency, import and other controls which foreign governments established as hurdles to normal transactions as far back as 1934.

Information which was common knowledge, because available to all foreign buyers of carbon black, was freely distributed to our competitors in the interest of accuracy. Price schedules, conditions of sale and terms of sale fell in that category of information.

With our large background of experience with the demoralization buyers abroad could create among American exporters and with our extensive facilities for analyzing the conditions abroad which could be used to advantage for a renewed demoralization we felt that the information we could supply for their use to protect themselves would bring to their attention the advantages and benefits they would automatically enjoy if they became members of Carbexport.

3. Keystone contract

On April 17, 1936, Keystone Carbon Co., a Louisiana corporation, entered into a contract (in the record as exhibit 284 A-N) with the association for a term running from January 1, 1937, to December 31, 1945, for the sale of 3½ million pounds of carbon black annually. The relevant terms are:

Paragraph THIRD requires that—

the Producer shall not directly or indirectly sell or deliver any export carbon black except to the Corporation as hereinafter provided. The Producer further agrees throughout the term of this agreement to use reasonable care that exports made by the Producer to Canada or Mexico are intended for use and consumption in those countries and shall not be diverted to other foreign countries, and also that carbon black sold by the Producer in the United States shall be exported only through the Corporation.

FIFTH. The price hereunder shall be f. a. s. Gulf Ports and the price for each month's shipments shall be the same as the price f. a. s. Gulf Ports at which the Corporation shall settle with producers who are Stockholders of the Corporation for export carbon black of standard quality shipped during such month, subject, however, to the deductions provided in paragraph NINTH hereof.

TWENTY-THIRD. The Corporation hereby grants to the Producer the option exercisable as hereinafter provided, to enter into a "Sales Agreement" with the Corporation, substantially identical in form with the sales agreements now

⁶⁰ T. 1724-1725.

existing between the Corporation and its Stockholders, which sales agreement shall provide for a contract quota of three (3) percent, effective from January 1, 1937, or from such earlier date as the Producer shall have performed or discharged its export commitments to other parties so as to enable Producer thereafter to make all sales of export carbon black through the Corporation, and continuing to the thirty-first day of December 1945. In case the Producer shall exercise said option, it shall subscribe for and purchase two hundred and sixteen (216) shares of the capital stock of the Corporation and pay for the same in cash at the rate of One Hundred Dollars (\$100) per share, as and when payment shall be demanded by the Corporation. Such option shall be exercisable by the Producer at any time on or before October 1, 1936, by notice in writing to the Corporation of its election to exercise said option and to subscribe for said stock, and if not so exercised on or before said date said option shall be void. In case the Producer shall exercise said option, the new sales agreement executed pursuant thereto shall supersede and take the place of the present agreement, and the present agreement shall thereupon become void.

The association notified one of its distributors, R. W. Greeff & Co., of this contract in a letter dated July 22, 1936, as follows (exhibit 285) :

We advise you formally herewith that Chas. Eneu Johnson & Company (Herkness), producer of the brands of carbon black sold in the export markets as "Atlantic" and "Special X" has joined Carbexport and that we shall purchase all of its carbon black for export from the United States beginning October 1st, 1936.

Furthermore, we have made a contract with Keystone Carbon Company (AAA and No. 216 brands) to purchase from it beginning October 1st, 1936, all of its carbon black for export. Our control over this black in export will continue until December 31, 1945, at least.

Exhibit 286 is a photostatic copy of letter dated December 14, 1936, from Columbian's counsel to the association recording fact of that member's acquisition of Keystone Carbon Co. It reads as follows:

Will you kindly sign as president and return to me the enclosed Carbexport stock certificate No. 48 for 216 shares in the name of Columbian Carbon Company issued on transfer of Certificate No. 46 for an equal number of shares in the name of Keystone Carbon Company, Inc.

Mr. Kayser testified as follows in reference to the Keystone contract:⁶¹

Q. Prior to the time that it did become a member, you entered into a contract with Keystone, in evidence now as exhibit 284-A to N, did you not?

A. Yes.

Q. What is it—if I am correct, I believe 9 years is the term of that contract, is it not?

A. I will have to look and see. Yes, 9 years.

Q. Was that a bit unusual for a term on a contract to purchase for Carbon Export?

A. No. Because early in 1936 or late in 1935, I don't remember which, the sales agreements binding producers and Carbon Export together, which then had a terminating date in 1938, were extended to December 31, 1945.

⁶¹ T. 353-355.

Q. And you looked upon them as analogous to a sales agreement with one of your members; is that correct?

A. I do not know as we did as with one of the members, except that I would rather say it was a similar contract to that made later with Continental Carbon Co. That was the attitude. Except that there is an option in this contract we are now discussing which allows Keystone, before the contract actually went into effect, to choose to become a stockholder on a regular sales agreement.

Q. And did Keystone elect under that option to become a member?

A. It did.

Q. I do not know whether the record as we now have it will show, but do you recall how soon after the date of this contract, April 17, 1936, it became a member?

A. Either in September or October or November of that year.

Q. In the fall?

A. In the fall of the year; yes.

Q. And do you recall when it, Keystone, was acquired by Columbian? If not, does 286 refresh your recollection as to it, approximately?

A. Well, before the end of the year of 1936 they became a member.

Q. So that, to summarize, between April 17, 1936, when you entered into contract, exhibit No. 285, you entered into a contract for a period of 9 years for the quantity therein specified. Within a short time they had elected to become a member and shortly after it elected to become a member, it was acquired by Columbian Carbon.

A. That is correct.

Q. And when Keystone did become a member you entered into the uniform contract with it?

A. Yes.

Q. The uniform sales agreement with it, as introduced?

A. Right.

E. Control of Distribution

The fourth specification in the bill of particulars reads as follows:

4. Contracts with the few vendees to whom it chooses to sell carbon black for export directly, known as "distributors," some of whom are American exporters, which require and cause them not to resell to other exporters, including other American exporters, known as "agents," unless such "agents" are first listed with and approved by Carbexport.

Distributors, as the first factor of distribution, are the immediate sales contact exercised by the association. A number of considerations enter into the qualifications of a distributor. Mr. Reid L. Carr testified that from long experience at least three things were found essential: First, financial responsibility, the association requiring adequate assurance of a distributor's solvency since sales are made to him on a c. i. f. basis foreign ports located at distant points. Second, willingness to conform to the association's price regulations and terms of sale to avoid the abuses of "rebating, price discrimination, and commission-splitting which formerly cursed the export trade." Third, he must have the technical equipment and personnel to merchandise the black properly and to render adequate consumer service. Illustrative of the facilities and type of service rendered by one association dis-

tributor, Binney & Smith Co., Mr. Carr outlined its history. It was organized in 1932 to succeed a 25-year-old partnership which had engaged in domestic and export trade in carbon black and chemicals. It has agents in about 45 cities in as many countries, and maintains offices in Paris, Copenhagen, and London, the latter known as Binney & Smith and Ashby, Ltd. Laboratories and technical staffs for customer service are maintained in New York City and London. Chemists are employed to furnish information to rubber, ink, and paint manufacturer users of carbon black. In addition to problems presented by the many grades of channel black, the advent of furnace black posed entirely new problems in connection with its adaptability to synthetic rubber. Binney & Smith regularly supply customers with reports and publications explaining new uses and techniques, 14 specimen copies of which are contained in the record as exhibits 381 A-G to 394.

He concluded his testimony as follows:⁶²

Now unless a distributor is thoroughly conversant with these and many other similar technical questions, cognizant up to the minute of the progress made in their solution, capable of recommending the particular types of black best adapted for specific uses, equipped to answer consumers' questions and furnish intelligent guidance in the use of the product, he is simply not in a position to render adequate service to his principals or to do his part in establishing and maintaining the foreign market for American carbon black upon a secure foundation.

Mr. Thomas D. Cabot testified that export trade in carbon black prior to formation of the association was unprofitable principally because of bad selling conditions. These he enumerated: The practice of a few large buyers acting individually and through intermediaries in shifting their business from supplier to supplier; commission-splitting and customers on the part of agents; growth of more liberal credit terms in a time of financial stringency; unscrupulous use of the right of rejection for quality reasons; and operation of black markets to the detriment of American exporters. His company joined the present association because it appeared to promise restoration of the export business to a profitable basis. Mr. Cabot concluded that "unless the association has the power to limit the channels through which its goods reach customers, its agents or distributors are not likely to extend themselves to secure markets. Their profit will be insecure because the association will be unable to enforce its rules.

Mr. C. E. Kayser testified that seven large buyers in the export market (three of them affiliates of American rubber manufacturers) were able, prior to formation of the association, to cause carbon black exporters "to succumb easily to unreasonable demands as to prices and terms and to be uncommonly fearful of rumors as to their going

⁶²T. 383; 388.

into carbon black production on their own." He referred to exhibit 574, in the record, which is a tabulation of export carbon black deliveries to the seven customers made by the association for the years 1934 to 1939. The customers named are: Continental Gunwerke (Germany and Spain); Dunlop Rubber Co. (Australia, France, Germany, India, Japan, South Africa, and United Kingdom); Michelin Tire Co. (France, Germany, Italy, Spain, Czechoslovakia, and United Kingdom); Pirelli (Argentina, Belgium, Brazil, France, Italy, Spain, and United Kingdom); Firestone (Argentina, India, South Africa, Spain, Switzerland, and United Kingdom); Goodrich (France and Japan); and Goodyear (Argentina, Australia, Brazil, Java, Sweden, and United Kingdom). The tabulation includes the purchases during the period 1934-39 by 10 smaller unnamed customers, and discloses that the purchases of the 17 customers for the 6-year period annually accounted for the following percentages of the association's exports: 64, 58, 63, 70, 67, and 63 percent. The balance of the association's exports went to a yearly average total of 4,000 small customers around the world. He described the mechanics of the association's distribution as follows:

(1) Manufacturers produced carbon black and supplied it upon the order of Carbexport for shipment abroad;

(2) Carbexport, the exclusive agent, requisitioned the manufacturers for carbon black to fill the export orders it received from its contract distributors. It took delivery from the manufacturers at seaports where, when necessary, it packaged the shipments in wood cases. Through its own forwarding agents it assembled lots according to distributors' instructions, arranged and contracted for ship space and supervised the loading and stowage aboard ship. It negotiated all ocean freight rates with steamship conferences and with nonconference lines. It attended to all shipping documents and other requirements to make the transfer of title complete. It made delivery of documents to its distributors and invoiced them for all shipments. It determined all prices involved in the export transactions, from the prices to be charged distributors and agents down to the prices to be collected from customers, in many instances as to every type of sales. It compiled all statistics with regard to exports for its membership, for United States Government offices and for such other persons as might be interested.

(3) The distributors contacted the markets and made the sales to consumers abroad. They did so either directly or through agents and their subagents. Customers' orders were upon the distributors' organizations and not upon Carbexport. The distributors requisitioned Carbexport for black to fill the said orders. The number of distributors through whom Carbexport sold in the export market was never less than eight. All markets were open to all distributors. All of them competed with each other in all of the large markets, in most of the medium-size markets and in some of the smaller markets. The term "markets" as used here means countries. The distributors billed and collected from either their agents or their customers located in the individual markets, depending upon the arrangements they had with their agents.

Distributors' contracts, following organization of the association, were entered into with the following: Godfrey L. Cabot, Inc.; J. M.

Huber, Inc.; Binney & Smith Co.; R. W. Greeff & Co. Inc.; Palmer Gas Products Corp.; Wishnick-Tumpeer, Inc.; Chance & Hunt; and United Oil & Natural Gas Products Corp. Ltd. The first six named are American concerns and the last two are English concerns. Exhibits 555 to 564, contained in the record, consist of folders containing photostatic copies of all association contracts to date with its distributors. Exhibits 19 A-I is a photostat of the contract with Binney & Smith Co. dated January 1, 1934, and Exhibit 20 A-J, the photostat of their distributors' contract dated January 2, 1940.

The contract provisions (exhibit 19 A-I) are briefly digested by sections as follows: (1) Vendor to sell purchaser all of its actual commitments for resale; (2) purchaser shall purchase only the carbon black of vendor for resale in the territory contracted; (3) territory: "All countries of the world except Belgium, Canada, Mexico, and the United States of America and its possessions, and shall not sell same for delivery outside the territory"; (4) "vendor will from time to time as it thinks fit fix the minimum prices, terms and conditions" of resale; (5) purchaser, upon payment for black invoiced to receive discount of 8 percent computed against vendor's f. a. s. Gulf price. This discount available only on aggregate delivery of 29,000,000 pounds in 1934; (6) payments to be made within 90 days, with a 1 percent cash discount for certain earlier payments; (7) vendor to make prompt shipment; (8) black to be of merchantable quality and vendor assume freight in event of rejection; (9) on deliveries outside the United Kingdom, purchaser agrees to pay agent who guarantees credit not in excess of 5 percent of f. a. s. price and not exceeding 3 percent otherwise; (10) vendor may refuse to make delivery or further sales and require offender's dismissal in case of rebate or split discount which reduces minimum price to consumer; (11) purchaser's records open to vendor's inspection; (12) purchaser may sell at any price but not below the minimum price; (13) purchaser to have sole right to certain brand names, 75 detailed; (14) vendor to see that black under any of the special brand names is not "sold outside the territory for reshipment into the territory" and "purchaser will use its best endeavor to see that carbon black purchased by it is not sold outside the territory"; (15) term, January 1, 1934, to December 31, 1934, but deemed renewable for calendar year 1935 unless either party gives termination notice by October 31, 1934; (16) notices to be in writing, served by registered post or cable; (17) contract, other than payment requirement, subject to "Force Majeure"; (18) "carbon black means hydrocarbon gas black made by the impingement process, other than high grade carbon black"; (19) contract not assignable without written consent of other party.

The terms of the January 2, 1940, contract (exhibit 20 A-J) are practically identical excepting for 49,000,000-pound aggregate antic-

ipated (sec. 5) and vendor's right to insist on cash payment less discount, against delivery of documents (sec. 6). The first two photostats in the folder identified in the record as 562, dated January 7 and 31, 1941, validate extension of this contract for the year 1941.

In connection with brand names, Mr. Kayser testified that the brand names are the identification of the distributor rather than the producer; that distributors who had sold certain producers' black prior to formation of the association, continued to do so thereafter under the distributors' agreements, but that every distributor at one time or another "distributes the product of various plants." This occurred when it was desirable to keep distributors' aggregate annual quotas in balance. The association maintained a record of brands identified by its own code number. Explaining procedure for supplying other producer's black under a given brand name, Mr. Kayser testified:⁶³

Our requisition upon the producer might not have this name at all, it might have a number like 1722, which identified to the factory or the producer what kind of black was called for. Then we supplied that kind of black.

Let us assume that was a black that Columbian Carbon Co. was able to supply and we wanted them to supply it and we gave them that identification number. If that identification number did not mean anything to another producer and we wanted to supply another producer's carbon black against it, we would ask Binney & Smith for a sample of what they considered, let us take any name, Dustless Micronex, for example, then we would pass that sample on to the other producer, that is, other than Columbian, from whom we wanted to get the black, and we would say: We want that sample matched, and if he could match that sample to the satisfaction of Binney & Smith Co., then we would requisition that non-Columbian producer to supply that quantity of carbon black.

Then Binney & Smith would pass it into the market under its own brand name, Dustless Micronex.

The association's directors, at their February 7, 1934, meeting adopted the following resolution (exhibit 86-A):

Resolved, That the appointment of the Amtorg Trading Corp., as agent by any distributor or the granting by any distributor to said company of any discount, commission, or concession from the usual price to consumers shall be deemed conduct hostile to the interests of Carbon Black Export, Inc.

Thereafter, in a letter dated February 13, 1935, Oscar Nelson wrote Mr. Kayser in part as follows (exhibit 26 C-D):

I have noted your letter to Mr. Chance with reference to restriction on sales to Amtorg Trading Corp., and inasmuch as the members of the Export corporation have practically discontinued selling to this country the attitude of the sellers has probably changed since the restriction was placed and some of the producers were making sales to Amtorg Trading Corp.

I believe that J. M. Huber, Inc., and our Mr. Higgins could be helpful in approaching the Amtorg Trading if you consider it inadvisable to do so yourself.

⁶³ T. 91; 96.

We want to secure some of this business if it is there for the corporation and we should take advantage of the fellow having the best connection for such approach.

Mr. Kayser's reply, dated February 18, 1935, reads as follows (exhibit 26 E) :

My letter to Mr. Chance did not mean to convey the idea that selling Amtorg Trading Corp. was forbidden, but merely to inform him that by directors' instructions no distributor could employ Amtorg as an agent. I shall discuss with Mr. Higgins and with Huber how Amtorg can be approached on the question of how sales to Russia can be effected.

Mr. R. H. Eagles, assistant secretary of J. M. Huber Corp., testified to his company's experience with appointment of agents and particularly on the foregoing Amtorg matter, as follows:⁶⁴

For years prior to the formation of the original association two of our strongest export agents were American Trading Co. of New York, who handled our sales in Japan and China, and the firm of Whitney & Oettler of Savannah, Ga., who handled our sales in Australia.

Carbexport permitted us to continue these agents without question and although the American Trading Co.'s business vanished with the United States embargo on carbon black to Japan considerably prior to Pearl Harbor, Whitney & Oettler continue to represent us in Australia.

In addition we have from time to time listed with Carbexport American firms located in New York and with connections in less important foreign markets. Carbexport never raised any objection to the appointment or dismissal of any such agents.

Amtorg Trading Co. was for many years the official, or semiofficial, purchasing agent for the Russian Government with offices in New York City. We sold them substantial quantities of black for several years, ending with 1931, at which time we believe they completed their own carbon black plants and discontinued all purchases of American black. Mr. Chance had evidently written Mr. Nelson about 3 years later, as to why these purchases had been discontinued and how they might be restored, and Mr. Nelson, probably recalling our previous dealings with Amtorg, suggested our name as possible contact. I have absolutely no recollection of having been approached by Mr. Kayser, along the lines suggested by Mr. Nelson. To the best of our knowledge, we have never sold Amtorg since 1931, although we have made some shipments recently via lend-lease.

Mr. Kayser testified that a consumer may not be an agent and referred to exhibit 37 A-B, a letter from Binney & Smith to Mr. Kayser, dated August 4, 1937, as illustrative. After referring to a sale made by the consumer, N. V. Java Straits Trading Co., on June 2, 1937, the letter goes on as follows (exhibit 37 A-B) :

I presume this sale has been questioned because we have since appointed the N. V. Straits Java Trading Co. as our agents in the Malaya States. I am therefore pleased to give you the full particulars, which I believe will exonerate our agents and also us of any blame.

According to our records, our agency agreement with the N. V. Straits Java Trading Co. is dated June 4, 1937 (incidentally, they have not returned their

⁶⁴ T. 803-804.

signed copy), and on that date we mailed them copy of Carbexport's price schedule and basic selling policy.

* * * * *

This order you will appreciate was taken several months before we had any thought of appointing the N. V. Straits Java Trading Co. as our agents, and therefore at that time we had no control over their resale price.

Exhibit 39 is a photostatic copy of the appointment by distributor Chance & Hunt, Ltd., of United Carbon Co. as their agent, dated February 12, 1934, and reading as follows:

You are hereby appointed as agent for the undersigned in the sale in the United States, for export to foreign countries, other than Canada, of the carbon black which we, as distributors, will purchase from Carbon Black Export, Inc., under an agreement effective January 1, 1934, with which you are familiar.

You will receive a commission of 3 percent of the price f. a. s. Gulf Ports, and you will have no responsibility in making collections, other than to exercise reasonable prudence in extending credit where you have no specific instructions from us as to credit.

In carrying out this agency, you will be bound by the provisions of the distributor's agreement with Carbon Black Export, Inc., and by our instructions. The agency hereby created may be terminated by either party upon 30 days' notice, either by letter or cablegram.

If the terms hereof are acceptable to you, please indicate so by affixing your signature to a duplicate hereof.

Mr. Kayser testified that the association could have objected to the appointment. He explained this particular appointment as being necessitated because of the distributor's domicile in England placing it at a disadvantage in dealing with U. S. Rubber Manufacturer customers.⁶⁵ Mr. Oscar Nelson testified that "some of the rubber companies here insist on buying on this side and other people have distributors in this country and, therefore, we are giving Chance & Hunt that service."

Mr. Kayser referred to exhibit 44, photostatic copy of a letter dated July 12, 1939, from General Chemicals, Ltd., to the association, as compliance with the requirement that the association approve assignment of a distributor's contract. The letter reads as follows:

I am instructed by my Board to refer to the correspondence which has taken place between Mr. C. E. Kayser, the president of your corporation, and Mr. Edgar Chance of the London Office of Chance & Hunt Limited, in regard to the status of the distributors contract of the 30th December 1938, between your corporation and Chance & Hunt Limited consequent on the proposal that Chance & Hunt Limited should be placed in voluntary liquidation and the contract assigned to I. C. I. (General Chemicals) Limited.

First, I would like to state that Chance & Hunt Limited was placed in voluntary liquidation on the 30th June 1939. Secondly, I have pleasure in confirming that I. C. I. (General Chemicals) Limited will assume full liability in respect

⁶⁵ T. 187; 709; 1695.

of the obligations of Chance & Hunt Limited under the said distributors contract of the 30th December 1938, and will carry out all matters arising out of that contract in the same way as Chance & Hunt Limited has done in the past.

Mr. Kayser testified that it was the association's policy to refer all purchase inquiries to its distributors. He pointed to 16 photostatic copies of correspondence dating from October 26, 1933, to December 7, 1940 (exhibits 48-55 B) in support thereof—quotation from several of these follows:

Exhibit 50 A, letter dated December 11, 1933, association to Boler Petroleum Co., Philadelphia, Pa., after giving names and addresses of eight distributors, closes as follows:

If you will be good enough to inquire with any one of these distributors we know that you will find them glad to supply your friends in France with their requirements.

Exhibit 50 C, Boler Co.'s reply dated December 18, 1933:

We want to again refer to your letter of the 11th inst, in reference to our selling your carbon black in France.

As requested we have written to the different companies you mentioned were handling your material in France and so far we have received negative answers, inasmuch as they all seem to have their own conselling arrangements there.

Isn't it possible for you to put us on the same basis as these other companies as we believe we could get you some business if we put in the same position?

Exhibit 50 B, association's further letter dated December 21, 1933:

Unfortunately for the suggestion you made in the last paragraph of your letter of December 18, our arrangements with producers and distributors of carbon black for export make it impossible for us, at this time, to negotiate with you for the sale of carbon black abroad on the same basis by which we have contracted with our present distributors.

In the event we are able to take a different position we shall be very glad to open this subject ourselves.

Exhibit 51 A, letter, Illinois Bronze Powder Co. to association, dated September 11, 1934:

We are in the market for Carbon Black Elf-Brand or Carbon Black Kalista Brand, or an equal quality, suitable for the manufacture of printing ink, for export to concerns with whom we are affiliated in Germany, and would be pleased to have your rock-bottom quotations, very best discounts, and deliveries, with prices based CIF Hamburg or Bremen, Germany. All bills to be rendered to us and payable in Chicago Exchange, by us.

Your name and address was given to us by Mr. C. M. Baldwin, Chicago representative of the United Carbon Co., Chicago.

Exhibit 51 B, association's reply, dated September 15, 1934:

We are pleased to have your letter of September 11, asking quotations on certain brands of carbon black, for export.

Elf Brand and Kalista Brand are products manufactured by Godfrey L. Cabot, Inc., 77 Franklin Street, Boston, Mass. That concern is, at the same time, one of the distributors in export for Carbon Black Export, Inc. We have,

therefore, taken the liberty to pass on to them copy of your letter, together with a request that they communicate with you direct.

Our reason for handling the matter in this way, instead of quoting you directly, is that it is not our policy to quote customers directly and independent of the distributors with whom we have contracted to sell our products.

Exhibit 52 A, letter dated October 18, 1938, E. Billings of Cabot Co. to the association:

We recently received an inquiry from the Hess Oil Co., 106 West Eleventh Street, Kansas City, for quotations on half million pound lots of carbon black more or less. On further investigation, we found that their interest was solely in carbon black for export and we accordingly declined to quote, explaining that all of our export sales must be made to you.

They now write asking whether there isn't some arrangement which could be made between yourselves, ourselves, and themselves whereby they could get what they needed. Their question is so generally worded that it isn't necessary to reply but I thought you would be interested in knowing of their curiosity because it may possibly result in business moving through them from some nonmember.

Exhibit 52 B, association's reply, dated October 19, 1938:

Thank you for yours of the 18th instant informing us of the request of the Hess Oil Co. of Kansas City, Mo., for a supply of carbon black for export. We shall try to keep an eye on their activities.

Exhibit 53, letter dated December 3, 1938, Mr. Billings of Cabot Co. to Mr. C. E. Kayser:

With further reference to my letter of November 28 concerning the inquiry from the S. S. Berger Co., I have had our agent on the west coast call on these people and I quote a paragraph from his letter:

"Mr. Berger is in the Export business, and tells me that he operates for the most part, in New Zealand, Australia, South Africa, and Latin America. He has no specific quantities in mind, rather he wants prices on our various grades of paint black, so that he, in turn, can offer the black to consuming trades in the countries named above. In fact, he does not know what, if any, blacks he can sell. He does not know that the paint companies in those countries use black and his idea is for us to give him prices on all of our various blacks, f. a. s. steamer for both carload and l. c. l. quantities, then to those prices to him, he will add on his profit and attempt to sell the blacks."

We have written Berger that, in view of our obligations to Carbexport, we could not quote him.

Exhibit 62 A-B is the photostatic copy of a letter dated March 14, 1935, from the association to Binney & Smith commenting on a rule of the United Kingdom Carbon Black Association giving distributors the option to absorb duty charges on black sales, and continuing as follows:

You will understand Carbexport's attitude when we say that it is a debatable question whether or not such special arrangements as recited above do not modify the meaning of a c. i. f. character sale. We simply want distributors to know that we will not undertake the risks of being party to the debate and that our responsibility—not necessarily our assistance—ceases with a legally

correct c. i. f. delivery. We may make an occasional exception to this policy, but the exception will have to be at our option and on our judgment.

It may be unnecessary to do so but distributors, including yourselves, might like to be reminded of the kind of extra undertakings beyond c. i. f. with which a distributor assumes to accommodate his customer which may change the character of the sale they appear to have made to the customers. Such instance would be when a distributor selling c. i. f. agrees to deliver the goods involved to an interior point, or when he sells c. i. f. subject to approval of goods on arrival.

Mr. Kayser testified that the British group, comprised of distributors and agents fixed rates of exchange and warehousing charges, but subject to the approval of the association, which considered the British group "in the nature of an advisory committee."

Exhibit 66 A-B, photostat of a letter dated June 18, 1937, from the association to Binney & Smith reported the establishment of a single distributor in Belgium as follows:

Carbexport is entering into a contract with African Metals Corporation of New York and Sepulchre Freres, Liege, Belgium, under which they jointly will be its sole representative selling for delivery in Belgium and Luxembourg all brands of carbon black under Carbexport jurisdiction. One of the provisions of the new arrangement is that Afrimet/Sepulchre will take over saleable stocks in the hands of present distributors and their representatives in Belgium and Luxembourg, afloat to or located in those countries at June 30th, 1937, which it can obtain at cost to the holders thereof plus legitimate charges. We required this provision so that none of our present representatives need find themselves embarrassed with stocks on hand after June 30th. Mr. Etienne Sepulchre will be pleased to negotiate the transfer which any distributor or agent under existing contracts may wish to make.

Mr. Kayser testified that prior to this centralization there had been five or six agents in Belgium. At the June 6, 1946, hearing, his attention was directed to exhibit 254, photostat of a letter dated March 17, 1938, Mr. E. Billings of the Cabot Co. to Mr. Kayser which reads (in last paragraph) as follows:

I am delighted to see that the percentage of outsiders' business done in Belgium has declined markedly because this furnishes about the best possible test of the soundness of the experiment of appointing one general agent for Carbexport in that country.

He testified on this as follows:⁶⁶

Then there is a discussion by Mr. Billings to the effect that in his estimation it is a delightful consequence or a satisfactory consequence of the establishment of a single agent in Belgium, that outsiders apparently don't have as much business there as they had before.

And my letter goes on to tell him that he is mistaken and that that is not the fact and that before we can determine whether or not our United Export position in Belgium is adversely affected by this appointment of a single agent instead of the numerous cats and dogs we had there, speaking in a fighting sense, we will have to watch the picture some time longer.

* * * * *

⁶⁶ T. 215; 1850.