

**Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Bituminous Concrete Assn., Inc.; Allied Chemical Corp.; Warren Brothers Roads Co.; Trimount Bituminous Products Co.; Essex Bituminous Concrete Corp.; H. H. McGuire & Co., Inc.; Rock-Asphalt Corp.; Merrimack Paving Corp.; Vulcan Construction Co. and Massachusetts Broken Stone Co., U.S. District Court, D. Massachusetts, 1960 Trade Cases ¶69,878, (Dec. 7, 1960)**

United States v. Bituminous Concrete Assn., Inc.; Allied Chemical Corp.; Warren Brothers Roads Co.; Trimount Bituminous Products Co.; Essex Bituminous Concrete Corp.; H. H. McGuire & Co., Inc.; Rock-Asphalt Corp.; Merrimack Paving Corp.; Vulcan Construction Co. and Massachusetts Broken Stone Co.

1960 Trade Cases ¶69,878. U.S. District Court, D. Massachusetts. Civil Action No. 59-785-M. Filed December 7, 1960. Case No. 1481 in the Antitrust Division of the Department of Justice.

**Sherman Antitrust Act**

**Combinations and Conspiracies—Price Fixing—Sales of Asphalt—Allocation of Markets and Customers—Bidding Practices—Trade Association—Regulating Price—Consent Decree.**—Sellers of bituminous concrete and a trade association were prohibited by a consent decree from making or influencing noncompetitive bids, quotations, prices, or sales; from allocation of territories or customers; from refraining or inducing others to refrain from bidding; and from exchanging information as to prices or bids. Independent prices are to be established, and a sworn statement to that effect included with each bid submitted to a government body during a five-year period. The trade association was prohibited from collecting or circulating, reporting, or recommending to any vendor of concrete any costs or average costs of manufacture or sale, or any prices, or any formulae for computing such costs or prices. The consent judgment, also, is to be prima facie evidence of an unlawful combination and conspiracy in suits which were filed prior to a specified time by Massachusetts state and local government bodies, or any city or town within the state of New Hampshire, and the defendants are enjoined from denying that effect, but are otherwise free to rebut the prima facie case or present available defenses.

For the plaintiff: Robert A. Bicks, Assistant Attorney General, William D. Kilgore, Jr., Baddia J. Rashid, John D. Swartz, John J. Galgay, Bernard Wehrmann, Elhanan Stone and J. Paul McQueen, Attorneys, Department of Justice.

For the defendants: Kevin Hern for Allied Chemical Corp.; Warren F. Farr (D. R. Grant), Ropes, Gray, Best, Coolidge & Rugg for Warren Brothers Roads Co. and Massachusetts Broken Stone Co.; Thomas E. Dwyer for Trimount Bituminous Products Co.; Ralph Warren Sullivan for H. H. McGuire & Co., Inc., Bituminous Concrete Assn., Inc. and Vulcan Construction Co.; John L. Murphy, Jr., for Rock-Asphalt Corp.; George N. Hurd, Jr., for Merrimack Paving Corp.; and John M. Fogarty for Essex Bituminous Concrete Corp.

**Final Judgment**

SWEENEY, District Judge [ *In full text*]: The plaintiff, United States of America, having filed its complaint herein on October 13, 1959, and defendants signatory hereto having admitted the allegations contained in the Government's complaint herein solely for the purpose and to the extent necessary to give to the following adjudication the *prima facie* effect stated in Section I below in the suits specified below, and for no other purpose, Now, therefore, before any testimony has been taken herein without trial and upon the consent of all the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[ *Prima Facie Effect of Final Judgment*]

That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the *prima facie* effect of this Final Judgment, in the suits specified below, and for no other purpose;

Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it. The specified suits referred to above are any suits instituted in this or any other court by the Commonwealth of Massachusetts, or any city or town within the Commonwealth of Massachusetts or the State of New Hampshire against any of the defendants signatory hereto prior to September 14, 1960, and which allege violation of the Federal antitrust law and claim damages growing out of the purchases of bituminous concrete from any such defendant.

II

[ *Jurisdiction*]

The Court has jurisdiction of the subject matter herein and all parties hereto. The complaint states a claim upon which relief may be granted against the defendants signatory hereto, and each of them, under Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

[ *Definitions*]

As used in this Final Judgment:

- (A) "Person" means any individual, partnership, firm, corporation, association or other business or legal entity;
- (B) "Bituminous concrete" means a paving material made by preheating densely graded mineral aggregate and mixing it in controlled proportions with hot asphalt cement;
- (C) "Governmental body" means the United States, any State, County or Municipality and any Agency thereof.

IV

[ *Applicability*]

The provisions of this Final Judgment applicable to any defendant signatory hereto shall apply to such defendant and to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

V

[ *Provision Pertaining to Association*]

The defendant Association signatory hereto is enjoined and restrained from collecting from or circulating, reporting, or recommending to any vendor of bituminous concrete any costs or average costs of manufacture or sale or any prices, pricing methods, discounts or other terms of sale of bituminous concrete or any formulae for computing such costs or prices.

VI

[ *Conspiracy to Fix and Maintain Prices Prohibited*]

The defendants signatory hereto are jointly and severally enjoined and restrained from, directly or indirectly:

(A) Urging, influencing or suggesting to, or attempting to urge, influence or suggest to any other person to quote or charge noncompetitive or specified prices or terms or conditions of sale for bituminous concrete to any third person;

(B) Entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program among themselves or With any other vendor of bituminous concrete or any association or central agency of or for such vendors, to:

(1) fix, determine, establish or maintain prices, pricing methods, discounts, or other terms of sale of bituminous concrete to any third person;

(2) allocate territories or customers for the sale of bituminous concrete;

(3) refrain from submitting bids for the supply of bituminous concrete to any governmental body or to any other person;

(4) submit a bid for the supply of bituminous concrete to any governmental body or other person which bid is not intended to attract the award of a contract;

(5) refrain from competing in the sale of bituminous concrete.

(C) Communicating, circulating, exchanging, among themselves or with other vendors of bituminous concrete, in any manner, any price information, price list or purported price list containing or purporting to contain any prices or terms or conditions for the sale of bituminous concrete; provided that nothing in this subparagraph (C) shall be deemed to invalidate, prohibit or restrain *bona fide* negotiations between vendors of bituminous concrete.

(D) Being a member of, contributing anything of value to, or participating in any of the activities of any trade association or central agency for bituminous concrete vendors with knowledge that the activities thereof are in violation of any of the provisions of this Final Judgment;

(E) Disclosing to or exchanging with any other vendor of bituminous concrete:

(1) The intention to submit or not to submit a bid to a governmental body;

(2) the fact that a bid has or has not been submitted, or

(3) the content of any bid.

VII

[ *Independent Prices*]

Each of the defendants signatory hereto, other than the defendant Association, is ordered and directed, not later than sixty (60) days following the date of the entry of this Final Judgment, individually and independently (1) to review its then prevailing prices for bituminous concrete in New England, (2) to determine prices of bituminous concrete in New England based on its own manufacturing and overhead costs, the margin of profit individually desired and other lawful considerations, and (3) to establish in New England the prices determined under (2) above, which prices shall become effective not later than ninety (90) days following the date of the entry of this Final Judgment.

VIII

[ *Requirement of Affidavit With Each Governmental Bid*]

Each of the defendants signatory hereto, other than the defendant Association, is ordered and directed for a period of five years after the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the Appendix A hereto, with each bid for bituminous concrete submitted to any governmental body in New England. Such sworn statement shall be signed by a principal officer of said defendant, by the person actually

responsible for the preparation of said bid, and by the person who signed said bid; and a duplicate of each sworn statement and of such bid, together with the workpapers used in the preparation of such bid, shall be kept in the files of the defendant for a period of six years from the date of execution of such bids.

IX

[ *Enforcement and Compliance* ]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access during the office hours of such defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant who may have counsel present, regarding such matters. Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

X

[ *Jurisdiction Retained* ]

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violation thereof.

APPENDIX A

*Affidavit*

The undersigned hereby certify that:

1. The attached bid to ..... (name of recipient of bid) dated .... has been arrived at by ..... (name of defendant) unilaterally and without collusion with any other vendor of bituminous concrete.
2. The intention to submit the attached bid, the fact of its submission, and the contents thereof, have not been communicated by the undersigned nor, to their best knowledge and belief, by any employee or agent of .....(name of defendant), to any person not an employee or agent of ..... (name of defendant), and will not be communicated to any such person prior to the official opening of the attached bid.

.....  
Date

Notarization

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Signature of principal officer.

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Signature of person who prepared bid.

.....  
Signature of person who signed bid.