

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States of America v. Long Island Sand and Gravel Producers' Association, Metropolitan Sand & Gravel Corporation, Seaboard Sand & Gravel Corporation, Henry Steers, Incorporated, McCormack Sand & Gravel Corporation, Gallagher Bros. Sand & Gravel Corporation, O'Brien Brothers, Incorporated, O'Brien Brothers 'Sand & Gravel Corporation, Land Improvement & Supply Co., Inc., William A. Atkins, Anderson Dana, James Rich Steers, William Jerome McCormack, John Joseph Bosch, Peter Cornelius Gallagher, James Francis Murphy, John Murray Gallagher, Charles Louis McKenzie, Joseph John O'Brien, Harold Francis O'Brien, William P. Jeffery., U.S. District Court, S.D. New York, 1940-1943 Trade Cases ¶56,048, (May 22, 1940)

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United States of America v. Long Island Sand and Gravel Producers' Association, Metropolitan Sand & Gravel Corporation, Seaboard Sand & Gravel Corporation, Henry Steers, Incorporated, McCormack Sand & Gravel Corporation, Gallagher Bros. Sand & Gravel Corporation, O'Brien Brothers, Incorporated, O'Brien Brothers 'Sand & Gravel Corporation, Land Improvement & Supply Co., Inc., William A. Atkins, Anderson Dana, James Rich Steers, William Jerome McCormack, John Joseph Bosch, Peter Cornelius Gallagher, James Francis Murphy, John Murray Gallagher, Charles Louis McKenzie, Joseph John O'Brien, Harold Francis O'Brien, William P. Jeffery.

1940-1943 Trade Cases ¶56,048. U.S. District Court, S.D. New York. May 22, 1940.

Proceedings instituted by the United States under the Sherman Anti-Trust Act against a trade association, several corporations and individuals engaged in the sand and gravel business, are terminated by entry of a consent decree enjoining defendants from conspiring to fix prices to be charged for the industry, to notify members of the industry of price changes, to allocate customers or refuse to sell to those who resell industry products, to operate any bid control device, to control future delivery contracts and to adopt uniform terms for extension of credit. The decree provides that defendants may gather and disseminate credit information and information as to volume of business and the volume sale price without disclosure of the prices of any individual industry member.

The decree refers to and annexes a resolution adopted by the Association, appointing a "Public Representative," who is paid by the Association, but whose obligation is to the public, who is authorized to disclose to the Attorney General, Federal Trade Commission, or other officer or department of the United States, any practice entered into by the Association contrary to public interest or fair dealing or in violation of law. The decree provides that the Attorney General shall be notified if the resolution is rescinded or modified.

See Sec. 1 of the Sherman Anti-Trust Act [Vol. 1, ¶ 543.3500].

Thurman Arnold, Assistant Attorney General, John H. Lewin, Herbert A. Berman, Special Assistant to the Attorney General, Attorneys for the Plaintiff.

Cullen & Dykeman, by J. A. Dykeman, Jacob I. Goodstein, Foley. & Martin, by P. J. Dobson, Mitchell, Taylor, Capron & Marsh, by C. A. Capron, Bleakley, Platt & Walker, by R. P. C. May, Joseph F. Murray, Leo G. Fritz, Attorneys for Defendants.

Before Clancy, J.

Consent Judgment

The United States of America filed its petition herein on this 21st day of May 1940; each of the defendants appeared and filed its answer to such petition, and asserted the truth of its answer and its innocence of any violation of law; no testimony having been taken, each of the defendants consent to the entry of this decree, without any findings of fact, on condition that neither such consent nor this decree shall be evidence, admission, or adjudication that it has violated any law of the United States; and the United States, by counsel, having consented to the entry of this decree and to each and every provision thereof, and having moved for this injunction;

And it appearing that by virtue of the attached consents of the defendants, and the acceptance of the same by the petitioner, it is unnecessary to proceed with the trial of the action, or to take testimony therein, or to make findings of fact, or to adjudicate the issues presented by the pleadings;

Now, therefore, before any testimony has been taken, and without any findings of fact or adjudication of the issues, and upon the consent of all parties hereto, it is hereby

Ordered, Adjudged, and Decreed:

[Jurisdiction]

I. The Court has jurisdiction of all persons and parties hereto; and for the purposes of this decree and proceedings for the enforcement thereof, and for no other purpose, the Court has jurisdiction of the subject matter hereof; and the complaint states a cause of action against the defendants, and each of them, under [Section 1 of the Sherman Act](#) (15 U. S. C. A., Sec. 1).

[Definitions]

II. The term "industry products," whenever used herein, means sand, gravel, and grits or any one or more of said products.

The term "industry member," whenever used herein, means a producer of the industry products.

The term "specific job," whenever used herein, means a building or construction project for which a retailer has agreed to furnish industry products.

[Activities Enjoined]

III. The defendants and each of them, their successors, officers, agents, servants, employees, and all persons acting under, through, by or in behalf of them or any of them, or claiming so to act, be and hereby are enjoined, restrained, and prohibited, directly or indirectly, from agreeing, combining, or conspiring among themselves or with other industry members with respect to the industry products

(a) To fix, establish, or maintain the prices to be charged for the industry products.

(b) To give notice to any industry member of intention to increase or decrease prices in advance of notice thereof to customers to whom such advance shall apply; but nothing contained in this subdivision shall be construed as enjoining or restraining a defendant, acting without agreement with other industry members, from giving notice to the trade and customers of its prices and the effective date of any change therein.

(c) To allocate customers between or among two or more of the defendants or other Industry members.

(d) To apportion or in any other manner restrict the volume which any of the defendants or other Industry members shall produce or sell.

(e) To refuse to sell to any person or to restrict or limit the persons who shall carry on the business of buying and reselling industry products; but nothing contained in this subdivision shall be construed to deprive a defendant, acting without agreement with other industry members, from selecting its own customers.

(f) To control or attempt to control resale prices, or to coerce or apply pressure on any customer to maintain any resale price.

(g) To operate or participate in any system or program for filing of invoices, bids, quotations or prices at which the industry products have been offered for sale or have been sold by the members thereof, or to carry on any program or activity for the checking of invoices, bids, quotations or prices; but nothing contained in this subdivision shall prohibit any defendant from making inquiry of another defendant, directly or through a common agency, as to the truth or falsity of representations made by a customer as to prices and terms of a contract theretofore made for purchase or sale of industry products, or the prices paid by such customer for such products theretofore delivered to him by a defendant or any member of the industry.

(h) To limit future delivery contracts to contracts for specific jobs.

(i) To exclude from future delivery contracts any terms or provision granting to the purchaser the benefit of or right to receive the current price of the seller in force at time of delivery.

(j) To adopt uniform terms or conditions for future delivery contracts limiting the quantities to be delivered thereunder and fixing or determining the price to be paid for industry materials purchased thereunder.

(k) To adopt uniform terms of sale which shall impose on a purchaser any charge for shipping or demurrage or which shall fix the amount thereof.

(l) To adopt uniform terms for the extension of credit.

[Activities Not Enjoined]

IV. Nothing contained in this decree shall limit the right of the defendants to do any act or engage in any practice not enjoined by this decree, including but not limited to the utilization of a trade association or similar agency to

(a) Gather and disseminate openly and fairly, for each classification of industry products, information as to the physical volume of production and shipment and the price at which such volume has been sold without disclosure of the prices of any individual industry member.

(b) Exchange and disseminate information as to customers and accounts for the sole and exclusive purpose of obtaining, disseminating and exchanging credit information.

V. No defendant, its successors, officers, agents, servants, employees, and no person acting under, through, by or in behalf of such defendant or claiming so to act shall control or attempt to control resale prices or coerce or apply pressure on any customer to maintain any resale price.

VI. Nothing contained in the foregoing provisions of this decree shall

(1) Prevent the officers, directors, managers, agents, servants and employees of any corporate defendant or any person acting under or on behalf of any corporate defendant from making any contract, agreement or arrangement among themselves or any of them with respect to the policy or affairs of such corporate defendant;

(2) Apply to any agreement solely between a producer of industry products and its subsidiary, or solely between subsidiaries of any one producer of such products;

(3) Apply to a sale by one producer to another producer of the industry products based upon prices and terms separately agreed upon between seller and buyer;

(4) Apply to the conduct of the individual business of any defendant, except as provided in Paragraph V hereof.

[Access to Records]

VII. For the purpose of securing compliances with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant

Attorney General, and on reasonable notice to the defendants be permitted (1) reasonable access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendants, relating to any of the matters contained in this decree, (2) subject to the reasonable convenience of the defendants and without restraint or interference from them, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters; and the defendants, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

[*State Laws in Conflict with Decree*]

VIII. Whenever obligations are imposed upon the defendants by the laws or regulations of any State with which the defendants by law must comply in order to do business within such State, the Court, upon application of the defendants or any of them, may from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws or regulations, and the right of the defendants to make such application and to obtain relief is expressly granted.

[*Jurisdiction Retained*]

IX. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or carrying out of this decree, for the modification thereof (including, without limitation, any modification upon application of the defendants or any of them required in order to conform this decree to any act of Congress enacted after the date of the entry of this decree), for the enforcement of or compliance therewith and for the punishment of violations thereof.

X. The Court is informed that the defendant association, Long Island Sand and Gravel Producers Association, has adopted a resolution in form annexed hereto. In the event said resolution shall be rescinded or modified or operations thereunder shall be discontinued or changed, the defendants, through said defendant association, shall promptly advise the Attorney General of such fact.

[*Effective Date*]

XI. This decree shall be effective from the date of the entry thereof.

Approved.

Appendix

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That this Association shall appoint a person to be designated "Public Representative,"

The Public Representative shall be a person who shall not be an employee of or have any financial interest in the business of any member of the industry.

The Association, in the selection of a Public Representative, shall use its best efforts to secure a person, who, by reason of his interest in public welfare, his reputation, education, business or professional experience and contacts will have that detachment from the business of the Association and industry members as will qualify and permit him to carry on the duties and functions herein provided to be performed by the Public Representative in accordance with the expressed intent hereof.

The term of office of the Public Representative shall be one year. He shall not be removed prior to the expiration of such term except after hearing upon charges of neglect or failure to honestly perform the duties of his office as herein set forth.

All charges for services of the Public Representative and all reasonable expenses of the Public Representative in performing his duties shall be paid by the Association, but such payment shall not impose any obligation on the Public Representative to serve the Association or the members thereof or to do any act or thing except as herein provided, and it is understood that the first duty and obligation of the Public Representative is to the public and the purchasers and users of industry products.

In order to relieve the Public Representative from dependence upon the Association for funds to cover payment for his services and expenses, the Association, at the time of appointment of a Public Representative, shall appropriate and pay, into a separate fund the sum of \$2,000. The Public Representative shall have a first lien on said fund for payment of his charges for services and expenses, and no part of said fund shall be used for any other purpose until after expiration of the term for which the Public Representative was appointed or termination of employment if the same occurs during said term.

The Public Representative shall be given notice of and shall be privileged to attend all meetings of the Association. Full and correct report of all meetings shall be furnished to the Public Representative.

The Public Representative shall be informed as to all activities of the Association and all agreements, understandings, industry programs, practices and all collective actions of the Association members among themselves and with others in the industry in connection with the production or sale of industry products, and it shall be the duty of the Association and the members thereof to so inform the Public Representative.

No agreement, understanding, program, or practice shall be adopted or operations carried on pursuant thereto until after notice and full disclosure of same to the Public Representative, and until after reasonable opportunity to the Public Representative to investigate and report on same.

If, in the opinion of the Public Representative, any proposed Association activity, program, practice, agreement, or understanding involves questions affecting the public interest or the rights of or fair dealing with the purchasers or users of industry products, the Public Representative shall make such inquiry into the facts and circumstances as he deems appropriate.

If, in the opinion of the Public Representative, any such Association activity, program, practice, agreement, or understanding may operate unfairly upon purchasers or users of industry products, the Public Representative shall, to the extent that he deems helpful, secure facts and recommendations from purchasers and users or such persons representative of them as he shall deem appropriate, and of assistance to him in the securing of facts and formulating of recommendations.

The Public Representative is authorized to receive complaints, suggestions, and recommendations from any member of the industry, and from purchasers and users of industry products, and from other persons whom the Public Representative may deem to be affected by the activities of the Association and the members thereof. Whenever, in the opinion of the Public Representative, the complaint appears to have merit and to warrant investigation, he shall make such inquiry and investigation concerning the complaint as to him seems proper and necessary.

The Public Representative, shall inform the Association of inquiries and investigations made by him.

Whenever, in the opinion of the Public Representative, any Association activity, program, practice, agreement, or understanding is or would be contrary to public interest, in violation of law, or unfair to purchasers or users of industry products, the Public Representative shall advise the Association in writing, and shall give such facts and make such recommendations as to him shall seem appropriate and helpful to the Association in the premises.

In case any member of the Association shall grant prices or other advantage to any retailer which he does not grant to others of his retailer customers in the same competitive area, such member shall inform the Public Representative as to such facts, together with such other facts and circumstances as he deems appropriate, and the Public Representative shall make such report and recommendations to such member as to the Public Representative shall seem appropriate.

Whenever any program, practice, agreement or understanding undertaken or entered into by the Association or the members thereof, in the opinion of the Public Representative, is contrary to public interest or is contrary to the rights of or fair dealing with purchasers or users of industry products, or is in violation of law, the Public Representative is authorized to make disclosure thereof to the Attorney General, the Federal Trade Commission, the Department of Commerce, or such other officer or department of the United States Government as the Public Representative may deem has jurisdiction of the subject matter.

The Public Representative may disclose to a complainant or to any interested person his opinion and conclusions with respect to any complaint which shall be filed with him. Except as herein specifically authorized with respect to departments and officials of the United States Government, the Public Representative shall not, without the consent of the Association, disclose to any person not a member of the Association, the business and affairs of the Association, and, without the consent of a member, disclose to the Association or to any person the business and affairs of such member.

Nothing in this resolution contained shall be construed as granting to the Public Representative authority to impose any course of conduct upon the Association or the members thereof, or to restrain them collectively or individually from following any course or undertaking any activity.

Each member of the Association shall furnish any information reasonably requested by the Public Representative and herein provided to be furnished to the Public Representative.

For the guidance of the Public Representative, in carrying on his functions the following is set forth:

The purpose of the appointment of the Public Representative is to provide a person who will view industry problems from the standpoint of public interest as distinguished from the viewpoint of the industry members; who shall be informed as to the collective activities and actions of the members; and who shall be authorized to report the same to the public officials charged with the protection of public interest in these matters; and who shall give the industry members the benefit of study, point of view, and recommendations of a person functioning in the capacity as above described.

The Public Representative, prior to taking office and entering upon his duties, shall file with the Association a sworn statement, as follows:

“....., being duly sworn, deposes and says: I accept the appointment of Public Representative of the Long Island Sand and Gravel Producers Association, and will truly, honestly and faithfully, to the best of my ability, perform the duties of such office according to the terms and conditions set forth with respect thereto.”

Further resolved, That each member of the Association, as a condition to remaining or becoming a member, shall promise in writing to promptly and correctly furnish the Public Representative all the information herein provided to be furnished to the Public Representative.

Upon motion duly made, seconded, and unanimously carried, it was

Resolved, That Mr. Dana is appointed a committee to make inquiry and to recommend a person or persons for appointment to the office of Public Representative; and it is

Further resolved, That no person shall be recommended by the Committee who is not a member of the faculty of a college or university. In case the Committee is unable to find a suitable person who is a member of the faculty of such an institution, the Committee shall not seek elsewhere pending report to the members and further instructions.

Upon motion duly made, seconded, and unanimously carried, it was

Resolved, That the Chairman shall file a copy of the foregoing resolutions in connection with the appointment of a Public Representative with the Attorney General of the United States, and shall advise said Attorney General of the person who is appointed to the office of Public Representative.

There being no further business, the meeting adjourned.

Anderson Dana. *Chairman.*