

Initial Decision

60 F.T.C.

and the total national production of hard ice cream by plants listed as wholesale by USDA. In the third column the comparison is with the total national wholesale production, less "captive" or "affiliated" plants, and in the last column the production of "captive" plants and those under 50,000 gallons have both been eliminated from the universe with which respondents' production is compared.

COMPARISON OF PERCENTAGE POINT CHANGES IN RESPONDENTS' PRODUCTION, 1947-1955

	Total frozen products production in States where respondents produce	Total U.S. hard ice cream wholesale production	Less "captive" plants	Less "captive" plants and those under 50,000 gallons
National.....	-5.0	-2.7	-2.6	-2.8
Borden.....	-1.7	-1.2	-1.2	-1.3
Foremost.....	<sup>1</sup> +1.4	+3.5	+3.8	+4.1
Beatrice.....	+1.0	+1.3	+1.4	+1.6
Arden.....	-3.1	+0.2	+0.3	+0.3
Fairmont.....	( <sup>2</sup> )	+0.2	+0.2	+0.3
Carnation.....	+1.0	+0.4	+0.4	+0.4
Hood.....	-7.5	-0.3	-0.4	-0.4
Pet.....	0.0	+0.01	+0.01	+0.01

<sup>1</sup> The above percentage is based on a comparison between 1950 and 1955 production figures, since there are no figures in the record for this respondent's total frozen products production in 1947.

<sup>2</sup> No figures.

As is apparent from the above table, with the exception of Foremost and Beatrice, none of the respondents has improved its production share by as much as 1 percent, irrespective of whether the production of respondents is compared with that of the states in which they produce or with the national production of hard ice cream at wholesale. Likewise, in the case of a comparison on the latter basis, the figures disclose that there is no significant difference between one based on total wholesale production as reported in official USDA figures, and one based on such wholesale production less the production of affiliated plants or less the production of both affiliated plants and plants under 50,000 gallons. The figures fail to disclose any trend toward concentration of the frozen products business in the hands of respondents, either individually or as a group.

In the case of Foremost and Beatrice, as already indicated above, the increase in their shares of production between 1947 and 1955 is accounted for largely by the production of companies which were acquired, rather than by any expansion in production or sales through their own plants. Several of the other respondents have also gained production by virtue of the acquisition of other companies, except for which some of their shares would be lower than above indicated. While some of these acquisitions may be subject to question under

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Section 7 of the Clayton Act, they are not directly involved in the instant proceedings, in which the question is whether respondents' production shares have been increased significantly by the use of the complaint practices.<sup>30</sup>

11. In addition to the primary charge of injury, involving competing ice cream manufacturers, the complaints make oblique reference to two other groups as being adversely affected, viz., retail ice cream dealers and "regular licensed facility dealers." There is not a scintilla of evidence of any injury to either of the latter groups.<sup>31</sup>

12. Based on the foregoing, and the record as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that there has been any substantial injury to, or lessening of, competition in any relevant market, or that there is any reasonable probability thereof, as a result of the use of the complaint practices by any of the respondents.

(b) While individual competitors in certain markets may have experienced adverse business conditions or competitive difficulties, the record fails to establish, (1) that there is any substantial causal relationship between such difficulties or conditions, and respondents' use of the complaint practices or (2) that competition in the relevant markets involved (as distinguished from the position of individual competitors) has been or is likely to be substantially injured.

(c) The record fails to establish any trend toward concentration of the frozen products business in the hand of respondents, during the period covered by the evidence, as a result of respondents' use of the complaint practices or otherwise.

## IV. Conclusions

A. *The Law of Unfair Methods of Competition*

1. The discussion up to this point has been with respect to the factual issues raised by the complaints. These are basically, (a) whether respondents have engaged in the complaint practices and, if so, to what extent, and (b) whether there has been any adverse competitive impact resulting therefrom. The consideration of these issues has assumed that the practices involved are unfair methods of competition,

<sup>30</sup> Such acquisitions might have indirect relevance if it were to appear that the complaint practices were responsible for any competitors selling out to respondents. However, as heretofore indicated, there is no evidence in the record to support an affirmative finding on this score.

<sup>31</sup> In the case of "regular licensed facility dealers", there is no evidence as to who they are or that it has ever been customary to purchase or lease facilities from them.

within the meaning of the Federal Trade Commission Act. This, however, is a fundamental issue in these proceedings, and to a consideration thereof the examiner now turns.

2. As already indicated, the complaints challenge various forms of dealer assistance including (a) the furnishing of facilities and other equipment, (b) the rendering of financial assistance, (c) the performing or furnishing of other services of value, and (d) the granting of various discounts, rebates and allowances. These various forms of assistance have heretofore been referred to loosely as the "complaint practices." However, the complaints do not attack these practices in and of themselves. Basic to the challenge to such practices is the allegation that they occur in a context of exclusive dealing, i.e., that they are expressly conditioned on exclusive dealing or that they necessarily result in exclusive dealing.

3. The complaints in these proceedings are patterned essentially after the complaint in the *Hastings Manufacturing Co.* case, 39 FTC 498, which also involved the offering of various inducements to customers in order to obtain their business on an exclusive or preferential basis. The practices there involved included the making of loans to distributors, the guaranteeing of increased profits, and the purchasing of the distributors' inventories of competitors' products at cost (regardless of age) and then dumping them. The Commission's finding that these practices constituted unfair methods of competition was not predicated merely upon respondent's use of the practices, but rather upon the fact that respondent used the practices to induce distributors to handle its products "upon an exclusive basis or upon a basis highly preferential" to respondent. The Commission also found that respondent had initiated the practices in question as part of "an aggressive campaign to acquire new and, so far as possible, exclusive channels of distribution."

The court of appeals, in affirming the Commission's decision and order, specifically recognized that exclusivity was an essential element of the offense which the Commission had found, stating that the Commission had found the practices to be unfair—

\* \* \* when done as an inducement to the distributor to discontinue handling competitive products and to handle the petitioner's products exclusively or preferentially. *Hastings Manufacturing Co. v. FTC* (C.A. 6, 1946), 153 F. 2d 253, 254. The court left no doubt as to its own position, that the element of exclusive or preferential dealing was a key element of the offense, in stating (at page 257):

\* \* \* It is not illegal for a manufacturer to finance his retail outlets or to guarantee them profits, but undoubtedly the utilization of these expedients,

singularly or in combination, as an inducement to jobbers to throw out competing lines and to handle, exclusively or preferentially, the products of a manufacturer "from whom such blessings flow," may well be within the statutory concept of unfair methods of competition. Such inducements as constituent elements in a method of competition, are the "exclusive-dealing requirements" which Mr. Justice Brandeis so vigorously condemned \* \* \*.

4. While the complaints are brought under Section 5 of the Federal Trade Commission Act, the essential element of the offense appears to parallel that under Section 3 of the Clayton Act, which proscribes the sale or lease of goods or equipment on the condition, agreement or understanding that the lessee or purchaser will not use or deal in the goods of a competitor of the lessor or seller (where the effect of such arrangement may be to substantially lessen competition or tend to monopoly). Presumably the present complaints were not brought under Section 3 of the Clayton Act because some of the practices do not technically involve the sale or lease of equipment, e.g., furnishing of facilities on a rent-free basis, rendering of miscellaneous services of value, and the granting of discounts. See *Curtis Publishing Co. v. FTC*, 270 Fed. 881, aff'd. 260 U.S. 568. However, it seems clear that the complaints are phrased in terms of a Section 3 Clayton Act type of violation, in order to come within the line of authority which holds that practices of the type that run counter to the public policy disclosed in the Clayton Act (or in the Sherman Act) may also be deemed to constitute unfair methods of competition under the Federal Trade Commission Act. See *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457; *FTC v. Motion Picture Advertising Service, Inc.*, 344 U.S. 392; *Carter Carburetor Corp. v. FTC*, 112 F. 2d 722 (C.A. 8, 1940).

5. That arrangements or practices which involve the element of exclusive dealing or other preclusive features fall within the category of practices which may be deemed to constitute unfair methods of competition under the Federal Trade Commission Act appears to be beyond cavil. See *FTC v. Motion Picture Advertising Service Co., Inc.*, *supra*; *Fashion Originators' Guild of America, Inc. v. FTC*, *supra*; *Hastings Manufacturing Co. v. FTC*, *supra*; *Carter Carburetor Corp. v. FTC*, *supra*. However, while such arrangements are of the type which may be considered to constitute unfair methods of competition, they are not per se illegal. *U.S. v. American Can Co.*, 87 F. Supp. 18, 31; see also Commission's decision in *Motion Picture Advertising Service Co., Inc.*, 47 FTC 378, 393. Irrespective of whether a proceeding is brought under the Clayton Act or Federal Trade Commission Act, a showing must be made with respect to the probable adverse competitive impact of such arrangements. An ul-

timate finding of illegality depends on a number of factors, such as the length of the contracts (*U.S. v. American Can Co.*, *supra*; *FTC v. Motion Picture Advertising Service Co., Inc.*, *supra*) and the proportion of the market tied up thereby (*Standard Oil Company of California v. U.S.*, 337 U.S. 293).

It has been suggested that in proceedings which are not specifically brought under Section 3 of the Clayton Act (in which it has been said that the courts have applied a somewhat automatic standard in determining probable competitive effect), a broader inquiry must be made into competitive conditions in order to determine the probabilities of competitive injury or tendency to monopoly.<sup>32</sup> However, for purposes of the present proceedings it is unnecessary to determine whether there is any valid distinction between the injury test applied under Section 3 of the Clayton Act and that applicable to proceedings under the Federal Trade Commission Act. Counsel supporting the complaint has not presented the case in the narrow frame of reference of the "quantitative substantiality" test of a Section 3 Clayton Act proceeding, but has sought to demonstrate broadly the anticompetitive effects and tendencies of the practices involved. Furthermore, as will hereafter appear, there is no record basis for a determination of the question of injury in terms of the somewhat mechanical quantitative substantiality test.

6. The examiner entertains no doubt that in terms of the issues drawn by the pleadings the complaints state a cause of action under Section 5 of the Federal Trade Commission Act. In reaching this conclusion it must be recognized that in one respect the complaints, as amended, go beyond the theory on which the *Hastings* case was tried. The complaint and order in that case were restricted to challenging the practices when they were used as an inducement for distributors "to discontinue handling" the products of competitors and to handle respondent's products exclusively. In effect, the practices were challenged only when used in a context of pirating away the customers of competitors by offering them illicit inducements. In the instant proceedings, under the amendment to the complaints, the practices are challenged not merely when used to take away the customers of competitors, but also when used to assist respondents' own accounts and when used in obtaining new accounts never previously served by anyone. In this respect, the amended and supple-

<sup>32</sup> See, e.g., *Report of Attorney General's Committee to Study Antitrust Laws*, 25, 141-142; *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594; *Tampa Electric Co. v. Nashville Coal Co.*, 168 F. Supp. 456 (M.D. Tenn., 1958); *Dictograph Products Inc. v. FTC*, 217 F. 2d 821 (C.A. 2, 1954).

mental complaints extend beyond the original complaints in these proceedings which, like the complaint in *Hastings*, were limited to challenging the practices when used to induce dealers to switch.

However, in another respect, the amended complaints are narrower than the original complaints in these proceedings. The original complaints, while patterned after *Hastings* in the sense that the various forms of assistance were challenged only when used in connection with "switch" accounts, appear to go beyond *Hastings* in the respect that they did not limit the attack on the practices merely to situations where exclusive dealing was involved. Apparently in amending the complaints it was decided to recede from the broad challenge to the practices as such, and to question them only when used to induce exclusive dealing, in order to be able to broaden the challenge with respect to the *type* of account involved. It is not entirely clear what motivated this change of approach, except that it did become apparent very early in the hearings that an attack limited to switch accounts was not a very practical one since only a small fraction of respondents' expenditures in the complaint practices involved switch accounts. It may be that counsel decided to recede from a theory which was of dubious merit under *Hastings*, in order to make a more realistic attack with respect to the type of account involved even though the latter change involved an extension of *Hastings*. In any event, whatever may have been the motive in amending the complaints, the examiner is satisfied that as amended (with exclusive dealing an essential element of the charge), they are legally sufficient even though they are no longer limited to switch accounts but include existing and pioneer accounts as well.

7. However, the above conclusion that the amended complaints are legally sufficient does not resolve the issue. While the amended complaints are framed in terms of exclusive dealing, counsel supporting the complaint during the course of the proceedings has gradually sought to minimize and ignore "exclusivity" as an essential element of the offense.<sup>33</sup> In the brief filed by him he has come full circle to the position that the complaint practices constitute unfair methods of competition, as such, without regard to whether they are used in a context of exclusive dealing or not. The order which he proposes would seek to require respondents to refrain from using the practices, irrespective of whether they are used as an inducement for exclusive dealing. In this respect the order differs from *Hastings* in which the respondent was ordered to cease using the practices only when

<sup>33</sup> It may be noted that this change of approach largely coincides with a change of counsel in support of the complaint. Present senior counsel was substituted for earlier counsel immediately following the amendment of the complaints.

