

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

