

Complaint

104 F.T.C.

IN THE MATTER OF  
INTERNATIONAL TELEPHONE & TELEGRAPH  
CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC. IN REGARD TO VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON  
ACT, AS AMENDED

*Docket 9000. Complaint November 26, 1974—Final Order July 25, 1984*

For reasons set forth in the Commission's Opinion, this final order reverses the ALJ's initial decision, denies complaint counsel's appeal, grants appeal of respondents and dismisses the complaint charging a New York City conglomerate and its wholly-owned baking company subsidiary with alleged violations of federal law. The complaint had alleged that the baking company had attempted to monopolize the white bread product sales market in five geographic areas and caused competitive injury in those markets by, among other things, engaging in predatory or discriminatory pricing practices for significant periods of time.

*Appearances*

For the Commission: *Jerry A. Philpott, Renee S. Henning, Stephen E. Nagin, Richard Malatt, Gilda E. Rodriguez, Marimichael O. Skubel and Allen M. Hickey*

For the respondents: *John H. Schafer, S. William Livingston, Jr., David J. Cynamon, Bruce D. Sokler and Jane H. Chalmers, Covington & Burling, Washington, D.C. and Craig D. Walley and Gordon Thomas, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

*Definitions*

1. For the purpose of this complaint, the following definitions shall apply:

(a) *Bread* shall refer to white pan bread and bread type rolls and related products but not to specialty breads.

(b) *Wholesale bakers* are bakers of bread which sell at wholesale to other establishments including groceries, restaurants, hotels and institutions. Bakeries owned and operated by grocery chains which distribute the bakeries' products through the chains' own retail grocery stores are not wholesale bakers. [2]

### *Respondents*

2. Respondent International Telephone and Telegraph Corporation ("ITT") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 320 Park Avenue, New York, New York. ITT is a conglomerate engaged directly and/or through subsidiaries in numerous and diverse businesses including, among others: the development, manufacture, distribution, servicing and operation of electronic and telecommunication equipment and other industrial and consumer products; life, fire and casualty insurance; processing wood pulp; mining; business and consumer services; and the manufacture and distribution of food products and automotive parts. In 1973, ITT had sales of approximately \$10.2 billion, making it the ninth largest domestic corporation in terms of sales, and assets of approximately \$10.1 billion, making it the eighth largest in terms of assets.

3. Respondent ITT Continental Baking Company, Inc. ("ITT Continental"), is a corporation organized, existing and doing business under the laws of the State of Delaware, with its office and principal place of business located at Halstead Avenue, Rye, New York. ITT Continental is a wholly-owned subsidiary of ITT, which acquired it in 1968 from its predecessor, Continental Baking Company. ITT Continental is engaged in the manufacture, sale and distribution of bread, cakes, snacks such as potato chips, frozen prepared foods, candy and ingredients for the bakery industry. In 1972, ITT Continental's net sales were approximately \$865 million. In 1972, ITT Continental would have been ranked as the 165th largest domestic corporation in terms of sales if it were not owned by ITT.

4. ITT controls, approves and benefits from the practices of ITT Continental.

### *Jurisdiction*

5. In the course and conduct of their businesses, respondents are and for a substantial period of time have been engaged in selling bread throughout various States of the United States, and have caused bread baked in various states to be shipped to purchasers in various other states. Thus, respondents are and at all times relevant

herein have been engaged in a continuous and substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson-Patman Act. [3]

## COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act.

*Trade and Commerce*

6. The relevant product market for purposes of this complaint is the baking, sale and distribution of bread by wholesale bakers. The wholesale baking of bread is the largest and most significant submarket of the bread baking industry. Relevant geographic markets consist of regional and local markets in the United States where bread is sold by ITT Continental, and aggregates thereof.

7. The baking, sale and distribution of bread is a substantial industry in the United States. In 1972, approximately 15.6 billion pounds of bread including specialty breads were sold in the United States, with a retail value of approximately \$3.3 billion. Of this, approximately 87.5% was baked and sold by wholesale bakers.

8. Concentration in the nation's bread industry is increasing. In 1963 the four largest bakers of bread and specialty breads accounted for 24% of the nation's bread sales; the eight largest accounted for 36%. By 1971 the four largest had increased their share to 30% and the eight largest to 40%. Concentration among the nation's wholesale bakers is higher. In 1963 the top four wholesale bakers of bread and specialty breads accounted for 31% of the total sales of the nation's wholesale bakers. By 1970 this had risen to over 37%. Between 1958 and 1972 the number of bakery plants declined by 45%. From January 1972 to mid-1973, 43 wholesale baking firms and 80 wholesale bakery plants closed.

9. Shares of total sales at the national level understate concentration in the bread industry. Due to its short shelf life and high transportation cost, most bread is sold within 150 miles of the bakery. Concentration is significantly higher in local and regional markets than in the nation as a whole, with 4-firm concentration ratios substantially exceeding 50% in many such markets.

10. Barriers to entry into wholesale bread baking are high. Significant start-up costs are associated with a new bakery, particularly with respect to establishing routes and obtaining sufficient shelf space. Because bread shelf space of grocers is limited, the introduction of a new brand means displacement of [4] established brands. Established multiplant wholesale bakers with interstate treasuries histori-

cally have met or bettered price concessions and promotions offered by bakers trying to expand or enter into their markets. Moreover, since bread is a homogenous product which is differentiated on the basis of sales and advertising expenditures, a new entrant who seeks to alter consumer preferences for established brands is placed at a substantial cost disadvantage.

11. ITT Continental is the world's largest bread baker. Its net sales of bread in 1973 were approximately \$475 million. This represents a 47% increase over 1968, the year in which ITT acquired Continental Baking Company. In 1970 ITT Continental's net sales of bread were almost half again as large as the next largest wholesale baker, Campbell-Taggart Baking Company. ITT Continental bakes bread in 48 bakeries located in 30 states and the District of Columbia and distributes it through in excess of 300 depots to areas in 46 states occupied by 70% of the population of the United States. ITT Continental's share of the nation's bread industry has grown steadily.

12. ITT Continental's market shares in regional and local markets are substantially higher than its share of national sales. ITT Continental has over 75% of the wholesale baker market in 4 regional or local markets; over 60% in 8; over 50% in 17; over 40% in 37.

13. ITT Continental is also the nation's largest producer of snack cakes, which it markets under the "Hostess" label. In 1973, ITT Continental's snack cake sales were \$315 million. In some areas snack cakes and bread are distributed by the same ITT Continental routes.

14. ITT Continental is one of few multistate wholesale bakers. In competition with other multistate wholesale bakers such as Campbell-Taggart Baking Company, American Bakeries Company, and Interstate Brands Corporation, as well as those local wholesale bakers who are still in existence, ITT Continental sells and distributes bread in most of the populous portions of the United States. [5]

15. ITT Continental's wholesale baking business was built and conducted and is now conducted on a national basis. From its headquarters in Rye, New York, ITT Continental centrally purchases raw materials for the production of bread, as well as supplies, equipment, and other needs. Advertising, both national and local, is prepared and placed in media by ITT Continental's headquarters. ITT Continental at all times maintains control, directly from its headquarters or through various regional offices, over the activities of its bakeries, such control being exercised with respect to, among other matters, planning and sales objectives, national accounts, the area in which and the price at which each bakery is permitted to sell, standards of products maintained by said bakeries, all but minor repairs to plants and equipment, personnel policies, and funds collected and disbursed by said bakeries.

*Acts, Practices and Methods of Competition*

16. ITT Continental and ITT jointly set for ITT Continental its sales and profit budgets and policies, including sales growth goals, which force ITT Continental managers to behave in a predatory manner. Through a requirement for detailed and systematic reports from ITT Continental with respect to all of its significant business decisions, ITT agrees upon, and/or concurs and acquiesces in most of the acts, practices and methods of competition engaged in by ITT Continental, including most or all of those hereinafter set forth.

17. Respondents plan to achieve dominance in wholesale baking in all relevant geographic markets, seeking to attain their objective by engaging in the acts, practices and methods of competition hereinafter set forth, most of which have been and are directed to specific geographic markets.

18. With the intent to lessen, hinder or restrain competition and/or to attain monopolies in wholesale baking in one or more relevant geographic markets, beginning at least as early as 1952, and continuing thereafter up to and including the date of this complaint, respondents and the predecessor of ITT Continental, Continental Baking Company, have engaged in various acts, practices and methods of competition including, but not limited to, the following: [6]

- (a) Acquisitions of a number of wholesale bakers;
- (b) Since 1962, acquisitions of at least three independent bakers in violation of a Federal Trade Commission order forbidding such acquisitions;
- (c) Sales of bread below their cost or at predatory prices for substantial periods of time in various geographic markets;
- (d) Subsidization of sales below cost or at predatory prices in various geographic markets by sales at higher prices in less competitive geographic markets;
- (e) Discriminations in price, directly or indirectly, between purchasers of bread of like grade and quality;
- (f) Paying for services or facilities furnished by selected customers and/or furnishing services to selected customers to induce such customers to maintain and/or increase purchases of respondents' bread;
- (g) Furnishing allowances, discounts and other things of value to customers or customers' employees for shelf and/or other merchandising space in grocery stores;
- (h) Systematic concentration of advertising and consumer and trade promotions in connection with the sale of bread at predatory prices in various geographic markets; and
- (i) Use of its dominant position in the sale of snack cakes and profits

resulting therefrom to increase bread sales and to subsidize losses thereon. [7]

#### *Effects*

19. The effects of the acts, practices and methods of competition described in Paragraphs 16, 17 and 18 are, among others, to:

- (a) Impair the ability of wholesale bakers to compete with ITT Continental;
- (b) Induce small wholesale bakers to discontinue the production and sale of bread;
- (c) Aggravate the trend towards concentration in wholesale baking;
- (d) Deter new entrants and raise barriers to entry into the wholesale baking industry;
- (e) Deter existing wholesale bakers from undertaking competitive initiatives;
- (f) Inhibit growth of existing wholesale bakers;
- (g) Substantially hinder, lessen, eliminate, injure, destroy and/or foreclose actual and potential competition in wholesale baking; and
- (h) Increase the probability that respondents will attain a monopoly in the wholesale baking industry in each and all relevant geographic markets. [8]

#### *Violations*

20. The acts, practices and methods of competition alleged in this complaint constitute attempts by respondents to monopolize and injure competition in the wholesale baking industry in relevant geographic markets in violation of Section 5 of the Federal Trade Commission Act.

21. The acts, practices and methods of competition alleged in this complaint constitute unfair methods of competition or unfair acts or practices by respondents in violation of Section 5 of the Federal Trade Commission Act.

#### COUNT II

Alleging violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

22. Each of the allegations in Paragraphs 1 through 5 herein are incorporated in this Count II as though set forth in full.

23. In the course and conduct of their business in commerce, ITT and ITT Continental, now, and for many years past have been in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, distribution and sale of bread.

24. Respondents, in the course and conduct of their business in commerce, as above described, have for a number of years discriminated and now are discriminating in price, directly or indirectly, between different purchasers of bread, by selling bread of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers.

Among the methods by which respondents discriminate between said purchasers is the granting of discounts of 5 to 12% and more off the list or regular prices to some customers in a trading area and denying such discounts to competing customers in the same trading area, and to customers in other trading areas. [9]

25. The effect of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and respondents' customers are respectively engaged; or to injure, destroy or prevent competition with respondents or with purchasers therefrom who receive the benefit of such discriminations.

26. The aforesaid acts and practices of the respondents constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

INITIAL DECISION BY

MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

MAY 1, 1981

INTRODUCTION

The Federal Trade Commission issued its complaint in this matter on November 26, 1974 (mailed December 16, 1974), charging respondents, International Telephone & Telegraph Corporation ("ITT") and ITT Continental Baking Company, Inc. ("Continental") with unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and with discriminations in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)). [2]

*Initial Pleadings*

More particularly, the Commission charged that Continental, until its acquisition by ITT in 1968, and Continental and ITT since that time, have engaged in certain practices with the intent to lessen, hinder or restrain competition or to attain monopolies in wholesale baking in one or more relevant geographic markets. The Commission

alleged that the practices challenged included, but were not limited to, the following (*See* Complaint ¶ 18):

- (a) Acquisitions of a number of wholesale bakers;
- (b) Since 1962, acquisitions of at least three independent bakers in violation of a Federal Trade Commission order forbidding such acquisitions;
- (c) Sales of bread below their cost or at predatory prices for substantial periods of time in various geographic markets;
- (d) Subsidization of sales below cost or at predatory prices in various geographic markets by sales at higher prices in less competitive geographic markets;
- (e) Discriminations in price, directly or indirectly, between purchasers of bread of like grade and quality;
- (f) Paying for services or facilities furnished by selected customers or furnishing services to selected customers to induce such customers to maintain or increase purchases of respondents' bread;
- (g) Furnishing allowances, discounts and other things of value to customers or customers' employees for shelf or other merchandising space in grocery stores;
- (h) Systematic concentration of advertising and consumer and trade promotions in connection with the sale of bread at predatory prices in various geographic markets; and
- (i) Use of its dominant position in the sale of snack cakes and profits resulting therefrom to increase bread sales and to subsidize losses thereon.

The Commission alleged that the effects of the challenged practices are to (Complaint ¶ 19):

- (a) Impair the ability of wholesale bakers to compete with Continental;
- (b) Induce small wholesale bakers to discontinue the production and sale of bread;
- (c) Aggravate the trend towards concentration in wholesale baking;
- (d) Deter new entrants and raise barriers to entry into the wholesale baking industry;
- (e) Deter existing wholesale bakers from undertaking competitive initiatives; [3]
- (f) Inhibit growth of existing wholesale bakers;
- (g) Substantially hinder, lessen, eliminate, injure, destroy and/or foreclose actual and potential competition in wholesale baking; and
- (h) Increase the probability that respondents will attain a monopoly in the wholesale baking industry in each and all relevant geographic markets.

The Commission also alleged that respondents have discriminated

in price between different purchasers of bread by selling bread of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers, the effect of which may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and respondents' customers are respectively engaged (Complaint ¶ 24).

In the notice of contemplated relief that accompanied the complaint, the Commission advised that, if the charges alleged in the complaint were sustained, it may, among other provisions, order respondents to divest wholesale baking assets, including bakery plants and other facilities in one or more areas, and require the licensing of brands or trademarks for respondents' bread under such terms as are consistent with the restriction of competition in the relevant markets (Complaint at 11).

In their answer (filed March 21, 1975) respondents admitted certain background facts, but denied all allegations as to any violation of Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act, as amended. Respondents also put forth as defenses certain prior actions of the Commission inconsistent with the theory of the complaint in Docket 9000 and the fact that certain challenges to their practices should be barred because of undue passage of time. Respondents further asserted that respondent ITT was not responsible for Continental's actions before September 1968, and that after that date it, being a corporation separate and distinct from Continental, has not engaged in the manufacture, sale, or distribution of bread. As to the charges of price discrimination, respondents raised the "cost justification" and "meeting competition" defenses. Finally, respondents asserted that the Commission lacked authority, on the basis of the allegations of the complaint, to secure the relief set forth in the notice of contemplated relief.

#### *Sanctions Order*

In the course of extensive post complaint discovery, complaint counsel sought detailed information on which they could recompute cost figures for individual bread varieties, cost figures which they considered essential to sustain the "sales below cost" allegations of the complaint. Respondents, stating that such an investigation was, in their opinion, beyond the scope of the Commission's complaint, on December 10, 1976, [4] refused to produce any further documents to support complaint counsel's efforts to develop a different cost accounting system from that which was employed by Continental during the years covered by the complaint.

Following complaint counsel's application for sanctions available under Section 3.38 of the Commission's Rules of Practice, and the

Administrative Law Judge's order of February 16, 1977, granting the application for sanctions, an order was issued March 22, 1977, imposing sanctions on respondents for failure to produce all documents deemed essential to recompute Continental's costs. The "sanctions order" provided that, for specific geographic markets during specific time periods, complaint counsel were deemed to have established that Continental sold bread below cost no matter how cost is measured. The sanctions order also provided that Continental could not introduce into evidence or otherwise rely upon the documents which it failed to produce and that it could not object to complaint counsel's use of other relevant material and reliable evidence to demonstrate that Continental made sales below cost in the designated geographic markets for the time periods specified.

Respondents were granted leave to file a limited appeal to the Commission on the policy question of whether it would be more appropriate for the Commission to seek district court enforcement of the subpoena as it related to the "withheld cost documents" rather than impose the sanctions for withholding the documents. On June 29, 1977, the Commission issued its order denying respondents' application for review.

Following the Commission's denial of the application for review, respondents made a continuous effort to require complaint counsel to accept their tender of the withheld documents and to obtain an order vacating the sanctions order. Complaint counsel steadfastly refused to accept those documents and respondents' motions were denied. (*See* orders dated November 7, 1977; September 28, 1979, April 15, 1980).

#### *Respondents' Discovery*

As complaint counsel's pretrial discovery neared completion at the end of 1977, it was agreed that respondents' discovery directed to Continental's wholesale baker competitors would be held in abeyance until the conclusion of the case-in-chief. Although broad subpoenas were issued to these nonparties in order to ensure preservation of documents, return dates thereon were suspended. After the case-in-chief was concluded, limited returns were negotiated with four of Continental's wholesale baker competitors.

#### *Hearings*

Adjudicative hearings commenced June 19, 1978 and 81 days of trial were held intermittently until October 15, 1980. [5] Complaint counsel's case-in-chief used 53 trial days, respondents' answering case used 16 trial days, complaint counsel's rebuttal case used 11-1/2 days and respondents surrebuttal case used 1/2 day. Ten of these hearing dates were devoted entirely to the handling of documentary material.

After the close of complaint counsel's case-in-chief on June 7, 1978, respondents filed numerous motions to dismiss the complaint in certain particulars, all of which were denied (Order Denying Respondents' Motion to Dismiss the Complaint as to International Telephone and Telegraph Company ("ITT"), dated September 21, 1979; Order Denying Respondents' Motion to Dismiss the Seattle phase of the Case, dated September 24, 1979; Order Denying Respondents' Motion to Dismiss the Complaint as to the Price Discrimination Allegations (Count II), dated October 5, 1979)). Earlier motions to dismiss the Denver and Minneapolis phases of the case on the grounds that the evidence would be stale were also denied (9182; order dated January 15, 1979).

#### *Time to File Initial Decision*

On October 17, 1980, the Administrative Law Judge closed the record for the receipt of evidence, although the record was reopened on November 4, 1980, to permit the receipt into evidence of certain documents that complaint counsel acquired from respondents after October 17, 1980. On October 27, 1980, the Commission granted a joint motion of counsel for extensions of time in which to file proposed findings and reply briefs. The Commission also extended the time for filing the initial decision until February 27, 1981. On December 23, 1980, the Commission issued an order, on complaint counsel's motion, granting the parties a further extension of time in which to file proposed findings and reply briefs and extended the time for filing the initial decision until March 14, 1981. Proposed findings were filed on January 9, 1981, and reply briefs were filed on February 6, 1981. On March 4, 1981, the Commission granted the Administrative Law Judge's request for an extension of time until April 10, 1981, in which to file the initial decision, and on April 7, 1981, further extended that time to May 1, 1981.

#### *Motions and Abbreviations*

Any motions appearing on the record not heretofore specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied. The proposed findings and conclusions submitted by counsel supporting the complaint ("CCPF") and counsel for respondents ("RPF") have been given careful consideration and to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence, as argumentative, as immaterial or based on material not in evidence. Other abbreviations used in this initial decision are: CX - Commission Exhibit; RX - Respondents' Exhibit; CC Mem - Complaint counsel's memorandum of law in support of CCPF; RBr - [6] Respond-

ents' brief in support of RPF; CC Reply Br. - Complaint counsel's reply brief. and R Reply Br. - Respondents' reply brief.

### *Collateral Proceedings*

Most of the factual and legal issues presented in this case arise from the facts and circumstances relating to Continental's pricing practices in five general market areas; *i.e.*, Denver, Minneapolis-St. Paul, Los Angeles, Northern California and Cleveland-Akron. Continental's practices have been, and in some cases, continue to be, the subject of private litigation. In Denver, a District Court's determination that Continental had violated Section 2(a) of the Clayton Act, as amended, was upheld by the Court of Appeals, *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973), *cert. denied*, 414 U.S. 975. In Minneapolis-St. Paul, private damage suits filed by Zinsmaster Baking Co., Pan O Gold Co., and Tender Krust/Creamy Crust, were settled before trial (CX 299F, 300A), *Zinsmaster Baking Co., et al. v. ITT Continental Baking Company*, No. 4-68 Civ. 96 (D. Minn). In Los Angeles, a suit brought by several of Continental's wholesale baker competitors was being prepared for trial during the final hearings in this matter. See *Wm. Inglis & Sons, Inc. v. ITT Continental Baking Co.*, (S.D. Cal. No. 78-3604). In Northern California a District Court's jury verdict for plaintiff was reversed by the district judge on a motion by Continental for judgment notwithstanding the verdict, *Wm. Inglis & Sons, Inc. v. ITT Continental Baking Co.*, 461 F.Supp. 410 (N.D. Cal. 1978), appeal pending in the Court of Appeals for the Ninth Circuit. In Cleveland, the representatives of the creditors of Laub Baking Co. have filed a treble damage suit against Continental, a matter that was being prepared for trial during the final hearings in this matter, *Melamed v. ITT Continental Baking Co.* No. 74-960 (N.D. Ohio). With respect to a sixth market, Seattle, complaint counsel have alleged that Continental engaged in certain anticompetitive practices, although no price discrimination conduct or sales below cost are alleged. Continental's practices in Seattle were also the subject of a private damage suit. The Court of Appeals applied the labor exemption of the antitrust laws and remanded it to the District Court for dismissal, *Granddad Bread Inc. v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979), *cert. denied*, 49 USLW 3493 (January 12, 1981).

Although the record in this matter contains certain materials collected or used in evidence in these other cases, this case is a *de novo* consideration of all issues, factual and legal, raised by the allegations of the complaint in Docket 9000, as modified or explained during the administrative proceedings.

In addition, the Commission investigated Continental's practices in

Denver and Minneapolis, and closed both files [7] without prejudice to the right of the Commission to reopen those investigations. (See Attachment A to Respondent's Motion to Dismiss the Denver Phase of the Case; RX 402C). A compliance investigation in Seattle during the early 1970's, relating to a 1964 Commission order prohibiting price-fixing, was closed without action (See Order Denying Respondents' Motion to Dismiss the Seattle Phase of the Case, dated September 24, 1979.)

#### *In Camera Treatment*

*In camera* treatment has been afforded many of the documentary exhibits in this case (including some in the rejected file). Although it was generally understood that all *in camera* status would expire on the date of the initial decision in this matter the record contains some exceptions and ambiguities on this subject (3999, 9166, 11466, 11429-49, 11829-30, 11319).

During the adjudicative hearings, counsel for Interstate moved to have Rxs 1051C-D; 1145A-J; 1146A-M; 1147A-B and 1148A-B (rejected) placed *in camera* with certain restrictions on their availability to employees of respondents (10382). These documents contain information about Interstate's marketing strategies and techniques, as well as analyses, and, if made public, may be detrimental to Interstate's business (See 10382). Interstate's motion was granted and *in camera* treatment was directed until further order of the Commission (10383, 10688).

First National Supermarkets ("National", the parent corporation of Pick N Pay, a Cleveland, Ohio, chain supermarket) has filed a motion for post-decision *in camera* protection for certain documents that it supplied to the parties for use in Docket 9000. These documents contain the formula by which Continental's wholesale prices of Pick N Pay private label bread products are determined, a formula that is used currently. National contends that this formula, as well as current prices charged by Continental, is highly sensitive business information, the disclosure of which to competitors would be detrimental to National's business. All information which is essential to decide the issues in this matter is contained in the portion of the record that will be open to public inspection. Accordingly, to protect the legitimate business interest of Pick N Pay and National, *in camera* treatment for CXs 973 (portion), 974, 975, 976, 978, 979, 980, 981, 982A-B, 984 A-G, 986 A-C, 2602 A-B and 2601 (A-D, rejected) is extended until the date of the Commission's decision in this matter or until otherwise ordered by the Commission.

There does not appear to be any reason to extend *in camera* treatment for any other document of record. Accordingly, the *in camera*

status for all other *in camera* documents expires as of the date of this initial decision. [8]

*Preliminary Summary of Facts and Contentions*

Although a long and detailed recitation of the facts annotated to the record is presented in this initial decision it seems appropriate to set forth a brief summary of the salient facts and the parties' basic contentions as an introduction to those findings.

The principal producers of bread products are either wholesale bakers or chain grocery stores that operate their own bakeries. Some wholesale bakers are multiplant companies operating a large number of bakeries throughout the United States. There are also wholesale bakers that operate in a few or only in one market area.

Bread bakers usually produce a great number of bread products. White bread constitutes, by far, the largest single bread product, and it is considered to be a homogeneous product. The same dough mix may be used to produce loaves of white bread, hot dog rolls and hamburger buns. These white bread products are generally referred to as "white pan bread." Some other bread products such as whole wheat, rye and pumpernickel breads are usually referred to as "variety" breads.

Wholesale bakers sell bread products to retail grocery stores, restaurants and institutions. They usually deliver bread products to the purchasers' stores or places of business. Chain store bakers, called "captive bakers," distribute their bread products exclusively through their own stores. Although production costs are approximately the same for all bread producers, the chain store bakers' costs of distribution are lower than the delivery costs of wholesale bakers. The retail price of captive label bread is usually lower than the retail price of bread baked by wholesalers.

Wholesale bakers sell bread under different labels and at different wholesale prices. The bread products sold under the wholesale bakers' principal trade name are usually called "advertised label." Wholesale bakers sell bread to chain stores that do not have their own bakeries under the stores' label which is generally called "private label" bread. The wholesale price of private label bread is usually lower than the wholesale price of advertised label bread which permits the grocer to sell it at a retail price comparable to the retail price of captive label bread.

Retail grocers, including chains with captive bakeries usually purchase the advertised label of most of the wholesale bakers doing business in a market area. Bread products are displayed in the grocery store on special bread racks. This display is usually referred to as the "bread table." The position and the amount of space on the bread

table which a grocer allots to a wholesale baker will determine the volume of that baker's products that are sold at retail in that store. [9]

Grocery stores operating captive bakeries give their captive label bread the largest space and the best position on the bread table. Grocers purchasing private label bread will give that bread product the largest space and best position on the bread table. The wholesale baker supplying a grocer with private label bread customarily will get the next best position on the bread table for its advertised label bread.

The wholesale and retail prices of the various wholesale bakers' advertised bread are usually identical in any particular marketing area. In fact, no wholesaler sells its advertised label white pan bread at a higher wholesale price than its competitors' wholesale price for the same product.

Notwithstanding the growth in population, the overall demand for bread has been static. Over the years the per capita demand for bread has decreased. In fact, the public's preference for white bread has decreased while the preference for variety bread has increased.

In many marketing areas, competition among the chain stores has resulted in low retail bread prices. As the retail price of captive bread decreases, noncaptive chains demand lower wholesale prices for private label bread. As the retail price spread between private/captive label bread and wholesaler bakers' advertised label bread increases, less advertised bread is purchased by the consumer. If one wholesale baker lowers its wholesale price of advertised label to protect its volume in advertised bread, all other wholesale bakers must match the lower price or they soon will face a loss of volume of their sales.

Another method of protecting the sales volume of advertised label, as well as increasing sales volume, is by obtaining a grocer's private label business and the additional sales of advertised label products that result from obtaining favorable space and position on the bread table.

Economies of scale are important in the baking industry and wholesale bakers must operate their bakeries at approximately 80% of maximum possible production capacity (2 shifts and some overtime) in order to obtain maximum efficiency.

As a result of lower wholesale prices, the profitability of the wholesale bakers is affected adversely. Besides lower wholesale prices, the extent of loss of profitability may also depend on a loss of volume of sales or on the percent of a wholesale baker's business that is in private label products.

Complaint counsel contend that in certain marketing areas Continental has lowered the wholesale price of private label bread or advertised label bread below Continental's fully allocated costs for long

periods of time and that as a result [10] other wholesale bakers, usually those operating only in one marketing area, have not been able to continue in business. Complaint counsel contend that such practices have been engaged in with the intent of injuring competition and creating a monopoly in an industry that has high barriers to entry. They also contend that the differences in price that result from respondents' pricing practices constitute price discriminations which have the effect of injuring competition and creating a monopoly. For purposes of antitrust analysis, complaint counsel contend that white pan bread baked by wholesale bakers constitutes a relevant product market, and that price discriminations and below cost selling can be measured on particular bread products within that product market (*See generally* CC Mem; CC Reply Br.).

Respondents contend that there is "chronic" excess capacity in the bread industry, usually caused by the backward integration of chain stores acquiring their own baking facilities, thus reducing the space available to wholesale bakers on the bread tables in a market. In this respect they argue that there are no significant barriers to entry into the bread baking industry. They argue that low retail prices of bread charged by the chain stores are the cause of low wholesale prices of private label and advertised label bread. They also contend that the wholesale bakers must compete for whatever space is available on the bread tables of the grocers who do not have captive bakeries and that the wholesale bakers must match the lowest wholesale price on the market. No wholesale baker can unilaterally raise prices. Respondents contend that they never beat other wholesale bakers' prices, but always responded to the prices offered to grocers by their wholesale baker competitors. They argue that it is not improper for a wholesale baker to sell below its fully allocated costs, in that selling at prices above marginal costs contributes to the cash flow and profitability of a baker and that such pricing makes good business sense.

Respondents assert that variety breads are interchangeable with white bread and that captive bread competes with wholesale baker bread. In this respect, they contend that the relevant market is all bread sold by both wholesale bakers and captive bakers. They also contend that wholesale bakers actually sell a line of bread products to grocers and that the product mix of private label and advertised label bread as well as white bread and variety breads, determines the profitability of any customer's account.

Respondents contend that the withdrawal of undercapitalized wholesale bakers that do not advertise their products is inevitable under the market conditions that exist in the bread industry and that such withdrawal is not the result of their pricing activities. Finally, respondents contend that their market share of the bread industry is

decreasing and that there is no way that they or any wholesale baker can achieve a monopoly position therein (*See generally* RBr.; R Reply Br.). [11]

#### *Expert Testimony*

Both sides presented the testimony of economic experts in support of their respective theories of the case. Complaint counsel's expert witnesses were Dr. Richard G. Walsh, a professor of economics at Colorado State University (8015), Dr. Stanley E. Boyle, a visiting professor of economics and independent consultant (7892), Dr. Rodney D. Patterson, also a professor at Colorado State University (7707), and Dr. Lee E. Preston, a professor of business and public policy at the University of Maryland (11574). Respondents' expert witness was Dr. Michael L. Wachter, professor of economics at the University of Pennsylvania (10386). Only Dr. Walsh has made specific studies of the baking industry, and he published a major work on the subject in 1963 (8017 *et seq.*).

The expert witnesses testified on a number of issues that have been raised in this case including their opinions on market (monopoly) power, relevant product markets, excess capacity, barriers to entry and whether certain pricing practices should be considered predatory instead of being seen as predictable and reasonable business responses to industry conditions. For example, Dr. Wachter testified that in an industry where there was excess capacity and low barriers to entry pricing below fully allocated costs and above marginal costs (or average variable costs) in the short run were to be expected (10421, 10453, 10650). He stated that under such circumstances, predation would not be an economically sound business choice, because it would be highly improbable that the firm could recapture the loss in profits through higher prices in the future (10483, 10625, 10655). In addition, several expert witnesses expressed opinions on whether divestiture would be an adequate remedy if the allegations of the complaint were sustained.

For the most part, the expert testimony is general and theoretical in nature and is not directed to the specific fact situations that exist in the several local marketing areas which have become the subject of this proceeding. In addition, the various opinions seem to be inconsistent in many respects. Accordingly, except for providing some understanding of technical economics concepts, this testimony is not very helpful in assessing the legality of Continental's pricing practices under the several statutes involved. However, it would appear that such expert testimony may be of great value to the Commission when it makes its policy determination as to the future regulation, if any, of respondents' conduct in the baking industry.

*Introduction to Findings of Fact*

Having reviewed the entire record in this proceeding, and having considered the demeanor of the witnesses who testified at the adjudicative hearings together with the [12] pleadings, admissions, proposed findings, conclusions and briefs submitted by complaint counsel and counsel for respondents, I make the following findings of fact based on the record considered as a whole. Because the record contains much duplication of factual material, not all references possible may be included in the citations to the record, especially where the parties do not differ significantly in their understanding of such facts.

## FINDINGS OF FACT

*Respondents*

1. Respondent ITT is a Delaware corporation with its principal place of business at 320 Park Avenue, New York, New York. ITT is a conglomerate engaged, indirectly and through subsidiaries, in numerous and diverse businesses including, among others: the development, manufacture, distribution, servicing and operation of electronic and telecommunications equipment and other industrial and consumer products; life, fire and casualty insurance; processing wood pulp; mining; business and consumer services; and the manufacture and distribution of food products and automotive parts. In 1973, ITT had sales of approximately \$10.2 billion and it was ranked ninth among domestic corporations in the Fortune 500 in terms of sales (Complaint ¶ 2; Answer ¶ 2; CX 2051).

2. Respondent Continental is a Delaware corporation with its principal place of business at Halstead Avenue, Rye, New York. Continental is a wholly owned subsidiary of ITT which acquired it in 1968 from its predecessor, Continental Baking Company. Continental is engaged in the manufacture, sale and distribution of bread, cake, snacks such as potato chips, frozen prepared foods, candy and ingredients for the baking industry. In 1972, Continental's net sales were approximately \$865 million (Complaint, Answer ¶ 3). If it had been a separate entity, Continental would have been ranked 177th in the "Fortune 500" in terms of sales (CX 2051). In 1972, some of Continental's subcompanies or divisions were Morton's Frozen Food, Pearson Candy Company, Gwaltney (meats), and Panaplus (ingredients) (9905 Dierker).

3. In 1973, Continental baked bread in 48 bakeries located in 30 states and the District of Columbia and distributed it through over 300 depots to areas of 46 states. In 1973, Continental's sales of bread were approximately \$445 million and the 1973 dollar sales of bread

were about 35% above its 1968 annual sales (*See* Complaint, Answer ¶ 11).

4. Continental Baking Company was founded in 1924 by the consolidation of 90 baking companies (463 Woodward). By 1978 Continental had 61 plants, 31 of which baked bread exclusively and 7 of which baked cake exclusively (468 Woodward). Since 1924, Continental Baking Company and its successor Continental have been the largest bread baker and snack cake baker in the [13] United States (464, 472-73 Woodward). In 1974, Continental's geographic coverage for bread products was approximately 70% of the U.S. population (471 Woodward; CX 116C). It served approximately 80% of the U.S. with cake (CX 116C).

5. In the early 1970's Continental's bakeries were grouped into 7 regions which are sometimes identified by the location of the regional office: New York, Atlanta, Detroit, Chicago (2), San Francisco, Los Angeles (473-79 Woodward). Each functional official at the bakery level *i.e.*, bakery manager, bakery sales manager, etc. has a counterpart at the regional level to whom he reports (474, 478, 480-81 Woodward; *see* 3164-65 Frielink). The regional office personnel have staff functions instead of line functions. The regional vice president has profit responsibility for his region (473 Woodward). Each regional vice president transmits a monthly management letter to the President of the Bakery Division in Rye, New York (479 Woodward).

6. Continental's Rye Headquarters purchases all major commodities (ingredients) used by its bakeries. It also prepares advertising copy and places advertising with various media. New product development and laboratory work is performed by headquarters personnel. Rye personnel also assist the various regional offices with labor negotiations, in making sales to national accounts, or multiple outlet accounts, and in making sales to certain "institutional accounts" such as hotel chains and military installations (660-61 Meyn).

7. Continental has a very sophisticated money management system by which the cash generated at the various plants is withdrawn each day and moved to Rye, N.Y. and then to ITT in New York City (1324-25 Willmont).

8. The day-to-day accounting is conducted at the individual plants and the results are combined or summarized at the regional offices and forwarded to Rye headquarters (490 Woodward). Since 1973, Continental has employed a Standard Cost system in its individual bakeries. Before implementation of this cost system, Continental developed estimated costs from a test cost program (528-29 Woodward).

9. Continental produces a full line of bread and "snack cake" products (467 Woodward). Continental's bread labels include Wonder, Home Pride Butter Top, Fresh Horizons, Country Fair and Country

Style (467, 493-94 Woodward). Continental's cake labels include Hostess and Twinkies (467-68 Woodward).

*Continental's Wholesale Competitors*

10. After Continental, the largest wholesale baking companies in the bread industry are Campbell-Taggart, American Baking Company ("American"), Interstate Brands Corporation ("Interstate"), Flowers Bakery and Metz Baking Company (514 Woodward). Today, Continental, Campbell-Taggart and Interstate are the "primary national bakers" (CX 4 (116)). [14]

11. Campbell-Taggart was formed as an offshoot of Continental in the late 1920's. In 1974, it had approximately 70 bakeries (CXs 69R, 2107). Many of these bakeries were located in the smaller cities of the South, Southwest, Midwest and Far West (CX 3 (105); *see also* CX 69R, Z-20). Campbell-Taggart serves approximately 30% of the U.S. population (CX 69F). Continental and Campbell-Taggart generally do not sell in the same geographic markets, although major overlapping markets are San Francisco, Denver, Sacramento, Kansas City, Memphis and Indianapolis (CX 3(105); *see also* CX 69R, Z-20). Although Campbell-Taggart performs in-depth services for the various functional departments of its bakeries, the local baking subsidiary companies operate as separate legal entities (CX 69Z-15; 1006-6 Z Mackaman). Campbell-Taggart's labels include Colonial, east of the Mississippi River, and Rainbo, Manor and Kilpatrick, west of the Mississippi River (10063-65 Mackaman; CX 2107). Continental has rated Campbell-Taggart as "excellent" in product quality and management (*See* CX 2107).

12. American operates approximately 20 plants located generally in the Northeastern, Central and Southwestern parts of the United States (CX 2107; *see also* CX 9 (204)). In 1973, Continental considered that American was "retrenching" and in 1979 Continental regarded American as the weakest of its national competitors (CXs 2107; 8 (038)). American's labels include Tastee and, on the west coast, Langendorf (8855 Murray).

13. Interstate operates approximately 30 bakeries located in the Eastern, Central, Southwestern and Northwestern United States (CX 2107). In 1973, Continental considered that Interstate was "retrenching" (CX 9 (154)). Continental generally regarded Interstate as a weaker competitor than Campbell-Taggart, but considered it to be strong in marketing approach and creativity (CX 2107; *see* CXs 2 (087); 4 (133)). Interstate's labels include Millbrook, Butternut, Weber and Blue Seal (3942 Heuter; 4706 J. Walsh).

14. As late as 1972, Ward Baking Company had 15 bread producing plants but was not regarded by Continental as a strong competitor

(CXs 2 (087); 4 (133); 9 (204)). Apparently Ward is no longer considered to be in the bread baking business (9425-26, 9376, 9532 Gase).

15. Flowers serves the Southeastern United States from approximately 21 plants. Continental regarded Flowers very highly (CX 2107). During the times relevant in this case, Flowers and Continental apparently did not compete in the sale of bread products, at least not in the six marketing areas studied in this case (See 514 Woodward; 10267 Jakaki).

16. Metz has approximately 14 bakeries located in the North Central region of the U.S. (10200 Metz). Its principal label is Old Home (10201 Metz). [15]

17. Major bakery cooperatives are Quality Bakers of America ("QBA"), W. E. Long, and American Bakers Cooperative (8053-54 R. Walsh; 514-15 Woodward). These cooperatives are management service associations organized on a nonprofit basis to provide the kind of services that a multiplant corporation might provide to its individual plants, including counseling services on production, engineering or accounting problems. Many independent bakers belong to cooperatives (8053 R. Walsh; see CX 3 (108); 10266-69 Jakaki; 11199 Schaus). The cooperatives also have advertised labels. Members of QBA can use the label Sunbeam and members of W. E. Long can use the label Holsum in many marketing areas (490-91 Woodward; RX 1039).

18. It is estimated, based upon information supplied by wholesale bakers to the Commission in 1970, that the shares of the national wholesale bakers' bread and bread type rolls national market were as follows: Continental 14.2%; Campbell-Taggart 9.7%; American 7.9% and Interstate 5.6% (See RX 1042 *in camera*).

#### *Captive Bakers*

19. In addition to the wholesale bakers, many retail grocery chains operate their own bakeries and produce bread which they sell in their own retail outlets (10208-09 Metz). In some marketing areas the chain store or "captive bakers" may be the largest producers of white pan bread.

#### *Bread Baking*

20. The bakery products produced by large wholesale bakers include white bread, hamburger buns and hot dog rolls, variety and hearth breads such as whole wheat, rye, pumpnickel and raisin breads, brown and serve rolls, specialty rolls such as Parker House rolls and English muffins, French bread, bread stuffing, snack cakes, doughnuts, pastries, sweet rolls and fresh pies (RX 1000C&E). White pan bread ("white bread") is white bread that is baked in a pan to the standards set by the government and it is considered to be a homo-

geneous product no matter who bakes it (499-500, 508 Woodward; *see* 7909 Boyle).

21. White pan bread is produced by either a conventional process (which entails the mixing of each batch of dough separately) or a continuous mix (which permits a continuous mixing of the dough) (518-19 Woodward). Although the continuous mix process became popular in the 1960's, the present trend is back to conventional mix process because it is more flexible in the production of variety breads and because it produces white bread, the texture of which may have better consumer acceptance (519-20 Woodward; *see* 3358-59, 3396 Frielink).

22. In the conventional mixing process, a sponge is produced. It ferments. Other ingredients are added after [16] fermentation. The mixture is then passed through equipment to be scaled, divided and placed in a pan to be baked. In the continuous process the ingredients are fed into a mixer or processing unit. The dough continues in a steady stream without fermentation, then it is scaled, divided and placed in a pan and baked (724 Meyn). Hearth breads are baked on a hearth, that is, a solid surface. Regular pan bread is baked in a pan on a shelf oven over a flame which is applied to the pan (724 Meyn). Continental uses special pans to produce hearth type breads (725 Meyn). Continental also uses a "brew system" which enables it to produce bread with properties of the conventional mix process by the continuous mix method (3199-3200, Frielink).

23. Economies of scale are important in the baking industry and wholesale bakers must operate their bakeries at approximately 80% of maximum production capacity (2 production shifts and some overtime) in order to obtain maximum efficiency (11204-05, 11223-24 Shaus; *see* 10295, 10300 Jakacki). Independent wholesale bakers are generally as efficient, if not more efficient, than the large multiplant wholesale bakers (11199-11200 Shaus).

#### *Bread Distribution*

24. Continental and other wholesale bakers sell bread principally to retail grocery stores. Wholesale bakers also sell to restaurants, hotels, institutions, and other customers (467-68 Woodward). It is estimated that Continental's sales to restaurants and institutional accounts, which consisted predominantly of buns and rolls was approximately 13% of its total route sales (RX 1039; *see also* CX 2361 B).

25. Continental and most other wholesale bakers distribute bread through a system of route salesmen who deliver bread to retail grocery stores and restaurants. These route deliveries are made from the bakery or from depots or agencies to which bread is transported in

large trailer trucks from the bakery for transfer to route trucks (482-3, 525 Woodward; 3167 Frielink).

26. Bread is usually sold on a guaranteed sales basis, that is, the wholesaler takes back loaves that are not sold within a few days. These loaves are called "stales" and the service is called "stale return." Sometimes bread is sold on a "no return" basis at a lower wholesale price (*See, e.g.*, CXs 207; 1714F; 1515 Z-95). Bread that is returned is usually placed in the bakery "thrift store" for resale at a reduced price (664 Meyn) or sold to farmers as feed (1120-21 Brout). Continental sets 48 hours as the shelf life of its Wonder label bread (726 Meyn; 1120 Brout). The driver-salesmen provide "rack service" to grocery stores. They physically place the fresh bread on the grocery store shelves two or three times a week and take away the stale returns.

27. Driver salesmen are members of the Teamster Union. Most union contracts provide that their compensation be based on [17] a certain salary plus commission. Chain store bakers usually distribute bread products by semitrailer to the "door" of their retail outlets; the bread is placed in the grocery shelves by store employees. Drivers of semitrailers usually belong to a different "local" of the Teamsters Union. They are paid on a straight hourly rate (726 Meyn). Generally, the costs of producing white bread are uniform among bakeries, but chain store bakers enjoy a distribution cost advantage because of the difference in delivery methods (*Id.*; CX 22(ii); 902-03 Stolle).

28. Because of the relatively small area that a bakery can serve with fresh bread, bread is marketed and sold on a local basis. No major baker competes in every market. The competitive conditions, price levels, identity and number of competitors differ from marketing area to marketing area. The pricing in one market generally has no direct impact on prices in other markets. There is no dispute that the relevant geographic markets are generally local (Answer ¶ 6).

29. Most wholesale bakers, including Continental, market an "advertised label" or "primary label" line of bread products sold under the brand name owned and usually promoted and advertised by the wholesaler. "Wonder" is Continental's principal advertised brand and accounts for the bulk of Continental's white bread sales (RX 1039 (*in camera*); 490-91 Woodward; *see* 649 Meyn).

30. Continental and many other wholesale bakers also sell bread packaged under the "private labels" of retail grocery chain stores. The brand name is owned by the retailer and the retailer promotes and advertises the bread. Wholesalers sell private label bread at lower wholesale prices than their advertised label, and private label bread is sold by the retailer at a lower retail price than advertised label bread (490-98 Woodward; *see* 727 Meyn). A private label program

usually includes at least the popular size loaves of white bread, hot dog rolls and hamburger buns (3177-78 Frielink; 4537 A. Gordon; 4734 J. Walsh; *see e.g.*, CX 1526B-C).

31. In addition, wholesale bakers sometimes sell "secondary" label bread. Secondary label bread usually sells at a price comparable to private label and is often provided to independent grocers that are too small to have an economical private label program (491, 494 Woodward; 650-51 Meyn). Some wholesale bakers will supply bread to a retail chain store packaged in a "controlled" label owned by the wholesale baker to which that chain store customer is granted exclusive use in a particular marketing area (650 Meyn; 4148 Heaps). Controlled label bread is usually sold at a private label wholesale price (*Id.*).

32. Bakeries owned by retail chain stores are called "captive" bakeries and the bread baked and sold in the chain's [18] retail outlets is called "captive label" bread. It is estimated that 50% of the white bread produced and sold in the U.S. is sold under either private label or captive label (604 Woodward).

33. Shelf position and the amount of shelf space in the retail grocery store are the most important factors in the marketing of bread, in that a better shelf position will sell more bread and larger shelf space will sell more bread (504-05 Woodward; 690-91 Meyn; 854-55 Vail). In addition, the consumer franchise (consumer acceptance of the labeled product) is an important factor. The grocer determines the allotment for bread shelf space among his various suppliers (652-53 Meyn). A preferred position for bakery products is the position that is exposed to the major flow of traffic past the bakery products display (656, 692 Meyn). It is customary for a grocer to allot the preferred position and the largest amount of shelf space to his private label bread and the next best position to the supplier of that private label bread which the supplier will use to merchandise his advertised label (506-08 Woodward; 656 Meyn). Chain stores with captive label bread will allot the preferred position and the largest amount of shelf space to the captive label bread (10137-38 Nissen; 10210-11 Metz).

34. Most grocers including chains who have their own bakery will usually carry a limited quantity of the advertised labels of all the wholesale bakers selling in a particular marketing area in order to meet consumer demand. Restaurants and institutions, on the other hand, usually purchase bread products from only one wholesaler.

35. Although all white bread is virtually a homogeneous product with regard to quality, nutrition, palatability and physical features, wholesale bakers, by advertising their primary label bread, are able to create a consumer franchise for their brands. Because of this consumer franchise, a retail grocer is able to sell advertised white bread

