IN THE MATTER OF

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, ET AL.

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

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

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

Appearances

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

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

COMPLAINT

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

Definitions

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

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

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

Respondents

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

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

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

Jurisdiction

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

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

COUNT I

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

Trade and Commerce

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

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

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

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

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

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

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

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

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

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

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

Acts, Practices and Methods of Competition

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

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

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

(a) Acquisitions of a number of wholesale bakers;

(b) Since 1962, acquisitions of at least three independent bakers in violation of a Federal Trade Commission order forbidding such acquisitions;

(c) Sales of bread below their cost or at predatory prices for substantial periods of time in various geographic markets;

(d) Subsidization of sales below cost or at predatory prices in various geographic markets by sales at higher prices in less competitive geographic markets;

(e) Discriminations in price, directly or indirectly, between purchasers of bread of like grade and quality;

(f) Paying for services or facilities furnished by selected customers and/or furnishing services to selected customers to induce such customers to maintain and/or increase purchases of respondents' bread;

(g) Furnishing allowances, discounts and other things of value to customers or customers' employees for shelf and/or other merchandising space in grocery stores;

(h) Systematic concentration of advertising and consumer and trade promotions in connection with the sale of bread at predatory prices in various geographic markets; and

(i) Use of its dominant position in the sale of snack cakes and profits resulting therefrom to increase bread sales and to subsidize losses thereon. [7]

Effects

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

(a) Impair the ability of wholesale bakers to compete with ITT Continental;

(b) Induce small wholesale bakers to discontinue the production and sale of bread;

(c) Aggravate the trend towards concentration in wholesale baking;

(d) Deter new entrants and raise barriers to entry into the wholesale baking industry;

(e) Deter existing wholesale bakers from undertaking competitive initiatives;

(f) Inhibit growth of existing wholesale bakers;

(g) Substantially hinder, lessen, eliminate, injure, destroy and/or foreclose actual and potential competition in wholesale baking; and

(h) Increase the probability that respondents will attain a monopoly in the wholesale baking industry in each and all relevant geographic markets. [8]

Violations

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

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

COUNT II

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

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

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

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

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

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

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

INITIAL DECISION BY

MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

MAY 1, 1981

INTRODUCTION

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

Initial Pleadings

More particularly, the Commission charged that Continental, until its acquisition by ITT in 1968, and Continental and ITT since that time, have engaged in certain practices with the intent to lessen, hinder or restrain competition or to attain monopolies in wholesale baking in one or more relevant geographic markets. The Commission alleged that the practices challenged included, but were not limited to, the following (*See* Complaint ¶ 18):

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

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

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

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

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

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

Sanctions Order

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

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

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

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

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

Respondents' Discovery

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

Hearings

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

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

Time to File Initial Decision

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

Motions and Abbreviations

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

Collateral Proceedings

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

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

In addition, the Commission investigated Continental's practices in