

Complaint

60 F.T.C.

IN THE MATTER OF
FOREMOST DAIRIES, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 6495. Complaint, Jan. 17, 1956—Decision, Apr. 30, 1962**

Order requiring the fourth largest dairy firm in the country to sell ten industry concerns it acquired in 1952, 1953, and 1955, which acquisitions might substantially lessen competition or tend to create a monopoly, in violation of Sec. 7 of the Clayton Act.

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 Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent, Foremost Dairies, Inc., hereinafter referred to as "Foremost", now and at all times relevant herein, is a corporation organized and existing under the laws of the State of New York with its main and principal office located at 2903 College Street, Jacksonville, Fla.

PAR. 2. Foremost is now and at all times relevant herein has been engaged in the purchase, processing and distribution of a diversified line of dairy products. Where used herein the term "dairy products" shall include one or any number of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk, and evaporated milk. Foremost distributes the various dairy products to retail consumers and to stores, restaurants, hotels and other miscellaneous outlets. Prior to and at the time of the acquisitions herein, Foremost purchased, processed and distributed dairy products in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, and still does.

PAR. 3. Foremost was initially organized in October 1931 under the laws of the State of Delaware and in 1949 Foremost was merged with

*As modified May 15, 1962.

and into Maxson Food System, Inc., a New York corporation, the continuing corporation bearing the name Foremost Dairies, Inc. In the period from 1932 to 1950, inclusive, prior to the time Section 7 of the Clayton Act was amended, Foremost acquired by purchase the stock or assets of 38 separate dairy product concerns with plant locations or equipment located in 47 communities in the States of Florida, Texas, South Carolina, Alabama, Georgia, Tennessee, Louisiana, New York, Pennsylvania, and North Carolina. At the expiration of the first year of operation of Foremost in 1932, said company had gross sales of approximately \$1,000,000 and for the year 1950 Foremost had gross sales of approximately \$52,000,000, with net sales of approximately \$48,000,000.

PAR. 4. In a series of transactions beginning in January 1951, subsequent to the time Section 7 of the Clayton Act was amended, Foremost has acquired the stock or assets of the following-named corporations engaged in the purchase, manufacture or processing and distribution of dairy products. All the acquired corporations at the time of the said acquisitions, in the regular course of business, either purchased, processed or distributed dairy products throughout the various states of the United States or purchased and received shipments of dairy products and related equipment from manufacturers and processors located throughout the United States. All the acquired corporations, prior to and at the time of the acquisitions, purchased, processed or distributed dairy products in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. Such acquisitions include the following:

- (1) In January 1951 Foremost acquired a dairy plant formerly owned by Mrs. Tuckers Foods, Inc., a Delaware corporation, located at Sherman, Tex.;
- (2) In February 1951 Foremost acquired Central Dairies, Inc., a South Carolina corporation, with main office located at Columbia, S.C.;
- (3) In May 1951 Foremost acquired Sunshine Dairy Products, Inc., a Florida corporation, with main office located at Gainesville, Fla.;
- (4) In June 1951 Foremost acquired Royal Dairy Products, a Florida corporation, with main office located at Tampa, Fla.;
- (5) In October 1951 Foremost acquired Lauren's Pasteurizing Plant, Inc., a South Carolina corporation, with main office located at Laurens, S.C.;
- (6) In February 1952 Foremost acquired International Dairy Supply Co., a Nevada corporation, with main office located at Oakland, Calif.;
- (7) In February 1952 Foremost acquired International Dairy Engineering Company, a California corporation, with main office located at Oakland, Calif.;
- (8) In February 1952 Foremost acquired Diamond Dairy, Inc., a Nevada corporation, with main office located at Oakland, Calif.;
- (9) In February 1952 Foremost acquired Campos Dairy Products, Ltd., a Hawaii corporation, with main office located at Lanikai, Hawaii;
- (10) In March 1952 Foremost acquired Gunn Ice Cream Co., a Florida corporation, with main office located at Pensacola, Fla.;

Complaint

60 F.T.C.

- (11) In March 1952 Foremost acquired Graham's Dairy, Inc., a Florida corporation, with main office located at Pennsuco (Miami), Fla. ;
- (12) In March 1952 Foremost acquired Acme Dairies, Inc., a Florida corporation, with main office located at Tallahassee, Fla. ;
- (13) In June 1952 Foremost acquired Taylors Home Made Ice Cream Co., a Texas corporation, with main office located at Ft. Worth, Tex. ;
- (14) In July 1952 Foremost acquired The Phenix Dairy, a Texas corporation, with main office located at Houston, Tex. ;
- (15) In August 1952 Foremost acquired Ives Dairy Company, Inc., a Florida corporation, with main office located at Miami, Fla. ;
- (16) In September 1952 Foremost acquired Tennessee Dairies, Inc., a Texas corporation, with main office located at Dallas, Tex. ;
- (17) In September 1952 Foremost acquired Southern Maid, Inc., a Virginia corporation, with main office located at Bristol, Va. ;
- (18) In September 1952 Foremost acquired Welch Milk Company, a West Virginia corporation, with main office located at Welch, W. Va. ;
- (19) In October 1952 Foremost acquired Bridgeman-Russell Co., a Minnesota corporation, with main office located at Duluth, Minn. ;
- Foremost also acquired the wholly-owned subsidiaries of Bridgeman-Russell Co. :
- (a) Dairyland Creamery Co., a South Dakota corporation, with main office located at Sioux Falls, S. Dak. ;
- (b) Minot Creamery Co., a North Dakota corporation, with main office located at Minot, N. Dak. ;
- (c) Purity Dairy Co., a North Dakota corporation, with main office located at Mandan, N. Dak. ; and
- (d) United Dairies, Inc., a Minnesota corporation, with main office located at Duluth, Minn. ;
- (20) In December 1952 Foremost acquired R. A. Shuey Creamery, a Nevada corporation, with main office located at Oakland, Calif. ;
- (21) In May 1953 Foremost acquired Dairymen's Milk Co., Ltd., a California corporation, with main office located at San Francisco, Calif. ;
- Foremost also acquired the wholly-owned subsidiary, Dairymaid Creameries, Ltd., a California corporation, with main office located at Hughson, Calif.
- (22) In May 1953 Foremost acquired Banner Dairies, Inc., a Texas corporation, with main office located at Oakland, Calif. ;
- Foremost also acquired five affiliated holding companies which are not engaged in production but merely lease property to Banner.
- (23) In July 1953 Foremost acquired Schneiders Creamery, Inc., a Florida corporation, with main office located at Eustis, Fla. ;
- (24) In October 1953 Foremost acquired Old Hundred, Inc., a Delaware corporation, with main office located at Southberry, Conn. ;
- (25) In February 1954 Foremost acquired Golden States, Ltd., a Delaware corporation, with main office located at Oakland, Calif. ;
- (26) In October 1954 Foremost acquired American Dairies, Inc., a Maryland corporation, with main office located at Kansas City, Mo. ;
- Foremost also acquired the wholly-owned subsidiaries of American Dairies, Inc. :
- (a) Meriden Creamery Company, a Missouri corporation, with main office located at Kansas City, Mo. ;

Complaint

- (b) Meriden Creamery Co., Inc., a Kansas Corporation, with main office located at Hutchinson, Kans. ;
- (c) American Butter Company, Inc., a Missouri corporation, with main office located at Kansas City, Mo. ;
- (d) De Coursey Creamery Company, a Kansas corporation, with main office located at Kansas City, Kans. ;
- (e) Patton Creamery Company, a Missouri corporation, with main office located at Springfield, Mo. ;
- (f) Arctic Dairy Products Company, a Missouri corporation, with main office located at Kansas City, Mo. ;
- (g) Carlin Creamery Company, a District of Columbia corporation, with main office located at Washington, D.C. ;
- (h) Wm. F. Huhn & Co., a Delaware corporation, with main office located at Washington, D.C. ;
- (i) The Aines Farm Dairy Company, a Missouri corporation, with main office located at Kansas City, Mo. ;
- (j) Community Dairy Products Company, a Missouri corporation, with main office located at Joplin, Mo. ;
- (k) Community Creamery Company, an Arkansas corporation, with main office located at Ozark, Ark. ;
- (l) Ozark Creamery Co., Inc., an Arkansas corporation, with main office located at Ozark, Ark. ;
- (m) Pratt Dairy Products Co., a Kansas corporation, with main office located at Pratt, Kans. ;
- (n) Tastemark Foods, Inc., a Missouri corporation, with main office located at Kansas City, Mo. ;
- (o) Tastemark Dairy Co., a Maryland corporation, with main office located at Paragould, Ark. ;
- (27) In March 1955 Foremost acquired Blue Moon Foods, Inc., a Delaware corporation, with main office located at Thorp, Wis. ;
- Foremost also acquired the wholly-owned subsidiary, June Dairy Products Company, a New York corporation, with main office located at New York, N.Y. ;
- (28) In August 1955 Foremost acquired Philadelphia Dairy Products Co., Inc., incorporated in the Commonwealth of Pennsylvania, with main office located at Philadelphia, Pa. ;
- Foremost also acquired the wholly-owned subsidiaries of Philadelphia Dairy Products Co., Inc. :
- (a) Janssen Dairy Co., Inc., a New Jersey corporation, with main office located at New York, N.Y. ;
- (b) Woodlawn Farm Company, a Pennsylvania corporation, with main office located at Philadelphia, Pa. ;
- (c) Harrington Dairy Co., a Pennsylvania corporation, with main office located at Philadelphia, Pa. ;
- (d) Richmond Dairy Company, a Virginia corporation, with main office located at Richmond, Va. ;
- (29) In September 1955 Foremost acquired Western Condensing Company, a California corporation, with main office located at Appelton, Wis. ;
- (30) In October 1955 Foremost acquired Florida Dairies Company, a Florida corporation, with main office located at Miami, Fla.

PAR. 5. As a direct result of the above listed acquisitions, Foremost is now one of the four largest purchasers, processors and distributors of dairy products in the United States and has increased its gross sales from approximately \$52,500,000 and net sales of approximately \$48,000,000 in 1950 to gross sales of approximately \$375,000,000 and net sales of approximately \$295,000,000 for the year 1954. In 1954 63 percent of Foremost's sales were derived from sales of fluid milk and cream; 20 percent of Foremost's sales resulted from sales of ice cream; and the remaining 17 percent of Foremost's sales represented sales of a wide variety of miscellaneous products. The operations of Foremost are divided into eight divisions at the present time and currently include the purchase, processing and distribution of dairy products in 30 states and Hawaii.

PAR. 6. In addition to Foremost's acquisitions of corporations hereinafore listed, Foremost also acquired nine additional dairy products concerns in 1951 and 1952 located in the State of Florida which were individually owned and were not corporations.

PAR. 7. The constant and systematic elimination of actual and potential competitors by means of the acquisitions described in paragraphs 4 and 6 hereof are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 8. Foremost has violated Section 7 of the Clayton Act, as amended, in that the acquisition of the stock or assets of the corporations listed in paragraph 4 hereof either individually or collectively may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

(a) Actual and potential competition between Foremost and the acquired corporations in the purchase, processing or distribution of dairy products has been or may be eliminated;

(b) Actual and potential competition generally in the purchase, processing or distribution of dairy products may be substantially lessened;

(c) The acquired corporations have been or may be permanently eliminated as an independent competitive factor in the purchase, processing or distribution of dairy products;

(d) The acquisitions by Foremost may enhance Foremost's competitive advantage in the purchase, processing or distribution of dairy products to the detriment of actual or potential competition;

(e) Competitive purchasers, processors or distributors of dairy products may be foreclosed from a substantial segment of the market

in that respondent has eliminated the acquired corporations as potential suppliers or customers;

(f) Industry-wide concentration of the purchase, processing or distribution of dairy products may be increased;

(g) Foremost's competitive advantage over other purchasers, processors or distributors of dairy products may be enhanced to the detriment of actual and potential competition;

(h) The acquisitions by Foremost increased the concentration in the purchase, processing or distribution of dairy products and has eliminated a number of independent small business concerns from the industry.

PAR. 9. The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. Bernard M. Williamson, Mr. Raymond L. Hays, and Mr. Alan R. Lyness for the Commission.

Milam, Le Maistre, Ramsay & Martin, by *Mr. George W. Milam*, of Jacksonville, Fla.; *Mr. Renah F. Camabier* and *Mr. Robert E. Freer*, of Washington, D.C.;

White & Case, by *Mr. Edgar E. Barton, Mr. Macdonald Flinn*, and *Mr. Thomas B. Leary*, of New York, N.Y., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

INDEX

	Page
PRELIMINARY STATEMENT.....	951
FINDINGS OF FACT.....	957
I. DESCRIPTION OF RESPONDENT AND ITS GROWTH...	957
A. Respondent's Inception, Growth and Acquisitions Prior to 1951.....	957
1. The Inception of Foremost Dairies, Inc.....	957
2. Pre-Complaint Acquisitions.....	958
a. Prior to 1945.....	958
b. 1945 Acquisitions.....	958
c. 1946 Acquisitions.....	959
d. 1947 Acquisitions.....	959
e. 1948 Acquisitions.....	960
f. 1949 Acquisitions.....	960
g. 1950 Acquisitions.....	960
B. Respondent's Financial Record.....	961
II. RESPONDENT'S ACQUISITIONS OF CORPORATIONS ENGAGED IN COMMERCE AND THEIR MARKETS, 1951-1956.....	962

FINDINGS OF FACT—Continued	
II. RESPONDENT'S ACQUISITIONS OF, ETC.—Continued	Page
A. Introduction.....	962
B. The Acquisitions and Their Markets.....	962
1. Western Condensing Company.....	962
2. Blue Moon Foods, Inc., and June Dairy Products Co., Inc.....	962
3. International Dairy Supply Company and Inter- national Dairy Engineering Company.....	964
4. Florida Dairies Company.....	965
5. Philadelphia Dairy Products, Inc.....	966
6. American Dairies, Inc.....	970
7. The DeSoto Ice Cream Division of Armour and Company.....	973
8. Bridgeman-Russell Company, Inc.....	974
9. Crescent Creamery Co.....	976
10. Portsmouth Pure Milk Company and Pure Milk Company, Inc.....	979
11. Old Hundred, Inc.....	979
12. Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd.....	980
13. Widemire's, Inc.....	980
14. Southern Maid, Inc., and Welch Milk Company..	981
15. Central Dairies, Inc.....	983
16. Gunn Ice Cream Company.....	984
17. Graham's Dairy, Inc.....	984
18. Banner Dairies, Inc.....	985
19. Tennessee Dairies, Inc.....	987
20. Phenix Dairy.....	995
21. Golden State Company, Ltd.....	1001
III. TESTIMONY OF M. A. ADELMAN.....	1012
IV. RESPONDENT'S FLUID MILK SALES IN CERTAIN SEC- TIONS OF THE COUNTRY.....	1017
CONCLUSIONS.....	1018
A. AS TO THE FACTS.....	1018
B. AS TO THE LAW.....	1023
1. Violation of Section 5 of the Federal Trade Commission Act..	1023
2. Violation of Section 7 of the Clayton Act.....	1028
(1) The Relevant Lines of Commerce.....	1028
(2) The Section of the Country.....	1030
(3) Interstate Commerce.....	1031
(4) Probable Adverse Effect upon Competition or Tend- ency toward Monopoly.....	1033
(a) Horizontal Acquisitions.....	1033
(b) Conglomerate Acquisitions.....	1039
(c) Market Extension Acquisitions.....	1040
ORDER OF DIVESTITURE.....	1047

PRELIMINARY STATEMENT

The Commission, on January 17, 1956, issued a complaint against Foremost Dairies, Inc., a New York corporation, (sometimes hereinafter referred to as Foremost) charging it with violation of Section 7 of the Clayton Act, as amended December 29, 1950, and Section 5 of the Federal Trade Commission Act, through, and as a result of, a series of transactions beginning in January 1951.

It is alleged in the Commission's complaint that the respondent Foremost, with its main and principal business office located at 2903 College Street, Jacksonville, Fla., was engaged in the purchase, processing and distribution of a diversified line of dairy products, including one or more of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk and evaporated milk, which it sold and distributed to retail consumers and to stores, restaurants, hotels and other miscellaneous outlets.

It is further alleged that, as a direct result of the acquisition of certain named corporations, Foremost was at the time of the complaint one of the four largest processors and distributors of dairy products in the United States. It is specifically alleged that Foremost had violated Section 7 of the Clayton Act in that the acquisition of the stock or assets of the corporations listed in paragraph 4 of the complaint, either individually or collectively, may have the effect of substantially lessening competition, or tending to create a monopoly in certain specified ways.

It is also alleged that, in addition to Foremost's acquisitions of corporations listed in the complaint, it had also acquired nine additional dairy product concerns in 1951 and 1952, located in the State of Florida, which were individually owned and were not corporations.

It is further alleged that the constant and systematic elimination of actual and potential competitors, by means of the acquisitions described in paragraphs 4 and 6 of the complaint: "are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act."

On March 20, 1956, the answer of respondent was filed in which respondent denied the allegations of paragraph 4 of the complaint, except that the respondent admitted that it had acquired the stock or assets of thirteen corporations which were engaged in commerce in the dairy products business. Answering paragraph 5 of the complaint, respondent denied the allegations "as a direct result of the above listed

acquisitions," and admitted the remaining allegations of paragraph 5 of the complaint. It denied each and every allegation contained in paragraphs 6, 7, 8, and 9 of the complaint, and set up as a second defense that the acquisitions were made in the public interest.

Respondent also filed, as a part of the answer, a motion to dismiss on the grounds that the complaint failed to state a cause of action, and a motion was also made to strike, severally, from the complaint certain parts thereof as being legally insufficient, irrelevant, immaterial or impertinent. Reference to the complaint indicates that the portions covered by the motion to strike were those subparagraphs of paragraph 4 relating to acquisitions of certain small companies and corporations not engaged in commerce, and also that the motion in the answer was to strike all of paragraph 6, which is the charging paragraph as to the concerns alleged to have been acquired in violation of Section 5 of the Federal Trade Commission Act.

An answer to the foregoing motions was filed by counsel supporting the complaint on March 21, 1956.

On March 27, 1956, at the initial hearing in Jacksonville, Florida, after hearing oral argument on respondent's motion, the hearing examiner struck from the complaint the allegations with reference to the Section 5 charge, on the grounds that the Commission had no jurisdiction over the acquisitions under Section 5 of the Federal Trade Commission Act.

An appeal was taken, by counsel supporting the complaint for the Commission, from this ruling of the hearing examiner on April 23, 1956. Answer was filed to this appeal by respondent on May 21, 1956.

On June 4, 1956, the Commission sustained the appeal of counsel supporting the complaint, and reversed the ruling of the hearing examiner in the following language:

The Commission being of the opinion that the hearing examiner was in error in this respect, and that facts indicating a violation of Section 7 of the Clayton Act, as amended, may also indicate a violation of Section 5 of the Federal Trade Commission Act, and, further, that practices not technically within the scope of a specific section of the Clayton Act may nevertheless constitute a violation of Section 5 of the Federal Trade Commission Act; and

The Commission being of the further opinion that in electing to charge a respondent in this case with violation of both Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, the Commission acted in the exercise of its administrative discretion, and that in so doing it made a decision on which the hearing examiner has no authority to sit in judgment.

Following this ruling, counsel supporting the complaint, in a series of hearings, introduced evidence with reference to both the Section 7

allegation and the Section 5 allegation. Prior to, and following this ruling; approximately 1700 pages of testimony and more than 500 exhibits were introduced by counsel supporting the complaint, and were received in evidence.

On August 9, 1957, counsel supporting the complaint moved to amend paragraph 4 of the complaint to conform to the proof as to further acquisitions, which said motion was granted, and the answer by respondent to the original complaint was allowed to stand for the amended complaint. On the same date, counsel supporting the complaint closed their case in chief.

On December 9, 1957, respondent filed a motion to dismiss and to strike, relating to both the Section 7 charge and the Section 5 charge. This motion was followed by a brief filed on December 20, 1957, in support of said motion. Counsel in support of the complaint filed a motion and brief in opposition to respondent's said motion on March 17, 1958. Oral argument on said motion was held before the hearing examiner on May 8, 1958.

On May 12, 1958, the hearing examiner entered a formal order dismissing respondent's said motion to dismiss and to strike.

On June 19, 1958, respondent filed a motion to amend the hearing examiner's order denying its motion to dismiss and to strike. The substance of this motion was practically identical with the motion filed at the close of Commission's case in chief, in that it raised no new questions not heretofore argued and adjudicated, except that respondent asked for a ruling in the nature of a declaratory judgment as to which of the acquisitions, according to the hearing examiner, had violated Section 7 of the Clayton Act.

On July 10, 1958, the hearing examiner, at the beginning of the taking of evidence in support of respondent's defense, held an oral argument on respondent's motion. During the course of this argument, at the request of the hearing examiner, counsel in support of the complaint made an explanation of their position with respect to what remedy they expected to invoke, other than divestiture, under the Section 5 charge. Thereafter, the hearing examiner made the following ruling:

Now, in doing that I want to make very plain that I haven't examined this record with a fine-tooth comb, and I may change my mind before I write my final decision, but as the record now stands on the theory of conglomerate acquisitions, which apparently is contemplated by Congress as being a little broader scope under the amended Section 7 of the Clayton Act than was contemplated in the original Section 7 of the Clayton Act, conglomerate acquisitions have been brought within the purview of the statute. So, on that theory that your motion for dismissal was overruled as much as anything else, in my

Initial Decision

60 F.T.C.

Judgment you should make an attempt to defend or to present evidence in opposition to whatever evidence has been presented on the following firms, whose acquisitions have been either by stock acquisition, stock exchange, or purchase of assets; International Dairy Supply Co.; Campos Dairy Products, Ltd.; Gunn Ice Cream Company; Phenix Dairy; Ives Dairy, Inc.; Southern Maid, Inc.; The Welch Milk Company; Bridgeman-Russell Company, Inc.; Marin Dairymen's Milk Co., Ltd.; Dairy Maid Creameries, Ltd.; Banner Dairies, Inc.; Widemire's, Inc.; Crescent Creamery Company; Old Hundred, Inc.; Moanalua Dairy, Ltd.; and even Rico Ice Cream Company, Ltd. of Hawaii; Golden State Company, Ltd.; Ives Ice Cream Company, a Florida firm; The DeSoto Ice Cream Division of Armour and Company; Portsmouth Pure Milk Company and Pure Milk Company, Inc.; American Dairies, Inc.; Blue Moon Foods, Inc.; Philadelphia Dairy Products, Inc.; Florida Dairies Company; and Central Dairies, Inc. (Tr. 1833-4)

At this point, counsel supporting the complaint asked whether or not respondent would be required to put in any proof with reference to non-corporate acquisitions.

The hearing examiner ruled:

As far as I am concerned, they won't, because I don't propose to make any findings on those acquisitions. I will bunch them together into one group and say, as to these companies, testimony was taken in support of the complaint, and that is all.

The attorneys supporting the complaint then asked if the ruling was that:

. . . we have not made out a prima facie case with reference to the Section 5 charge?

The ruling of the hearing examiner was, at this point:

No. My ruling is that I am not passing on it. I have already passed on it, and the Commission has reversed me; so, that is still my position. You can argue them before the Commission any way you want to on that. The case is open on that particular phase of it.

The examiner also ruled at that time that the Commission could decide whether or not the attorney in support of the complaint had made out a prima facie case, and whether or not they want anything done; that in the event the Commission determined that the attorneys in support of the complaint had made out a prima facie case under the Section 5 charge, it would be necessary for them to go back with the respondent and take defensive testimony with reference to these non-corporate acquisitions. The hearing examiner indicated that he was not going to require the respondent to do it, and that if the Commission wanted to require them to do it they may.

On July 21, 1958, counsel in support of the complaint filed an appeal with the Commission from the ruling of the hearing examiner of July

10, 1958, as to the Section 5 charge. This appeal was answered by counsel for the respondent on August 19, 1958.

On September 10, 1958, the Commission granted the appeal of counsel in support of the complaint, and vacated the ruling of the hearing examiner of July 10, 1958. In taking this action, the Commission noted that the hearing examiner had not ruled that counsel supporting the complaint had failed to make a prima facie case as to the (Section 5) allegations in the complaint. The following language also appears in the opinion:

The effect of the ruling is to preclude any final decision on the acquisitions so eliminated, short of a remand, since respondent may rightfully claim hereafter that it had no opportunity to defend as to these. The Section 5 charge presents questions of law and fact which the Commission prefers to determine upon a complete record. This includes as to such charge any proper defense of the acquisitions concerned which the respondent may wish to offer.

We hold, therefore, that it was error for the examiner to rule that the acquisitions other than those he listed need not be defended. Accordingly, the appeal of counsel supporting the complaint is granted and appropriate order vacating the examiner's ruling will be entered.

Following the foregoing ruling of the Commission, approximately 3400 pages of testimony were taken in opposition to the allegations of the complaint, and more than 400 exhibits were received in evidence. Counsel for respondent closed their case in chief on March 31, 1960. Thereafter, rebuttal testimony was received in April and June 1960. The taking of testimony was closed June 3, 1960. Thereafter, on August 19, 1960, counsel in support of the complaint filed proposed findings, consisting of nearly 300 pages, and, on the same date, counsel for respondent filed their proposed findings containing more than 300 pages. Oral argument thereon was held September 7, 1960.

Consideration has been given to the respective proposed findings, and all the reliable, probative and substantial evidence in the record upon material issues of fact and law. Each of the proposed findings which have been accepted has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

In view of the opinion of the hearing examiner, as hereinafter set forth in the conclusions, no detailed findings will be made with respect to the following acquisitions by the respondent:

Proprietorships

1. H. H. Parrish, and Almeida P. Parrish, trading and doing business in the name of Superior Dairy Products, Orlando, Florida.
2. O. H. Thomas, trading under the firm name of University City Dairy, Gainesville, Florida.

3. F. L. Clough and Roxie M. Clough of Starke, Bradford County, Florida.
4. P. S. Gonzales, doing business under the name of Phil's Dairy, in Alachua, Florida.
5. Carl C. Swebilus, DeLand, Florida.
6. W. W. Lively, Mrs. W. W. Lively, and Mrs. W. J. Brownlee, in partnership, doing business as Brownlee & Lively Dairy, Atlanta, Georgia.
7. Mr. and Mrs. C. R. Whitehurst, doing business as Whitehurst Dairy, Gainesville, Florida.
8. E. H. Harty, doing business under the trade name of Jacksonville Home Milk, Jacksonville, Florida.

Corporations

9. Mrs. Tucker's Foods, Inc., Sherman, Texas.
10. Sunshine Dairy Products, Inc., Gainesville, Florida.
11. Royal Dairy Products, Inc., Tampa, Florida.
12. Laurens Pasteurizing Plant, Inc., Laurens, South Carolina.
13. Diamond Dairy, Inc., Oakland, California.
14. Acme Dairies, Tallahassee, Florida (in receivership).
15. Taylor's Homemade Ice Cream Co., Fort Worth, Texas.
16. R. A. Shuey Creamery, Oakland, California.
17. Schneider's Creamery, Inc., Eustis, Florida.
18. Redwood Empire Dairies, Inc., Fortuna, Humboldt County, California.
19. Vander Bie's, Inc., St. Paul, Minnesota.
20. Hage's Ltd., San Diego, California.
21. Thompson Brothers Ice Cream Company, Butler, Pennsylvania.
22. Slade's Dairy, Inc., Santa Fe, New Mexico.
23. H. A. McDonald Creamery Co., Detroit, Michigan.
24. Jones and Griest, Inc., Washington, Pennsylvania.

The foregoing concerns, beginning with Mrs. Tucker's Foods, Inc., are corporations, but, according to the evidence in the record produced by counsel supporting the complaint, they were not engaged in interstate commerce, either in the purchasing of raw materials or in the sale of dairy products.

Full findings will be made with respect to the following acquisitions of corporations which were, at the time the testimony was taken, believed to be engaged in commerce:

1. Central Dairies, Inc., a South Carolina corporation, Columbia, South Carolina.
2. International Dairy Supply Co., a Nevada corporation, Oakland, California.
3. Campos Dairy Products, Ltd., a Hawaiian corporation, Honolulu, Hawaii.
4. Gunn Ice Cream Company, a Florida corporation, Pensacola, Florida.
5. Graham's Dairy, Inc., a Florida corporation, Miami, Florida.
6. Phenix Dairy, a Texas corporation, Houston, Texas.
7. Ives Dairy, Inc., a Florida corporation, Miami, Florida.
8. Tennessee Dairies, Inc., a Texas corporation, Dallas, Texas.
9. Southern Maid, Inc., a Virginia corporation, Bristol, Virginia.
10. The Welch Milk Company, a West Virginia corporation, Welch, West Virginia.

