IN THE MATTER OF

RUBEN SHAFFER TRADING AS B & W SALES COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6257. Complaint, Nov. 3, 1954—Decision, Feb. 8, 1955

Consent order requiring a seller in Baltimore, Md., to cease supplying others with push cards, etc., and selling or otherwise disposing of any merchandise, including Scotch Koolers, aluminum tumblers, chairs, and cameras, by means of a game of chance.

Before *Mr. William L. Pack*, hearing examiner.
Mr. J. W. Brookfield, Jr., for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ruben Shaffer, an individual trading as B & W Sales Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ruben Shaffer is an individual trading and doing business as B & W Sales Company with his office and principal place of business located at 113 West Fayette Street in the city of Baltimore, Maryland. Respondent is now, and for more than six months last past has been, engaged in the sale and distribution of various articles of merchandise, including but not limited to Scotch Koolers, aluminum tumblers, chairs, and cameras and has caused said merchandise, when sold, to be transported from his place of business in Baltimore, Maryland, to purchasers thereof located in the various States of the United States other than in Maryland, and in the District of Columbia.

There is now and has been for more than six months last past a substantial course of trade by respondent in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as described in

Paragraph 1 hereof, respondent, in soliciting the sale of and in selling and distributing his merchandise, furnishes and has furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. Among the methods and sales plans adopted and used by respondent, and which is typical of the practices of respondent, is the following:

Respondent distributes, and has distributed, to members of the public, certain literature and instructions, including, among other things, push cards, order blanks and circulars which include thereon illustrations and descriptions of said merchandise. Said circulars explain respondent's plan of selling and distributing his merchandise and of allotting it as premiums or prizes to the operators of said push cards; and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said cards. One of respondent's said push cards bears 35 feminine names with ruled columns on the back of said cards for writing in the name of the purchaser of the push corresponding to the feminine name selected. Said push card has 35 partially perforated discs. Each of said discs bears one of the names corresponding to one of those on the list. Concealed within each disc is a number which is disclosed only when the customer or purchaser pushes or separates a disc from the card. The push card also has a larger or master seal or disc and concealed within the master seal is one of the names appearing on the discs. The person selecting the name corresponding with the one under the master seal receives his choice of one of four articles of merchandise. The push card bears the following legend or instructions:

NAME UNDER SEAL RECEIVES

CHOICE OF ONE GIFT

Scotch Kooler

Set of 8 Aluminum Tumblers

Aluminum Folding Chair

Spartus Synchronized Box Camera

Nos. 1 to 44	(Here	TOTAL
Pay as Drawn	Master	$12.24
Nos. Over 44	Seal)	
Pay Only 44¢		

(Under which appear 35 discs hereinabove referred to)

Sales of respondent's merchandise by means of said push cards are made in accordance with the above-described legend or instructions. Whether a purchaser receives an article of merchandise or receives nothing for the amount of money paid and the amount to be paid for a chance to receive any of the merchandise are thus determined wholly by lot or chance. All of the articles of merchandise have a value substantially greater than the price to be paid for any one of the chances or pushes.

Respondent furnishes and has furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of his merchandise by means of games of chance, gift enterprises or lottery schemes. The sales plans or methods involved in the sale of all of said merchandise by means of said other push cards is the same as that hereinabove described, varying only in detail as to the merchandise distributed and the prices of chances and the number of chances on each card.

PAR. 3. The persons to whom respondent furnishes and has furnished said push cards use the same in selling and distributing respondent's merchandise in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of his merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plans or methods in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondent and the element of chance involved therein and thereby are induced to buy and sell respondent's merchandise.

The use by respondent of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 8, 1955, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondent with violation of the Federal Trade Commission Act through the use of lottery methods in the sale and distribution of his merchandise. A stipulation has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the filing of an answer to the complaint is waived, and that the complaint and stipulation shall constitute the entire record in the proceeding; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which respondent may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, respondent specifically waiving any and all right, power and privilege to challenge or contest the validity of such order; that the complaint may be used in construing the terms of the order; and that the order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission.

It appearing that the proceeding is in the public interest, the stipulation is hereby accepted and made a part of the record and the following order issued:

ORDER

It is ordered, That respondent Ruben Shaffer, an individual trading under the trade name B & W Sales Company, or under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of scotch koolers, aluminum tumblers, chairs, cameras or other articles of merchandise in commerce,

as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or other lottery devices, either with merchandise or separately, which said push cards or other lottery devices are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of February 8, 1955].

IN THE MATTER OF

RA-PID-GRO CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6267. Complaint, Dec. 2, 1954—Decision, Feb. 8, 1955

Consent order requiring a corporate seller in Dansville, N. Y., to cease misrepresenting in advertising the effectiveness on plants, shrubs, and trees of its "Ra-Pid-Gro" chemical fertilizer, the economy afforded by its use, and its superior quality as compared with other fertilizers.

Before *Mr. Earl J. Kolb*, hearing examiner.
Mr. William L. Pencke for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Ra-Pid-Gro Corporation, a corporation, and Thomas P. Reilly, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Ra-Pid-Gro Corporation is a corporation, organized and existing under the laws of the State of New York. The principal office and place of business of said respondents in 88 Ossian Street, Dansville, New York.

Individual respondent Thomas P. Reilly is president of corporate respondent. He formulates the policies and directs and controls the practices and activities of said respondent.

PAR. 2. For more than two years last past, said corporate respondent has been and is now engaged in the sale and distribution of a chemical fertilizer, designated Ra-Rip-Gro, designed to be used as a liquid fertilizer by the addition of water.

When sold, respondent Ra-Pid-Gro Corporation ships said product to purchasers thereof located in various States of the United States other than the State of New York. Said respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce in said product.

PAR. 3. In the course and conduct of said business and for the purpose of inducing the purchase of said product, respondents have made and are now making many statements and representations concerning said product by means of advertisements inserted in newspapers and magazines having a national circulation, and by pamphlets, folders, and other advertising material distributed by respondents and their dealers in various States of the United States. Typical, but not all inclusive of such representations, are the following:

Ra-Pid-Gro was * * *

First to combine a complete formula for the feeding of all trees and plants.

Ra-Pid-Gro contains all the known chemical trace elements, and vitamins necessary for growth and production, and for vigorous, healthy plant life.

First to put up a complete fertilizer or plant food in highly concentrated form without a filler.

Fed regularly as directed, your plants will thrive and grow under the most adverse conditions, when others are stunted, shriveling and dying.

You get results that can't be matched by any other fertilizer or plant food.

Ra-Pid-Gro is a miracle working concentrated food that helps nature, bring out the best in your flowers, fruits, vegetables and ornamental tree.

Ra-Pid-Gro insures success, for it speeds up production and assures an abundant crop.

Saves dying trees, shrubs, many plants given up for dead will respond to applications of Ra-Pid-Gro.

Save all your trees, shrubs and plants by dipping them in a solution of Ra-Pid-Gro before planting.

Some chemicals in solid form dissolve immediately. Others require months in which to dissolve. Therefore at no time is a plant getting a balanced diet from the usual dry fertilizer. The answer is liquid fertilizer—composed, not of one chemical or a few chemicals, but all the required chemicals and trace elements.

Ordinary fertilizers need rain or artificial watering to make them available to plant life.

All trees and plants require a liquid diet. It is impossible for them to feed on solids.

Ra-Pid-Gro obsoletes former fertilizing methods.

First to germinate grass in four days.

Use any quantity on foliage and roots—it won't burn.

Ra-Pid-Gro costs less.

One pound of Ra-Pid-Gro makes 176 lbs. of liquid fertilizer.

One pound of Ra-Pid-Gro is the equivalent of 100 pounds of any other fertilizer you may have used in the past.

One pound of Ra-Pid-Gro (at $1.25) is the equivalent of 100 pounds of regular powder fertilizer (at $4.25).

Ra-Pid-Gro is 100% usable by plants.

Every bit is 100% plant food and when applied in solution it is immediately absorbed by plant roots.

Ra-Pid-Gro applied to foliage enters the sap stream at once supplying immediately a complete, balanced food formula.

Ra-Pid-Gro combines in proper proportions the vitamins necessary for human, animal or plant life. By feeding it to your vegetable garden, you not only benefit your vegetables, but you thereby help overcome the deficiencies in your own diet.

PAR. 4. By means of the foregoing representations and many others similar thereto but not specifically set out herein, respondents represent, directly or by implication:

1. That Ra-Pid-Gro is a complete chemical fertilizer, containing all known chemical trace elements and vitamins necessary, for growth, production and feeding of all trees and plants;

2. That when Ra-Pid-Gro is fed regularly to plants they will thrive and grow under the most adverse conditions, while plants not so treated will shrivel and die;

3. That results are obtained through the use of Ra-Pid-Gro that are superior to any other fertilizer;

4. That when trees, shrubs and plants are dipped in Ra-Pid-Gro before planting their growth is assured and when given up for dead, will be saved through applications of Ra-Pid-Gro;

5. That plants do not receive a balanced diet through the use of dry fertilizer;

6. That all plant food must be in liquid form before it can be utilized by plants and trees;

7. That respondents' product has made all other fertilizing methods obsolete;

8. That Ra-Pid-Gro will cause grass to germinate in less time than all other fertilizers;

9. That Ra-Pid-Gro will not burn any plant, regardless of the quantity applied;

10. That Ra-Pid-Gro is cheaper than dry fertilizers and that one pound thereof makes 176 pounds of liquid fertilizer, is equal to 100 pounds of any other fertilizer and at the price of $1.25 is the equivalent of 100 pounds of dry fertilizer costing $4.25;

11. That Ra-Pid-Gro when dissolved and applied to plant leaves is absorbed immediately in the sap stream of the plant;

12. That Ra-Pid-Gro in solution is 100% plant food;

13. That Ra-Pid-Gro contains all of the vitamins necessary for human and animal life and when used on gardens, the vitamin content of the food grown therein will be increased to the extent that its consumption will help overcome vitamin deficiencies.

PAR. 5. In truth and in fact:

1. Ra-Pid-Gro is not a complete chemical fertilizer for the feeding of trees and plants as there are trace elements, other than those con-

tained in said product which are required for tree and plant growth. Moreover, some soils are so deficient in the trace elements present in respondents' product that the amounts therein are not sufficient to supply the deficiencies. Vitamins are not necessary for growth, production or feeding of trees or plants.

2. The regular application of Ra-Pid-Gro will not cause plants to grow under the most adverse conditions as there are many conditions which retard or prevent the growth of plants or cause them to shrivel and die, other than the absence of fertilizer.

3. There are other fertilizers or plant foods that will produce as satisfactory results as Ra-Pid-Gro.

4. There is no assurance that treees, shrubs or plants, which are dipped in Ra-Pid-Gro, will grow. Growth is dependent upon their condition and there are many conditions which will prevent the growth of plants having no relation to the question of fertilization. Plants given up for dead may or may not be saved by the application of respondents' product depending upon the cause of their condition. Only in case their condition is due to a lack of fertilization and they can be saved by the application of fertilizer, can they be saved by the application of Ra-Pid-Gro.

5. Some dry fertilizers contain the same ingredients as are present in respondents' product and will, in the presence of sufficient moisture supplied by rain or irrigation, provide a balanced diet to plants.

6. It is true that all commercial plant food, including that of respondents, require moisture in order to be made available to plants and trees. Respondents' product is mixed with water before application. In the case of dry plant foods the water is applied after application either by rain or irrigation. There is no significant difference in the utilization of the ingredients in the two forms of plant food under these conditions.

7. Ra-Pid-Gro does not make other fertilizing methods obsolete.

8. There are other commercial fertilizers which, when properly applied and supplied with sufficient moisture, will germinate grass in as short a time as respondents' product.

9. Unless used strictly as directed, respondents' product may burn the leaves of plants and the roots of young and tender plants.

10. Based upon the amount of food available to plants, Ra-Pid-Gro does not cost less than other commercial fertilizers. One pound of Ra-Pid-Gro does not make 176 pounds of liquid fertilizer as practically all of the 176 pounds is water and water is not a fertilizer. One pound of Ra-Pid-Gro is not the equivalent of 100 pounds of all other fertilizers.

11. Not all of the ingredients in Ra-Pid-Gro are absorbed by foliage and there are some plants whose foliage will absorb only a negligible amount of the solution.

12. Ra-Pid-Gro in solution is not 100% plant food as the solution consists principally of water which is not a plant food.

13. Respondents' product does not contain all of the vitamins necessary for human or animal life. The vitamins in respondents' product will not increase the vitamin content of vegetables grown in soil to which its said product has been applied and the consumption of food grown in soil to which said product has been applied will not help overcome vitamin deficiencies.

PAR. 6. Respondents, Ra-Pid-Gro Corporation, a corporation, and Thomas P. Reilly, individually and as an officer of said corporation, in the conduct of said business, have been and are in substantial competition in commerce with other corporations and with individuals, partnerships and others engaged in the sale of fertilizers.

PAR. 7. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that such representations were and are true and into the purchase of substantial quantities of respondents' product because of such erroneous and mistaken belief. As a result thereof, trade has been unfairly diverted and is now being diverted to respondents from their competitors in commerce and substantial injury has been and is being done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 8, 1955, the initial decision in the instant matter of hearing examiner Earl J. Kolb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charges the respondents, Ra-Pid-Gro Corporation, a corporation, and Thomas P. Reilly, an individual

and as an officer of said corporation, with unfair methods of competition and unfair and deceptive acts and practices in violation of the Federal Trade Commission Act, in the advertising of a chemical fertilizer, designated Ra-Pid-Gro.

In lieu of submitting an answer to said complaint, respondents entered into a stipulation for a consent order with counsel in support of the complaint, which was duly approved by the Director and Assistant Director of the Bureau of Litigation. This stipulation covers all the charges of the complaint except the allegation of falsely representing that Ra-Pid-Gro is a complete chemical fertilizer. It is now conceded by the attorneys supporting the complaint that the representation that Ra-Pid-Gro is a complete chemical fertilizer is not misleading as that term is understood by the fertilizer trade.

By the terms of said stipulation the respondents admitted all the jurisdictional allegations set forth in the complaint, waiving hearing before the hearing examiner or the Commission, the filing of exceptions or oral argument before the Commission and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. In said stipulation the respondents further agreed that the order hereinafter set forth shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power and privilege to challenge or contest the validity of said order.

It was further provided that said stipulation, together with the complaint, shall constitute the entire record herein; that the order hereinafter set forth may be entered in disposition of this proceeding without further notice; that the complaint herein may be used in construing the terms of said order which may be altered, modified or set aside in the manner prescribed by statute for orders of the Commission.

The Hearing Examiner having considered said stipulation for consent order, and being now duly advised in the premises, hereby accepts said stipulation for consent order and issues the following order in conformity therewith:

ORDER

It is ordered, That the respondent corporation, Ra-Pid-Gro Corporation, a corporation, and its officers, and Thomas P. Reilly, individually and as an officer of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal

Trade Commission Act, of the chemical fertilizer designated Ra-Pid-Gro, or any other product containing substantially the same ingredients or possessing substantially the same properties, do forthwith cease and desist from representing, directly or by implication:

1. That Ra-Pid-Gro contains all of the known trace elements necessary for the growth production or feeding of trees or plants.

2. That vitamins are necessary for the growth, production or feeding of trees or plants.

3. That application of Ra-Pid-Gro will cause plants to grow under any circumstances other than a lack of fertilizer.

4. That other fertilizers or plant foods will not produce as satisfactory results as Ra-Pid-Gro.

5. That the dipping of trees, shrubs or plants in Ra-Pid-Gro before planting will assure growth.

6. That plants given up for dead will be saved by applying Ra-Pid-Gro, except in the case of plants that can be saved through the application of a fertilizer.

7. That dry fertilizers do not provide a balanced diet to plants.

8. That a fertilizer must be applied in liquid form in order that plants may utilize the ingredients.

9. That Ra-Pid-Gro makes other fertilizing methods obsolete.

10. That Ra-Pid-Gro causes grass to germinate in a shorter time than all other commercial fertilizers.

11. That the application of Ra-Pid-Grow will not burn plants unless expressly limited to its use as directed.

12. That Ra-Pid-Gro costs less than other commercial fertilizers.

13. That one pound of Ra-Pid-Gro makes 176 pounds of liquid fertilizer or any other amount that is in excess of the actual amount of fertilizer present.

14. That one pound of Ra-Pid-Gro is equivalent to 100 pounds of other fertilizer or to any other number of pounds that is contrary to the fact.

15. That all of the ingredients in a solution of Ra-Pid-Gro are absorbed when spray on foliage or that the foliage of all plants will absorb significant amounts of the solution.

16. That Ra-Pid-Gro contains all the vitamins necessary for human or animal life or that the consumption of food produced on soil to which said product has been applied will help overcome vitamin deficiencies because of such application.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 8, 1955].

IN THE MATTER OF

CROWN ZELLERBACH CORPORATION ET AL.

Docket 5421. Complaint, Feb. 13, 1946—Order, Feb. 9, 1955

Order of dismissal—following Supreme Court's reversal in the *Automatic Canteen Company of America* case—of complaint charging a manufacturer of paper and paper products and its two subsidiaries, with offices in California, with violating sec. 2 (f) of the Clayton Act as amended by refusing to purchase paper and paper products from sellers unless they were granted prices lower than those paid by their competitors, thus accepting and receiving prohibited discriminations in price.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Mr. Philip S. Ehrlich, *Mr. Albert A. Axelrod*, *Mr. Ricardo J. Hecht*, *Mr. Philip S. Ehrlich, Jr.* and *Mr. Irving Rovens*, of San Francisco, Calif., *Mr. Paul R. Harmel*, of Washington, D. C., and *Sawyer & Marion*, of New York City, for respondents.

ORDER DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein and upon respondents' appeal from said initial decision, and upon briefs and oral argument of counsel; and

It appearing to the Commission that the decision of the Supreme Court of the United States in the matter of *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U. S. 61 (1953), and the dismissal by the Commission of Count II of the complaint in the matter of *Automatic Canteen Company*, Docket No. 4933 (January 12, 1955),[1] as a result of said decision, require that the complaint in this proceeding be dismissed:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

Commissioner Mead dissenting and Commissioner Howrey not participating.

[1] See p. 574 *supra*.

IN THE MATTER OF

PERMANENT STAINLESS STEEL, INC., AND PRESSED STEEL CAR COMPANY, INC. (NOW KNOWN AS U. S. INDUSTRIES, INC.)

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6010. Complaint, July 17, 1952—Decision, Feb. 14, 1955

Order requiring a manufacturer of stainless steel cooking utensils with general offices in Chicago, and its corporate sales agent in Houston, Tex., to cease representing falsely—chiefly by means of demonstrations of said products before groups of prospective buyers at which time advertising matter supplied by the manufacturer was distributed—that the consumption of food cooked or kept in aluminum utensils would cause cancer and was hazardous to health, and that preparation of food in aluminum caused formation of dangerous poisons; that use of their utensils would promote and insure better health, was necessary to health, would prevent gallstones and stomach troubles and help build up a good digestive system; and to cease making false representations concerning the therapeutic effects of various mineral elements in the diet.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. R. P. Bellinger and *Mr. Joseph Callaway* for the Commission.

Hamblen & Bobbitt, of Houston, Tex., and *Patterson, Belknap & Webb*, of New York City, for Permanent Stainless Steel, Inc.

Olwine, Connelly & Chase, of New York City, and *Steptoe & Johnson*, of Washington, D. C., for U. S. Industries, Inc.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding charges the two respondents with making false representations and disparaging statements relative to aluminum cooking ware, in connection with the sale and distribution of stainless steel cooking utensils, in violation of the Federal Trade Commission Act. Subsequent to the submission of respondents' answers and the receiving of evidence in support of and in opposition to the allegations of the complaint, a stipulation as to the facts was entered into by and between counsel for respondents and counsel supporting the complaint.

Under the terms of this stipulation all the factual issues in controversy are resolved except that pertaining to the responsibility of respondent Pressed Steel Car Company, Inc. for the false representations and disparaging statements made orally by the salesmen em-

ployed by respondent Permanent Stainless Steel, Inc. in connection with the sale of stainless steel cooking utensils. The evidence concerning this issue, consisting of Commission's Exhibits 5, 7 and 43 through 48 inclusive, and the testimony of Witnesses Reed, Davis, Marcy, Hastings and Kusch, is adopted by reference in the stipulation, and the initial responsibility for its factual interpretation is entrusted to the Hearing Examiner. Accordingly, the exclusive basis for the findings as to the facts and conclusions hereinafter made is the aforesaid stipulation, including the evidence adopted therein by reference.

1. Respondent Permanent Stainless Steel, Inc., hereinafter referred to as Respondent Permanent, is a Texas corporation, with its office and principal place of business located at 5609 Alameda Street, Houston, Texas. Respondent Pressed Steel Car Company, Inc., hereinafter referred to as Respondent Pressed Steel, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with general offices located at 6 North Michigan Avenue, Chicago, Illinois.

2. In December, 1949, Respondent Pressed Steel purchased the business of the Solar-Sturges Manufacturing Company, including its cookware division. Thereafter, since January, 1950, Respondent Pressed Steel has been and now is engaged in the business of manufacturing and selling stainless steel cooking utensils under the name of Solar-Sturges Manufacturing Division of Pressed Steel Car Company, Inc. The cooking utensils so manufactured and sold are designated "Permanent Stainless Steel," and the trade mark bearing this brand name is impressed on each piece of stainless steel cookware made and sold by Solar-Sturges Manufacturing Division of Respondent Pressed Steel.

3. Prior to 1950, Respondent Permanent operated its business under a franchise as the exclusive distributor of Permanent Stainless Steel cookware in the States of Texas, New Mexico, Arizona and Oklahoma for the Solar-Sturges Manufacturing Company. On May 1, 1950, Respondent Pressed Steel renewed the aforesaid franchise by an agreement with Respondent Permanent.

4. Respondent Pressed Steel causes and has caused said stainless steel cookware, upon order, to be transported from its place of business in the State of Illinois to Respondent Permanent at its place of business in the State of Texas. Respondent Permanent is now, and for several years last past has been, engaged in the sale and distribution in commerce of said product, and has caused some of said product,

when sold, to be transported from its place of business in the State of Texas to purchasers thereof in other states of the United States.

In the course and conduct of their business, as aforesaid, respondents are now and have been in substantial competition with other corporations and parties likewise engaged in the business of selling and distributing cooking utensils in commerce between and among the various states of the United States. The volume of respondents' business in cooking utensils in commerce has been and is substantial.

5. Respondent Pressed Steel has sold and sells its cooking utensils to Respondent Permanent, which, in turn, has sold and sells said product to the ultimate purchasers principally by personal solicitation through the medium of its agents and representatives, hereinafter called dealers. None of the capital stock of Respondent Permanent is owned by Respondent Pressed Steel. Respondent Permanent's sales are not limited to products manufactured by Respondent Pressed Steel.

6. The principal method of selling employed by Respondent Permanent's dealers has been by the giving of dinners and demonstrations before groups of prospective purchasers. At such dinner parties sales talks have been made and are made with respect to claimed advantages of Permanent Stainless Steel cooking utensils in connection with the preparation of food, and with respect to claimed disadvantages of the cooking utensils of competitors, particularly those made of aluminum. The material for such sales talks has been furnished to the dealers by Respondent Permanent. Both the demonstrations and sales talks have created the false impression among some purchasers and prospective purchasers in commerce that the consumption of food cooked or kept in aluminum utensils will endanger health by causing serious and dangerous poisons or specific diseases such as cancer, arthritis, polio, etc. Such demonstrations and sales talks have further created the false impression among some purchasers and prospective purchasers in commerce that the use of Respondent Permanent's cooking utensils will be conducive to health by building up a good digestive system and by preventing gall stones and stomach trouble.

Aluminum has been used in the manufacture of cooking utensils for many years. During that period of time, it has been found to be a highly satisfactory material for use in cooking utensils. The consumption of food cooked or kept in aluminum utensils is neither detrimental nor hazardous to the health of the users thereof by reason of the use of aluminum utensils; no poisons are formed from the preparation of foods in aluminum utensils.

7. Respondent Permanent has made statements by means of brochures and pamphlets distributed in commerce to the effect that

"Dr. Mayo, the well-known physician and surgeon, has stated that 'most diseases are traceable to faulty diet.' "; and that "Water, used in cooking, transmits, as a consequence, 212° F. heat into food and destroys as much as 45% to 55% of the mineral contents in these foods," which statements were and are false.

Respondents Permanent and Pressed Steel have falsely represented by means of advertising material distributed in commerce, that the sulphur, phosphorus, chlorine, fluorine, iodine, and other mineral elements contained in food intended for human consumption, are destroyed, damaged, or injured by the heat resulting from cooking methods other than Respondent Permanent's.

8. Respondents Permanent and Pressed Steel have also falsely represented, by means of a brochure, distributed in commerce, which depicted a child, under the heading "Food for Health," flanked by representations associating certain functions or structures of the body with certain specified mineral elements, and stating that silicon is a necessary nutrient for well-being; sodium and chlorine for the complexion; iodine, calcium and phosphorus for the heart; chlorine and sodium for the joints; phosphorus for the nails; fluorine for the bones; potassium and chlorine for shapeliness; chlorine and sodium for clear skin; magnesium, sulphur, sodium and iron for proper digestion; phosphorus, iodine and manganese for the nerves; magnesium and phosphorus for the blood; and sodium for the ligaments.

A printed chart or table included in said brochure reads as follows:

Essential Organic Mineral Salts	*Effects*
Sulphur— Brain, Nerves, Liver	Purifies—tones system—intensifies feeling and emotions
Phosphorus— Brain, * * *	Nourishes the brain cells: builds power of thought; stimulates growth of hair and bone.
Calcium— * * * Lungs	* * *; gives vitality, endurance; heals wounds; counteracts acid.
Magnesium— Nerves, Intestines	Relaxes nerves; refreshes system. Prevents and relieves constipation.
Potassium— Tissue, Glands	Liver activator; strongly alkaline; makes tissues elastic, muscles supple, creates grace, beauty, good disposition.
Chlorine— Glands, Intestines	Cleans; expels waste; freshens; purifies, disinfects.
Fluorine— Lungs, Tendons, Veins	Strengthens; cements, builds resistance; hardens.
Sodium— Glands, Stomach, Blood	Aids digestion; counteracts acidosis; halts fermentation; purifies blood; dissolves congestion.

Essential Organic Mineral Salts	*Effects*
Iodine— Glands, Brain	* * *; normalizes gland and cell action; ejects, and counteracts poisons.
Silicon— Nails, Skin, Teeth, Hair	Gives keen hearing; sparkling eyes, pearly teeth and nails; glossy hair; tones system.
Manganese— Heart, Brain, Tissues	Increases resistance; strengthens; co-ordinates thought and action; improves memory.

The use of the above-described brochure, Commission's Exhibit 5, was discontinued by respondents in May, 1952.

9. By means of the aforesaid printed chart or table, respondents have falsely represented and implied that sulphur purifies and tones the human system and intensifies feeling and emotions; that phosphorus nourishes the brain cells; builds power of thought, and stimulates the growth of the hair; that calcium gives vitality and endurance, heals wounds, and counteracts acids; that magnesium relaxes nerves, refreshes the human system, prevents and relieves constipation; that potassium is a liver activator, makes tissues elastic and muscles supple, creates grace, beauty, and a good disposition; that chlorine cleans, freshens, purifies, disinfects, and expels waste from the human body; that fluorine has a beneficial effect on the lungs, tendons and veins by strengthening, cementing, hardening and building the resistance of those tissues, tendons and veins; that sodium aids digestion, counteracts acidosis, halts fermentation, purifies blood, dissolves congestion; that iodine normalizes glands and cell action and ejects and counteracts poisons; that silicon gives keen hearing, sparkling eyes, pearly teeth and nails, and glossy hair, and tones the human system; that manganese increases resistance, strengthens thought and action, and improves memory.

10. Minerals are not appreciably damaged or destroyed by the heat used in any method of cooking. Vitamin C and some elements of the Vitamin B complex are destroyed by prolonged high temperatures; other vitamins are not. Depending upon the solubility of the compound in which they occur in foods, minerals and Vitamins B_1 and C are leached out in boiling water. If the water is not consumed as part of the diet, there is a loss of these food elements. The amount of loss depends on the amount in the food before cooking, which in turn depends on the soil in which grown, the manner of harvesting and storage, and the exposure to light and air between maturity and preparation.

11. As previously stated, at the giving of dinner parties and demonstrations before groups of prospective purchasers, advertising literature has at times been distributed to prospective purchasers. Two of

such advertising folders, known herein as Commission's Exhibits 5 and 7, have been, at Respondent Permanent's request, printed and sold to it by Respondent Pressed Steel. Commission's Exhibit 5 consists of a printed folder which describes Permanent Stainless Steel cookware, presents a "Food for Health" chart, describes the free dinner party offered to prospective purchasers, and states that, after the dinner,—

> We give a brief talk on the benefits of health cooking * * *. We even clear the table and wash the dishes. This is our method of demonstrating and advertising our product and to further show our appreciation for the privilege of using your home we present you a beautiful gift—free.

The entire advertisement is over the name of Respondent Pressed Steel, and the name of Respondent Permanent does not appear thereon.

Commission's Exhibit 7 consists of a folder substantially the same as Commission's Exhibit 5, except for the omission therefrom of the "Food for Health" chart. Both of these folders ask the interested public to "Let us demonstrate in your home how Permanent cookware seals in food values and flavors."

The use in the above-described advertising literature of the words "we," "our" and "us," with its specific authorization for oral statements by salesmen contained in the words "We give a brief talk," over the name of Respondent Pressed Steel, created the appearance to prospective purchasers that the salesmen presenting such literature and giving such talk were the authorized agents and spokesmen for the manufacturer of the cookware described therein. Indeed, Respondent Pressed Steel as well as Respondent Permanent admit in the stipulation as to the facts that they distributed false statements through the medium of these folders or brochures. The active cooperation of Respondent Pressed Steel with its distributors and salesmen in promoting the retail sale of Permanent Stainless Steel cookware is further shown by its solicitation of salesmen in the July, 1950 issue of Specialty Salesman Magazine, in an advertisement addressed only to prospective salesmen. Therein Respondent Pressed Steel invited such persons to become salesmen of Permanent Stainless Steel cookware, and to work with established distributors in their own territory. In such advertisement, interested prospective salesmen were invited to submit information concerning themselves to Respondent Pressed Steel.

Furthermore, the continued effort on the part of Respondent Pressed Steel to create in the public mind confidence in the salesmen promoting its product and to obtain thereby an increased volume of sales thereof is shown by the publication, subsequent to the issuance of the complaint, in the November, 1952, and January, 1953, issues of Good

Housekeeping Magazine and Parents' Magazine, of an advertisement of Permanent Stainless Steel cookware, in which Respondent Pressed Steel represents that "Each Permanent cookware representative is a reliable businessman bonded after careful investigation." In the July, 1953 issue of Good Housekeeping Magazine, Respondent Pressed Steel invites the public to "Welcome your authorized Permanent representative when he calls for an appointment."

In the face of the above facts, Respondent Pressed Steel contends that it is not responsible for the oral statements made by the salesmen of stainless steel cookware at the free dinner parties which were offered in the printed advertisements prepared by Respondent Pressed Steel, and for which it acknowledges responsibility. This contention is based upon the technical theory that Respondent Pressed Steel is legally insulated from the retail distribution of its product, in that Respondent Pressed Steel manufactures and sells its product to independent distributors, who in turn distribute it to the purchasing public through salesmen, called dealers, who are not Respondent Pressed Steel's employees, but persons over whom it has no control.

This contention is diametrically opposed to the basic concept of fair dealing implicit in the Federal Trade Commission Act. No manufacturer can, in justice, foster in the minds of prospective purchasers the impression that a salesman selling its product is its authorized representative and demonstrator therefor, and thereafter, having enjoyed, through the efforts of such salesman, a substantial volume of sales of such product, disclaim responsibility for the false representations, either oral or written, by means of which such sales were made.

CONCLUSIONS

The acts and practices of each respondent, as set forth above, have had the capacity and tendency to mislead and deceive a substantial number of the purchasing public into believing that the false representations and false impressions created thereby were true, and to induce a substantial number of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' products. As a result thereof, trade has been unfairly diverted to the respondents from their competitors, in consequence of which substantial injury has been done by respondents to competition in commerce between and among the various states of the United States.

The methods, acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair and deceptive acts and prac-

tices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. Accordingly, it is concluded that this proceeding is in the public interest, and that respondents should be required to cease and desist from such practices, as follows:

ORDER

It is ordered, That the respondents, Permanent Stainless Steel, Inc., a corporation, and U. S. Industries, Inc., a corporation, formerly known as Pressed Steel Car Company, Inc., a corporation, and their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of cooking utensils made of stainless steel, or any other products of substantially similar composition, design, construction or purpose, do forthwith cease and desist from representing, directly or by implication:

1. That the consumption of food cooked or kept in aluminum utensils will cause cancer, or is in any way detrimental or hazardous to the health of the users.

2. That the preparation of food in aluminum utensils causes the formation of poisons.

3. That cooking food in utensils in which water is used, or by any method or process other than in respondents' utensils, will, by reason of the heat or otherwise, result in appreciable damage or destruction to minerals.

4. That the use of respondents' cooking utensils will promote or insure health, or is any more conducive to health than the use of any other recognized cooking utensils.

5. That the use of respondents' said products will be of any benefit in the prevention of gall stones or stomach troubles, or in building up a good digestive system.

6. That the sulphur, phosphorus, chlorine, fluorine, iodine, or any other mineral elements contained in food intended for human consumption, are destroyed, damaged or injured by the heat resulting from cooking methods other than respondents'.

7. That silicon is essential for proper human nutrition.

8. That sodium or chlorine has any specific effect on the complexion or the skin; iodine, calcium or phosphorus on the heart; chlorine or sodium on the joints; phosphorus on the nails; fluorine on the bones; potassium or chlorine on shapeliness; magnesium, sulphur, sodium or iron on the digestion; phosphorus, iodine or manganese on the

nerves; magnesium or phosphorus on the blood; or sodium on the ligaments.

9. (*a*) That sulphur purifies or tones the human system, or intensifies feeling or emotions.

(*b*) That phosphorus nourishes the brain cells, has any effect on the power of thought, or on the growth of the hair.

(*c*) That calcium has any effect on vitality or endurance, heals wounds, or counteracts acids.

(*d*) That magnesium has any effect on the nerves, refreshes the human system, or prevents, or, as contained in human food, will relieve constipation.

(*e*) That potassium is a liver activator, makes tissues elastic or muscles supple, creates grace or beauty or has any influence on one's disposition.

(*f*) That chlorine cleanses, freshens, purifies, disinfects, or expels waste matter from the human system.

(*g*) That fluorine strengthens, cements, hardens or builds the resistance of the lungs, tendons or veins.

(*h*) That sodium in human food aids digestion, counteracts acidosis, halts fermentation, purifies blood or dissolves congestion.

(*i*) That iodine normalizes glands or cell action, or will eject or counteract poisons.

(*j*) That silicon has any effect upon the hearing, the eyes, the teeth, the nails, the hair, or any other organ or function of the body, or tones the human system.

(*k*) That manganese increases resistance, strengthens or coordinates thought or action, or has any effect on the memory.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

Presented for determination here is the appeal filed by the respondent U. S. Industries, Inc. (formerly Pressed Steel Car Company, Inc.) from the initial decision of the hearing examiner which ruled this appellant and respondent Permanent Stainless Steel, Inc. have engaged in unfair and deceptive acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

Appellant alleges that the primary issues presented by its appeal is whether U. S. Industries, Inc. is responsible for the actions and statements of the other respondent in this proceeding, Permanent Stainless Steel, Inc. (hereinafter referred to as "Permanent") or of the representatives, dealers or agents of Permanent, and whether a cease and

desist order could issue against appellant based upon statements in a brochure, the use of which was discontinued prior to the issuance of complaint. Appellant also takes issue with Paragraphs One through Five of the order attached to the initial decision, alleging that these paragraphs are based solely on oral misrepresentations by respondent Permanent's dealers and representatives, and not on material furnished by it to Permanent. Appellant additionally requests modification of Paragraph Six of this order, though admitting that the claims prescribed therein are based on a brochure printed by it and furnished to Permanent for distribution to its dealers.

The facts are not in dispute. Appellant U. S. Industries, Inc. is engaged in the manufacture and sale of cooking utensils which are purveyed to the public under the brand name Permanent Stainless Steel Cookware. Appellant sells its products throughout the country through fourteen distributors, including respondent Permanent, which is the exclusive enfranchised dealer for these utensils in a four-state area. Appellant sells its cookware to respondent Permanent, which, in turn, promotes sales of its products to ultimate users principally through the course of dinner parties and demonstrations conducted by Permanent's sales representatives. The order in this matter is directed against both appellant and respondent Permanent, but respondent Permanent has not taken an appeal from the examiner's initial decision.

The complaint, under which this proceeding was instituted, has charged that appellant and respondent Permanent, through the latter's agents, representatives or employees, have engaged in misrepresentation of appellant's products, in commerce, in the respects therein alleged, and falsely disparaged competitive cookware, particularly aluminum. Contained in the record is a stipulation between counsel which conclusively establishes that, during the course of the sales talks, false statements have been made by salesmen to the effect that the consumption of food prepared or kept in aluminum utensils will endanger health by causing cancer and other diseases. It similarly appears that during these demonstrations, statements have been made which falsely represent that respondent's wares will be conducive to health by building up a good digestion and preventing gallstones and stomach trouble. The material for these false representations was furnished to its representatives by respondent Permanent.

The initial decision found that the statements contained in certain folders presented by appellant over its own name and sold by it to respondent Permanent and other distributors for use in promoting sales at dinner parties and other demonstrations, have served to create

the impression among prospective purchasers that the salesmen conducting the presentations are the representatives of and spokesmen for the appellant. The initial decision holds that having fostered the impression that the salesmen selling its product is its authorized representative and demonstrator therefor, and having thereupon enjoyed a substantial volume of sales through the salesman's efforts, appellant cannot then disclaim responsibility for the false representations by means of which such sales were made.

In interposing objections to the decision's ruling that the manufacturer must be deemed to share responsibility for the oral misrepresentations of the salesmen, appellant contends that the language of the folders furnished by it has not conveyed the impression that respondent Permanent's dealers were appellant's representatives. We think this contention is wholly without merit. Featuring appellant's stainless steel cookware and over appellant's name, the folders solicit prospective purchasers to "Let us demonstrate in your home how permanent cookware seals in food values and flavors." As set forth in the initial decision, the folder also states:

> * * * we give a brief talk on the benefits of health cooking. * * * We even clear the table and wash the dishes. This is our method of demonstrating and advertising our product, and to further show our appreciation for the privilege of using your home, we present you a beautiful gift—free.

Additionally, by means of its folders depicting a child flanked by representations associating certain functions of the body with specified mineral elements, appellant has represented, among other things, that these elements will normalize gland and cell action, aid digestion, increase resistance, coordinate thought and action, and improve memory, which statements and others appellant has stipulated are false.

The examiner recommended issuance of an order against the false statements contained in appellant's folders, and found that such folders had served to create the impression that the salesmen were the representatives and spokesmen of the appellant. By placing in the hands of respondent Permanent, under its name, the folders referred to, knowing that they would be used by respondent's dealers and representatives in promoting its product, appellant furnished a means by which prospective purchasers could be unfairly influenced and misled. We believe that the examiner was correct in holding that appellant must therefore share with respondent Permanent responsibility for the false claims made.[1]

Appellant contends that even admitting responsibility for the state-

[1] *C. Howard Hunt Pen Co.* v. *F. T. C.*, 197 F. 2d 273; *F. T. C.* v. *Winsted Hosiery Mills*, 253 U. S. 493.

ments contained in its folders, it should not be held under Paragraphs One through Five of the order, which it contends are based solely on oral misrepresentations by respondent Permanent's salesmen, and not on statements contained in its publications. We think there is little doubt that the role of moving spirit or "principal" in the conduct of oral sales presentations was imputed to appellant by its advertising, and that "apparent authority" for the oral misrepresentations could be and was ascribed to these salesmen because of appellant's advertising. Nor do we deem it material, as urged under the appeal, that an actual agency relationship may not have, in fact, existed between appellant and these salesmen.

In *Standard Distributors* v. *Federal Trade Commission*, 211 F. 2d 7 (2d C. A. 1954), Judge Learned Hand, in upholding the Commission's order with respect to a corporate officer named in his individual capacity as a party to that proceeding, said, in part:

> It is indeed true that this results in holding such an officer responsible for the conduct of those who are not his agents; * * * However, we do not see that it is any severer a responsibility than that of a principal for the conduct of his agent within the scope of an "apparent authority" that he may have done his best to circumscribe. It is true that "apparent authority" has at times been said to result from estoppel; but that is not true,[2] for the principal is held, even though the third person does not rely in any way upon the authority; as, for example, in the case of a tort. As Professor Wigmore long ago pointed out, the doctrine in such cases is a more or less rationalized vestige of altogether different notions whose provenience goes back to the archaic law of status.[3] So far as it any longer satisfies our present demands of justice, it is because, since the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent may exceed his instructions—subject, indeed, to limits, vaguely left open, upon his "apparent authority."
>
> Much the same argument seems to us to be permissible, when, as here, no agency exists.

The statements made during the course of the oral sales presentations must be construed in the light of all the attendant circumstances, including the appellant's folders in hand and the purchasers' probable understanding of the status existing between appellant and these salesmen and his reliance thereon. The Commission, indued by statute with the public interest,[4] is not bound by common law principles of agency in fulfilling its statutory mandate to protect the public from deception. The customary and probable implication from appellant's furnishing respondent Permanent's representatives with brochures

[2] *Restatement of Agency*, Sec. 159 (c).

[3] Responsibility for Tortious Acts, VII Harvard Law Review, pp. 397-405; *Kidd* v. *Edison Co.*, 239 Fed. Rep. 405; affd. 242 Fed. Rep. 923 (C. A. 2).

[4] 38 Stat. 719; Title 15 U. S. Code, Sec. 45.

containing deceptive claims, under its name, would seem to be that this agent's authority to represent appellant was without limitation for the kind and type of sales presentation being made. The purchaser could reasonably believe that appellant had consented to the sales misrepresentations, and that the acts were done on its behalf by the salesmen purporting to act for it. We think the appellant, by furnishing these folders to his distributors, provided a very effective shell to be used in hunting customers for appellant's wares. However, he is not absolved by the fact that, to the shell, the salesmen may have added a few buckshot of their own.

We deem it immaterial, as urged by appellant, that no express statement is contained in the stipulation to the effect that prospective purchasers considered the dealers to be appellant's representatives, or that no statement appears there indicating that these salesmen sought to emphasize, or additionally confirm to purchasers, the relationship with appellant which was attributed in such promotional material. We deem it immaterial, also, that the appellant may have never expressly approved the oral misrepresentations under consideration here, in the course of specific sales transactions. Nor is it controlling, moreover, as additionally urged under the appeal, that appellant may have lacked disciplinary authority over salesmen who misrepresented its cookware.

Reference appears in the initial decision to magazine advertising engaged in by the appellant, one of which solicited prospective salesmen to contact appellant for employment in selling cookware with its distributors. In other advertisements, likewise incorporated into the stipulation by reference, the statement appears, among others, that "Each Permanent Cookware representative is a reliable businessman bonded after careful investigation." Appellant urges that the latter of these two categories of magazine advertisements cannot be considered as proof that the concern has held out the dealers as its representatives. The advertisements further state that the products are sold through independent distributors and their courteous local representatives, and in certain of them the public is solicited to participate in the free dinner parties conducted by "your local Permanent representative." The advertisements in question clearly evidence appellant's active cooperation with dealers in promoting the retail sale of its cookware. It would be improper to conclude that the statements contained in the magazine advertisements could not be deemed to constitute evidence relevant and material to a determination of whether appellant may have held salesmen out as its representatives.

It is contended additionally that such latter magazine advertise-

ments may not be properly considered as proof that appellant has held the salesmen out as its representatives for the reason that they were not published until after this proceeding was instituted. In the situation here presented, it is not necessary however, to pass on this point. We note in this connection that the initial decision did not rely upon these advertisements as controlling to the conclusion in question, but rested its determination, instead upon statements contained in the folders. This is evident when it is considered that the decision below, when referring to these magazine advertisements, found that their dissemination attested a "continued effort" by appellant to create consumer confidence in salesmen promoting its products. The contentions advanced under these aspects of the appeal are accordingly rejected.

It is additionally urged in the appeal brief that this proceeding is now moot with respect to appellant's practices inasmuch as its use of the deceptive folders or brochures was discontinued May, 1952, approximately two months prior to institution of this proceeding. Even assuming, arguendo, that appellant does not now contemplate recirculating the deceptive folders, the fact remains that appellant vigorously maintained that its practices were lawful throughout the course of extended hearings in this proceeding, which hearings were terminated only when the stipulation as to the facts was agreed upon for inclusion into the record. We think that issuance of an appropriate order is required to insure against resumption of the challenged practices. The record, moreover, contains no indication that the salesmen, whom appellant has held out as its representatives and currently holds out in its advertising as bonded and reliable sources for its products, have discontinued the false statements which appellant admits were used in sales presentations for its products. The question of mootness is for the Commission to decide,[5] and there is no assurance in this record that the acts complained of will not be resumed. Rejected, accordingly, are appellant's contentions that this proceeding is moot.

Appellant additionally requests in its brief that the proscriptive language appearing in Paragraph Six of the order attached to the initial decision be modified by appending a proviso expressly permitting its use of statements to the effect that depending upon the solubility of the compound in which they occur in foods, minerals are leached out in boiling water. In opposing this request, counsel supporting the complaint asserts he does not challenge the suggested proviso's scientific accuracy on record basis. He urges in this con-

[5] *Guarantee Veterinary Co., et al.* v. *Federal Trade Commission,* 285 Fed. 853.

nection, however, that the present language of Paragraph Six does not proscribe statements in the vein referred to, and we think his interpretation of the paragraph in question is in all respects correct.

We are accordingly denying appellant's appeal in its entirety and are entering our order adopting the hearing examiner's initial decision. The decision is modified insofar as it relates to the name of appellant company, as it appears from the record that on October 29, 1954, the name "Pressed Steel Car Company, Inc." was changed to "U. S. Industries, Inc."

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter came on to be heard by the Commission upon the appeal filed by the respondent Pressed Steel Car Company, Inc., now known as U. S. Industries, Inc., from the initial decision of the hearing examiner.

Having considered the record herein, the Commission, for reasons stated in its accompanying opinion, has determined that the exceptions interposed under the appeal are without merit and should be denied.

The Commission is of the further view that its decision here should take cognizance of certain changes in the appellant's corporate structure and name which have occurred since this proceeding was instituted, and that it should modify the order to cease and desist to the end that such order contain reference to appellant under its present name of U. S. Industries, Inc.

It is ordered, That the appeal of respondent U. S. Industries, Inc., formerly known as Pressed Steel Car Company, Inc., be, and the same hereby is denied.

It is further ordered, That the preamble of the order to cease and desist contained in the initial decision be, and it hereby is, modified by striking the words "Pressed Steel Car Company, Inc., a corporation," and substituting in lieu thereof the words "U. S. Industries, Inc., a corporation, formerly known as Pressed Steel Car Company, Inc."

It is further ordered, That the initial decision, as modified herein be, and it hereby is, adopted as a part of the decision of the Commission.

It is further ordered, That the respondents Permanent Stainless Steel, Inc., and U. S. Industries, Inc., formerly known as Pressed Steel Car Company, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

LESTER SLAMOWITZ ET AL. TRADING AS LEMAR FURS

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND OF THE FUR PRODUCTS LABELING ACT

Docket 6233. Complaint, Sept. 16, 1954—Decision, Feb. 18, 1955

Consent order requiring a furrier in New York City to cease misbranding fur products in violation of the Fur Products Labeling Act.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. John J. McNally for the Commission.

Mr. Leonard Feldman, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Lester Slamowitz and Marvin Imberman, as individuals and copartners trading as Lemar Furs, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Lester Slamowitz and Marvin Imberman are individuals and copartners trading as Lemar Furs with their principal office and place of business located at 345 Seventh Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondents have introduced, manufactured for introduction, sold, offered for sale, transported, and distributed in commerce as "commerce" is defined in the Fur Products Labeling Act, fur products, as that term is defined in said Act, and have manufactured for sale, sold, offered for sale, transported, and distributed fur products which have been made in whole or in part of fur, as that term is defined in said Act, which have been shipped and received in commerce.

PAR. 3. Among the fur products referred to above were stoles. Exemplifying respondents' practice of violating the Fur Products Labeling Act and the Rules and Regulations thereunder is their

(A) Misbranding and false invoicing of such fur products by:

(1) Failing to affix labels to fur products and failing to furnish invoices to purchasers of fur products showing:

(*a*) the name or names of the animal or animals producing the fur contained in the fur products as set forth in the Fur Products Name Guide and as permitted under the Rules and Regulations;

(*b*) that the fur products contain or are composed of bleached, dyed or otherwise artificially colored fur;

(*c*) the name of the country of origin of any imported furs used in fur products.

(2) Falsely and deceptively representing on labels and invoices that their fur products were "Natural Mink," when they were in fact tip-dyed.

(B) Further misbranding their fur products by:

(1) Falsely or deceptively labeling and otherwise falsely or deceptively identifying said fur products;

(2) Mingling non-required information with required information in violation of the Fur Products Labeling Act and Rule 29 of the Regulations;

(3) Failing to set forth on labels the name or other identification issued and recorded by the Commission of one or more persons who manufactured such fur products for introduction into commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

PAR. 4. The aforesaid acts and practices of respondents were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated February 18, 1955, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on September 16, 1954, issued its complaint herein

under the Federal Trade Commission Act, and the Fur Products Labeling Act against the above-named respondents, charging them in certain particulars with having violated the provisions of said Acts and the Rules and Regulations promulgated by the Commission under the Fur Products Labeling Act. The respondents were duly served with process and thereafter requested and obtained time from the Hearing Examiner in which to file answer, which time was last extended to December 8, 1954.

On November 2, 1954, the respondents, however, stipulated in writing with counsel supporting the complaint, therein waiving the filing of an answer and agreeing that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein. Such written stipulation was approved in writing by the Director and Assistant Director of the Commission's Bureau of Litigation.

By said stipulation, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing before the Hearing Examiner or the Commission and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation and, further, that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The aforesaid stipulation for consent order as so approved was submitted on November 10, 1954, to the above-named Hearing Examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. And upon due consideration of the complaint and the stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which such order may be entered, the Hearing Examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each and all

of the parties respondent herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, and the Fur Products Labeling Act, and the Rules and Regulations promulgated by the Commission under the latter Act against the respondents as a whole and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, the same to become final when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondents Lester Slamowitz and Marvin Imberman, as individuals and as copartners trading as Lemar Furs or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the manufacturing for sale, sale, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

(A) Misbranding and falsely invoicing fur products by:

(1) Failing to affix labels to fur products and failing to furnish invoices to purchasers of fur products, showing:

(*a*) the name or names of the animal or animals producing the fur contained in the fur product as set forth in the Fur Products Name Guide and as permitted under the Rules and Regulations;

(*b*) that the fur product contains or is composed of used fur, when such is a fact;

(*c*) that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is a fact;

(*d*) that the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is a fact;

(*e*) the name of the country of origin of any imported furs used in a fur product;

(2) Using on labels attached to fur products and on invoices of fur products, the name of another animal in addition to the name of the animal actually producing the fur contained in the fur product.

(3) Falsely and deceptively, representing on labels and invoices that their fur products are "Natural" when they are in fact tip-dyed.

(B) Misbranding their fur products by:

(1) Falsely or deceptively labeling or otherwise falsely or deceptively identifying said fur products, or using labels affixed to such fur products which contain any form of misrepresentation or deception with respect to such fur products;

(2) Setting out on labels attached to fur products non-required information with required information;

(3) Failing to set forth on required labels attached to fur products the name or other identification issued and registered by the Commission of one or more persons who manufactured such fur products for introduction into commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 18, 1955].

IN THE MATTER OF

JOSEPH BAUM

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND OF THE FUR PRODUCTS LABELING ACT

Docket 6265. Complaint, Nov. 26, 1954—Decision, Feb. 22, 1955

Consent order requiring a furrier in New York City to cease misbranding and false invoicing of fur products in violation of the Fur Products Labeling Act.

Before *Mr. J. Earl Cox*, hearing examiner.
Mr. John J. McNally for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Joseph Baum, an individual, hereinafter referred to as respondent, has violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Joseph Baum is an individual with his principal office and place of business located at 214 West 28th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondent has introduced, manufactured for introduction, sold, offered for sale, transported, and distributed, in commerce, as "commerce" is defined in the Fur Products Labeling Act, fur products and furs, as those terms are defined in said Act, and has manufactured for sale, sold, offered for sale, transported, and distributed, fur products, which have been made in whole or in part of fur which had been shipped and received in commerce. Among such furs and fur products were trimmings, scarves and stoles.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified with respect to the name or names of the animal or animals that produced the fur from which said fur products had been manufactured, in violation of Section 4 (1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4 (2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 5. Certain of said fur products were misbranded in that respondent, on labels attached to fur products,

(*a*) Mingled non-required information with required information in violation of the Fur Products Labeling Act and Rule 29 of the Rules and Regulations promulgated under said Act; and

(*b*) Failed to show the item number of such fur products in violation of the Fur Products Labeling Act and Rule 40 of the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5 (b) (1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in that such invoices misrepresented the name of the animal that produced the fur from which said fur products had been manufactured, in violation of Section 5 (b) (2) of the Fur Products Labeling Act.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in that respondent, on invoices furnished to purchasers and prospective purchasers of said fur products, failed to show the item number of such fur products, in violation of the Fur Products Labeling Act and Rule 40 of the Rules and Regulations promulgated thereunder.

PAR. 9. The aforesaid acts and practices of respondent were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 22, 1955, the initial decision in the instant matter of hearing examiner J. Earl COX, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that the respondent, Joseph Baum, of 214 West 28th Street, New York, New York, has violated the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act by falsely and deceptively labeling and invoicing fur trimmings, scarves, stoles and other fur products which the respondent has manufactured, sold and distributed in commerce, as "commerce" is defined in said Acts.

Without filing an answer, and prior to the date set in the complaint for the initial hearing in this proceeding, respondent entered into a Stipulation For Consent Order with counsel supporting the complaint. This stipulation was approved by the Director and Assistant Director of the Commission's Bureau of Litigation, and transmitted to the Hearing Examiner.

The stipulation provides, among other things, that respondent admits all the jurisdictional allegations set forth in the complaint and that the record herein may be taken as if findings of jurisdictional facts had been made in accordance with such allegations; that the stipulation, together with the complaint, shall constitute the entire record herein; that the complaint may be used in construing the order agreed upon, which may be altered, modified or set aside in the manner provided by the statute for orders of the Commission; that the signing of the stipulation is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint; and that the order provided for in the stipulation and hereinafter included in this decision shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon.

All parties waive the filing of answer, hearings before a Hearing Examiner or the Commission, the making of findings of fact or conclusions of law by the Hearing Examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the Hearing Examiner and the Commission to which respondent may be entitled under the Federal Trade Commission Act or the rules of the Commission, including any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with the stipulation.

The order agreed upon conforms to the order contained in the notice accompanying the complaint, and disposes of all the issues raised in the complaint. The Stipulation For Consent Order is there-

fore accepted, this proceeding is found to be in the public interest, and the following order is issued:

It is ordered, That respondent Joseph Baum, an individual, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacturing for sale, sale, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured.

2. Failing to affix labels to fur products showing:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur product contains or is composed of used fur, when such is a fact;

(*c*) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is a fact;

(*d*) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a fact;

(*e*) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(*f*) The name of the country of origin of any imported furs used in the fur product.

3. Mingling non-required information with required information on labels attached to fur products in violation of Rule 29 of the Rules and Regulations.

4. Failing to show, on labels attached to fur products, the item number of such fur products, as required by Rule 40 of the Rules and Regulations.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur product contains or is composed of used fur, when such is the fact;

(*c*) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(*d*) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(*e*) The name and address of the person issuing such invoice;

(*f*) The name of the country of origin of any imported furs contained in a fur product.

2. Using on invoices the name or names of any animal or animals other than the name or names provided for in paragraph B(1) (a) above, or furnishing invoices which contain any form of misrepresentation or deception, directly or by implication, with respect to such fur product.

3. Failing to show the item number or mark of each fur product on the invoice pertaining to such product, as required by Rule 40 of the Rules and Regulations.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondent Joseph Baum, an individual, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of February 22, 1955].

IN THE MATTER OF

COLUMBIAN BRONZE CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6204. Complaint, May 5, 1954—Decision, Feb. 24, 1955

Consent order requiring the two corporate producers of the "vast bulk" of inboard marine propellers for pleasure craft in the eastern United States, with main offices at Freeport, Long Island, and Grand Rapids, Mich., respectively, to cease cooperating in fixing and maintaining prices, etc., for their products.

Before *Mr. John Lewis*, hearing examiner.

Mr. George W. Williams for the Commission.

Glass, Lynch & Kusch, of New York City, for Columbian Bronze Corp.

McCobb, Heaney & Dunn, of Grand Rapids, Mich., for Michigan Wheel Co., etc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporations listed above in the caption of this complaint, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the said Act (U. S. C. Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Columbian Bronze Corporation is a corporation organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business at Freeport, Long Island, New York, and is sometimes herein referred to as "Columbian."

Respondent Michigan Wheel Company is a corporation organized, existing and doing business under the laws of the State of Michigan, with its principal office and place of business at 239 Market Avenue, S. W., Grand Rapids, Michigan, and is sometimes referred to herein as "Michigan."

The respondent Michigan Wheel Company purchased and wholly owns the trade name "The Federal Propellers," which is generally con-

ducted by Michigan as a separate unit, and at the same address, and is sometimes referred to herein as "Federal."

PAR. 2. The above-named respondents are principally engaged in the production and marketing of marine propellers of the type generally used for pleasure craft and range in size from 8 inches to 65 inches in diameter, some of which may be of a special or unique design. Respondent, Michigan Wheel Company, produces and markets a line of both inboard and outboard propellers. Neither Federal nor Columbian produces or markets outboard propellers.

While propellers are produced by concerns on the West Coast, the business of those on the West Coast is confined largely to the western area of the United States, and the business of respondents is confined largely to the eastern area of the United States.

There are a number of propeller producers and marketers in the United States, as above indicated, most of whom are small producers thereof, and by reason of the position of the respondents in the industry, who produce and market the vast bulk of the said propellers in at least the eastern area, they have a dominant, or potentially dominant, position therein in said eastern area.

In addition to the production and distribution of propellers, respondents produce and market other marine hardware and equipment.

The respondent Columbian Bronze Corporation had an average annual volume of sales of approximately $1,500,000, a large part of which was for the marine propeller segment of its business.

The respondent Michigan, including The Federal Propellers, had gross sales in 1952 of approximately $2,000,000, of which amount approximately $1,500,000 represents the marine propeller segment of its business.

The customers of the respondents are distributors, dealers, boat builders, boat owners and the government, on bids. Distributors are generally defined as those customers who start with and have a stock of propellers valued at $1,000 for inboard and $500 for outboard propellers, and generally perform the function of a distributor. Dealers are those who sell directly to the users thereof.

PAR. 3. The said respondents, in the regular course and conduct of their respective businesses, as hereinabove described, sell and cause the aforesaid products, when sold, to be shipped or otherwise transported to purchasers thereof located in States of the United States other than in the state of origin of said shipment, and in the District of Columbia, and the said respondents have, during all the time herein described, carried on and are now carrying on a constant course of trade in commerce in said products, between and among the various States of the United States and in the District of Columbia.

PAR. 4. The said respondents are in competition with one another and with others in producing, selling and otherwise distributing the products herein described and referred to as inboard marine propellers, in commerce, within the intent and meaning of the Federal Trade Commission Act, except insofar as actual and potential competition has been hindered, frustrated, lessened, restricted, restrained, or eliminated by the acts, practices and methods alleged herein.

PAR. 5. Since on or about January 1, 1947, respondents have engaged in a mutual and common understanding and planned common course of action to lessen, suppress and eliminate competition between and among themselves in the sale of inboard marine propellers, and in furtherance thereof and pursuant thereto have engaged in, done and performed the following acts, practices, methods and things:

(*a*) Discussed with one another prospective price changes and prospective discount schedules and sales terms, in advance of the establishment of such price lists and discount schedules.

(*b*) Exchanged price information in the form of price lists, discount schedules and sales terms before and after sales transactions.

(*c*) Conferred and consulted with one another concerning arrangements with dealers, jobbers and distributors.

(*d*) Discussed and conferred with one another in advance of publication or announcement of prices, or price changes, the charge to be included in the boring of shaft holes in propellers.

PAR. 6. The effect of the aforesaid mutual and common understanding and planned common course of action and the acts, practices, methods and things done in furtherance thereof and in pursuance thereto, as alleged in Paragraph Five above, has been and is to eliminate, lessen and suppress competition between and among the respondents by the establishment of uniform prices and substantially uniform prices and other terms and conditions of sale and charges, and has a dangerous tendency to enhance prices, and to injure and deprive the public of the benefits of free and full competition; and is altogether to the injury and prejudice of the public.

PAR. 7. The aforesaid acts, practices and methods of said respondents constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 24, 1955, the

initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on May 5, 1954, charging them with the use of unfair methods of competition and unfair acts and practices in commerce, in violation of the provisions of the Federal Trade Commission Act. After being duly served with said complaint, the respondents appeared by counsel and filed their separate answers thereto. Thereafter a stipulation was signed by the parties providing for the entry of a consent order disposing of all the issues in this proceeding. Said stipulation has been submitted to the above-named hearing examiner, heretofore duly designated by the Commission, for his consideration in accordance with Rule V of the Commission's Rules of Practice.

Respondents, pursuant to the aforesaid stipulation, have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation further provides that the answer heretofore filed by respondents is to be withdrawn and that the parties expressly waive a hearing before the hearing examiner or the Commission, and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents have also agreed that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, and specifically waive any and all right, power, or privilege to challenge or contest the validity of said order. It has been further stipulated and agreed that the complaint herein may be used in construing the terms of the order provided for in said stipulation, and that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid stipulation for consent order dated November 22, 1954, the answer previously filed by respondents being hereby deemed withdrawn, and it appearing that said stipulation provides for an appropriate disposition of this proceeding, the same is hereby accepted and ordered filed as part of the record herein by the hearing examiner, who makes the following findings, for jurisdictional purposes, and order:

1. Respondent Columbian Bronze Corporation is a corporation, organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business at Freeport, Long Island, New York.

Respondent Michigan Wheel Company is a corporation organized, existing and doing business under the laws of the State of Michigan, with its principal office and place of business at 239 Market Avenue, S.W., Grand Rapids, Michigan.

Respondent The Federal Propellers, a name under which Michigan Wheel Company also does business, is generally conducted by said respondent as a separate unit, and at the same address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That the respondents, Columbian Bronze Corporation, a corporation, and Michigan Wheel Company, a corporation, also trading as The Federal Propellers, their respective officers, agents and employees, and any subsidiary or affiliate, in connection with the offering for sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their said products, namely, marine propellers, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, agreement, understanding or arrangement between themselves or by and between either or both of them and others not parties hereto, to do or perform the following acts or things, namely:

(1) Fixing or maintaining the prices, bids, discounts or other terms or conditions upon which their respective propellers are sold or distributed.

(2) Fixing or maintaining charges for or in connection with the boring of their respective propellers.

(3) Exchanging or otherwise supplying competitors or potential competitors with price information, including discounts and other terms of sale of said products and boring charges, in advance of the announcement of prices, discounts and other terms of sale or boring charges.

Provided, It is understood that this order prohibits exchanging of price information, including discounts and other terms of sale of said products and boring charges, only when done in advance of the public announcement of such information; except that this proviso shall not

be deemed to authorize the exchanging of such information at other times if done pursuant to a planned common course of action, agreement, understanding or arrangement to do the things prohibited in sub-paragraphs (1) and (2) hereof.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 24, 1955].

IN THE MATTER OF

ADVERTISING SPECIALTY NATIONAL ASSOCIATION ET AL.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5952. Complaint, Feb. 7, 1952—Decision, Mar. 4, 1955

Order requiring a trade association of manufacturers and jobbers of advertising specialties, its jobber members and its manufacturing members who sold to jobbers, to cease acting in concert to secure resale price maintenance for the purpose of eliminating price competition among jobbers in each manufacturer's product; and dismissing the complaint as to all the direct-selling manufacturer members of respondent association who did not sell to jobbers.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Rufus E. Wilson and *Mr. George W. Williams* for the Commission.

Kittelle & Lamb, of Washington, D. C., for respondents generally.

Mendelsohn, Lane & Friedman, of Cleveland, Ohio, for Kromex Sales Co.

DECISION OF THE COMMISSION

The Commission, having fully considered the entire record herein including the transcript of the hearings (which shows that all members of Respondent Association were represented by counsel), the briefs of the parties and oral argument of counsel, hereby finds that this proceeding is in the interest of the public and makes this, and the accompanying opinion, its findings as to the facts and conclusion.

Respondent Advertising Specialty National Association, a nonprofit corporation, is a trade association of the respondent manufacturers and jobbers of advertising specialties, organized and existing under the laws of the State of Illinois with its principal office located at 1346 Connecticut Avenue, N. W., Washington, D. C. The jobbing members and the member manufacturers supplying jobbers of said Association are numerous and changing.

The Named Jobber Respondents

The following listed respondent jobber members are representative of all of the jobber members of the respondent Association at the time of the issuance of the complaint, as named in the 1952 Membership Roster (Com. Ex. 45), and who are all respondents herein.

Rowan Printing Company, a North Carolina corporation, with its office and principal place of business at Salisbury, North Carolina.

The Geo. H. Jung Co., an Ohio corporation with its office and principal place of business at 312 East Court Street, Cincinnati, Ohio.

Harry K. Voelp, Inc., a Pennsylvania corporation, with its office and principal place of business at 134 Fourth Avenue, Pittsburgh, Pennsylvania.

Terra Haute Advertising Company, Inc., an Indiana corporation, with its office and principal place of business at 1317 Poplar Street, Terre Haute, Indiana.

Novelty Advertising Company, an Ohio corporation, with its office and principal place of business at 1148 Walnut Street, Coshocton, Ohio.

Respondents Margaret B. Rosen, W. Wells Woodward and Harry C. Lisle, who were jobber members of said Association in 1949, have not been members of the Association since prior to the issuance of the complaint herein. It is believed that the complaint, therefore, should be dismissed as to these three respondents. The term respondents as used hereinafter shall not include these individuals.

The Named Manufacturers Supplying Jobbers, Respondents

The following listed respondents are representative of all of the manufacturers supplying jobbers, who were members of the respondent Association at the time of the issuance of the complaint, as named in the 1952 Membership Roster (Com. Ex. 45), and who are all respondents herein.

The H. L. Moore Company, Inc., a Pennsylvania corporation, with its office and principal place of business located at Cochranton, Pennsylvania.

The George F. Cram Company, Inc., an Indiana corporation, with its office and principal place of business located at 730 East Washington Street, Indianapolis, Indiana.

Western Plastic & Specialty Co., Inc., an Ohio corporation, with its office and principal place of business located at 1130 Williamson Building, Cleveland, Ohio.

Kromex Industries, Inc. (Formerly Kromex Sales Company), and Ohio corporation, with its office and principal place of business located at 880 East 72nd Street, Cleveland, Ohio.

Paul C. Johnson and Esther G. Johnson, individually and as copartners trading as J. E. Johnson Printing Company, with their office and principal place of business located at 8522 Lorraine Avenue, Cleveland, Ohio.

Bernet B. Lewis, individually, and trading as Advertising Specialty Company, having his office and principal place of business at 741 Washington Street, Indianapolis, Indiana.

Robert D. Phelps and John M. Phelps, individually and as co-partners trading as Phelps Manufacturing Company, having their office and principal place of business at 916–922 North 15th Street, Terre Haute, Indiana.

Messenger Corporation, an Illinois corporation, with its office and principal place of business located at Auburn, Indiana.

Sanders Manufacturing Company, a Tennessee corporation, with its office and principal place of business at 122–126 Fourth Avenue, South, Nashville, Tennessee.

The Elliott Calendar Company, an Ohio corporation, with its office and principal place of business at 1148 Walnut Street, Coshocton, Ohio.

Perry L. Engel and Ray Thompkins, individually and as copartners trading as the Coshocton Novelty Company, having its office and principal place of business at Eleventh and Adams Street, Coshocton, Ohio.

The Guy S. Meek Calendar Co., an Ohio corporation, with its office and principal place of business at 1397 Walnut Street, Coshocton, Ohio.

The J. F. Meek Company, an Ohio corporation, with its office and principal place of business at 129½ South Fifth Street, Coshocton, Ohio.

The Beach Leather Co., Inc. (formerly known as The Beach Leather Company), an Ohio corporation, with its office and principal place of business at 1301 Walnut Street, Coshocton, Ohio.

Francis & Lusky Company, Inc., a Tennessee corporation, with its office and principal place of business at 1223–1225 Broadway, Nashville, Tennessee.

Kingston Pencil Corporation, a Tennessee corporation, with its office and principal place of business at 320 North Market Street, Chattanooga, Tennessee.

Daniel L. Townes, individually and trading as Shelbyville Pencil and Novelty Company, having his office and principal place of business at Shelbyville, Tennessee.

The Chaney Manufacturing Company, an Ohio corporation, with its office and principal place of business at 567 East Pleasant Street, Springfield, Ohio.

The Ohio Thermometer Company, an Ohio corporation, with its office and principal place of business at 33 Walnut Street, Springfield, Ohio.

Kurtz Bros., a Pennsylvania corporation, with its office and principal place of business at Fourth and Reed Streets, Clearfield, Pennsylvania.

Respondent Sidney S. Zentner, a member of the respondent Association in 1949, has not been a member since prior to the issuance of the complaint herein. It is believed that the complaint, therefore, should be dismissed as to him. The term respondent as used hereinafter shall not include this individual.

Respondents Scripto, Inc., Shaw-Barton, Inc., and Kemper-Thomas Company are shown by the record to be direct selling manufacturers only. For the reasons stated in the accompanying opinion of the Commission, it is believed that the complaint should be dismissed as to these respondents and to all other unnamed respondent manufacturing members of the Association shown in the 1952 Membership Roster (Com. Ex. 45) to have sold their products directly only and who are not shown to have sold at all through jobbers. The term respondents as used hereinafter shall not include any of these said direct selling manufacturers.

The Named Individual Respondents

Respondent Russel M. Searle is the Secretary of the respondent Association, has been active in all of its affairs, and has participated in the acts and practices hereinafter found to be illegal.

Respondent C. A. Peck, an individual, was President of Newton Manufacturing Company, Newton, Iowa, an unnamed jobber respondent herein, a Director and Chairman of the Executive Committee of the respondent Association during the time the acts and practices hereinafter found to be illegal occurred.

Respondent H. K. Atkins, an individual, was Treasurer of Winthrop-Atkins Co., Inc., 151 Pierce Street, Middleboro, Massachusetts, an unnamed respondent manufacturer supplying jobbers, a Director and member of the Executive Committee of the respondent Association during the time the acts and practices hereinafter found to be illegal occurred.

Respondent H. R. LeRoy, an individual, was President of LeRoy, Inc., an unnamed respondent manufacturer supplying jobbers, and a jobber and a Director of respondent Association during part of the time the acts and practices hereinafter found to be illegal occurred.

Respondent F. P. Spikins, an individual, was President of Bagley and St. Clair, an unnamed respondent manufacturer supplying jobbers, and a member of the Executive Committee during part of the time the acts and practices hereinafter found to be illegal occurred.

Respondents R. J. Bernard, H. E. Kranhold, George E. Wood, J. S. Shaw (erroneously named in the complaint as J. W. Shaw), and J. L. Turner were officials of direct selling manufacturer respondents which did not sell to jobbers. Respondents C. N. Montanye was an official of a company which withdrew from membership in respondent Association prior to the issuance of the complaint herein. It is believed, therefore, that the complaint should be dismissed as to these respondents. The term respondent as used hereinafter shall not include the individuals named in this paragraph.

Commerce and Competition

The respondent member manufacturers and member jobbers of said respondent Association, in the regular course and conduct of their respective businesses, as hereinbefore described, caused the aforementioned advertising specialty products, when sold, to be shipped or otherwise transported to the purchasers thereof located in the States of the United States and in the District of Columbia other than in the State of origin of said shipment. Said respondents have for many years last past carried on and are now carrying on a constant course of trade in commerce in said products between and among the various States of the United States and in the District of Columbia.

Respondent member manufacturers and member jobbers of said respondent Association are in competition with one another and other in manufacturing, selling and otherwise distributing the products herein described and referred to as "advertising specialties," including calendars, in commerce, within the intent and meaning of the Federal Trade Commission Act, except insofar as actual and potential competition has been hindered, frustrated, lessened, restricted, restrained or eliminated by the acts and practices found herein.

Acts and Practices

The respondent member manufacturers supplying jobbers and member jobbers and the individual respondents, acting through and with the assistance of the respondent Association and otherwise, in the manner described in the accompanying opinion of the Commission, have been parties to a planned common course of action and agreement to eliminate price competition with and among the jobbers in the sale of each manufacturer's products by:

1. Requiring respondent member manufacturers to sell advertising specialties to respondent member jobbers on a list price basis only.

2. Requiring respondent member jobbers to resell their products to

the ultimate consumer at prices fixed or established therefor by respondent member manufacturers.

3. Requiring those respondent member manufacturers who sell directly through their own salesmen, as well as to jobbers, to maintain the same list prices for their products on their direct sales as are furnished to respondent member jobbers.

Although, in most cases, the recommendations of the Jobbers Group that the Manufacturers supplying Jobbers establish and maintain resale list prices were carefully worded, it is clear that such action was insisted on by the Jobbers Group. Such collective action by a group of jobbers which constitutes a substantial part of this market had the practical effect of requiring this action by the manufacturers supplying jobbers.

Each of the manufacturers supplying jobbers and jobber members of respondent Association have been informed of the acts and practices engaged in by it in furtherance of said planned common course of action by attendance at meetings, or by being sent Association manuals, bulletins or other notices.

The aforesaid acts, practices, and methods of respondents are all to the prejudice of the public and have a substantial and dangerous tendency and capacity to hinder, lessen, restrict, and restrain competition in commerce in the sale of advertising specialties.

CONCLUSION

The aforesaid acts, practices and methods of respondents are all unfair acts and practices in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

ORDER

1. *It is ordered*, therefore, That the jobber respondents Rowan Printing Company, Geo. H. Jung Co., Harry K. Voelp, Inc., Terre Haute Advertising Company, Inc., Novelty Advertising Company, and each of the jobber members of the respondent Advertising Specialty National Association, as named in the 1952 Membership Roster, and their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale and distribution of advertising specialties in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said jobber respondents

or between or among any one or more of said jobber respondents and other jobbers not parties hereto, to do or perform any of the following acts or practices:

(*a*) Demanding that a manufacturer of said products establish or maintain resale list prices for any of its said products.

(*b*) Threatening to boycott a manufacturer of said products which does not establish or maintain resale list prices for any of its said products.

(*c*) Reporting price cutting of a manufacturer's list prices established as a result of demands or threats of a group of jobbers.

(*d*) Eliminating, lessening or suppressing price competition between or with jobbers of any manufacturer's said products.

2. *It is further ordered*, That the respondent manufacturers supplying jobbers, H. L. Moore Company, Inc., George F. Cram Company, Inc., Western Plastic & Specialty Co., Inc., Kromex Industries, Inc., Paul C. Johnson and Esther G. Johnson, individually and as copartners trading as J. E. Johnson Printing Company, Bernet B. Lewis, individually and trading as Advertising Specialty Company, Robert D. Phelps and John M. Phelps, individually and as copartners trading as Phelps Manufacturing Company, Messenger Corporation, Sanders Manufacturing Company, The Elliott Calendar Company, Perry L. Engel and Ray Thompkins, individually and as copartners trading as Coshocton Novelty Company, The Guy S. Meek Calendar Co., The J. F. Meek Company, Beach Leather Co., Inc., Francis & Lusky Company, Inc., Kingston Pencil Corporation, Daniel L. Townes, individually, and trading as Shelbyville Pencil and Novelty Company, The Chaney Manufacturing Company, Ohio Thermometer Company and Kurtz Bros., and each of the manufacturers selling to jobbers, who are named in the 1952 Membership Roster of the Advertising Specialty National Association, and their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale or distribution of advertising specialties in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from individually or collectively:

Participating in, cooperating with, assisting in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy of jobbers, prohibited by paragraph 1 of this order.

Provided, however, That nothing herein shall be interpreted as prohibiting a manufacturer from establishing and maintaining resale prices on its products in any manner exempted from the prohibitions of the Federal Trade Commission Act by the McGuire Act.

3. *It is further ordered*, That the respondent Advertising Specialty

National Association and respondents Russell M. Searle, C. A. Peck, H. K. Atkins, H. R. LeRoy, and F. P. Spikins and the directors, officers and representatives of said respondent Association do forthwith cease and desist from, individually or collectively, participating in, cooperating with, or assisting in the carrying out of any planned common course of action, understanding, agreement, combination or conspiracy of jobbers prohibited by paragraphs 1 or 2 of this order.

4. *It is further ordered*, That the complaint be, and it hereby is, dismissed as to respondents Margaret B. Rosen, W. Wells Woodward, Harry C. Lisle, Sidney S. Zentner, Scripto, Inc., Shaw-Barton, Inc., The Kemper-Thomas Company, R. J. Bernard, H. E. Kranhold, George E. Wood, J. S. Shaw, J. L. Turner, C. N. Montanye and all of the direct selling manufacturer members of the respondent Association who do not sell to jobbers.

5. *It is further ordered*, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Gwynne not participating as he did not hear oral argument and Commissioner Secrest not participating as oral argument was heard in this matter prior to his appointment to the Commission.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

The complaint in this case charges that the Advertising Specialty National Association, a trade association of manufacturers and jobbers of advertising specialties, its members and certain individuals who have been active in its affairs, have been parties to an unlawful combination to eliminate competition in the sale of their products. The complaint specifically names twenty-three manufacturers, eight jobbers and eleven individuals as respondents and as representatives of the other members of the Association. Answers were filed by all of the named respondents denying the charges. Thereafter, fourteen days of hearings were held in Washington, D. C., during which considerable testimony and a large number of documents were presented in support of and in opposition to the allegations of the complaint.

Upon consideration of the case on the merits, the hearing examiner concluded that the record did not establish the existence of any illegal agreement or combination in restraint of trade. The proceeding is now before the Commission upon appeal from his initial decision dismissing the complaint.

Respondents are members of an unusual industry. They produce and sell hundreds of products, all having a common purpose—good will advertising. These products include calendars, pencils, letter openers, yardsticks, key cases and other articles of many kinds and descriptions. The essential features of advertising specialties are that they are given free by the buyer to the ultimate user and that they bear the advertising imprint of the giver. Prices are determined more by the advertising value of the product than upon the basis of its own utility. The product provides "billboard" space, so to speak, for the advertiser. The products of the different manufacturers, generally, are not comparable; they usually vary as to type, shape, appearance or value. Because of this variety in the products, there could not be much price uniformity between manufacturers' products. Further the record shows there is a high degree of non-uniformity in price even between those products which are comparable. Competition between manufacturers is largely in ideas rather than in price.

The respondent Advertising Specialty National Association is composed of three classes of members: direct selling manufacturers, manufacturers who supply jobbers, and jobbers. In recent years the Jobbers Group and the Manufacturers Supplying Jobbers Group have each met separately and discussed the problems affecting their particular group. There have been no group meetings of the direct selling manufacturers. All classes of members attend the Association's joint meetings. In 1951 eighteen direct selling houses with annual sales of $72,195,744 were members of respondent Association. In the same year, 132 manufacturers who supply jobbers having total sales of $29,943,988, and 144 jobbers with sales to consumers of $17,066,528, were also members of respondent Association. The annual sales of advertising specialties for the entire industry were estimated at $300,000,000.

The complaint alleges that these various classes of respondents have all combined and agreed to restrain competition and that they have used the Association as an instrumentality for the accomplishment of this purpose by taking joint action at Association meetings and by distributing and recommending to the members a jobber's and a manufacturer's Manual.

The complaint sets out a number of specific practices engaged in by respondents in formulating and carrying out their combination. In summary, those alleged practices consisted of requiring respondent manufacturers to establish and maintain consumer list prices on the products they sell to jobbers and requiring the jobbers to resell their products to the consumers at the resale prices so fixed by the manu-

facturers; requiring uniform practices as to discounts to jobbers, compensation to salesmen, anticipatory discount schedules to ultimate purchasers, free goods and charges for sketches and c. o. d. shipments; and preventing member manufacturers from selling to jobbers who are not members of the Association and restricting membership to those jobbers with whom respondents were willing to compete.

There is no charge of price fixing between the respondent manufacturers. The price competition with which this proceeding is concerned is between jobbers selling the products of the same manufacturer. As each of the manufacturers who supply jobbers sells its products to many different competing jobbers, there is competition between the jobbers in the sale of the identical product made by the same manufacturer. Price cutting by one jobber on such merchandise directly affects other jobbers competing in the sale of the same products.

The minutes of the Jobbers Group of the Association show that at practically every meeting there was a discussion of such price cutting. These jobbers, acting collectively at Association meetings, passed and submitted to the Manufacturers Supplying Jobbers Group resolutions urging these manufacturers to establish consumer list prices and to require that their list prices be maintained. The manual and minutes of their meetings show that respondent manufacturers who supply jobbers concurred in the objectives of these resolutions. Respondents contend that the resolutions of the jobbers and the action by the manufacturers' group did not constitute agreements to maintain list prices but were merely expressions by the individuals present that they recognized that maintenance of list prices was a sound business practice and one which insured compliance with the Robinson-Patman Act.

The hearing examiner found that no agreement existed between the manufacturers to establish consumer list resale prices for their jobbers nor to require the jobbers to resell at those prices. He recognized the existence of documentary evidence from which such an agreement could be inferred but refused to draw the inference principally because the prices established by each manufacturer were prices vertically fixed and did not result in price uniformity among the respondent manufacturers. He did not specifically discuss the evidence of agreement between respondent jobbers, nor the resolutions of the Jobbers Group and the Manufacturers Supplying Jobbers Group to establish and maintain resale prices for the purpose of eliminating price cutting on the jobber level.

The complaint charges that all of the respondents, jobbers and manufacturers, entered into a planned common course of action to re-

quire the jobbers to sell their products at the resale prices established by the manufacturers. As discussed hereafter, joint action was taken by the Jobbers Group and the Manufacturers Supplying Jobbers Group at Association meetings as to resale price maintenance. The facts as to what occurred at the meetings are clearly set out in the minutes. There is little dispute as to such facts. The principal issue is whether or not respondents' group action constituted an agreement in restraint of trade.

The record shows that in 1939 officials of the Association mistakenly concluded that sound and practical operations under the Robinson-Patman Act required a manufacturer of advertising specialties to establish and maintain the prices at which its products were to be sold to the ultimate consumer by its jobbers. A resolution to this effect was unanimously adopted at the General Membership Meeting of the Association on October 4, 1939.

Periodically, the Jobbers Group of the Association recorded its desire to maintain manufacturers' published prices and passed resolutions requesting the Manufacturers Supplying Jobbers Group to establish resale list prices, to demand adherence to them by jobbers, and to require their own salesmen, when selling direct to the consumers, to sell at the list prices.

A typical reaction by the manufacturers group was to accept the spirit of the request, to state they would take appropriate steps, and to reaffirm their Robinson-Patman Act resolution. Price cutting from established resale prices was discussed at a joint meeting of the Association with it being emphasized that both jobbers and manufacturers should see to it that they were maintained. The manufacturers group of the Association in its Manufacturers' Manual recommended to manufacturer members that they maintain their resale prices and eliminate price cutting. The jobbers Manual of Practices put out by the Association also recommended to jobbers that they maintain list prices and report jobbers who cut prices. The foreword of the manual contains a statement that it sets forth the majority opinion of the jobber members of the Association.

Increased price cutting through entry of new manufacturers into the field would periodically cause the Jobbers Group to take action. Policing of price cutting was frequently discussed at jobbers meetings with the consensus of the meetings being that instances of price cutting should be reported to the manufacturer involved so that he could take corrective steps. In such cases the manufacturer usually contacted the accused jobber and endeavored to eliminate his price cutting. Campaigns were conducted with approval of both the jobbers

and manufacturers to discourage manufacturers from selling to jobbers at net prices without establishing and maintaining consumer list prices. In this same connection the Secretary of the Association, at the request of the Jobbers Group, developed a form letter which was sent to any manufacturer selling an advertising specialty at a net price to a jobber without establishing a consumer list price. This letter contained the following statements:

"The purpose of this letter is to tell you of the jobber's disfavor of net prices and to show you the traditional, desired and safe method of presentation of prices to the advertising specialty industry. This action was requested at the recent meeting of the Jobbers Group of the Association.

"The established jobber knows that any advertising specialty sold on a net price basis very soon becomes a 'price football'—it will be sold at all kinds of prices—and that the salesmen's commission as well as the jobber's margin suffer thereby. The result is that products presented at a net price to jobbers are avoided by established jobbers. Selling effort is put on products that are presented in the usual manner and which, as a result, have greater stability.

"The worthwhile and responsible jobber will not handle a line unless the manufacturer sets and maintains the price. He cannot afford to put his selling efforts behind a product which is unstable pricewise.

"There is another reason, too, why 'net prices' are not acceptable. It is a legal reason and is based on federal law—the Robinson-Patman Act—popularly known as the anti-price-discrimination law. In view of established selling methods in the advertising specialty industry, this law requires that the manufacturers' established price be maintained. Hence, the effect of the law is that the manufacturer is responsible for the price at which his goods are sold. It is the manufacturer's responsibility to establish his prices to the ultimate buyer—the advertiser—and to insist that such prices are maintained."

The minutes of a meeting of the Jobbers Group and those of a meeting of the Manufacturers Supplying Jobbers Group show that one of these campaigns to induce manufacturers to establish and maintain consumer list prices had produced "most salutary results."

The record indicates that virtually all of the manufacturers in this field do establish and maintain consumer list prices. There is some price cutting by some jobbers, but only in a small percentage of their sales.

These facts establish that the jobbers have acted in concert through the Association and with their suppliers—to secure resale price maintenance for the purpose of eliminating price competition among them-

selves in each manufacturer's products, and that their actions have had a substantial tendency to eliminate price competition among themselves at the consumer level.

This result has been reached with full recognition of the fact that all parties said they believed that the Robinson-Patman Act required manufacturers of advertising specialties to establish resale prices and to maintain them. Products were shipped directly from the manufacturers to the ultimate customer on the jobber's order and, although the sale was to the jobber who resells the products, this method of delivery allegedly caused the belief in the industry that the manufacturer would be liable for any price discrimination by its jobbers. Respondents claim to have been acting throughout on this belief. This does not justify, however, the jobber's concerted action to eliminate price cutting. A mistaken belief that an action is proper does not legalize it. Participation by jobbers in an agreement such as this to suppress price competition between themselves is an unreasonable restraint of trade even though the parties to the combination may have believed their actions were legal.

An additional argument is made that respondents' acts in connection with resale price maintenance were permitted by the Federal Fair Trade Acts. The McGuire Amendment to the Federal Trade Commission Act exempts certain resale price maintenance agreements. However, it provides that nothing therein shall make lawful agreements between competitors, such as the jobbers herein, who are selling on the same competitive level. Similar provisions in the Miller-Tydings Amendment to the Sherman Act have been interpreted as not permitting a combination of producers, wholesalers and retailers to fix and maintain resale prices wherein the retailers and wholesalers agreed to persuade and compel the producers to establish and maintain agreed upon resale prices by entering into formal fair trade contracts. *U. S.* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 296 (1945). The facts in this case can be distinguished but the *Frankfort* decision clearly establishes that a combination including competing retailers to eliminate price competition on the retail level by causing the producers to establish and maintain resale prices is not legalized by resale price maintenance statutes. Here the jobbers, acting jointly through the Association, persuaded producers to agree collectively to take action to establish and maintain resale prices so as to eliminate price cutting between the jobbers. Such concert of action to suppress price competition between jobbers does not come within the exemption of the McGuire Act.

The manufacturers who supply jobbers by accepting as a group the

jobbers' joint request that they establish and maintain consumer list prices and in stating that they would take appropriate steps, thereby agree to establish and maintain resale prices. The manufacturers acted to help the jobbers perfect their joint efforts to eliminate price cutting with full knowledge of their purpose. At one joint meeting of the Association, for instance, the manufacturers and jobbers participated in a lengthy discussion as to ways and means of policing price cutting. Because the problem affected the various manufacturers differently, it was concluded that each manufacturer should decide how to police his own prices. Where a jobber reported an instance of price cutting to a manufacturer, the latter usually contacted the jobber doing the cutting and endeavored to have it eliminated.

Upon this record we feel compelled to disagree with the hearing examiner and to hold that respondent jobbers and the respondent manufacturers supplying them participated in an illegal combination, as alleged in the complaint. This is not true as to respondent direct selling manufacturers who did not participate in this joint action.

As to those allegations concerning alleged agreements to prevent sales to jobbers who were not members of the Association, the hearing examiner correctly held they were not established by the evidence. Agreements were reached as to what classes of business organizations were eligible for membership in the Association as jobbers, but there is a failure of proof as to agreement to boycott non-member jobbers. In fact the record shows the contrary, namely, that respondent manufacturers sold freely to non-member jobbers.[1]

The record further fails to show any illegal agreement as to the remainder of the practices alleged in the complaint, for the reasons adequately set out by the hearing examiner in his initial decision.

The appeal from the initial decision is granted as to the issue of concert of action between respondent jobbers and the respondent manufacturers who supplied them to suppress price cutting through resale price maintenance. In all other respects the appeal is denied.

Special Concurring Opinion

By Mason, Commissioner.

I concur in the decision of the Commission. No respondents were tried in absentia. Members of the Association not named in the

[1] The $17,066,526 in sales by respondent jobbers at consumer prices presumably does not even equal one-half of the $29,943,988 in sales by respondent manufacturers supplying jobbers, as the manufacturers' sales are in terms of invoice prices to the jobber and reflect the discount granted (Tr. 1427). Thus, it appears that over one-half of these manufacturers' sales were made to non-member jobbers.

caption of the complaint were represented by counsel of record and took part in the proceedings.

NOTE. The initial decision, after setting forth the nature of the complaint and the numerous practices which respondents were alleged to have engaged in pursuant to their said unlawful concert of action, is as follows:

The industry is an uncommon one. Although it sells merchandise, the merchandise is incidental to the purpose for which it is bought, namely, advertising. The merchandise must be geared to the message which the customer desires to convey to the ultimate donee. The products are varied: calendars, pencils, thermometers, leather products, yardsticks, paint paddles, cigarette lighters, knives, letter openers, combs, key cases, notebooks, desk sets, refrigerator dishes, windshield scrapers, most of which are imprinted, of course, with the name of the donor for the obvious purpose of advertising his business. They are not homogeneous, nor even for the most part, of like grade and quality. Manufacturers sell either direct to such donors or through jobbers who, in turn, sell to donors. From the evidence it is apparent that the advertising service is more important than the sale of merchandise and that the sale is part of an advertising plan. A single manufacturer customarily sells through several hundred jobbers and on the other hand, a single jobber frequently represents several hundred manufacturers in order to have as wide a selection of articles with donee appeal and advertising message at his command as possible. Samples are supplied to jobbers by manufacturers as are catalogs and price sheets. Suggested selling prices for each product usually appear thereon as well as letter symbols which indicate to the jobber the percentage of discount from the suggested selling price which is to be the jobber's compensation. The jobber typically does not carry any stock of such merchandise or physically handle advertising specialties. When he secures an order it is written up in his office and transmitted to the manufacturer of that product and, if accepted, the product is then manufactured with the advertiser's name imprinted thereon and shipped directly by the manufacturer to the customer in the jobber's name. Invoicing is to the jobber at the suggested selling price less the jobber's discount, responsibility of collection of sale price and the assumption of credit risk being upon the jobber. The jobber's salesman is compensated by a portion of the difference between the suggested selling price and the invoice price to the jobber agreed upon between him and his employer jobber. Direct selling houses eliminate jobbers and compensate their salesmen on a commission basis.

The complaint rates largely on inferences claimed to arise from the

language appearing in the minutes, bulletins, constitution, by-laws, creed, Manufacturers' and Jobbers' Manuals of ASNA. An inference of agreement could reasonably be drawn from several excerpts from these two Manuals, such as that "it was agreed that a particular recommendation be followed" or that a particular "recommendation was adopted" but, on the whole, after reading all the voluminous documentary evidence, it appears to the Examiner that this evidence is inconclusive on the point of agreement. Repeatedly, the words recommended usage or practice are used. Repeatedly, it appears that the jobber group made recommendations to the manufacturer group as to the practices of the latter which were either not adopted or approved, or were passed over. Repeatedly, it also appears that the Association regarded it as illegal to agree or to coerce or to adopt or to enforce any recommendation or consensus of opinion as to what was stated to be sound business practice. Much is made by counsel in support of the complaint about the so-called creed of the Association which contains the statement: "I believe in the maintenance of established policies and selling prices, and believing all this, I hereby pledge my efforts to the maintenance and execution of these principles.", and the constitution and by-laws which contain the quite natural statements that the members are bound thereby. These statements, however, in the Examiner's opinion, are general, platitudinous, bland and indefinite. The foreword to the Manufacturers' Manual, of which also much is made, states that the information contained therein represents the studied and careful consideration of the individual members, that it has been prepared for the guidance of those similarly engaged, and includes only conclusions that have been discussed and approved. In view of the testimony of how these statements were arrived at, the time of their formulation and their purpose, the Examiner finds no conclusive or persuasive evidence of agreement therefrom. There is no question of credibility presented.

Stress is laid on an alleged agreement among manufacturers to maintain list prices and there is evidence from which this could be inferred. Such inference is, however, negatived by the fact that the great majority who did insist on such list price maintenance had done so long prior to any discussion thereof in any ASNA meetings, by the fact that no price uniformity resulted, and by the fact that the insistence was vertical rather than horizontal and not universal.

Much is also made of the alleged conspiracy among manufacturers to require jobbers to maintain suggested resale prices. The ASNA documentary evidence at most shows discussion and recommendations to do so, the testimony by interested witnesses is in the negative. The

facts which lead the Examiner to the conclusion that there existed no such conspiracy or agreement are: (1) there is no competition between many manufacturers' products because such products are not identical or even similar, even in a given category, such as notebooks, because of the wide range of sizes, backing, paper, binding, etc.; (2) there is no price uniformity shown among products which indirectly may compete; (3) neither all manufacturers nor all jobbers did so; (4) there is sound business reason for a manufacturer individually insisting on his customers doing so; (5) price cutting exists in the industry; (6) no price uniformity exists among competing manufacturers where suggested resale prices were in fact maintained by their jobbers. The evidence as a whole indicates that what maintenance existed was an individual matter with each manufacturer down his distributional line rather than a horizontal agreement among manufacturers, as is charged.

As to the remainder of the restraints charged, the Examiner does not believe that these respondents or the other members of the Association purportedly joined by representation, in fact agreed on the business practices charged in the complaint for the following reasons:

(1) Competition in this industry is as to product and idea rather than as to price which is relatively unimportant.

(2) There are but relatively few instances of any inquiry among the membership as to whether or not a recommended business practice was being followed or as to what practices were being followed.

(3) There is no substantial evidence of policing by the Association or by any committee thereof.

(4) There is no evidence of any enforcement, coercion or penalization for failure to follow the recommended business practices or the following contrary or different practices.

(5) Lack of a uniform basis in making charges and lack of resulting uniformity, such as in making charges for samples, sketches, etc.

(6) A practice discussed and recommended in one year is found to be rediscussed and re-recommended in subsequent years, which is certainly not indicative of the claimed agreement on that practice in the first instance. If the agreement had been made and followed there would be no point in rediscussing and re-recommending the same practice. The discussion, if any, would have been confined to suggested amendment or change.

(7) The record abundantly shows that there was no substantial adherence to the practices claimed to have been agreed upon. The evidence is substantial and overwhelming that manufacturers, both direct and through jobbers, and the jobbers themselves, followed whatever

practice their particular activity dictated was best for their own business, whether it agreed with or conflicted with the practices recommended in the Manufacturers' or Jobbers' Manual. The record abundantly indicates that each of the substantial number of members who testified as witnesses did as he saw fit with reference to following any of the eighteen business practices hereinabove set out as being charged in the complaint. If the recommended practices had the binding effect, or the moral obligation to follow, claimed for them, this would not occur. Each of these witnesses gave what appeared to the Examiner to be sound as well as plausible business reasons for his own course of conduct and this testimony is uncontroverted.

(8) Some of the practices alleged to restrain trade are *de minimis* competitively (charging for samples, giving of free goods, service charges on C. O. D. shipments) others are not unreasonable (assuming them to be by agreement and uniform) such as charging for sketches, C. O. D. deposits.

It is true of course, that an agreement to restrain trade even though not effectuated is just as unlawful as though it had been effectuated. (*Keasby & Mattison Co.* v. *F. T. C.*, 159 F. 2d 942; *Socony-Vacuum Oil* v. *U. S.*, 310 U. S. 150; *Fashion Originators Guild* v. *U. S.*, 312 U. S. 457.) However, the record does not here present a picture of an agreement entered into which was subsequently thwarted either by Government prosecution or default of a substantial number of members, or other obstruction. If there existed the claimed agreement the Association and its membership had ample time to carry it out without obstruction or untoward event preventing it. Furthermore, where the fact of the agreement is in itself in question, the subsequent conduct of the parties claimed to have entered into it is still cogent evidence as to whether there was in fact any agreement. The courts and the Commission have repeatedly relied upon postmeeting uniformity of action by those present, and those represented by those present, to sustain a finding of agreement. Neither suggestion nor remonstrance by concert is of itself conclusive evidence of an agreement.

The theory of counsel supporting the complaint as evidenced by his submitted proposed findings of fact, argument and reasons therefor would forbid, as imposing an illegal moral obligation of compliance, any discussion of business practices, any recommendations or suggestions regarding them in any meeting and limit a trade association meeting and activity to listening to non-member speeches, dances, cocktail parties, and individual sales efforts.

The picture presented by this record to the Examiner is of an industry in which rigid business practices such as those charged in the

complaint would be improbable, if not practically impossible, because of the peculiarities of its merchandising, the disparate groups composing the Association, and their diverse commercial interests, the wide range of both products and ideas and the individual situations of those even in the same group, the combinations of product with idea and purpose so multifarious and diverse, and the multiplicity of manufacturers selling through the same jobber. The record presents a picture of growth and increasing competition. Most of the latter is on idea and product rather than on price with ingenuity and imagination unlimited.

The charge of boycott by members of non-members is wholly unsustained. Four of the five member manufacturers who appeared as witnesses sold to more non-members than to members and two non-member jobbers who appeared as witnesses had never been refused any manufacturer's line because they were non-members. There is no affirmative evidence of any boycott in the record. The ASNA minutes show that the selection of jobbing accounts has always been recognized as the individual manufacturer's prerogative and no pressure has been exerted on manufacturers to discourage or prevent them from selling to non-member jobbers.

Accordingly, *it is ordered*, That the complaint be, and the same hereby is, dismissed as to all of the respondents in this proceeding.

IN THE MATTER OF

NORTHERN BROKERAGE CO., NORTHERN PRODUCE EXCHANGE CO., AND GEORGE M. KRISCHEL

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (C) OF THE CLAYTON ACT AS AMENDED

Docket 6274. Complaint, Dec. 22, 1954—Decision, Mar. 10, 1955

Order requiring a corporate food broker, its president, and a second corporate wholesaler in which said president and his wife owned a 50% interest, to cease violating sec. 2(c) of the Clayton Act as amended, by receiving commissions, etc., from sellers on sales made by said broker to the affiliated wholesaler.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 10, 1955, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On December 22, 1954, the Federal Trade Commission issued its complaint in this proceeding, charging Respondents with violating, and having violated, the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936. On January 27, 1955, Respondents filed their answer thereto, admitting all the material allegations of fact set forth in said complaint. Under the provisions of Rule VIII (a) of the Commission's Rules of Practice, the submission of such an answer constitutes a waiver of Respondents' rights to a hearing as to the facts alleged in the complaint, and of all other intervening procedure. The Rule cited also provides that when such an answer is filed, the Hearing Examiner shall make findings as to the facts and conclusions based upon such complaint and answer, and issue an order disposing of the proceeding. Accordingly, the Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the interest

of the public, makes the following findings as to the facts and conclusions drawn therefrom, and, in consonance therewith, issues the order hereinafter set forth.

FINDINGS AS TO THE FACTS

1. Respondent, Northern Brokerage Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 332 Tinker Street, Rockford, Illinois. Respondent corporation is engaged principally in the food brokerage business, representing numerous sellers outside the State of Illinois in the sale and distribution of their food products throughout the northern part of Illinois, and to a lesser extent in the State of Wisconsin. Respondent represents suppliers selling, among other things, canned foods, dried and frozen foods, and fresh fruits and vegetables, all of which are hereinafter sometimes referred to as food products.

Respondent George M. Krischel is president of respondent Northern Brokerage Co. The capital stock of said company is solely owned by Respondent Krischel and members of his family as follows:

George M. Krischel	25 shares
Alma E. Krischel (wife)	24 shares
Joan E. Krischel (daughter)	1 share

As president, and through ownership by himself and his immediate family, Respondent Krischel has exercised, and now exercises, authority and control over the business conducted by said corporate Respondent, including its purchase, sales and operational policies.

2. Respondent, Northern Produce Exchange Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 332 Tinker Street, Rockford, Illinois. Respondent corporation is engaged in business as a wholesaler and distributor of canned fruits and vegetables, dried foods of the various types, and fresh fruits and vegetables, all of which are hereinafter sometimes referred to as food products. Its average sales approximate $1,000,000 annually. Robert B. Johnson is president of this corporation and owns 50% of its outstanding capital stock. Respondent George M. Krischel is vice-president and he, together with his wife, Alma E. Krischel, owns the remaining 50% of the outstanding stock of this corporation. Their share holdings are listed as follows:

Robert B. Johnson	100 shares
George M. Krischel	80 shares
Alma E. Krischel (wife)	20 shares

As vice president and with his wife, owner of fifty percent of the capital stock, Respondent George M. Krischel has exercised, and now exercises, a substantial and influential degree of authority and control over the business conducted by said corporate Respondent Northern Produce Exchange Co., including the direction of its purchase, sales and distribution policies. By virtue of such facts, purchases and other transactions on behalf of said Northen Produce Exchange Co. are also on behalf of said George M. Krischel.

3. Respondent George M. Krischel is an individual engaged principally in business as a broker and wholesale distributor of canned goods, dried fruits, and fresh fruits and vegetables. As such, he represents numerous sellers outside the State of Illinois in selling their merchandise throughout northern Illinois and, to a lesser extent, in the State of Wisconsin. He is president and, along with his immediate family, owns all the capital stock of Respondent Northern Brokerage Co. which has its principal office and place of business located at 332 Tinker Street, Rockford, Illinois. Respondent Krischel is also vice-president of Respondent Northern Produce Exchange Co. and he, along with his wife, Alma E. Krischel, owns 50% of the capital stock of this latter corporation, which is likewise located at 332 Tinker Street, Rockford, Illinois.

As president of Respondent Northern Brokerage Co., and with all the capital stock being owned by him, his wife and unmarried daughter, Respondent Krischel exercises authority and control over the business conducted by Respondent Northern Brokerage Co., including the direction of its sales and operational policies. As vice-president of Respondent Northern Produce Exchange Co., and with 50% of its capital stock being owned by him and his wife, he exercises a substantial and influential degree of authority and control over the business conducted by this corporation, including the direction of its purchases, sales, and distribution policies.

4. In the course and conduct of the business of Respondent Northern Brokerage Co. and the business of Respondent Northern Produce Exchange Co., both businesses being conducted from the same office and at the same address, said individual Respondent, has, since January 1, 1951, continuously made substantial sales for at least two of his principals through Respondent Northern Brokerage Co. to Respondent Northern Produce Exchange Co., of which he is vice-president, and in which he and his wife own a 50% interest. Respondent Northern Produce Exchange Co. has, since January 1, 1951, continuously purchased substantial quantities of fresh fruit through Respondent Northern Brokerage Co. from at least two of its suppliers, whose

places of business are located in States of the United States other than the State of Illinois. On these purchases individual Respondent George M. Krischel, through corporate Respondent Northern Brokerage Co., has been and is now being allowed something of value as a commission, brokerage, or other compensation or allowance, or discount in lieu thereof by said sellers.

5. Said Respondents, both individual and corporate, directly or indirectly, cause said food products so purchased to be transported from said States of origin to destinations in another State. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act in said food products across State lines between said individual Respondent, through corporate Respondents, and the sellers of said food products. Said food products are sold and distributed for use, consumption, or resale within the various States of the United States.

CONCLUSION

The acts and practices of the Respondents, both corporate and individual, in receiving and accepting something of value as a commission, brokerage, or other compensation, or discounts in lieu thereof, on their purchases of food products through a brokerage firm owned or controlled as indicated herein by an officer of, and substantial stockholder in, the corporation making the purchases, as above found, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the Respondent, Northern Brokerage Co., a corporation, its officers and the individual Respondent, George M. Krischel, individually and as an officer of Northern Brokerage Co. and Northern Product Exchange Co., and their respective representatives, agents, and employees, directly or indirectly, or through any corporate or other device in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon any purchase of food products by or for the account of Northern Produce Exchange Co., where George M. Krischel or any other officer of the Northern Brokerage Company are officers of or have a substantial stock ownership in or control of Northern

Produce Exchange Co., either directly or through family ownership of the stock, or where either of the Respondents, Northern Brokerage Co. or George M. Krischel, or both, are the agents, representatives or other intermediaries, or where it or he is acting for or in behalf of, or where it or he is subject to the direct or indirect control of Northern Produce Exchange Co., or any other buyer.

It is further ordered, That the Respondent Northern Produce Exchange Co., a corporation, its officers and the individual Respondent, George M. Krischel, while an officer of or major stockholder in said corporation, and their respective representatives, agents or employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase of food products by or for their account or the account of any of them.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents Northern Brokerage Co., a corporation, Northern Produce Exchange Co., a corporation, and George M. Krischel, individually and as President of Northern Brokerage Co. and Vice President of Northern Produce Exchange Co., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of March 10, 1955].

IN THE MATTER OF

SPADA DISTRIBUTING COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (C) OF THE CLAYTON ACT AS AMENDED

Docket 6254. Complaint, Oct. 25, 1954—Decision, Mar. 11, 1955

Consent order requiring a fruit and vegetable wholesaler in Portland, Ore., to cease accepting commissions or brokerage fees from sellers on purchases for its own account for resale, in violation of sec. 2 (c) of the Clayton Act as amended.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Mr. Irving Korn, of Portland, Ohio, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated, and is now violating, the provisions of subsection (c) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Spada Distributing Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 335 S. E. Morrison Street, Portland, Oregon.

Respondent, to facilitate its business, maintains branch offices and warehouses at Redmond, Brooks, Gaston, and Madras, Oregon, and at Prossner and Moses Lake, Washington.

PAR. 2. Respondent is now engaged and, since July 1, 1946, has engaged in business principally as a wholesaler, buying and selling fresh fruits and vegetables, citrus juices and other food products, all of which are hereinafter designated as food products. It operates farms in the States of Oregon, Washington, and Idaho, which farms produce some of the food products respondent sells, although in addition to the quantity it produces, respondent also purchases substantial amounts from a number of sellers located in various States of the United States.

Respondent distributes and sells its food products principally to buyers located in the States of Oregon, Washington, and Idaho, but it also sells some of its food products to buyers located in various other States of the United States, and a small proportion to buyers in foreign markets.

Said respondent's sales average between $4,000,000 and $5,000,000 annually.

PAR. 3. Respondent in the course and conduct of its said business since July 1, 1946, has purchased, and is now purchasing a substantial quantity of its requirements of food products from sellers located in States other than the States where respondent is located, and as a result of respondent's purchases and its instructions, such food products are shipped and transported by the respective sellers thereof across state lines to respondent and respondent's customers, and there has been since July 1, 1946 and is now a constant current of trade and commerce conducted by said respondent in such products between and among the various States of the United States.

PAR. 4. Respondent, since July 1, 1946, in connection with its purchases of substantial quantities of food products in commerce, as hereinabove alleged, has received and accepted, and is now receiving and accepting, directly or indirectly, commissions, brokerage fees or other compensation or allowances, or discounts in lieu thereof from some, but not all, of the sellers from whom it purchases food products in commerce for its own account for resale.

A specific illustration of respondent's transactions with a seller from whom it is now, and has, since July 1, 1946, received commissions or brokerage fees on purchases of food products for its own account is set out as follows:

Since respondent began business in 1946, it has been a substantial purchaser in its own name, and for its own account for resale of substantial quantities of citrus products, including grapefruit, oranges, and tangerines, from a large seller located in the State of Florida. When the food products purchased by the respondent from the seller are lost or damaged in transit, respondent files claims in its own name and for its own account for such loss or damage against the transportation company responsible, and collects damages. The products so purchased, on arrival at respondent's place of business, are warehoused and insured by respondent at its own expense and for its own account.

Respondent sells such products to its customers, in its own name, and for its own account, and at prices and on terms it determines either receiving a profit or accepting a loss thereon as the case may be. Respondent on such transactions with said seller since July 1,

1946, has received and is now receiving and accepting directly or indirectly commissions or brokerage fees in a substantial amount.

PAR. 5. The foregoing acts and practices of the respondent as above alleged in receiving and accepting directly or indirectly commissions, brokerage fees or other compensation or allowances or discounts in lieu thereof from sellers in connection with its purchases in commerce of food products for its own account as above alleged, violates subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Section 13).

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 11, 1955, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On October 25, 1954, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondent with receiving and accepting, directly or indirectly, commissions, brokerage fees or other compensation, allowances or discounts in lieu thereof from sellers in connection with the purchase in commerce of food products for its own account, in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

Thereafter, on January 17, 1955, Respondent, through its president and counsel, entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the Hearing Examiner a Stipulation For Consent Order disposing of all the issues involved in this proceeding.

Respondent is identified in the stipulation as a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 335 S. E. Morrison Street, in the city of Portland, State of Oregon.

Respondent admits all the jurisdictional allegations set forth in the complaint, and agrees that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance therewith.

All parties hereto request that the answer of Respondent, heretofore filed with the Commission on November 16, 1954, be withdrawn, and

expressly waive the filing of answer, a hearing before a hearing examiner of the Commission, the making of findings as to the facts or conclusions of law by the Hearing Examiner or the Commission, the filing of exceptions and oral argument before the Commission and all further and other procedure before the Hearing Examiner and the Commission to which Respondent may be entitled under the Clayton Act, as amended, or the Rules of Practice of the Commission. It is agreed by Respondent that the order contained in the stipulation shall have the same force and effect as if made after full hearing, presentation of evidence and findings and conclusions thereon. Respondent specifically waives any and all right, power or privilege to challenge or contest the validity of such order.

It is also agreed that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record in this proceeding, upon which the initial decision shall be based. The stipulation sets forth that the complaint herein may be used in construing the terms of the aforesaid order, which may be altered, modified, or set aside in the manner provided by statute for orders of the Commission.

The stipulation further provides that the signing of the Stipulation For Consent Order is for settlement purposes only, and does not constitute an admission by Respondent of any violation of law alleged in the complaint.

In view of the facts outlined above, and the further fact that the order embodied in the aforesaid stipulation is identical with the order accompanying the complaint, it appears that such order will safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, in consonance with the terms of the aforesaid stipulation, the Hearing Examiner grants the request for withdrawal of Respondent's answer, accepts the Stipulation For Consent Order submitted herein, finds that this proceeding is in the public interest, and issues the following order:

It is ordered, That respondent Spada Distributing Company, Inc., a corporation, its officers, and its respective representatives, agents, or employees, directly or indirectly, or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of food products or other commodities made for its own

account, or where the respondent is the agent, representative, or other intermediary acting for, or in behalf of, or subject to the direct or indirect control of any buyer.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondent Spada Distributing Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of March 11, 1955].

IN THE MATTER OF

STENOGRAPHIC MACHINES, INC.; LASALLE EXTENSION UNIVERSITY: AND THE STENOTYPE COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6076. Complaint, Jan. 14, 1953—Decision, Mar. 18, 1955

Order prohibiting an agreement between the only two distributors of mechanical shorthand machines in the United States to divide the market between themselves, one to confine its sales and solicitations mainly to private commercial schools or colleges while the other limited its activities mainly to home-study and correspondence students.

Before *Mr. John Lewis*, hearing examiner.

Mr. George W. Williams and *Mr. Paul H. LaRue* for the Commission.

McBride & Baker, of Chicago, Ill., and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., for Stenographic Machines, Inc.

Staehlin & Jantorni, of Chicago, Ill., for LaSalle Extension University and The Stenotype Co.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on January 14, 1953, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that respondents on November 16, 1948, and thereafter, agreed to divide, and did divide, among themselves the customers in the mechanical shorthand market, thereby tending to limit competition and create a monopoly in said market.

Respondents appeared by counsel and filed motions to dismiss the complaint based, in substance, on the insufficiency of said complaint and the mootness of this proceeding by reason of the cancellation of the alleged agreement of November 16, 1948. Said motions were denied by order of the undersigned hearing examiner dated March 19, 1953. Thereafter, said respondents filed their separate answers, in which they denied having engaged in any illegal practices as charged.

Pursuant to notice, hearings were held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding, in Chicago, Illinois, on various dates between May 4, 1953 and February 3, 1954. At said hearings testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and introduce evidence bearing on the issues. At the conclusion of the evidence offered in support of the complaint, motions were filed by respondents to dismiss the complaint for insufficiency of evidence, and a separate motion was filed by respondent Stenographic Machines, Inc. to strike certain documentary evidence consisting of correspondence between the other two respondents and third persons. Said motions were denied by order of the examiner dated October 23, 1953. At the close of all the evidence proposed findings and conclusions, together with reasons therefor or supporting briefs, were filed by counsel for respondents and counsel supporting the complaint, all of which have been carefully considered. No request for oral argument has been received from counsel.

Upon consideration of the entire record herein, and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

I. The Business of Respondents

A. *Respondent LaSalle*

Respondent LaSalle Extension University (sometimes referred to herein as LaSalle) is a corporation organized, existing and doing business under the laws of the State of Illinois, with its principal office and place of business at 417 South Dearborn Street, Chicago, Illinois. Said respondent operates what is commonly known as a correspondence school, through which it teaches a variety of subjects by the correspondence or home-study method. Among the courses conducted by said respondent is one in the training of students to take dictation by means of a mechanical shorthand machine known as the Stenotype, which is sold in conjunction with said course, the course of instruction being designated as Stenotypy.

The Stenotype machine has been manufactured for LaSalle by other companies, in accordance with LaSalle's specifications. The

prototype of the machine was acquired by LaSalle in 1927, when it purchased the assets of the bankrupt Stenotype Company of Indianapolis. From approximately 1928 to 1936 the Stenotype machine was sold by LaSalle largely to students taking respondent's course in Stenotypy by the correspondence or home-study method, and to a lesser extent to business schools. However, starting approximately in 1936, LaSalle began to sell said machine to students enrolled in schools known as "Stenotype Institutes," which LaSalle assisted in organizing. Although privately owned and operated, said institutes were affiliated with LaSalle under a franchise or other contractual arrangement. The only courses of instruction offered in such schools were courses in Stenotypy, as distinguished from the average business school teaching a variety of commercial subjects. LaSalle assisted in the training of the teachers at such schools and awarded certificates to students upon satisfactory completion of the course. The owner or manager of such school was designated by LaSalle as its Registrar. The students enrolled at such schools signed a dual form of contract with LaSalle and the school. The contract with LaSalle provided for the purchase by the student of the Stenotype machine, texts, lessons and other material from LaSalle, and the contract with the school provided for the furnishing of instruction to the student by the school, and the payment therefor by the student. Separate payment was made by the student to LaSalle and the school, respectively, under the dual contract. This arrangement was known as the "Cooperative Plan."

Some of the independent business schools to whom LaSalle sold had an arrangement similar to that of the Stenotype Institutes in that they operated under a franchise from LaSalle and had a similar contractual arrangement for the purchase of Stenotype machines and text materials, and the payment of tuition.[1] In the case of most independent business schools, however, there was no such formal relationship with LaSalle and they purchased machines or text material from time to time on an individual-transaction basis.

During the latter part of 1948, LaSalle abandoned its so-called cooperative plan of operation and began selling its machines, texts and lesson materials to the schools as a unit, with the latter making their own separate arrangements with the students for the purchase of the machines and materials and the payment of tuition. This method of operation was known as the "Package Plan" for the reason that all of the physical material, including the machine, was sold to the school

[1] One of LaSalle's officials estimated that approximately 10 percent of the independent schools operated under this plan.

as a package. Under the Cooperative Plan, LaSalle had paid a commission to its salesmen on each sale of a machine and the accompanying material, as well as on the amount of tuition from the student, although LaSalle itself received no direct benefit from the tuition since that amount went entirely to the school. Under the Package Plan the school did its own selling to the students, and LaSalle was not obligated to pay any commissions on such sales.

B. *Respondent Stenotype*

Respondent The Stenotype Company (sometimes referred to herein as Stenotype) is a corporation organized, existing and doing business under the laws of the State of Illinois, and has its principal office and place of business at 417 South Dearborn Street, Chicago, Illinois. Respondent Stenotype is a wholly owned subsidiary of respondent LaSalle, and was organized in 1937 for the purpose of handling LaSalle's Stenotype business, including the sale of Stenotype machines, textbooks and lesson materials to Stenotype Institutes, independent business schools and home-study students. During the latter part of 1948 respondent Stenotype became inactive, and its functions involving the sale of courses or machines to institutes, business schools and students were thereafter carried on directly by respondent LaSalle. During the period of its operation Stenotype maintained no separate books and records, and its officers were identical with LaSalle's.

C. *Respondent Stenographic*

Respondent Stenographic Machines, Inc. (sometimes referred to herein as Stenographic) is a corporation organized, existing and doing business under the laws of the State of Illinois, with its principal office and place of business at 318 South Michigan Avenue, Chicago, Illinois. Said respondent was organized in 1938 by Milton H. Wright, a former official of LaSalle who, while he was with the latter, had been in charge of the sale of Stenotype courses and machines. Stenographic developed its own mechanical shorthand machine, known as the Stenograph, and its own text materials. The Stenograph machine is in many respects similar to the Stenotype, both being adaptations of the original Stenotype which LaSalle had acquired in 1927.[2] Stenographic's machine and the text materials prepared by it for use in connection therewith are sold to various independent business schools and to certain institutes formerly affiliated with LaSalle. Up to 1952

[2] It may be assumed that the patents for the original Stenotype had already expired when Stenographic put out its machine.

Stenographic did not manufacture its machine, but had it produced by another company in accordance with Stenographic's specifications. However, in 1952 it acquired its own plant and has been manufacturing the machine itself.

D. *The Relations Between the Two Groups*

During the latter part of 1947 LaSalle cancelled its contract with the company which was then making its machine, for the reason that it could not agree with the manufacturer on the price of the new model which the latter was seeking to develop for it. After several unsuccessful attempts to procure another manufacturer, LaSalle entered into negotiations with respondent Stenographic for the purpose of having the latter manufacture its machine. The agreement between the two companies, which was signed on November 16, 1948, provides that Stenographic will develop and manufacture for LaSalle a new model Stenotype machine, and that, pending completion of the new model, Stenographic would sell to LaSalle a certain number of its own Stenograph machines at a stipulated price per machine. It was agreed that upon completion of the new Stenotype machine LaSalle would pay Stenographic an amount equal to the factory cost of the machine, plus $10.00 per machine. The contract was for a period of five years and obligated LaSalle to purchase at least 5,000 machines per year during the term of the contract. Due to a decline in its business, LaSalle did not actually purchase the full number of machines provided for in the agreement,[3] which was terminated on January 8, 1953, and was superseded by a new arrangement in the form of a letter, under which LaSalle was relieved of the obligation of purchasing any specific number of machines from Stenographic. Under the new arrangement Stenographic was to continue making the Stenotype machines for LaSalle in accordance with the latter's needs, the price thereof to be determined at the time of each order, such orders to be placed for a six-month period. The new arrangement was for an indefinite term, subject to cancellation by either party upon two years' notice in advance. Until it acquired its own plant in 1952, the machines produced for LaSalle under the contract were actually manufactured by the firms which made Stenographic's own machine.

[3] The number of machines actually delivered to LaSalle is as follows:

1949	3,099	1951	3,858
1950	4,232	1952	2,231

E. *Position in the Industry*

Outside of the LaSalle-Stenotype group and Stenographic, there are no other companies in the market at the present time distributing a mechanical shorthand machine. This situation has existed, substantially, since the date of the agreement between the two groups on November 16, 1948, and for several years prior thereto. It is therefore apparent, and is so found by the hearing examiner, that the respondents dominate the mechanical shorthand market.

F. *The Interstate Commerce*

The record establishes, and it is so found, that the respondents sell and distribute their respective mechanical shorthand machines in the various states of the United States, and in the District of Columbia, and that said respondents maintain; that at all times mentioned herein they have maintained, a regular course and current of trade and commerce in said machines between and among the various states of the United States and in the District of Columbia; and that their volume of trade in said machines has been, and is, substantial.

II. The Illegal Practices

A. *Background and Issues*

The complaint herein charges in substance that Stenographic and LaSalle entered into an illegal agreement or understanding to divide the market in mechanical shorthand machines, in pursuance of which Stenographic was to confine its sales and solicitations mainly to private commercial schools or colleges, and LaSalle (including its subsidiary Stenotype) was to confine its sales and solicitations mainly to home-study or correspondence students. This agreement or understanding for a division of the market is alleged to have arisen out of the agreement of November 16, 1948, between Stenographic and LaSalle. In addition to reliance upon the language of the agreement (particularly Clause 7 thereof), counsel supporting the complaint relies on a number of letters which passed between the respondents, and on certain correspondence between LaSalle and its customers or potential customers, which correspondence counsel claims reflects the understanding reached in the agreement of November 16, 1948, to the extent that such understanding may not be entirely clear from the written agreement. Counsel supporting the complaint called as his witnesses various officials of respondents and sought, with varying degrees of success, to get them to accept his interpretation of what

they meant or intended by certain of the language used in the agreement and the various items of correspondence.

In offering their defense respondents relied on substantially the same witnesses as those called in support of the complaint. It was the general contention of these witnesses, at both junctures of their testimony, that counsel supporting the complaint had improperly interpreted the language of the agreement and the correspondence, and they sought to show that the language used was consistent with a non-culpatory purpose on their part. Respondents further endeavored to show, through certain figures and summaries taken from their records, that not only was there no agreement by LaSalle to give up its school business and confine itself mainly to home-study students, but that LaSalle's school business has actually increased since the agreement.

The basic question for decision, therefore, is whether the interpretation of the agreement and correspondence urged by counsel supporting the complaint is the correct one. In order to determine this question it is necessary to refer to the actual language used in the documentary evidence and to consider it in the light of respondents' explanations thereof. To the extent that there is any doubt as to what was meant or intended in the written agreement and correspondence, the evidence offered by respondents to show whether there was any actual division of the market will have a bearing in resolving such doubt.[4]

B. *The Agreement of November 16, 1948*

As previously indicated, the agreement of November 16, 1948, between LaSalle and Stenographic deals with the development of a new model Stenotype machine by Stenographic for LaSalle, and fixes the number of machines to be purchased and the prices to be paid by LaSalle, and contains other provisions with respect to ownership of tools and dies, the duration of the contract and liability thereunder. However, the agreement contains one clause upon which counsel supporting the complaint relies particularly as supporting his contention that the transaction involved an illegal understanding with respect to

[4] In their motion to dismiss at the close of the evidence in support of the complaint, respondents appeared to take the position that the lack of evidence of any actual division of the market was fatal to the case of counsel supporting the complaint. For the reasons appearing in the examiner's order of October 29, 1953, denying the motion to dismiss, the examiner concluded that a showing of an actual division of the market was not a necessary element of the *prima facie* case where the evidence was otherwise sufficient to establish the consummation of an agreement of the type charged. Respondents now apparently accept the correctness of this position, but urge that in determining whether an illegal agreement was ever entered into, the fact that there was no actual division of the market is a factor to be taken into consideration.

a division of the market. The clause in question, which is number 7 of the agreement, reads as follows:

7. It is understood and agreed that LaSalle desires to promote the sale of Stenotypes by it to purchasers of its correspondence courses, and through certain private Stenotype institutes now in existence where sales are made by salesmen under contract with the Stenotype Company or LaSalle. With respect to any school whose contract is terminated, Stenographic, upon notice in writing from LaSalle of such termination, shall thereafter offer Stenographs to such school at Stenographic's regular list prices, terms and conditions.

The explanation for the inclusion of this clause, given by E. J. Kendall, LaSalle's treasurer, who represented that company in the negotiations, was that it was inserted on advice of counsel "to protect us from possible lawsuit when and if somebody should be left without machines or courses because of termination of a contract." When Kendall was asked whether it was contemplated at the time of the agreement that there would be any termination of contracts with some of the schools, he replied in the negative but added that "such things [do] happen in the course of business." When asked to explain how his company could have any liability under a contract with a school if it were terminated, Kendall fell back on the line of defense that he was merely acting on advice of counsel and didn't know himself. Aside from the possible inconsistency between Kendall's testimony regarding the termination of contracts and his testimony elsewhere that LaSalle had no contracts with its schools,[5] the examiner was not impressed with his explanation as to why paragraph 7 was put in the agreement.

M. H. Wright, who represented Stenographic in the negotiations, also claimed that the clause was inserted on advice of counsel, and professed to have no understanding as to the "technical and legal" reasons for its insertion. However, when pressed for an explanation, he stated that it was put in to protect his company from possible "involvement * * * with departments of the government" arising out of a "possible infringment of schools' rights." Among the involvements with the government mentioned by Wright were "certain Congressional acts that make it very difficult to fix a price * * * The Wright-Patman Act (sic), for instance." However, he again fell back to the line of defense that he was not "as well aware of [the technicalities] as counsel was, and we put this paragraph in there on advice of counsel." Despite Wright's and Kendall's professed lack of understanding with respect to this clause, which they claimed was inserted

[5] Although Kendall claimed at one point that there were no contracts with any of the schools since 1940, the examiner is convinced that this information is incorrect, as will elsewhere appear.

on advice of counsel, no effort was made to produce an explanation by counsel, although respondents were represented in this proceeding by the same counsel who assisted in the contract negotiations.

In connection with the proposed findings filed on behalf of Stenographic, counsel states that one of the "considerations [which] prompted counsel for the parties to suggest the inclusion of Paragraph 7 in the contract" was the fact that it was contemplated some of LaSalle's schools might find the Package Plan less desirable than the Cooperative Plan and be left without a source of supply. Aside from the fact that this explanation by counsel in proposed findings has no testimonial value, the examiner cannot accept this as an explanation of why the parties were advised to put clause 7 in the agreement. In the first place Kendall testified that the change from one plan to the other took place in May 1948 or, at least, not later than October 1948. Unless, therefore, Kendall is incorrect the changeover had occurred before the agreement between LaSalle and Stenographic was consummated. Assuming, however, as appears more likely, that the adoption of the package plan occurred at or about the time of the contract between the respondents, it is doubtful that this was the real reason for including clause 7 in the contract. While it may be that the Package Plan was less desirable from the school's point of view than the Cooperative Plan, it is difficult to see how the school stood to gain anything by being given an opportunity to purchase supplies from Stenographic, since this would merely give it the right to purchase another package, Stenographic's rather than LaSalle's. If the change to the Package Plan has any connection with clause 7 it is, in the opinion of the examiner, as a concomitant of an arrangement under which LaSalle was to de-emphasize its school business and not as the cause for inclusion of the clause in the contract.

Turning to the actual language of clause 7, it will be noted that it refers to contracts with schools "now in existence" and provides that LaSalle shall notify Stenographic when such contracts are terminated, in which event the latter would offer to service the schools. While not expressly requiring LaSalle to terminate any contract, the language used contains the suggestion that LaSalle would not try to expand its school activities beyond those then in existence, and that as contracts expired or were terminated, a transfer to Stenographic would be considered. The language used is admittedly, and probably purposely, ambiguous. However, its meaning becomes fairly apparent when considered in the light of the correspondence and other evidence in the record. To a consideration of such evidence, in chronological order, the examiner now turns.

C. *The Correspondence Between Respondents and With Third Persons*

1. The Corresondence Between T. K. Elliott and Herman Miller

During 1948 T. K. Elliott was vice-president and sales manager of respondent Stenotype, and Herman Miller was the owner of The Stenotype Company of California, which was LaSalle-Stenotype's exclusive representative on the West Coast. Miller did business in Los Angeles under the name "The Stenotype Company of California," and also conducted a school in San Francisco under the name "Stenotype Certified School." He had a ten-year contract as LaSalle's West Coast representative, which was due to expire in May, 1949. During the fall of 1948 Miller was having certain difficulty in obtaining machines from LaSalle, which, for a period of about a year, had been without any source of supply. Since about August 1948, Miller had been corresponding with M. H. Wright of Stenographic in an effort to procure machines from the latter. Following a telephone conversation between Miller and Elliott, the latter, in a letter dated November 3, 1948, advised Miller that he had talked to William Allan (LaSalle's president) "about the matter we discussed," and that Allan had agreed with him that "we cannot blame you for wanting to deal directly with Wright under the circumstances." The letter further continues:

> We are perfectly willing to release you from your contract and to cancel orders which you have on hand with us upon receipt of your request. Mr. Allan points out that *inasmuch as this is at the very start of our deal with Wright, it is essential that there be no possibility of misunderstanding.* Therefore he insists that we must receive your letter requesting cancellation of your contract and cancellation of your orders before advising Wright that all is clear. [Emphasis supplied]

The letter also requests that certain machines which were loaned to Miller be returned, upon receipt of which Elliott would "see to it that Wright is advised you are in the clear." On the same day Miller wrote to Elliott to "confirm our agreement by telephone made today in order to permit me to negotiate with Mr. Wright for Stenograph machines." The letter further continues:

> This move is made because of the information that you gave me that you have temporarily discontinued your efforts to bring out the new machine, upon which we have based our last two years' operations.

Other correspondence passed between Miller and Elliott in which there was apparently discussed the possibility of a continuation of relations between them. On December 9, 1948, Elliott addressed the following letter to Miller:

> I have just received your letter of December 3. While I realize that too many personal notes having to do with a piece of business might prove em-

barrassing or confusing later, I am going to take the liberty of tipping you off to something else which I have not told you before this time.

I think I did tell you that we have arranged with Wright to manufacture our new Stenotype machine. Our machine will be a Stenotype, entirely distinctive, and will be the same in appearance as the pictures which you have seen. However, there will be enough standard parts in the two machines so that it will lower the manufacturing costs for both of us and it looks like we will both come out better from the cost standpoint. *Naturally, this deal entails some agreements between us. One of those agreements was that we would not try to steal customers from each other. We agreed with Wright that we would not try to open any new schools which are not at present franchised if he has another school in the immediate territory. It was agreed that should a school wish a franchise and in the event Wright could not satisfy him or he did not want to do business with the Stenograph people, then Wright would release him to us and we could go ahead.*

The reason I am telling you this is because as a result of my effort to cooperate with you and do what you asked me to do, on the phone, we told Wright that In view of the circumstances, we had no objection to your negotiating with him. *Now if he holds us to the terms of the agreement, we cannot renegotiate with you unless he releases you to us.* I know all this sounds rather silly in a letter, but do you get the picture? When you requested that we cancel your contract, I immediately told Wright I had the request and we were willing to go along with you in complying with your request, even though at the same time I wrote you and called your attention to several details in connection with the cancellation. *Naturally we are very anxious not to upset this deal now that we have it clicking pretty well, and I frankly do not know just what Wright's attitude is going to be* if we tell him you have changed your mind and want to continue doing business with us.

I think you should have this inside information because I do not want you to feel that we are trying to get rid of you. I told Wright in the first place that it was all right to negotiate with you because you asked me to. Now if he figures you are his baby, it might cause trouble if I tell him that the deal is off.

If we can work it out with M. H. [Wright], it will be necessary that we start out from scratch with you and that means a new contract * * *.

* * * The best thing you could do at this time would be to write us indicating that you would be willing to consider a new contract on the same basis as the other major schools, so that I can assure our people that you are interested in going right along with us under the new plan. As I say, *I do not know just what Wright's attitude is going to be*, but I am sure we can carry more weight in discussing the matter with him if we are sure that there is going to be no question concerning your deal if and when you come back to us.

You understand of course that this is a little personal note to you and not official. I am not answering your official letter and cannot do so until I get the go-ahead from the boss. If you can see your way clear to writing me along the lines I have suggested, I know it will help me in straightening this thing up, both here and with M. H. [Emphasis supplied.]

Further reference to the arrangement with Stenographic appears in a letter from Elliott to Miller, dated January 26, 1949, as follows:

Your letter of January 17 seems to clear things away pretty well and consideration of a new contract that will be in line with the contracts which will be issued to New York, Chicago and other major offices. There is one point remaining which must be cleared away before we can proceed. *You will recall I mentioned in another letter that we have an agreement with Wright not to interfere with schools which are doing business with him.* At your request we told Wright that we had no objection to your doing business with him and *there is now some possibility that Wright is going to consider you one of his schools* and this will make the situation rather awkward.

Kendall tells me that Wright told him, in a conversation with him the other day, that you had indicated a desire to act as his Pacific Coast distributor. I don't know whether he went along with you on this or whether you even asked him, *but we do have to clear this point away before going further or we could upset our deal with Wright.*

I'll get right after this matter and *if Wright is not claiming you as one of his agencies we will proceed with the matter of the new contract and franchise* just as soon as we have the new contract ready. If I run into any difficulty with Wright concerning this matter, I'll let you know.

Mr. Allan advises that until we get this point clarified we cannot do anything *which could be considered a violation of our agreement with Wright*, so I cannot ship you the 2000 ADVANTAGE booklets which you requested. * * * [Emphasis supplied.]

This letter was supplemented by the following letter addressed to Miller by Elliott on January 27, 1949:

It has been called to my attention that I overlooked mentioning a very important point to you in my letter of January 26. In that letter I indicated that it seemed everything was cleared away for us to negotiate *except for the matter of our agreement with Wright.*

We have handled most of our contacts with Wright through Mr. Kendall for reasons which I will not go into here. When I asked Kendall to clarify with Wright just exactly what your status is, he hit the ceiling. It so happens the Executive Committee has agreed that we will not renegotiate a franchise with any school whose credit standing is in any way questionable. Mr. Kendall pointed out to me very forcefully that your account is delinquent at the present time and that you owe us $4,272.98. He says that he will not recommend renewing the contract until this balance is paid.

* * * If you will get your check in here to cover, I think we can go on from there without too much trouble. [Emphasis supplied.]

The foregoing is persuasive evidence in support of the existence of an agreement of the type charged in the complaint.[6] Miller's letter of November 3 indicates that his consent to a cancellation of his agree-

[6] Respondent Stenographic objected to the receipt of this correspondence in evidence as not binding upon it and, following the receipt of such correspondence (subject to a motion to strike), Stenographic moved at the close of the evidence offered in support of the complaint to strike the correspondence between Stenotype and Miller. As indicated in the hearing examiner's order of October 29, 1953, the motion to strike such correspondence was denied for the reason that the record, in the opinion of the examiner, revealed sufficient independent evidence of an illegal agreement of the type charged to justify receipt of the disputed correspondence and to give it probative effect as an admission made by one of two "co-conspirators."

ment with LaSalle was based on information given him by Elliott that LaSalle was not going to bring out a new machine. For reasons which were not fully developed, LaSalle later decided to continue with Miller if he cleared up the arrears in his account and if Stenographic would consent to the arrangement. Throughout Elliott's letters there is expressed a concern about antagonizing Wright of Stenographic, which, it may be inferred, stemmed from the fact that the latter was LaSalle's vital source of supply. Finally, the letter of December 9 is clear evidence of an illegal agreement to limit competition between the two groups.

LaSalle sought to minimize the effect of this correspondence, and particularly the admissions in the letter of December 9, 1948, by claiming that the statements which Elliott made in the letter of December 9 were untrue, that he had not participated in any of the negotiations for the agreement of November 16, 1948 and was not familiar with its terms, and that he had made untruthful statements to Miller in an effort to get Miller to renew his relationship with LaSalle-Stenotype. However, after careful consideration of the explanations given, the examiner is satisfied that Elliott's information to Miller was substantially in accordance with the facts. Despite his protestations of ignorance, Elliott admitted that he knew the contract was being negotiated when he wrote the letters, that he was informed when it was closed, and that he was generally familiar with the arrangement between the two groups of companies. The statements made by him in the letters reveal too much knowledge on Elliott's part regarding the details of the situation, and conform too much to the information revealed in other correspondence to merit serious consideration of any claim that such statements were merely a coincidental figment of Elliott's fertile imagination.

Respondents argue that the fact Elliott referred to "our deal with Wright" in a letter dated November 3, 1948, indicates the whole story was imaginary, since the agreement was not signed until November 16. However, the evidence shows that negotiations for the agreement had begun in October and it may be inferred that certain understandings had already been reached before the written agreement was signed on November 16.[7] Respondents also argue that the fact that Elliott, in the later correspondence, was trying to hold on to Miller is inconsistent with any agreement to turn over its schools to Stenographic. How-

[7] As previously mentioned, Elliott admitted he knew the contract was being negotiated when he wrote the letters. Kendall admitted that he had discussed the agreement with Elliott "in a general way" while it was being negotiated. Likewise, the latter's letter indicates that he had discussed the matter with William Allan, his company's president, who was not called to deny this.

ever, the fact that LaSalle did not turn over all its schools to Stenographic does not, in the opinion of the examiner, establish that there was no agreement for a division of the market. The complaint, it may be noted, does not charge a complete division of the market, but that each party agreed to confine its sales "largely and principally" to a certain segment of the market. The correspondence between Elliott and Miller is consistent with such an understanding, and indicates a natural desire on LaSalle's part to salvage what it could of its school business without antagonizing Stenographic, to whom it was beholden for its machines.

2. Correspondence Regarding the List of LaSalle's Schools and Institutes

On January 5, 1949, M. H. Wright of Stenographic addressed the following letter to E. J. Kendall of LaSalle:

> Your December 27 letter, *listing institutes and schools in two classes*, is acknowledged; and thank you very much.
>
> *The meanings of this letter, in the light of our conversations, are appreciable, we think*, and accordingly, we are glad to have it. When there's more to say, you'll be saying it; unless we might possibly beat you to it, which is not at all likely. [Emphasis supplied.]

Although this letter refers to a letter by Kendall dated December 27, neither company was able to produce the original or a copy of the letter, and neither could account for its disappearance. Both Kendall and M. H. Wright were less than candid in their testimony about the list of schools and its connection with the agreement between the two companies. Kendall's explanation as to why he sent a list of schools to Wright was that he believed that Wright had asked him "for a record of the schools with whom they were doing business in two classes, Stenotype institutes and schools other than institutes." When asked why Wright would ask for such a list since this was LaSalle's own business, Kendall replied:

> That isn't the way we work. Our books are open. We cooperate with everyone * * *. Whatever Mr. Wright asked me for, whatever was in my power to give him, I gave it to him.

When asked what he understood Wright to mean by his statement that the "meanings of this letter, in the light of our conversations, are appreciable," Kendall replied, "Mr. Wright is a very affable gentleman, he is very appreciative of any little thing." When pressed for a more specific answer as to his understanding of the letter, Kendall replied, "The meaning I got out of that letter was 'Thank you very much for the list you sent to us. This is fine.'" When asked what the "conversations" referred to in the letter were about, Kendall replied, "We talked about everything under the sun."

Wright's testimony regarding the correspondence was in a similar vein. When he was asked as to what he meant by the statement in his letter that the "meanings" were "appreciable" in the light of their conversations, he gave the following reply:

> I could only very vaguely recall a thing of that sort. I have no memory clearly at all. The chances are that it is merely some words that seemed to flow out of a mind that wasn't too busy otherwise.

When asked why he had asked for a list of schools, Wright replied:

> I suppose it was incident to some talk we had had, but what specific purpose there would be in having two lists of schools, I wouldn't know now. I bet there weren't twenty-five schools in all the list. You are in a teapot looking for a tempest here * * *.

When pressed for a more specific answer, Wright expressed the opinion that possibly the list had reference to the "fear we had in our company that some schools * * * might be deprived of a service." When it was pointed out that under paragraph 7 of the agreement his company would be notified of the termination of any contract with schools by LaSalle, Wright gave the following response:

> I probably didn't have to have them [the list of schools]. It probably was an empty gesture. There was no point to it because there wasn't anything involved of any importance.

Wright was reluctant to admit that the request for the list of schools had any connection with paragraph 7 of the agreement. However, his testimony in this respect was contradicted by his son Robert, who stated that the list was requested by him, in accordance with paragraph 7 of the agreement, so that his company could have some idea as to the number of schools they might be called on to supply with machines under that paragraph.

The proximity of this correspondence to the date of entering into the agreement of November 16, 1948 and the close connection between its subject-matter and that of paragraph 7 of the agreement tend, in the opinion of the examiner, to establish that the letter was an outgrowth of the understanding reached by the parties in connection with the agreement. The failure to produce the letter of December 27 and the evasive testimony of Kendall and Wright are both indicative of the pattern of obfuscation which characterized significant portions of their testimony.

3. Correspondence Regarding the Advertisement of the Stenotype Institute of Boston

Respondent LaSalle had an affiliated school in Boston, known as the Stenotype Institute of Boston. This school was owned and op-

erated by one Frank Emery. Stenographic also had an outlet for its Stenograph machine in Boston, known as the Winslow School, which was owned and operated by one Joseph Leddy. The Stenotype Institute of Boston advertised its school in the newspapers as "Boston's Only Stenotype School Authorized by Stenotype Company." A copy of this advertisement was referred to Kendall of LaSalle by Wright, who, according to his testimony, had received it from Leddy in Boston. Following the receipt of the advertisement from Stenographic, Kendall addressed the following reply to Wright on May 2, 1949:

> I am glad you sent to me the clipping of the ad for the Stenotype Institute of Boston.
>
> *I assure you that this will be taken up with Mr. Emery and Mr. Caulfield promptly.*
>
> In a recent talk with Frank Emery, he gave me the impression that *he would co-operate with us fully.*
>
> I will let you hear from us after we have word with regards to this ad. [Emphasis supplied.]

Following this letter Kendall, on May 10, 1949, addressed a further letter to Wright regarding the same subject matter, as follows:

> I checked with Mr. Emery regarding the ad which you turned over to me, and *I am sending you his reply with the attachments* so that you can see at first-hand his reaction.
>
> These matters will take a bit of working out, but I am sure that *if we keep at it everyone concerned will soon learn that his best interest is in promoting a machine shorthand rather than in fighting each other.* [Emphasis supplied.]

The record does not disclose the contents of the letter from Emery referred to in Kendall's letter of May 10, 1949. Although counsel supporting the complaint and the examiner requested respondents to make an effort to ascertain the whereabouts of this letter, they stated that they were unable to find it, and apparently could not account for its disappearance.

Respondents' explanation for the above correspondence was that Leddy had objected to the use of the word "Only" in the advertisement that LaSalle's affiliate was "Boston's Only Stenotype School," for the reason that it would give the public the impression that it was the only school teaching machine shorthand in Boston. Although Emery's school was admittedly the only Stenotype school in Boston, Kendall testified that he had agreed to take up the matter with Emery because:

> We are not interested in anyone fighting each other. We believe the best solution to any problem is to reach a mutual understanding with regard to the method that machine shorthand is superior to shorthand.

When Kendall was asked whether the respondents were actually fighting one another at that time, he testified that "we are always fighting each other, but we believe the very best way to fight each other is on the basis of merit." When asked to explain in what way they were fighting each other, Kendall gave the explanation that: "The only fighting each other I know of is the reference to machine shorthand versus the old-fashioned shorthand." Since neither of the respondents was engaged in promoting the "old-fashioned shorthand," Kendall's answer was obviously a *non sequitur* resulting from his prior lack of forthrightness.

The statement appearing in the letter of May 2 to the effect that Emery had given Kendall the impression that "he would cooperate with us fully" and the further statement in the letter of May 10 that "if we keep at it everyone concerned will soon learn that his best interest is in promoting a machine shorthand rather than in fighting each other," strongly suggest that this correspondence was part of an effort by LaSalle and Stenographic to limit the competition between them. Implicit in both the correspondence and the testimony is the idea that what Wright and Kendall were aiming at was the establishment of a *modus vivendi* between their two customers in Boston which would, in effect, establish a soft, gentlemanly competitive relationship between them. It seems reasonable to infer that Wright would not have made the request that he did, and that Kendall would not have seen fit to procure the cooperation of Emery, were it not for the underlying understanding reached in the agreement of November 16, 1948.

4. Correspondence Regarding the Advertisement in American Business Education Magazine

During May 1949 LaSalle inserted an advertisement in the American Business Education Magazine. The advertisement was headed:

This "C. S." Card is a 3-Way Ticket To Success.

The reference to the C. S. card in the advertisement was to the certificate of "Certified Stenotypist" which was issued by LaSalle to students who completed the course in Stenotypy. The advertisement stated that the certificate of Certified Stenotypist was a "Ticket to Success" to three categories: (1) the job applicant, (2) the employer, and (3) the school. The reference to the advantages of a Certified Stenotypist certificate to the school was contained in the third paragraph of the advertisement, and read as follows:

3. FOR THE SCHOOL * * * turning out a steady parade of Certified Stenotypists builds increased prestige and patronage. Your school succeeds in direct proportion to the ability and success of your graduates. Stenotypy gives them *plus* ability which reflects favorably upon your school.

Following the appearance of this advertisement in the American Business Education Magazine, M. H. Wright of Stenographic addressed the following letter to Kendall of LaSalle on May 31, 1949:

> The current issue of AMERICAN BUSINESS EDUCATION (May, 1949) carries your company ad on the back page. *The third paragraph rather puzzles all of us.* Will you please let us have your comment? [Emphasis supplied.]

Kendall replied to Wright's letter on June 2, 1949, with the following explanation regarding the insertion of the advertisement:

> Everyone here was as surprised as you must have been to know that the ad in the American Business Education Magazine was still running.
>
> This contract was made more than a year ago and everybody forgot all about it. This was a group ad placed simultaneously with several other magazines under contract.
>
> Mack Bennett, our advertising manager accepts the responsibility for this error.
>
> *As I told you, we are not promoting Stenotypy through schools. Our contract covers this agreement. We have not made a single franchise since we entered into our agreement with you and I assure you we do not intend to do so since the Co-op plan was discontinued last October.*
>
> *I am not surprised that you were puzzled by this ad and I assure you that this will be the last copy.*
>
> Funny how these things escape you, isn't it? [Emphasis supplied.]

Wright responded to Kendall's letter of explanation by a letter, dated June 3, 1949, in which he indicated that he accepted Kendall's explanation, with the comment: "It rings true."

Despite the self-evident meaning of the above correspondence, and its unmistakable connection with the agreement for a division of the market, both Kendall and Wright denied that it had any such connotation. Their explanations regarding this correspondence are of a kind with that pertaining to some of the other correspondence previously discussed. When Kendall's attention was first directed to the questioned advertisement which "puzzled" Wright, he stated that it "didn't puzzle me," that "it is a splendid statement and [I] endorse it a hundred per cent," and that he guessed Wright "thought it was good, just as I do." When his attention was called to the fact that in his letter of June 2, 1949 he acknowledged that he "was as surprised as" Wright that the ad was run, he stated that he didn't remember the reason for his surprise. However, at the next group of hearings, after he had evidently had an opportunity for reflection, Kendall explained his surprise was due to the fact that the advertisement was "obsolete," since it had been run under the name of The Stenotype Company and it was now his company's policy to advertise as LaSalle Extension University, and he expressed the opinion that this undoubtedly was why Wright had brought the matter to his attention. Kendall de-

nied that the fact that one of the three categories to whom the advertisement was directed was "The School" had any connection with his "surprise" and Wright's puzzlement.

Aside from the self-contradiction in Kendall's testimony, the plain wording of the correspondence belies his claims. It is clear that Wright did not call the advertisement to Kendall's attention because of any use of an "obsolete" name, but because the "third paragraph" (which was directed at "The School") "rather puzzles all of us." Kendall's "surprise" had nothing to do with the "obsolete" name, but with the fact that the advertisement was directed to schools, which was a breach of his commitment to Wright that, "we are not promoting Stenotypy through schools. Our contract covers this agreement."

Although Kendall claimed that Wright was puzzled because of the use of the obsolete name, Wright was frank enough to concede that the cause of his puzzlement was the fact that the advertisement was directed to schools. However, he gave as the reason for his puzzlement the fact that he didn't believe the Package Plan, to which LaSalle had just changed, would be suitable for a school that "doesn't sell a package or teach a package" which, according to Wright, was primarily intended for home-study use. When Wright was asked what difference it made to his company that LaSalle had seen fit to insert an erroneous ad, he gave the following response:

> To tell the truth, it didn't make a doggone bit of difference what they did. We were needling a little. It was one of those moments and really doesn't have much point.

Wright's explanation about the Package Plan not being suitable for schools is in direct contradiction to the testimony of T. K. Elliott of LaSalle, who stated that, despite the change in the form of contract from the Cooperative to the Package Plan, "basically we were doing the same thing with mainly the same schools." The record shows that a similar advertisement to the one objected to had previously been inserted by LaSalle and was evidently considered to be appropriate, insofar as schools were concerned. The main difference in the two situations was that at the time of the previous insertion there was no agreement between Stenographic and LaSalle.

The general tenor of the correspondence makes it apparent that it was not generated by any whimsical curiosity on Wright's part or considered by Kendall as a casual inquiry from a solicitous associate calling attention to a minor error in an advertisement. The tone of Kendall's reply, in which he found it necessary to "assure" Wright that his company did not intend to franchise any more schools and to "assure" him further that "this will be the last copy," certainly is in-

consistent with the casual character which respondents sought to attribute to this correspondence.

The key to the whole matter is, of course, found in Kendall's statement appearing in his letter of June 2 that:

> * * * we are not promoting Stenotypy through schools. Our contract covers this agreement. We have not made a single franchise since we entered into the agreement with you and I assure you we do not intend to do so, since the Co-op plan was discontinued last October.

Kendall sought to explain this statement about not promoting Stenotypy through schools as being merely an expression of his company's historic policy to confine their promotions mainly to home-study students and institutes, and not to franchise independent business schools. However, the examiner cannot accept this rather fine-spun explanation based on the distinction between institutes and other categories of schools. In the first place, according to Kendall's own testimony, LaSalle did franchise qualified business schools, albeit not to the same extent as its institutes. Secondly, and more important, it is clear from the context of the letter that Kendall was referring to a recent policy and was using the word "schools" in the generic sense. The policy of not promoting Stenotypy through schools is expressly stated in the letter to be an outgrowth of the November 1948 agreement,[8] which agreement in clause 7 thereof deals mainly with the institutes and refers to them as "schools." Although Kendall's letter also refers to the discontinuance of the "Co-op Plan" in connection with his statement that LaSalle did not intend to issue any more franchises, the examiner is satisfied that this was not the underlying reason for the change of policy on the issuance of franchises, since there was nothing about the change from the Co-op to the Package Plan to prevent such issuance.[9] If anything, the abandonment of the Cooperative Plan was a result of the policy not to promote sales to the schools, which resulted from the November 1948 agreement, and was not the cause of the lack of promotion.[10]

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[8] Kendall admitted that the "contract" referred to in the letter is the agreement of November 16, 1948.

[9] Elliott testified that LaSalle was doing basically the same thing with its schools under the Package Plan as it was under the Cooperative Plan.

[10] Originally Kendall claimed that the change in LaSalle's selling plans with the schools occurred in May 1948, thereby indicating that it had no connection with the agreement of November 1948. When his attention was called to the fact that the above letter mentioned October as the date of the change, Kendall gave the explanation that some schools had students enrolled under the old system and that in these instances the plan was put into operation in October. In the light of some of this witness' other testimony this explanation impresses the examiner as an afterthought, and the examiner is of the opinion from the evidence as a whole that the change occurred in October at or about the time when negotiations with Stenographic were in progress.

5. The Letter of February 17, 1950

On February 17, 1950 Kendall addressed the following letter to M. H. Wright:

As much as I would like to, it seems the days pass and I do not get the opportunity to contact you personally, so I am writing you while I have this matter in mind.

The enrollment of Home Study students has not yet reached our expectation of volume. Sales have increased considerably since we have now announced to our field representatives that the revised training and new model Stenotype is now ready for service. We have increased our advertising and *we believe that we will have a steady increase in this volume.*

I have talked to you several times in the matter of school sales. We have not promoted this activity at all, so there is a diminishing volume from this activity.

We caught up with back orders for Stenotypes and we now have a sufficient inventory to take care of the current orders so we find that our present requirements for Stenotypes as within the volume of 100 Stenotypes per week, originally agreed upon.

I feel that this information will be of value to you in the manufacturing process and in scheduling your commitments for Stenographs. * * *. [Emphasis supplied.]

Kendall's explanation of why he had discussed the matter of school sales in the letter with Stenographic was as follows:

That was just the common everyday business things you talk about when you get together and have lunch. You talk about things in general, and you talk about the weather, too.

When he was asked for an explanation of the statement in the letter that he and Wright had talked about the matter of school sales "several times," Kendall gave the following enlightening response:

Sure, we talked dozens of times, we talk every time we get together. He called me on the phone two or three times a week, and said, "How's business?".

In the brief filed by counsel for LaSalle the explanation given for this letter is that Kendall was merely making known LaSalle's "sales progress and inventory position" to Stenographic as the manufacturer of its machine. While this is a perfectly natural reason for Kendall writing to Wright, albeit one which Kendall overlooked in his testimony, it does not destroy the significance of the admission in the letter that the reason for the decline in school sales was that LaSalle had not "promoted this activity at all." Counsel for LaSalle seeks to interpret this remark as merely a statement of LaSalle's historic policy not to promote sales to independent business schools, and as not referring to its affiliated schools, the Institutes. However, the examiner is satisfied from the letter as a whole and from the entire context of events, including the figures of sales to all types of schools (which will be hereafter discussed) that Kendall's reference to school sales was in-

tended in the generic sense and was not limited to a particular type of school. It is significant that the same letter which talks about a diminishing volume of school sales also expresses hope that home-study sales will have a steady increase, although indicating some disappointment with the progress thus far. As will hereafter appear, this latter activity, which it is charged was the one primarily allocated to LaSalle, experienced a considerable upsurge after 1948.

6. The Letter of May 1, 1950 From Wright to Elliott

On May 1, 1950, Wright wrote to T. K. Elliott of LaSalle with regard to an order for some "Stenotype Speed Manuals" on behalf of one of Stenographic's school customers. One of the reasons given by Wright for ordering the manuals on behalf of the customer rather than having the latter communicate directly with LaSalle was because, as stated in Wright's letter, "You no longer assume to serve the schools, I believe." Although not much point was made of this letter during the course of the hearing, the examiner considers it of significance as confirming Wright's understanding of what LaSalle's policy now was with respect to schools. In the setting of the whole case it may be inferred that this understanding arose out of the agreement between the two companies.

7. The Correspondence With the Berean School

Respondent Stenotype received a letter dated July 5, 1950, from a school in Philadelphia known as the Berean School, inquiring as to "the terms and conditions upon which a Stenotype Franchise is granted to schools and if there is an available franchise that we may secure for Berean School in Philadelphia." This letter was received by the secretary of T. K. Elliott, who at that time was apparently on leave of absence from the company due to illness. Elliott's secretary referred the matter to Kendall, placing the following notation on the incoming letter:

Mr. Kendall—Can I offer them Package Plan. No franchise? Would be in competition with Stenograph there.

In response to this notation on the inquiry, Kendall placed the following instruction to Elliott's secretary on the letter:

Explain that we no longer "Franchise" schools. Offer the Package plan (for cash).

The following reply was then prepared for Kendall's signature, addressed to the Berean School under date of July 17, 1950:

* * * You enquired of conditions under which a Stenotype Franchise is granted to schools. *Our present policy does not provide for the granting of*

franchises because we are not in a position to grant the exclusive rights in any territory.

Stenotypy is being offered primarily by Home Study as a complete training program including the Stenotype machine and complete instruction service.

As you know, the success of Stenotype by resident school instruction depends upon trained Stenotype teachers and a sufficient enrollment to justify a specialized instructeress.

We offer the Stenotype machine for sale to you at our special school price of $79.10.

The complete set of Stenotype text consisting of the three theory manuals, the speed manual, and complete set of lessons, may be purchased at $10.00 for the complete package.

As you undoubtedly know, Stenotypy is taught by the Stenotype School in Philadelphia, 1227-29 Walnut Street, Philadelphia. This school, however uses the Stenograph whereas we offer the LaSalle Stenotype.

We are forwarding you some descriptive literature and we invite your further enquiry. [Emphasis supplied.]

The above correspondence indicates that while LaSalle offered to sell machines to the Berean School, it was unwilling to offer the school a franchise. The basis for this refusal appears to be suggested in the note made by Elliott's secretary on the incoming letter that the school "would be in competition with Stenograph" in Philadelphia, thus indicating that the refusal stemmed from the agreement with Stenographic. Kendall claimed in his testimony that his company's policy of granting franchises had been abandoned long before any agreement with Stenographic. However, this testimony was so confused and contradictory that no credence can be given to it. Thus while claiming at one point that his company had had no written contract or franchise since 1940 granting a school exclusive recognition in a particular area, he indicated at another point that schools were still granted exclusive recognition in a certain territory but that "if there is any agreement it is in the form of a * * * letter of designation." Kendall's testimony that there were no franchises or written agreements with schools after 1940 is contradicted by at least three pieces of documentary evidence in the record: (1) his own letter to Wright, dated June 2, 1949 stating that "we have not made a single franchise *since we entered into our agreement with you*" (which would fix the date of discontinuance of franchises as the fall of 1948), (2) the agreement of November 16, 1948, which refers to Stenographic being notified with respect "to any school whose *contract* is terminated," and (3) a letter from Elliott to Miller, dated March 24, 1948, "enclosing copies of the new cooperative school *franchise* forms."[11] Kendall's

[11] Kendall claimed that these forms were something that Elliott had specially prepared for Miller and that they were never executed. However, the same letter states that the new forms "are basically about the same as the old school cooperative fran-

testimony was also contradicted by that of Elliott which was to the effect that in the latter part of 1948 LaSalle sent out letters cancelling "franchises" of schools under the Cooperative Plan "with the idea of issuing a new franchise under the package plan."

Whether they were called franchises, letters of designation or by any other appellation, the examiner has no doubt that schools were granted certain territorial rights and recognition as a LaSalle affiliate until at least the approximate time of the agreement between LaSalle and Stenographic. The examiner is also convinced that the refusal to grant Berean a franchise was based on the understandings arising out of that agreement, as evidenced by the notation made by Elliott's secretary on the incoming letter. Significantly, the Stenographic school in Philadelphia, which was the "competition" referred to in the notation made on Berean's letter, was the former LaSalle affiliate, The Stenotype School of Philadelphia. This school is specifically mentioned in LaSalle's reply to Berean. It appears somewhat unusual to the examiner that LaSalle should advise a potential customer as to the address of the school using the machines and methods of its competitor.

8. The Correspondence with the Lenox School

LaSalle received the following letter, dated December 7, 1950, addressed to it on the stationery of the Lenox School, Public Schools of the District of Columbia, and signed by the "Secretary" of the school:

> I am interested in learning about purchasing a Stenograph Machine. Perhaps, you would be good enough to answer some of my questions, so that I can better tell my class about the machines.
>
> First of all, I contacted the Stenotype Institute here in Washington, D. C. and they informed me that they sell the Stenograph Machine for $79.95 cash. Does your school sell the machine for cash, also, without taking the full Stenotype Course? Or, is it possible to obtain a machine, (or machines) on a credit basis?
>
> At your earliest convenience, kindly let me hear from you. I know of at least three people who are interested in purchasing machines after the Christmas Holiday. * * *.

In response to this letter LaSalle made the following reply, under date of December 14, 1950:

> We acknowledge your letter of December 7th inquiring about the purchase of Stenograph machines.
>
> We do not offer a Stenograph machine which is manufactured by the Stenographic Machines Incorporated, 318 South Michigan Avenue, Chicago, Illinois, and distributed in Washington D. C. by the Stenotype Institute of Washington.[12]

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chise, but they are set up in a more impressive form. We want all schools to be in this franchise."

[12] The latter was a former LaSalle institute which, according to Kendall's testimony, was lost to Stenographic prior to the agreement of November 1948.

We distribute a Stenotype machine which is very similar to the Stenograph machine. *However, our policy is to sell a complete training program including the text and lesson assignment, complete instruction service, and the Stenotype machine as a unit. The price is $225.00.*

We accept orders for the Stenotype machine separately from the training under certain circumstances such as where a student already has had a Stenotype and would like to replace it. The price of the LaSalle Stenotype is $95.00 with a five per cent discount for cash payment with order. Monthly terms of $25.00 down and $10.00 a month may be arranged where credit is established.

Under another cover we have sent to you a copy of "Stenotypy for Better Business Careers," which fully explains the course and shows a picture of the Stenotype machine and gives full details of the training program.

We will appreciate your further inquiry if we may be of service. [Emphasis supplied.]

The above correspondence is cited by counsel in support of the complaint as another instance where LaSalle indicated a reluctance to sell its machines to a school. While in the correspondence with the Berean School, LaSalle had indicated a reluctance to grant a franchise to the school, it was at least willing to sell that school Stenotype machines at the regular school price; whereas in the case of the Lenox School the letter evidences a reluctance to deal with the school except on the basis of selling the complete instruction service for the sum of $225.00.

Kendall's explanation for the statement in the letter that it was LaSalle's policy to limit the sale of machines, apart from the training course, to "certain circumstances such as where a student already has had a Stenotype" was as follows:

We don't think the public schools or any others should buy machines unless they know how to teach Stenotypy.

At a later point in his testimony, when he was asked why he had offered to sell a machine to the Berean School and did not make a similar offer to the Lenox School, Kendall's explanation was that in the case of the Berean School, he understood it as being an inquiry from a school wanting to teach Stenotypy, whereas he understood the inquiry from the Lenox School to be an individual inquiry from the writer of the letter. Despite the fact that the letter of inquiry is written on the stationery of the Public Schools of the District of Columbia and is signed by the Secretary, Kendall nevertheless insisted that he regarded it as an inquiry from an individual because the letter used the first person singular "I" rather than the plural expression "we," the latter being, in his mind, indicative of an official inquiry. The examiner finds it somewhat difficult to accept this rather finespun distinction, particularly since the letter from the school refers to the fact that the

inquiry is being sent "so that I can tell my class about the machines." [13] In any event, Kendall's explanation that his company would only sell machines to certain qualified users, and the statement in the above letter indicating that it was the company's policy only to sell the complete training course, are at variance with Kendall's earlier testimony that:

> Our list, which is available to *anyone* who asks for it, offers a package consisting of the Stenotype machine, the text, lessons and material, *but we won't insist that they buy the entire package.* If they want to buy part of it, they may buy the books or the paper or the machine. It is priced separately.

Another unusual aspect of LaSalle's reply to the Lenox School letter is that, in addition to advising the inquirer as to the address of LaSalle's competitor, a carbon copy thereof was sent to "Wright." [14]

D. *The Contention of Respondents Concerning the Increase of LaSalle's Sales to Schools*

To support their basic contention that counsel supporting the complaint was seeking to draw unjustified inferences from the agreement and the correspondence in the record, and that no illegal agreement was in fact entered into, respondents endeavored to show (1) that the percentage of LaSalle's sales to schools actually increased sharply after 1948 instead of declining, and (2) that LaSalle acquired a number of new schools and institutes after the agreement with Stenographic. It is contended that these figures "demonstrate conclusively" that there was no agreement by LaSalle to confine its effort to the home-study field by discouraging sales to schools. However, the analysis which the examiner has made of the figures submitted by respondents not only fails to bear out respondents' contentions but tends to affirmatively establish that the illegal agreement charged in the complaint was actually carried into execution. Respondents' contentions, based on the figures submitted by them, are discussed below:

1. The Alleged Increase in the Percentage of Sales to Schools

LaSalle introduced into the record a summary of its Stenotype sales from 1928 to 1952. The summary is prepared on an annual basis and purports to show Stenotype sales (a) to home-study students, (b) to Stenotype Institutes and schools under the cooperative and package plans, and (c) to other schools. Two separate sets of figures are given for each of the above three categories, (1) the *number* of

[13] Significantly, in his earlier testimony, before he was asked to explain the difference in the treatment of the two schools, Kendall used the expression "public schools" in referring to the injury from the Lenox School.

[14] This appears from the following notation at the foot of the reply: "CC: Mr. Wright."

sales during the year and (2) the *dollar volume* of such sales. According to computations made by LaSalle, based on the above figures, the "Percent of School Sales to Total Stenotype Sales" has increased from 2.6% in 1948 to 23.9% in 1949.

However, the figures used by LaSalle are not a fair measure of what happened to their school sales during this period. In the first place, the percentages used are based on the number of transactions involved in sales to schools, and include supplies as well as machines. Under this method, a single sale of a book or some paper in a minor amount would have the same weight as a single transaction involving the sale of a number of Stenotype machines and courses.[15] Obviously the standards of comparison are not equal. In order to properly compare the trend of sales to schools with that of all Stenotype sales, the proper measure of comparison is the dollar volume of such sales rather than the number of transactions involved. The difference in the results achieved under the latter method from that used by LaSalle may be seen from the following comparisons:

Percent of School Sales to Total Stenotype Sales

	Based on number of transactions involved	Based on dollar volume of sales
	Percent	*Percent*
1945	0.9	6.44
1946	2.6	18.73
1947	2.3	18.39
1948	2.6	14.17
1949	7.3	17.03
1950	6.4	14.21
1951	14.6	12.00
1952	23.9	18.24

While the above figures do not show any such marked increase in the percentage of sales to schools as that contended by LaSalle, it must also be conceded that they do not show any marked decline in the percentage of sales to such schools. However, these figures do not tell the whole story. The charge is not merely that LaSalle agreed to give up the so-called independent schools, but that it agreed to de-emphasize its school business generally, including its institutes, and to concentrate mainly on home-study students. When reference is made to the figures of sales to institutes (which also include sales to some independent schools operating under the Cooperative and Package plans), an entirely different picture from that urged by LaSalle appears. Set forth below is a comparison of LaSalle's sales for a representative period before and after the contract with Stenographic,

[15] Kendall testified that the column headed "Sales of Stenotypes and Supplies to Schools" includes sales of supplies, such as paper, separate and apart from sales of machines.

showing sales in all three categories (home-study students, institutes and non-contract independent schools), both on the basis of total dollar volume and on the basis of the percentage of such sales as compared to total Stenotype sales:

	Total sales of Stenotypy	Home study		Sales to institutes [1]		Sales to other schools	
		Volume	Percent	Volume	Percent	Volume	Percent
1945	$882,286	$221,132	25.06	$604,326	68.50	$56,828	6.44
1946	828,835	268,711	32.42	404,872	48.85	155,252	18.73
1947	770,451	228,864	29.70	399,924	51.91	141,663	18.39
1948	509,930	185,744	36.43	251,918	49.40	72,268	14.17
1949	425,346	248,959	58.53	103,950	24.44	72,437	17.03
1950	564,164	384,478	68.15	99,509	17.64	80,177	14.21
1951	549,525	417,330	75.94	66,265	12.06	65,930	12.00
1952	523,033	358,395	68.52	69,264	13.24	95,374	18.24

[1] Sales prior to the year 1949 were under the Cooperative Plan; sales beginning in 1949 are those made under the Package Plan.

The above figures show that the significant change which took place in LaSalle's sales occurred in the field of its institutes. In the first year after the contract between the parties such sales declined by more than 50% on a dollar-volume basis, and they continued to decline until by 1952 they only amounted to about one-eighth of LaSalle's sales as compared to their former position of one-half or better. The figures also reveal that home-study sales, which prior to the agreement accounted for approximately one-third of LaSalle's total sales, have increased so that they now represent in excess of two-thirds of such sales. It seems evident from the foregoing figures that the major change which took place occurred, not in the field of the independent business schools, which never amounted to more than about 18% of LaSalle's total business during this period, but in the field of its institutes, and that home study has taken the place of the institutes as the major source of revenue.

2. The Alleged Acquisition of New Schools

LaSalle offered in evidence a list of six institutes and 16 business schools which it claimed were newly acquired after November 1948. The fact that it acquired 22 new schools since the date of its agreement with Stenographic is cited as evidence of the fact that there was no agreement by LaSalle to get out of the school business and to confine itself mainly to home-study students.

An analysis of the list offered by LaSalle and its comparison with other evidence in the record establishes that the list is "highly watered" insofar as it purports to show that LaSalle acquired any substantial amount of new school business subsequent to the date of the agreement with Stenographic. Of the six "new" institutes, five were either old

customers (including two of Herman Miller's schools) or subsidiaries of old customers,[16] and one, by Kendall's own admission, was not an institute but consisted of a woman steno-typist who ordered supplies from LaSalle and gave some private lessons.[17] Of the 16 so-called new independent schools listed by LaSalle, ten are located in communities where there is no rival school purchasing the Stenograph and the sales to these schools are so small and sporadic that there is reason to believe that Stenographic had no interest in acquiring them.[18] In the case of three of the other so-called independent schools, the record shows that they were public schools and that the sales to them were made under a home-study coaching plan.[19] Since LaSalle was supposed to concentrate on home study under the agreement with Stenographic, the sales to these schools are perfectly consistent with that agreement. Of the remaining three schools, there is reason to believe that Stenographic acquired one of them in 1950.[20] Except for the

[16] These include the Stenotype Schools listed in the following cities: Little Rock, Los Angeles, San Francisco, Montreal and Ottawa. The first of these, according to Kendall's own testimony, merely involved a change of name or management of an old customer. The record shows only one sale to the Little Rock school in 1949, six in 1950, and two in 1951. The second and third schools mentioned above are Herman Miller's schools, with whom LaSalle had resumed business. While the school in Montreal is listed by LaSalle as a "new" school, in another exhibit purporting to show its customers as of the day prior to the agreement with Stenographic, the institute in Montreal is listed as a customer. Significantly, at one point in his testimony Kendall stated that no new institutes were formed after 1946. When his attention was called to the above-mentioned exhibit, he quickly added the name of the Montreal school. However, the fact that it is elsewhere listed as an old school suggests that his first answer was correct. The Ottawa School is merely a subsidiary of the Montreal School, according to Kendall's testimony.

[17] This is the school listed in the exhibit as the Stenotype Institute of Denver. The record shows only a single sale to this customer in 1951.

[18] Below are listed the names of these schools and the number of sales to them according to LaSalle's own records:

School	Sales (Based on RX 3)			
	1949	1950	1951	1952
Utterbach Business College, Mattoon, Ill.			1	
Steubenville Business College, Steubenville, Ohio		1	3	5
Northwest Business College, Huron, S. Dak.	1	3	1	
Hine Business College, Midland, Tex.	2			
Rogers Business College, Everett, Wash.	No sales listed.			
Skaget Business College, Mt. Vernon, Wash.	No sales listed.			
Benson School, Clovis, N. Mex.		1	3	1
Amarillo Secretarial School, Amarillo, Tex.	No sales listed.			
Butte Business College, Butte, Mont.		1		
State Vocational School, Dothan Field, Ala.	No sales listed.			

[19] These include East Detroit High School and Lake View High School of Detroit, Michigan and Civic Center, St. Clair, Michigan. Although listed as new schools, LaSalle's record of sales made between March 1, 1949 and December 31, 1952 shows no sales to the first two of these schools.

[20] According to LaSalle's figures, it made two sales to the Massey-Draughon Business College of Montgomery, Alabama, in 1949 and five in 1950. No sales are listed thereafter. However, one of Stenographic's exhibits lists this school as being acquired as a customer in June 1950, and shows sales of $5,428.87 to it up to 1952.

sales to Miller's two schools and two or three other schools, the record shows that the sales to all 22 of the so-called new schools and institutes were on a relatively small scale. The fact of the matter is that despite the "new" acquisitions, LaSalle's sales to its institutes dropped sharply throughout the 1949–1952 period, while the sales to independent schools remained fairly static. This is mute testimony to the unrealistic nature of LaSalle's claims with respect to its expansion during this period, based on the acquisition of new Stenotype schools.

E. *The Competition Between Respondents*

Respondents contend that the competition between them was either nonexistent or on a very minor scale. Such contention is apparently urged as negating the existence of any illegal agreement to curtail competition or as indicating that any agreement which may have been made had no substantial effect on competition. Respondents' basic position in this respect is that LaSalle is fundamentally an educational institution, whose primary interest is the teaching of students rather than the sale of machines, and that its objectives have been pursued mainly through its home-study students and institutes, and only incidentally through independent business schools. On the other hand, it is contended that Stenographic is primarily interested in selling machines and that it has concentrated mainly in the field of independent business schools.

The examiner finds that this claim of the absence of substantial competition between the respondents is lacking in merit. The record shows that there has been substantial competition between LaSalle and Stenographic both with respect to LaSalle's so-called institutes and in the field of independent business schools. When Stenographic entered the field in 1938, the major part of LaSalle's business was with its institutes, the next largest part was in home study, and the smallest, but a nevertheless significant, part was with general business schools.[21] In order for Stenographic to build up its business it was necessary, as Wright himself testified, to "get our schools out of their [LaSalle's] list," and further to take "a lot of theirs [schools] and I

[21] Illustrative of the division of LaSalle's sales during this period, and for some years thereafter, are the following figures of dollar volume of sales:

	Institutes	Home Study	Business schools
1938	$494,624	$221,186	$111,777
1939	561,001	196,968	111,997
1940	511,288	227,216	113,523

am sure maybe they took some of ours." According to Stenographic's own figures, it is today doing business with at least 34 schools which were formerly doing business with LaSalle. Other figures, showing Stenographic's schools as of 1951, reveal that it was doing business with at least 15 schools bearing the name "Stenotype" or "Stenotype Institute" as part of the name of the school.

In the opinion of the examiner, the emphasis put on the fact that LaSalle is primarily an educational institution interested in selling training courses and not shorthand machines is largely a matter of semantics. According to Wright, when he was with LaSalle prior to forming his own company, "most of the emphasis was on machine sales." Assuming, however, that there is some merit to the claim that LaSalle was interested in training students in the art of mechanical shorthand rather than in merely selling machines, the same thing was true of Stenographic's operations since it too sold texts and other materials in connection with its machines and was interested in the proper training of the student.[22] Kendall of LaSalle admitted that basically his company and Stenographic "both promote the sale and distribution of our own machines and training."

Based on the evidence in this record, the examiner is convinced, and finds, that competition between LaSalle and Stenographic has been real and substantial in the non-home-study field, except insofar as it has been curtailed by agreement of the parties. Only in the home-study field is evidence lacking of actual competition. Even in this field, according to Wright, his company has been for some time engaged in the preparation of material for home study use, but has not yet perfected it or put it on the market. Whether Stenographic would have by now entered the home-study field if not for its agreement with LaSalle is a matter as to which there may be room for speculation. In any event, to the extent that LaSalle and Stenographic were not in actual competition in this field, they were at least potential competitors, and any agreement to limit such competition would likewise be illegal.[23]

Summary and Concluding Findings

The examiner is convinced from the record as a whole, and so finds, that respondents entered into an agreement substantially as alleged in the complaint. The fact that these two groups of competitors

[22] Correspondence between Stenographic and Herman Miller, which was introduced in evidence by the former, reveals an unwillingness on its part to sell machines to Miller except on a basis which would recognize the welfare of the students and the fact that Stenographic was interested in something more than the sale of machines.

[23] *U. S.* v. *Aluminum Co. of America,* 148 F. 2d 416, 429; *U. S.* v. *General Dyestuff Corp.,* 57 F. Supp. 642, 648; see also *American Tobacco Co.* v. *U. S.,* 328 U. S. 781, 709.

should have entered into an agreement that one would become the other's source of supply is itself a rather unusual and suspicious circumstance. While there were certain advantages (such as cost-saving arising from the interchangeability of parts) which might have suggested the desirability of such an arrangement as a strictly business deal, nevertheless, the fact that one competitor would be willing to place its source of supply at the mercy of the other, even to the extent of having that competitor develop a new machine for it, suggests that possibly there was more to the arrangement than meets the eye.

When reference is made to the actual terms of the agreement, one is confronted with the somewhat unusual provision that LaSalle would notify Stenographic when it terminated a contract with any of its schools and that Stenographic would then undertake to serve these schools. While the agreement does not expressly require that LaSalle terminate any of its contracts, there is a suggestion in the language used that such a course may possibly have been within the contemplation of the parties. Any doubt on this score, however, is resolved when recourse is had to the subsequent conduct of the parties, which is largely recorded in various items of correspondence.

Thus in December 1948, shortly after the agreement between the parties was consummated, LaSalle sent Stenographic a list of its schools and institutes. The letter transmitting the list was strangely missing at the time of the hearing herein. All that appears is the acknowledgment of the list by Wright of Stenographic with the cryptic comment that: "The meanings of this letter, in the light of our conversations, are appreciable." The explanations given of this correspondence by Wright and by Kendall of LaSalle are a masterpiece in evasion and circumlocution. While they were not required to make admissions helpful to counsel supporting the complaint, their lack of candor is a factor to be considered in evaluating their testimony as a whole and in considering whether the disappearance of certain correspondence was sheer accident. Despite the reluctance of these witnesses to admit that there was any connection between the sending of the list and clause 7 of their contract, the testimony of Wright's son establishes that there was such a connection, albeit it was his claim that this clause of the contract had no illegal connotations. It may be inferred that this list served some useful purpose, since the record shows LaSalle sustained a substantial loss in its business with so-called institutes, and that Stenographic acquired a substantial number of institutes and schools which were formerly customers of LaSalle.[24]

[24] According to a list of schools prepared by Stenographic, purported to show schools which it acquired from LaSalle, 23 of the 34 schools were acquired after December 1948 when it received the above list.

The correspondence which passed between the parties further shows that in May and June 1949, Stenographic undertook to censor the advertising of LaSalle and of one of its customers. Although the advertisement of LaSalle's affiliate school in Boston, which represented itself as the "only" Stenotype school in Boston, was accurate, Kendall undertook at Wright's request to have it modified. The reply from the customer was strangely missing, but in his own reply Kendall assured Wright "that if we keep at it everyone concerned will soon learn that his best interest is in promoting a machine shorthand rather than in fighting each other." The examiner entertains no doubt that if not for the underlying understanding between the two companies Kendall would not have sought to get his customer to modify his advertising and, in fact, that Wright would not have made the request he did in the first place.

The second effort at censorship is perhaps the most damaging piece of evidence, aside from the correspondence with Herman Miller. The advertisement to which Wright objected was one which indicated that LaSalle was still seeking to get business from schools. When Wright asked Kendall to explain this advertisement, the latter indicated that it was all a mistake arising from the fact that his advertising manager had forgotten to cancel an order given prior to their agreement, and assured Wright it would be "the last copy." Kendall's letter contains the unmistakable admission that as a result of the agreement with Stenographic his company was "not promoting Stenotype through schools" and had "not made a single franchise since we entered into our agreement." This explanation was accepted by Wright with the gracious comment: "It rings true."

In February 1950, in advising Wright as to his probable needs under the contract, Kendall indicated that he and Wright had discussed the matter of school sales "several times" and acknowledged that: "We have not promoted this activity at all, so there is a diminishing volume from this activity." The same letter indicates that LaSalle's home-study activities were being expanded, which is also in accordance with the agreement between them. In a letter written by him in May 1950, Wright acknowledged what his understanding of LaSalle's policy now was, viz.: "You no longer assume to serve the schools." It may reasonably be inferred that this understanding on Wright's part was an outgrowth of the agreement and the discussion between himself and Kendall.

The foregoing evidence, in the light of what actually happened to LaSalle's business, is sufficient, in the opinion of the examiner, to establish the existence of an agreement of the type charged in the com-

plaint. However, the correspondence between Elliott and Herman Miller of the Stenotype Company of California lends additional support to the conclusion and serves to clarify some of the details of the understanding. This is particularly true of the letter of December 9, 1948, which states that "naturally" the deal between LaSalle and Stenographic "entails some agreements between us," as follows:

> One of those agreements was that we would not try to steal customers from each other. We agreed with Wright that we would not try to open any new schools which are not at present franchised if he has another school in the immediate territory. It was agreed that should a school wish a franchise and in the event Wright could not satisfy him or he did not want to do business with the Stenograph people, then Wright would release him to us and we could go ahead. * * *.

This exposition by Elliott undoubtedly explains why LaSalle was able to acquire a number of small schools in communities where it was not in competition with Stenographic and why it declined to grant a franchise to a school in Philadelphia where there was such competition. While the correspondence with Miller indicates a desire to keep his business, if possible, there is nothing inconsistent between this and the existence of an agreement with Stenographic to curtail competition, since it is evident from the correspondence that only if the matter was "cleared" with Wright could they continue with Miller.

The correspondence between LaSalle and two potential customers in July 1950 and December 1950 also lends support to the existence of an illegal agreement between LaSalle and Stenographic. It is clear from the July correspondence that the reason why no franchise was granted to the Berean School of Philadelphia was, as indicated on the notation made by LaSalle on the letter received from that school, that: "[We] would be in competition with Stenograph there." In the correspondence with the Lenox School of Washington, D. C. in December 1950, LaSalle endeavored to discourage a sale of machines by advising the inquirer that it was its policy only to sell a complete training course.

While respondents' officials who testified sought to give a different, and largely innocent interpretation, to much of the above correspondence, the hearing examiner cannot accept these explanations in the light of the record as a whole. While some of the explanations might be considered to have a measure of plausibility if considered in isolation, when viewed in the light of the record as a whole, including the many contradictions and evasions above adverted to, the examiner prefers to accept the normal meaning of, and reasonable inferences to be drawn

from, the contemporary documents rather than some of respondents' officials' fine-spun latter-day denials and explanations.[25]

If there were any doubt as to the existence of an agreement substantially as charged in the complaint, it is dissipated when reference is made to the evidence of what happened to respondents' business after the agreement, particularly the figures of LaSalle's sales. Although cited by LaSalle in support of its claim that there was no agreement by it to de-emphasize its school business, the figures actually show to the contrary. These figures show that while LaSalle's sales to its institutes amounted to $251,918 in 1948 and accounted for approximately 50 percent of all Stenotype sales, the sales for such institutes declined by 1952 to $69,264 and accounted for only 13% of all Stenotype sales. During the same period home-study sales, which were $185,744 and accounted for 36 percent of Stenotype sales in 1948, increased to $358,395 in 1952, when they accounted for 68 percent of its sales. Sales to independent business schools, while they showed some decline during the period, did increase in 1952 to above the 1948 level. However, such increase is a negligible factor in the overall loss in non-home-study sales. While no comparable figures of Stenographic's sales during the 1948–1952 period are available, the record does disclose that it acquired approximately 25 former LaSalle schools since the date of its agreement with LaSalle.

From the record as a whole, the examiner is convinced, and so finds, that LaSalle and Stenographic entered into an agreement under which LaSalle was to de-emphasize its school business and place its primary emphasis on home study, and that Stenographic was to be given an opportunity to take over a number of LaSalle's schools as well as to acquire new ones. While it may be that LaSalle still retains some of its institutes and schools, and that there are still some instances of overlap of customers and of competition between them, as respondents claim, this does not disprove the existence of an illegal agreement for a division of customers. As is true in many of such covert agreements, all the details of the arrangement are not always apparent and certain exceptions to the general rule are made. However, while all of the ramifications of the arrangement, or possible exceptions or modifications which the parties may have decided to make, may not be apparent, the fact remains that a basic agreement of the type charged has been established and, furthermore, such agreement has, in substantial measure, been carried into effect. Just as it may not always be possible to establish a perfect competition, it is also not always possible to achieve a perfect agreement to limit competition, since, as the

[25] See *U. S.* v. *U. S. Gypsum Co.*, 334 U. S. 364, 395.

poet said: "The best-laid schemes of mice and men gang aft a'gley." Such lack of perfection in achievement does not gainsay the fact that finite men have entered into an illegal agreement to meddle with the natural laws of competition.

III. The effect of the unfair practices

Respondents contend, in effect, that there can be no substantial adverse effect upon competition of the practices here complained of because the mechanical shorthand business constitutes only a very minor segment of shorthand instruction field generally.[26] The examiner regards this contention as lacking in any substantial merit. The mechanical shorthand business is clearly a separate field of trade or commerce or a definable segment of such a field, in which an agreement of the type above found would have a substantial effect on customers or potential customers in the field. Respondents' argument that their customers or potential customers have available to them other modes of shorthand instruction has as much merit as an argument that a conspiracy between airline carriers can have no effect on commerce because passengers have an opportunity to use rail, bus and other modes of transportation. The fact is that respondents are the only sources from which mechanical shorthand machines can be obtained and have a virtual monopoly in the field. It matters not that the amount of their commerce is relatively small in comparison with other commerce in this general field since it is the "character and not the extent of the control which the law denounces. The amount of interstate commerce or trade involved is not material." [27]

It is accordingly found that the agreement, understanding and arrangement hereinabove found, and the methods, acts, practices and things done and performed in pursuance thereof have a dangerous tendency unduly to hinder competition and tend to create a monopoly in respondents in the trade and commerce hereinabove described and found.

CONCLUSION OF LAW

It is concluded that the acts and practices of respondents and the things done and performed by them as hereinabove found, are all to the prejudice of the public and constitute unfair methods of competi-

[26] Respondents sought to show that in 1949 persons receiving instruction by mechanical shorthand machines constituted less than one percent of all persons receiving intruction in shorthand by pen, pencil and other non-mechanical devices.

[27] *Louisiana Farmers' Protective Union* v. *Great A. & P. Tea Co.*, 131 F. 2d 419, 422; see also *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600, 605.

tion and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

THE REMEDY

Although denying that they entered into any illegal agreement respondents urge, in effect, that no order should be entered against them since the agreement of November 16, 1948, from which the illegal understandings are alleged to flow, was abandoned on January 8, 1953, approximately two weeks prior to service of the complaint in this proceeding upon them. The examiner finds this contention to be wholly lacking in merit. In the first place the alleged abandonment of the agreement of November 16, 1948 on the eve of the issuance of the complaint and after this matter had, to respondents' knowledge, been under investigation for over a year does not demonstrate any particular good faith on their part. In the second place the examiner is not convinced that the basic understanding with respect to a division of customers reached in the 1948 agreement has been abandoned. The letter-agreement of January 8, 1953 continues the basic relationship between the parties and there is no reason to believe that the illegal understanding above found has been abandoned. It is accordingly concluded that this proceeding is in the interest of the public and that an order to cease and desist from the illegal practices found should issue against respondents.

ORDER

It is ordered, That the respondents Stenographic Machines, Inc., a corporation, LaSalle Extension University, a corporation, and The Stenotype Company, a corporation and their respective officers, directors, agents, and employees, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any type of shorthand stenographic machine whether sold or disseminated under the name "Stenotype," "Stenograph" or any other name or designation, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, combination, agreement, or understanding or arrangement between or among themselves, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

(1) Allocate to, among or between themselves or any manufacturer, seller or distributor of said machines, the customers, potential customers, or class of customers to whom said products may be sold, rented, leased, loaned or disposed of in any other manner;

(2) Restrict, restrain or limit in any manner or by any means those to whom any manufacturer, seller or distributor of said products may sell, lease, rent, loan or dispose of same in any other manner; and

(3) Restrict or restrain in any manner or by any means the sale or distribution of said machines.

OPINION OF THE COMMISSION

PER CURIAM:

This is an appeal by respondents from an initial decision finding that respondents have entered into an illegal agreement to divide between themselves the market for mechanical shorthand machines contrary to the provisions of the Federal Trade Commission Act.

LaSalle Extension University operates a correspondence school. Included among the courses taught is that of taking dictation by means of a mechanical shorthand machine. This Respondent also sells a machine which is known as the "Stenotype". Respondent Stenotype Company is a wholly-owned subsidiary of the LaSalle Extension University. Since the latter part of 1948, The Stenotype Company has been inactive and its functions have been taken over by respondent LaSalle. Respondent Stenographic Machines, Inc. is engaged in the manufacture and distribution of a shorthand machine known as the "Stenograph".

The complaint alleges that respondents have entered into an agreement whereby Stenographic was to confine sales mainly to private commercial schools or colleges and LaSalle was to confine its sales principally to home study or correspondence students.

Involved principally are questions of fact. The initial decision contains a detailed statement of the evidence. From an examination of the record, we conclude that the findings, conclusions and order of the hearing examiner are correct and they are adopted as the findings, conclusions and order of the Commission.

It is directed that an order issue accordingly.

ORDER AFFIRMING INITIAL DECISION

Respondents having appealed from the initial decision of the hearing examiner dated July 15, 1954; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision adopting the findings, conclusion and order contained in the initial decision:

It is ordered, That respondents' appeal from the initial decision is denied and the initial decision is hereby affirmed.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order contained in said initial decision.