

other material or by any manner or means unless such is the fact;

(b) Products contain or are made or composed in whole or in part of gold, natural stones, Mother-of-Pearl, Turquoise or any other material or substance not actually used or contained therein;

(c) Any of respondents' products not actually made or produced by Indians or any other race or group have been so made or produced;

(d) Imitation pearls are genuine pearls.

3. Furnishing or otherwise placing in the hands of retailers or dealers the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinbefore prohibited.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall on the 19th day of February 1963, become the decision of the Commission; and accordingly:

It is ordered, That 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.

IN THE MATTER OF

JACK B. STEIN TRADING AS
UNIVERSAL BUSINESS SYSTEMS OF NEW JERSEY

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

Docket C-315. Complaint, Feb. 19, 1963—Decision, Feb. 19, 1963

Consent order requiring a Newark, N.J., seller of skip-tracing forms to collection agencies, finance and loan companies, dealers selling on installment accounts, etc., to cease using such subterfuges to obtain information concerning the purchasers' delinquent debtors as simulating official and government forms and United States Government checks, arranging for mailing the forms from Washington, D.C., with official sounding names on the return envelopes, and representing falsely that debtors would collect a substantial sum of money by filling in the questionnaires.

Complaint

62 F.T.C.

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 Jack B. Stein, an individual trading and doing business as Universal Business Systems of New Jersey, 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 Jack B. Stein is an individual trading and doing business under the name of Universal Business Systems of New Jersey, with his principal office and place of business at 20 Branford Place, Newark, New Jersey.

PAR. 2. Respondent is now, and for some time last past has been engaged in the business of preparing and selling printed forms and other material for use in locating delinquent debtors. Respondent causes said printed forms and other material, when sold, to be transported from his place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and the District of Columbia, and has sent and received by means of the United States mail, letters, checks and documents to and from states other than the State of New Jersey. Respondent maintains, and at all times hereinafter mentioned has maintained, a course of trade in his said forms and other material in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. The said printed forms and other material prepared by the respondent and transported as hereinbefore alleged, are intended to be, and are, sold to collection agencies, finance and loan companies, merchants who sell on installment accounts and others who have unpaid accounts in which the alleged debtor's present address is unknown. The forms and other material are designed and intended to be used and are used by said purchasers for the purpose of obtaining information concerning the purchasers' alleged debtors, with the aid and assistance of the respondent as hereinafter set forth.

The said material is prepared in form and content to simulate official or governmental forms and several of them are similar to checks issued by the United States Government and contain figures representing a substantial sum of money. In preparing these forms, the respondent has adopted a number of fictitious and official sounding names, among which, but not all inclusive, are the following:

663

Complaint

Director of Income Tax Assistance Service,
Vendors Security Service,
Employment Records Service,
Employment Records Center,
Audit Services,
Vehicle Registration Service,
Employment Registration Service,
Housing Service Bureau,
Housing Registration Service,
Audits and Disbursement Bureau,

Typical, but not all inclusive, of the forms prepared and sold by the respondents are the following:

I

Employment Records Service

Transmittal Request

MONEY ORDER

The

Superintendent of Disbursements

WILL PAY AND TRANSMIT

By Money Order

The Amount Specifically Allocated in 1961 Series Query Form

The Sum of FIFTY DOLLARS

The Sum Actually Remitted to Applicant, issued as a
REIMBURSEMENT PAYMENT OR REFUND
For the Correct Completion of This Form

Payment will
be made only
to

[Empty rectangular box for recipient name]

Completion of
this query does
not constitute
warrant of trans-
mittal of the
maximum amount
noted hereon.

Transmittal Number
106

A nationwide vendor's record control service with the primary function of maintaining, up-dating and correcting essential records of its vendor affiliates, none of whom are agencies of any government or bureaus, divisions or sub-divisions thereof.

Complaint

62 F.T.C.

(Reverse Side)

ALLOW NINETY DAYS
FOR TRANSMITTAL OF
MONEY ORDER

For Office Use Only—Do Not Write Here

Date Recv'd	Husb. Verified	Wife Verified	Changes Noted
	Records Noted	Checked by	Disposition
	Payment Approved		Validating Stamp

To Properly Complete This Form All Replies Must be Correct and Current and Subject to Verification by Our Validating Division

RETURN IN ENCLOSED ENVELOPE ONLY, WITHIN FIVE DAYS

To Be Completed By Husband

1. Name and Address of Present Employer

City ----- State -----
2. Occupation or Type of Work -----
3. Social Security No. -----
4. If Employed by Name Other Than Shown in
Address, Indicate Same -----
5. Business Telephone Number -----
6. Clock or Badge No. -----
Signature -----

To Be Completed By Wife

1. Name and Address of Present Employer

City ----- State -----
2. Occupation or Type of Work -----
3. Social Security No. -----
4. If Employed by Name Other Than Shown in
Address, Indicate Same -----
5. Business Telephone Number -----
6. Clock or Badge No. -----
Signature -----

This Money Order Transmittal Request is directed to you, by Employment Records Service a non-governmental facility acting for its principals in order to elicit current data which will enable its principal to correct, and up-date pertinent records and where necessary permit proper initiation of measures for recovery, or adjudication of claims, it has outstanding with addressee.

669

Complaint

II

DIRECTOR OF AUDIT SERVICES 1960

709 Albee Building (N.W.) Washington, D.C.

WILL TRANSMIT AND PAY TO THE ADDRESSEE

an amount
not to exceed

50 DOLS 76 CTS

and specifically
the sum allocated
for this purpose

REFUND, REIMBURSEMENT, or PAYMENT
issued in consideration of the correct completion of this form

claim no.

payment will be made
to person whose name
appears here upon.

All funds paid on redemption will be drawn on a local bank, a member of Federal Deposit Insurance Corp., Director of Audit Services, an agency acting for its principals, none of which are government facilities.

Complaint

62 F.T.C.

(Reverse Side)

INFORMATION NECESSARY FOR PROPER COMPLETION

The questions listed must be answered to enable proper verification necessary for payment

Name -----
 Number and Street -----
 City ----- State -----
 Employed by -----
 Address -----
 Home Phone ----- Business Phone -----

 Spouse's name (Husband or Wife) -----

No disbursement of monies can be made without it.

Employed by -----
 Address -----
 Husband's signature -----
 Wife's signature -----

PLEASE PRINT OR TYPE.

Do Not Write Here
Validating Stamp
Payment Approved
Husband's Social Security No.
Wife's Social Security No.

The purpose of this inquiry is to elicit for the Director of Audit Services, a non-governmental facility, pertinent data to enable its principal to properly initiate measures for recovery or adjudication of claims it has outstanding with addressee.

Complaint

III

RECORDS CONTROL AND REVIEW SERVICE

422 Washington Bldg.

Washington, D.C.

MAIL RETURN NOTICE

We were advised by the Post Office Department that mail addressed to -----

- who is a friend, or relative of yours
- who is, or was, employed by your organization was returned —moved—address unknown

To assist us in contacting individual, will you kindly complete the form on reverse side, and return to this office, in the envelope provided.

To have mail delivered to a new address, file form 22, order to change address, which is available at any post office or from any carrier. A written and signed order or a telegram is acceptable. The order or telegram must be sent by you, your agent, or the person in whose care the mail will be accepted. The old and the new addresses must always be furnished. Mail addressed to persons for whom an order to change address is on file will be sent by the post office of original address to the new address.

INQUIRY NO.

A nationwide vendor's record control service, with the primary function of maintaining, up-dating, and correcting essential records of its vendor affiliates, none of whom are agencies of any government, or bureaus, divisions, or sub-divisions thereof.

Complaint

62 F.T.C.

Reverse Side

Please Print or Type the Information Requested Hereon

Present Mailing Address: -----
 No. and Street -----
 City ----- Zone ----- State -----
 Home Telephone Number -----
 Present Employer's Name -----

 Address -----
 Spouse's Name (husband or wife) -----
 Spouse's Employer's Name -----
 Address -----
 Name of Nearest Relative -----
 Address -----
 Additional information -----

 Authorized Signature -----

DO NOT WRITE HERE

 Records Corrected to Indicate
 New Home Address -----
 New Place of Employment -----

 Date -----
 Certification from Records Substantiates Statements —was
 not furnished

 Certified by -----
 Date -----
 Kind of Document and date made -----
 Information given in Document -----

 Birth date needed -----
 Birth Place -----
 Father -----

This Mail Return Notice, is directed to you, by Records Control and Review Service, an agency, acting for its principals, none of which are government facilities, in order to elicit current data which will enable its principals to correct, and up-date pertinent records, and where necessary permit proper initiation of measures for recovery, of adjudication of claims, it has outstanding with addressee.

The first two forms set forth above are printed on paper of a size and color similar to checks issued by the United States Government. The third form set forth above is of a size and format similar to a form which might be used by an official agency for obtaining pertinent information. The disclaimer of any connection with a Government agency and the statement of the purpose of the inquiry is printed in type much smaller than the other portions of said forms.

The respondent's method of operation was, and now is, as follows :

Printed forms and other material, when sold, are shipped to the purchaser who places the name and last known address of the debtor on each piece and returns them, in bulk, to the respondent. The respondent, in turn, ships the forms, in bulk, to places outside the State of New York, particularly Washington, D.C., which are used as mailing addresses and from which said forms are mailed to the individual addressees. A return envelope is enclosed upon which is printed one of the names above mentioned or a similar name and the address from which the form was mailed. If the debtor fills in the necessary information and returns the form to the mailing address, it is forwarded to the respondent at his place of business. The respondent then sends it to his customer.

PAR. 4. Through the use of the words or terms set forth in Paragraph 3 and the form and phraseology of said forms, respondent represents and implies, and places in the hands of the purchasers of his forms means and instrumentalities whereby they represent and imply to those to whom said forms are mailed that the request for information is made by a governmental agency or in some other official capacity. The fact that many of said forms are mailed from Washington, D.C., enhances such implication. The insertion in some of said forms of the words "will transmit" and a sum of money serves as a representation or implication that the amount inserted therein is due and owing to the persons whose names are inserted in the forms and can be collected, and that by filling in the desired information they will be entitled to receive such sums.

In truth and in fact, the information is not requested for any governmental or official purpose and there is no money due to or collectible by those to whom the forms referred to above are sent or to any other person, but, on the contrary, the sole business of respondent, conducted as aforesaid, is to sell the various printed forms to others, to be used by them for the purpose of obtaining information concerning their alleged debtors. By selling and placing said forms in the hands of the purchasers, respondent thereby furnishes to such purchasers means and instrumentalities by and through which they may, and often do, obtain such information by subterfuge.

Therefore, the statements and representations on the said printed forms and other material and the implications therefrom, are false, misleading and deceptive.

PAR. 5. The use of said forms and other material as above set forth, has had, and now has, the tendency and capacity to mislead and deceive persons to whom said form is sent into the erroneous and mistaken belief that the said representations and implications are true and induce the recipients thereof to supply information which they otherwise would not have supplied.

Decision and Order

62 F.T.C.

PAR. 7. The aforesaid acts and practices of respondent as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Jack B. Stein, is an individual, trading and doing business as Universal Business Systems of New Jersey, with his office and principal place of business at 20 Branford Place, Newark, New Jersey.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That the respondent Jack B. Stein, an individual, trading and doing business as Universal Business Systems of New Jersey, or any other name or names, and respondent's representatives, agents, and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors, or the offering for sale, sale or distributing of forms, or other material, for use in obtaining information concerning delinquent debtors, or in the collection of, or attempt to collect, delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, or placing in the hands of others for use, any form, questionnaire or other material, printed or written, which does not clearly and conspicuously reveal that the purpose for which the information is requested is that of obtaining information concerning alleged delinquent debtors or in the collection of, or attempting to collect alleged delinquent accounts.

2. Representing, or placing in the hands of others, any means by which they may represent, directly or by implication, that money or a free gift or any other thing of value, is being held for the person from whom information is sought, unless respondents have in their possession a substantial sum of money or a gift of substantial value which will be sent to such person and then only when the exact sum of money or the exact nature of the gift or other thing of value, is clearly and expressly disclosed and described.

3. Using the name "Director of Income Tax Assistance Service", "Vendors Security Service", "Employment Records Service", "Employment Records Center", "Audit Services", "Vehicle Registration Service", "Employment Registration Service", "Housing Service Bureau", "Housing Registration Service", "Audits and Disbursements Bureau", or any other name or words of similar import to designate, describe or refer to respondent's business or otherwise misrepresenting the purpose for which information is sought by respondent or purchasers of respondent's forms or other material.

It is further ordered, That 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 this order.

IN THE MATTER OF

BROWN SHOE COMPANY, INC.

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

Docket 7606. Complaint, Oct. 13, 1959—Decision, Feb. 20, 1963

Order requiring the nation's second largest shoe manufacturer, an integrated company operating at all levels of the shoe industry, to cease unlawfully restraining competition by such practices as enforcing a provision in its franchise agreements with independent retail shoe store customers which required them to restrict their purchases of shoes to its lines and prohibited their stocking of competing lines, giving them in return special benefits in-

Complaint

62 F.T.C.

cluding free signs, business forms and accounting assistance, participation in lower cost group fire, public liability, robbery, and life insurance, and special below-list prices on canvas and waterproof footwear; and to cease requiring its retail shoe store operator customers to adhere to its suggested resale prices, and maintaining continuous pressure upon them to insure that they did not depart from the minimum resale prices it fixed.

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 party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of Section 5 of 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, the Commission hereby issues its complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent, Brown Shoe Company, sometimes hereinafter referred to as "Brown", is a corporation organized under the laws of the State of New York with its office and principal place of business located at 8300 Maryland Avenue, St. Louis, Missouri.

PAR. 2. Brown is an integrated company operating at all levels of the shoe industry. Prior to 1950, it was primarily engaged in the manufacture and distribution of shoes at the wholesale level. Since 1951, through the acquisition of retail shoe stores Brown has become a substantial and large retailer of shoes. Brown owns and operates 48 factories and warehouses in 41 different cities located in 7 States. Brown's total sales of \$236,946,078 for its fiscal year ending October 31, 1957, make it the world's second largest manufacturer and seller of shoes.

Brown's shoes are marketed by three separate methods or plans: (1) through independent retail shoe stores which have entered a franchise agreement with Brown or one of its divisions or subsidiaries; (2) through wholesale sales to independent shoe stores, chains and mail order houses; and (3) through approximately one thousand company-owned retail stores.

Brown's shoes are sold under a wide variety of trade names. The Kinney and Regal brands are sold only through Brown owned retail stores bearing those names. Brown shoes for men are trade named Educator, Pedwin, Roblee, Stuart Holmes, and Style-Craft. Brown shoes for women are marketed under the trade names Air Step, Connie, Educator, Glamour Debs, Jacqueline, Life Stride, Marquise, Naturalizer, Natural Poise, Paris Fashion, Revette, and Risque. The

Brown manufactured children's shoes bear the names Buster Brown, Educator, Official Boy Scout, Official Girl Scout, Propr-bilt, and Robin Hood. All of the Brown shoes retail in the medium price field. In addition, shoes are sold to retail chain and mail order houses for resale under the private brand names of the customers.

PAR. 3. The shoes manufactured or distributed by Brown have been, and are being, sold by Brown through its divisions and subsidiaries to purchasers located throughout the several States of the United States, the territories thereof, and in the District of Columbia. The respondent causes said shoes to be transported and shipped from the various places of manufacture to purchasers thereof who are located in States other than the State where said shoes were manufactured, and there has been and is now a constant and continuous current and flow of said shoes in interstate commerce. Respondent, therefore, is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of shoes in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business in commerce, Brown, through its Brown Franchise Stores division, has been and is now engaged in unfair methods of competition and unfair acts or practices in that it has entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown. Customers who have entered into such agreements or franchises with Brown are termed "Brown Franchise Stores", and are afforded special treatment and given certain benefits, hereinafter described, which are not granted to the Brown customers who do not enter into such agreements or franchises.

PAR. 6. At the present time, there are approximately 650 Brown Franchise Stores located in forty-seven of the States of the United States. Total sales by Brown to the Brown Franchise Stores in Brown's fiscal year ending October 31, 1957, were \$21,724,564.

Brown Franchise Stores are, for the most part, "family type" stores selling a complete line of shoes to fit every member of the family. They are mostly located in the towns and smaller cities and only one Franchise Store is appointed in each town or small city.

PAR. 7. Among the valuable benefits or services received by Brown Franchise Stores from, or through, Brown are free signs, business forms and accounting assistance; participation in lower cost group fire, public liability, robbery, and life insurance policies; and special, below list prices on U.S. Rubber Company canvas and waterproof footwear.

As consideration for the above-enumerated services, the Brown Franchise Store is required to concentrate its purchasing to the grades and price lines of shoes sold by Brown and to refrain from stocking and selling the shoes of competitors of Brown. The Standard Brown Franchise agreement provides that the franchisees will:

1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company.

PAR. 8. Dealers who violate the above-described agreement, by buying and stocking shoes manufactured and sold by competitors of Brown, are dropped from the Franchise program and are deprived of the hereinbefore-described valuable benefits attendant thereto. Acting on instructions from Brown, the insurance companies which write the Brown-sponsored, term group fire, public liability, robbery and life insurance policies covering Brown Franchise Stores, refuse to renew the policies of recalcitrant dealers. Also acting on instructions from Brown, the United States Rubber Company charges recalcitrant dealers higher prices for canvas and waterproof footwear. Furthermore, Brown itself withdraws and refuses to grant to dealers dropped from the Franchise program, the free signs, business forms, accounting assistance and other services and benefits granted to dealers under the Franchise program.

PAR. 9. The purpose, intent or effect of the aforesaid methods, acts and practices of the respondent has been, is, or may be, substantially to lessen, hinder, restrain and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and handling shoes of competitors of Brown; to exclude, or to tend to exclude, competitors of Brown from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of Brown from a substantial share of the retail-dealer market in many trade areas; to appropriate to Brown the exclusive right to supply substantially the entire purchased shoe requirements of a substantial number of retail shoe dealers; and to enhance further the dominant position of Brown in the shoe industry and thereby to tend to create a monopoly in Brown in the purchase and sale of shoes in interstate commerce.

PAR. 10. Paragraphs 1 through 4 of Count I are hereby incorporated by reference and made a part of this charge as fully and with the same effect as though here again set forth verbatim.

PAR. 11. Through its sales divisions and subsidiaries, Brown sells its branded shoes to more than fifteen thousand independent retail shoe stores located in each of the States of the United States and in the District of Columbia.

In many trade areas throughout the country, the independent retail shoe store customers of Brown compete with each other or with Brown owned retail stores in the resale to the public of Brown manufactured shoes.

PAR. 12. In the course and conduct of its business of selling branded shoes to independent retail shoe stores, Brown has been, and is now, engaged in unfair methods of competition and unfair acts or practices in commerce, in that it forces and requires or attempts to force and require its retail shoe store operator customers to agree to maintain arbitrary, noncompetitive resale consumer prices fixed and promulgated by Brown.

PAR. 13. Brown regularly publishes and distributes to its retail shoe store operator customers price lists or catalog sheets which contain the consumer prices to be observed by said customers.

Frequently Brown publishes said consumer prices in full page advertisements in magazines having national circulation.

Through its representatives and officials, Brown maintains continuous pressure upon its retail shoe store operator customers to insure that they do not depart from or sell below the minimum resale prices fixed by Brown. Customers who do advertise or sell at prices below the agreed minimum are immediately contacted by a Brown representative, who is instructed to secure the operator's adherence to the fixed minimum prices by persuasion, but if that fails, to threaten and inform the customer that Brown will discontinue doing business with it.

PAR. 14. By means of the aforesaid unlawful agreements, which respondent enforces or attempts to enforce by coercion and threats, plus the distribution of the aforesaid price lists and the publication of prices in national magazines, Brown has illegally fixed, controlled and maintained, or attempted to fix, control and maintain, the prices at which shoes manufactured and distributed by it are resold to consumers.

PAR. 15. The acts and practices of Brown as alleged in Counts I and II of this complaint are all to the prejudice of competitors of Brown and to the public; have a tendency to hinder and prevent,

and have actually hindered and prevented, competition in the purchase and sale of shoes in commerce; have a tendency to obstruct and restrain, and have actually obstructed and restrained, such commerce in shoes; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. James P. Timony supporting the complaint.

Bryan, Cave, McPheeters & McRoberts, of St. Louis, Mo., by *Mr. R. H. McRoberts*, *Mr. Gaylord C. Burke* and *Mr. Edwin S. Taylor*, for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

JANUARY 25, 1962

The Federal Trade Commission issued its complaint against the respondent on October 13, 1959, charging that it has entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require these customers to restrict their purchasers of shoes for resale to the respondent's lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of respondent; and in a separate count, charging that it forces and requires, or attempts to force and require, its retail shoe store operator customers to agree to maintain arbitrary, noncompetitive resale consumer prices fixed and promulgated by respondent. The complaint charged that these practices, alleged in both counts of the complaint, constituted unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act. Respondent's answer denied generally the allegations of the complaint, although minor factual allegations were admitted.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint and oral argument thereon. At the close of the presentation of the Commission's case, respondent moved for dismissal of the charges on the grounds that a prima facie case had not been established. The hearing examiner elected to defer ruling upon this motion until the close of all the evidence in the case. The hearing examiner now hereby denies the motion to dismiss the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both

parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom, and issues the following order:

FINDINGS AS TO THE FACTS

COUNT I

1. Brown Shoe Company, Inc. (referred to in the complaint as Brown Shoe Company; hereinafter sometimes referred to as "respondent" and as "Brown"), is a New York corporation with its office and principal place of business at 8300 Maryland Avenue, St. Louis County, Missouri.

2. Respondent has among its wholly owned subsidiaries G. R. Kinney Corp., Regal Shoe Company, Wohl Shoe Company, Bourbeuse Shoe Company, and Moench Tanning Company, Inc.

Respondent is primarily engaged in the manufacture and distribution of a broad line of medium-priced, nationally advertised shoes for men, women, and children. These shoes are marketed principally by sales at wholesale to independent retail shoe store customers. In 1959, respondent was actively selling to approximately 6,000 independent retail shoe stores.

Respondent and its subsidiaries have over fifty manufacturing plants, tanneries and warehouses in ten States of the United States and in Canada.

3. Wohl Shoe Company (hereinafter referred to as "Wohl") is a wholly owned subsidiary of respondent, and is a Missouri corporation with its principal office at 1601 Washington Avenue, St. Louis, Missouri. Wohl sells shoes at wholesale to independent retail customers and also at retail to consumers.

Wohl sells women's shoes at wholesale to approximately 3,200 customers located throughout the United States and the District of Columbia. In 1958 there were 208 of these customers operating on the "Wohl Plan". A Wohl plan account is an independent retail outlet which is partially financed by Wohl and generally buys most of its women's shoes from Wohl. In addition, Wohl retails primarily women's shoes, but also some children's and men's shoes. In 1958 Wohl was selling at retail through 457 leased departments in 243 stores.

Regal Shoe Company, a wholly owned subsidiary of respondent, is a manufacturer and retailer of men's medium-priced shoes. In 1958 Regal had a chain of 92 retail outlets in which its shoes were sold.

The G. R. Kinney Corporation is a wholly owned subsidiary of respondent. It operates a chain of family shoe stores and manu-

Initial Decision

62 F.T.C.

factures and sells men's, women's, and children's popular-priced shoes. In 1959 it owned and operated 488 retail stores.

4. Respondent has separate selling divisions through which it markets its brands of shoes. The principal brands and the divisions selling them are:

<i>Division</i>	<i>Brand</i>
Air Step-----	Air Step
Buster Brown-----	Buster Brown
	Glamour Debs
	Official Boy Scout
	Official Girl Scout
	Propr-Bilt
Life Stride-----	Life Stride
Naturalizer-----	Naturalizer
Risque-----	Risque
Robin Hood-----	Robin Hood
	Robinettes
Roblee-----	Roblee
United Men's-----	Buster Brown
	Official Boy Scout
	Pedwin

Each of these sales divisions has its own sales manager and its own sales force. A retailer who sells respondent's shoes will be called on by a salesman from each division whose brand he carries. Each of the sales managers of the sales divisions is responsible to the vice president in charge of sales.

5. In 1957, Brown conducted the largest consumer advertising campaign in the shoe industry, spearheaded by 52 color pages in Life Magazine and 58 additional pages in other leading national magazines.

6. Respondent's sales for the fiscal year ending October 31, 1959, including the sales of its subsidiaries at wholesale and at retail, were \$276,549,164. Respondent is second in dollar sales and third in pairage production among shoe manufacturers in the United States.

7. Respondent has been, and is now, in competition with other corporations, individuals, and partnerships engaged in the manufacture, sale, and distribution of shoes in interstate commerce.

8. Respondent manufactures shoes in six States of the United States. Respondent causes its shoes to be transported and shipped from these places of manufacture to retail shoe customers who are located in each of the States of the United States and the District of Columbia. There has been, and is now, a constant and continuous current and flow of said shoes in interstate commerce.

9. Another division of respondent is the Brown Franchise Stores Division. The personnel of this division includes the headquarters staff comprised of three men, one of whom is the manager of the division, and 16-salaried fieldmen who visit the franchise stores. The

679

Initial Decision

franchise stores division is responsible to the vice-president in charge of sales.

10. During a recent 5-year period, 200 stores entered the program. In November 1959, there were 682 stores on the program, and in October 1961, the total had risen to 766.

11. Of the retailers operating on the franchise program, about 259 have entered into written Franchise Agreements with respondent. In recent years written agreements have not been made with newcomers to the program. There is no difference in respondent's policy toward those franchise holders who have signed the agreement and those who have not, and the rights and obligations of both groups are the same. The total sales of respondent to retail stores on the franchise program for the fiscal year ending October 31, 1959, was \$24,675,617.

12. For the benefits and services which dealers on the franchise program who entered into written agreements will receive, they agreed that:

In return I will:

1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company.

This provision has been in effect since 1949 or 1950. The preceding Brown Franchise Contract provided that the Franchise Agreement terminated if the franchise dealer purchased shoes from any manufacturer other than Brown.

13. Among the benefits and services which a dealer will receive by being on the franchise plan are: architectural plans, service of a field representative, merchandising records, retail sales training program, accounting system, national and regional meetings, and group purchasing of insurance, rubber footwear, and display material.

14. The retailer on the franchise program obtains the service and assistance of field representatives who give advice and suggestions on merchandising, sales promotion, personnel, accounting and record-keeping, and on other matters. In addition, these fieldmen will conduct a sales clinic or a salesmanship lecture for store personnel, and counsel a prospective franchise holder on the location of his store and terms of the lease.

15. Fieldmen call on the franchise holders from 2 to 10 times a year and work exclusively with dealers on the franchise program; except when calling on other dealers to persuade them to go on the program, and during the "conversion" period when a dealer is about to go on the program.

16. Fieldmen assist in filling out monthly reports by the franchise holders. This report is sent to the respondent and shows the performance of each line for that month and the ending inventory. Fieldmen also help fill out the buying guide for the franchise holders. This buying guide is used in restocking a store, and helps the dealers determine the amount of shoes he will buy for the season. The buying guide contains statistics taken from the monthly reports, so that the franchise holder knows the performance of all his lines at the end of each season. The buying guide is prepared prior to the two buying seasons, which are spring and fall.

17. The accounting and recordkeeping system furnished through the franchise program is a complete record system for a shoe store. Franchise holders are given a continuing supply of these forms. One of the forms supplied is the monthly report, which the Franchise Agreement requires to be made regularly, but which many dealers make less frequently.

18. Respondent has an architectural department that will completely design a new store or draw plans to remodel an existing store in its entirety. As many as half of the franchise holders have used this service. Although the service is available to other retailers who concentrate on respondent's shoes, 70-75 percent of the architects' time is devoted to working on plans for franchise stores.

19. Under an arrangement with U.S. Rubber Company, respondent receives a commission on purchases of U.S. Rubber Company footwear by dealers on the franchise program. For the fiscal year ending October 31, 1959, respondent received commissions totaling \$171,417. Respondent pays U.S. Rubber Company for the canvas and waterproof footwear purchased by the franchise dealers. U.S. Rubber Company ships the footwear directly to the dealers and respondent bills the franchise dealers. During 1959 there were 473 franchise dealers purchasing rubber or canvas footwear under this arrangement. From 1950 to October 21, 1955, respondent represented to franchise dealers that they would receive the following additional discounts on purchases through respondent, over and above the discounts available if purchased directly from U.S. Rubber Company:

Storm Footwear

Advance orders of more than 144 pairs and less than 480 pairs—3 percent.
Fill-in orders if bought in 12 pair runs and if merchants ordered more than 144 pairs on advance orders—8 percent.

Keds

Fill-in orders if bought in 12 pair runs and if merchants ordered at least 480 pairs on advance orders—8 percent.

These additional discounts were not made available by respondent to customers other than franchise dealers.

20. From 1956 up to 1959 respondent represented to franchise dealers that on this storm footwear and Kedettes they would get the 8 percent discount and 2 percent cash discount by purchasing 144 pairs, instead of having to purchase 480 pairs to get those discounts if they were not on the franchise program. Respondent represented that on fill-in orders on these shoes the franchise dealers would get an 8 percent discount for buying 12 or more pairs which was not available to dealers not on the franchise program. On Keds, the discount on fill-in orders is still in effect, and this discount is available only to respondent's franchise dealers.

21. Respondent represents to franchise dealers that they will be participating in group purchasing of fire, public liability, robbery, safe burglary, business interruption, and life insurance. From November 1, 1949, to October 31, 1955, respondent represented that merchants on the franchise program would receive a discount in price on fire insurance not available to individual outlets and represented to them:

Because of the favorable experience the insurance company has had with our Franchise Store operators during the past 25 years, we are in a position to save the retailer approximately 25% on his fire insurance premium compared to his local rate.

Respondent has continued to represent that there would be considerable savings on insurance purchased through the franchise program. Respondent supplies the average inventory of the franchise holders to the insurance company, and for this service is compensated by the insurance company.

22. In addition to the benefits and services which dealers receive under the Franchise Agreement, many Brown Franchise Dealers have received loans from respondent. These loans are as high as \$30,000. On October 31, 1957, the total amount of loans to all dealers, including those under the franchise program, was \$844,886.83.

23. Large outside illuminated Roblee and Buster Brown signs and neon Naturalizer signs are given to dealers who aggressively push those lines and sell them effectively, and are not handling conflicting lines. The dealer pays \$1 for the outside sign, and he pays the maintenance cost, and the sign is given to the dealer until he stops handling the shoes, in which case, respondent takes the sign down. Brown Franchise Dealers have 30 of the 51 Roblee signs which respondent has given out, and they have 53 of the 115 Buster Brown signs given out.

24. Window decoration service for which there is a charge and the architectural service are offered to other dealers who concentrate on

respondent's lines, as well as to Brown Franchise Dealers. Respondent also gives dealers window decoration without charge, such as neon signs and cards.

25. The forms upon which the Brown franchise fieldmen submitted their reports state: "ENCOURAGE CONCENTRATION ON B.S.C. LINES AND ELIMINATION OF CONFLICTING LINES." A newer form has eliminated this statement, but the omission did not change the practice.

26. The following written instructions to fieldmen by the manager and the assistant manager of the Brown Franchise Program show the policy of encouraging the concentration on Brown lines and the elimination of conflicting lines:

This week our Buster Brown sales representative, Frank Mirra, called me and among various things discussed, he advised that he had just learned that Orville Shugart plans to buy American Girl line for Fall.

George, let's get into this immediately and head this off before the shoes are received in the store. As you know, if the American Girl line is purchased, this will not be in keeping with our Franchise Program.

I think it is time for a forthright discussion with Mr. Bump on what we attempt to accomplish with dealers who operate their business on our Franchise Program. If he does not see the wisdom of going along with the thought of operating these stores more progressively, avoid directly conflicting purchases, then I think we have no other alternative than to ask him to withdraw from the program.

The one very important point that concerns me, T. R., is that you say he can get a better mark up on men's Great Northern shoes and that his customers want leather soles. If this be the case and he is determined to continue to carry Great Northern instead of Pedwin, then we have no other alternative than to ask him to withdraw from the Franchise Program.

27. Such evidence as there is relating to action taken by the fieldmen in following these instructions indicates that they sometimes failed to achieve the desired results, and it appears that respondent's home office was sometimes lax in enforcing its policies, although, as hereinafter found, some dealers were dropped from the program for failing to comply with this policy. The manager of Brown Franchise Stores Division testified that there was a point at which a dealer would be dropped from the program for carrying conflicting lines.

28. The manner in which the fieldmen encourage concentration on Brown lines and the elimination of conflicting lines is shown in the following excerpts from their reports:

Outside lines were analyzed, and the unprofitable performance of these lines pointed out to the management. One line of ladies' shoes that was bought in 8 patterns last spring, was cut to 4 patterns for the Fall buy, and will be reduced even further for next Spring's buy.

The only problem in this store, in-so-far as we are concerned, is the presence of an outside line of shoes. Tom and I talked with Clarence about this and

he agreed to give the Life Stride serious consideration before buying next season. Apparently he was not aware of the strength of Life Strides and the strong position it holds in the stores.

I will do everything possible to get this other line out of the store.

A good portion of Jack's inventory represents spot shoes from outside lines and in talking with Jack he admits that these represent a small percentage of his sales and are not needed. In most cases they amount to overlapping patterns. Three lines of shoes will be eliminated this coming season.

Outside lines were discussed and she also agrees that most are not necessary and will be discontinued.

Concentration on fewer lines and less patterns was discussed and will be applied more this fall. Debs are to be discontinued and Shelby Arch type shoes are to be replaced with Propr-Bilt.

Concentration on fewer lines was discussed and it was decided to discontinue Golo dress flats and Grinnell sports.

29. During the fiscal years 1949 through 1955, respondent dropped 22 stores because of a failure to comply generally with the conditions of the Brown Franchise Agreement, one of the conditions being the prohibition against handling conflicting lines. Respondent, in that period, dropped 19 stores for handling conflicting lines which was "completely contrary to the franchise agreement." From November 1, 1954, through April 1, 1958, a dozen or more dealers were dropped from the Brown Franchise Program primarily because they handled conflicting lines.

30. The Brown Franchise Dealers probably buy on an average about 75 percent of their total volume of shoes from respondent.

31. Shoe manufacturers try to have only one account carry each of their lines in a town or trading area. U.S. Shoe Corporation gives May Company Department Stores a 10-mile radius "protection." Freeman Shoe Corporation sells to only one account in a small town. So does respondent. Most Brown Franchise Dealers are found in towns of from 5,000 to 30,000 population, and in almost all instances there is only one franchise store in each community. Some manufacturers will put their line of shoes in two outlets in a town if one is a shoe store and the other is a department store.

32. Price is a factor in determining which outlets are available to a manufacturer. Not all retail shoe outlets are desirable customers for this reason. The outlet may stock shoes ranging too far below or too far above the manufacturer's suggested resale price to be a suitable outlet.

33. There are nearly 100,000 retail outlets in the United States which sell shoes. Many of these sell only a particular style of shoe, such as cowboy boots in a western store, or baby shoes in a baby store. Many also have few shoes in relation to their total inventory, their

Initial Decision

62 F.T.C.

shoes being carried as a side line. Among the outlets which sell shoes are the following types:

Grocery store	Drug store	Health store
Dry goods	Surplus store	Pawn shop
Variety store	5 & 10	Curio shop
Shoe repair shop	Western store	Indian Post
Hardware store	Supermarket	Cafe
Sporting goods store	Army Surplus store	Glass manufacturer
Saddle shop	Leather goods store	Commissary
Work clothes store	Zink smelter	Baby store
Oil company	Gun store	
Specialty store	Dollar store	

34. Brown Franchise Stores are choice retail shoe outlets. Because these stores are family shoe stores they are considered a prime market by respondent's competitors. They are considered most desirable from a volume as well as a credit standpoint. The average volume of sales in 1960 for stores on the Brown Franchise Program was \$97,000. The average return on investment for these stores has been 16 percent as against 11.8 percent for all independent shoe stores. Respondent characterizes its franchise dealers as the "most prosperous group of shoe retailers in America" and states that the Brown Franchise Program is not available to any shoe store but is best fitted for the "outstanding dealers" in each community.

35. Representatives from six of respondent's competitors testified that they were foreclosed from selling Brown Franchise Dealers generally. They testified that their sales volume was reduced or lost entirely to customers who became Brown Franchise Dealers. Most of them gave specific examples, some of which were erroneous, but it is clear that they lost volume to these accounts and some of them lost accounts completely. By the very nature of the transition of dealers to the Brown Franchise Program it would be expected that many competitors would lose accounts completely to Brown and that others who did not lose the accounts would lose sales volume to these accounts. The question to be resolved is whether they, and as a consequence competition, were likely to be adversely affected by the restriction the Brown Franchise Program placed on the dealers to refrain from dealing in conflicting lines. The terms of the agreement are clear and the dealers undoubtedly knew what they had agreed to do, and when the written agreements were replaced with oral agreements, with the newer accounts in recent years, the terms were the same. The dealers could not know positively how rigidly they would be required to adhere to their agreements, but it must be inferred that many of them would abide by their agreements to the letter. Over the years most of these dealers have learned that respond-

ent will condone some duplication of lines, particularly if the outside line is a short line or a specialty line or if the real volume is in respondent's lines, because five out of six of them carry at least one line that competes to some extent with a Brown line. There is a point beyond which outside lines will not be tolerated by Brown, and it is believed that generally the dealers know what it is.

36. It is therefore found that the restrictive provision of the agreements between respondent and its Brown Franchise Stores Division dealers was a major factor in foreclosing markets to the competitors who testified herein, as well as to other competitors of respondent, and as a consequence competition has been adversely affected as will be hereinafter more specifically found.

37. Respondent contends that the contract requirement has been abandoned and that most of the present franchise holders have not signed a written agreement containing the restrictive provision. It also contends that it was not enforced and that the restrictive contract could not have had adverse effects. The evidence does not support these contentions, except that in recent years the written contract has not been used in bringing stores under the franchise plan, and many of the franchise holders testified that the restrictive provision was not called to their attention or enforced.

38. The evidence shows that the restrictive provision against handling conflicting lines has been enforced and will continue to be enforced and that it necessarily inhibits franchise holders from buying other brands which they would buy if they were not restricted.

39. It may be, as respondent contends, that for some retailers it would be an unwise business practice for them to carry conflicting lines, but the law protects the buyer's freedom of choice, even if the choice is uneconomic for him.

40. Respondent also contends that most franchise holders carry other lines, some of which are conflicting, and that this shows a lack of effectiveness of any restrictions if any there be. Most of the important conflicting lines carried by the franchise holders are short lines of specialty shoes, such as Clinics (primarily for nurses) and Hush Puppies (loafers), which are condoned, but it is clear that respondent will remove customers from the plan when it considers the restrictive provision has been seriously breached. It will continue to sell these customers, but will not continue the benefits which accrue to Brown Franchise Plan customers.

41. The question remaining is whether the adverse effects of the practice may be substantial.

Although respondent is the second largest shoe manufacturer in the country, its sales through the Brown Franchise Plan are less than

1 percent of all shoes sold in the United States. It confines its production to medium-priced shoes which limits the area of effective competition to some indeterminate extent, but since most of these Brown Franchise Plan customers are in cities of 5,000 to 30,000 population, it would appear that the greatest effect of the restrictive provision would be felt in these localities. The substantiality of the effect is distorted by attempting to compare the market share sold through the franchise plan to the total United States market. It appears that each trading area where a Brown Franchise Plan account is located would be the appropriate geographical market in which to appraise the effects of the restrictive provision because the retail shoe market is not a national market except to the slight extent that shoes are bought by mail. Because of custom, convenience, necessity, or perhaps other reasons, consumers usually purchase shoes in their local communities and it is the aim of most shoe retailers to give their customers such service and value as will retain their patronage. Considering the importance of fitting shoes, it is believed that purchases of shoes by mail constitute only a small part of the total sale of shoes and that the retail shoe market is essentially a series of local markets. In these trading areas the market share of the stores under the Brown Franchise Plan is, of course, much higher, and the number of retail competitors varies from about 5 to about 26.

42. Since there are about 600 such trading areas, in most of which the effect of the restrictive provision is substantial, it is concluded that the total effect on competition is substantial. The benefits of unrestricted competition should be permitted to flow to competitors of respondent, to customers of respondent and their competitors, and to consumers. In many trading areas the benefits of competition are hindered by respondent's restrictive provision.

43. At least two other shoe manufacturers, which sell men's, women's, and children's shoes in direct competition with Brown, have franchise stores programs somewhat similar to respondent's program.

International Shoe Company, the nation's largest shoe manufacturer, sells men's, women's, and children's shoes under a variety of brand names which compete directly with Brown brand shoes. International has a franchise stores program under the direction of its Merchants Service Division, and the independent shoe retailers which operate on that program are known as Merchants Service Stores. In order to obtain the benefits and services available under the program, a Merchant Service Dealer agrees to feature the shoes of a division of International, in each type of shoes (men's, women's, and children's) he carries, and at all times to handle such shoes in a representative manner.

General Shoe Company sells men's, women's, and children's shoes under a variety of brand names which compete directly with Brown brand shoes. General has a franchise stores program under the direction of its Genesco Retailers Service Agency, and the independent shoe retailers which operate on that program are known as Friendly Franchise Stores. In order to obtain the benefits and services available under the program, a Friendly Franchise Dealer agrees to purchase sufficient quantities of footwear from General, in each type of shoes (men's, women's, and children's) he carries, as are necessary to assure the presence of an adequate and representative stock of merchandise in the Friendly Franchise Store at all times.

This record does not show whether the requirements of these contracts of International and General are construed to require the dealers to refrain from buying competitive shoes, but to the extent they are so construed, or to the extent they tend to create captive customers, the market open to the many sellers of shoes would be further restricted.

44. It is found and concluded that the effect of the methods, acts, and practices of the respondent, as hereinbefore found, has been, is, or may be, substantially to lessen, hinder, restrain, and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and dealing in shoes of competitors of respondent; to exclude, or attempt to exclude, competitors of respondent from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of respondent from a substantial share of the retail dealer market in many trade areas; and to enhance the dominant position of the respondent in the shoe industry.

COUNT II

45. The foregoing findings numbered 1 through 10, 22, 34, and 38 relate to the charges in Count II of the complaint and it is so found. They are incorporated herein at this point by reference.

46. Respondent contends it does not require or attempt to require its dealers to adhere to its suggested resale prices. The evidence shows that respondent has a definite policy of seeking adherence to its announced or advertised resale prices and shows instances where, on two different occasions each, attempts were made to secure the adherence of two price cutters to suggested resale prices. It is not clear whether these attempts resulted in agreements with the customers each time, but they appear to have ultimately come into line with respondent's policy. In any event, respondent resorted to several means in an effort to bring this about, which included sending salesmen to advise the dealers of Brown's policies, telephoning one of them from the central

office urging adherence, instructing salesmen to advise the dealer that continued lack of conformance would result in his being disenfranchised, arranging a meeting between its price-cutting dealer and a nonprice-cutting dealer, urging that they agree upon adhering to suggested resale prices, attempting to suppress advertising of discount prices, and checking these dealers at a later time to determine whether they were conforming.

47. Each of the respondent's selling divisions publishes wholesale price lists for the brand or brands of shoes sold by it. The Buster Brown and Robin Hood lists contain "suggested" retail prices. The United Men's and Roblee lists contain a schedule showing the retail price to be charged for each different wholesale price category. The women's and girls' shoe price lists do not contain a "suggested" retail price, but a suggested markup of "44 or 45 percent" is communicated to the customers orally by the salesmen. Because dealers know what the recommended markup is, they know automatically the suggested resale price. In addition, most of the respondent's selling divisions send out suggested retail price lists each season.

Respondent publishes suggested resale prices for some of its shoes in full page advertisements in magazines having national circulation. These ads often give a specific price for the shoe illustrated, as well as a price range for the line.

48. Respondent's director of marketing testified concerning customers of respondent who do not abide by the suggested resale price:

Now, once in a while a fellow will get an idea that he is going to have an advantage, and we will try to get him turned around to where he wants to sell his shoes at the regular markup which other merchants are doing.

In response to a question as to the instruction given to salesmen who are sent to see price-cutting merchants, he said:

. . . we have to go over and see this fellow and try to dissuade him from that practice . . . you have got to make your peace over in that area or you will lose several customers. So you have got to straighten it out.

So the way to straighten it out is to try to show him the error of his ways and get him on the right basis because this practice of selling shoes at a discount price level is an almost inflexible thing with our brand of shoes. And when he is doing that he is in trouble.

When respondent first establishes a sales relationship with a retailer, the program of adherence to retail prices is discussed. Respondent's director of marketing was asked:

When you take a new outlet that hasn't been in the shoe business you wouldn't know whether he is going to be a price cutter or not?

He responded:

Oh, yes. You talk to him quite a while before you sell him, telling him what is expected of him.

The result of these conversations is that price-cutting dealers rarely get on the respondent's books.

49. During the summer of 1956, Fraver's Shoe Store of Chambersburg, Pennsylvania, a Brown franchise store, cut the price on certain patterns \$1 below the recommended price. Paul Dutrey, another Brown franchise holder with stores in Waynesboro and Carlisle, Pennsylvania, complained of this price cutting and he received help from respondent. George Croker, the Brown Franchise Stores Division field representative, was sent to see Fraver and he got Fraver and Dutrey to "have a cup of coffee together and talk it over" so that they could "have an agreement on the prices on their shoes." Croker reported back to J. R. Johnston, manager of the Brown Franchise Stores Division, that "Mr. Fraver has assured me he will maintain the prices on our shoes so there will be no conflict in the future." Croker's purpose in writing to Johnston was "to indicate to the St. Louis office that these two parties has—was going to get together and iron out any differences that they had in their thinking." Croker did get Fraver to agree to the "proper markup." Johnston wrote to Croker and stated that: "We certainly appreciate Fraver's willingness to cooperate."

50. Fraver apparently resumed price cutting because Johnston called him concerning his price cutting in June of 1957. On October 5, 1957, Dutrey directed a letter to Johnston complaining that Fraver was " * * * still underselling your shoes in every line." This letter was answered by T. R. Curtis, the assistant manager of the Brown Franchise Stores Division, who assured Dutrey that the field representative, George Croker, had been ordered to " * * * contact Fraver for the purpose of having a thorough understanding that he must discontinue this practice." In his letter to Croker, Curtis instructed:

* * * we want you to again, personally, contact Fraver for the purpose of discussing the necessity of his selling our lines at our recommended retail prices and if he does not agree to this, then it will be necessary for us to discontinue selling him. He will, perhaps, agree to our recommended prices and if so, be sure to have a very thorough understanding that if he does under-price the lines in the future, it will be necessary for us to discontinue our business relationship.

In addition, the fieldman was told to contact Dutrey after visiting Fraver " * * * so he will know this is being taken care of."

On October 14, 1957, Dutrey again, complained about Fraver's cutting prices, and this time threatened to discontinue purchasing Brown shoes " * * * unless we get satisfactory guarantees from you that this practice will stop * * *." Upon receiving this complaint, Johnston again telephoned Fraver, with the result that he was able to telegraph Dutrey that Fraver " * * * agrees to abide by suggested retail prices

Initial Decision

62 F.T.C.

all patterns of Brown Shoe Company lines he carries." And Johnston followed the telegram with a letter which read :

This letter will follow up my telegram regarding the discussion I had with Mr. Fraver over at Chambersburg regarding the pricing of certain Brown Shoe Company patterns. I talked with him at considerable length on why it was necessary that we ask him to abide by our suggested retail prices and he agreed to do just that.

He will remark any patterns that are necessary, at once, and I am confident that we will not have a recurrence of this situation. I have much respect for Mr. Fraver's integrity and with the long association we have enjoyed I know we can count on him to keep his word.

The manager of the Brown Franchise Stores Division also wrote to all the selling divisions of Brown telling them of Fraver's price cutting and recommending "* * * that when you call on Mr. Fraver from time to time that you check the retail prices for your particular line of shoes and make sure he is abiding by your suggested prices other than during clearance sale periods."

51. On June 15, 1956, Pomeroy's, a department store in Harrisburg, Pennsylvania, advertised Roblee shoes which normally sell for \$10.95 to \$16.95 at a sale price of \$6.99. Mr. Dutrey of Carlisle, Pennsylvania, complained to Brown that this action by Pomeroy's breached an agreement between Brown Franchise Dealers and the respondent as to when a clearance sale, with attendant reduced prices, was to be held.

Stanley Bozaich, manager of the Roblee Division, immediately contacted his salesman, John Mirra, and asked: "I want to know how come Pomeroy's ran this ad on June 15 showing these two shoes, as we have discussed previously that this would not happen and our program on Roblee sales was definitely pointed out to them." And, he later wrote to the salesman and said:

Regarding your conversation with Al Schwarz relative to the ad of June 15 in which they advertised Roblee shoes on sale, I believe you know the policy of the Company and this is definitely not allowed.

Roblee shoes go on sale twice a year in July and January. Any other sale promotion on Roblee shoes is not to be advertised as such.

I want you to straighten this out with Al Schwarz so that in the future regardless of whether we give him close-outs or he is running out his regular stock, this is not to happen.

The manager of the Brown Franchise Stores Division wrote to Dutrey and said that he had been taking care of the price cutting by Pomeroy's by "* * * telephone conversations with the salesman, with the merchandising manager of Pomeroy's, correspondence, etc." He said that in contacting the Roblee salesman and the sales manager about the price cutting, they "* * * have authorized me to give you their assurance that there will not be a recurrence of this."

52. In September of 1956 Pomeroy's again advertised Brown shoes below the suggested list prices and this time both Buster Brown and Roblee brand were involved.

Dutrey complained to the president of Brown and he advised Dutrey that the matter was "* * * being given thorough attention * * *." The "attention" consisted, in part, of the issuance by the Roblee Division sales manager Bozaich to his salesman, Mirra, the following instruction:

Before I took any actual action with Pomeroy's I wanted to write and inform you of this situation. At this time I am going on record and telling you if this happens once again we will be forced to withdraw Roblee shoes from the Pomeroy store in Harrisburg.

I understand a change in merchandise men is going on at the present time at Pomeroy's, however, putting a sale on Brown Shoe Company products and advertising them at this particular time of the year is definitely against Company policy and we will not adhere to these principles.

You will probably have to make a trip to Harrisburg to get this thing straightened out. The above facts will definitely have to be given to Pomeroy's since we do not want a repetition of this in the future.

53. Mirra made the trip to Harrisburg and went to see Moskowitz, who had succeeded Schwarz as merchandising manager at Pomeroy's. Mirra testified concerning his conversation with Moskowitz:

* * * I said to Mr. Moskowitz, I realize that cleaning stock was very important and adjusting the inventory was very important but if he would just not advertise—put these shoes in the newspaper, just sell them, put them on the table and sell them so I could get Mr. Dutrey off my back.

54. The sales manager of the Buster Brown Division reported:

Our salesman Tufshinsky has contacted these people and has their assurance that there will be no further cut-price promotions on our shoes at any time other than our Semi-Annual Sale periods.

55. That the above action by the sales managers of the Roblee and Buster Brown Divisions was taken at the behest of the president, Clark Gamble, is shown by a letter from the Brown Franchise Stores Division manager, Johnston, to his field representative, Croker, in which letter he stated: "Mr. Gamble has insisted that the Sales Managers of these divisions get this situation straightened out. I am sure it will be." That rigid price maintenance is the official policy of Brown, endorsed and supervised by its highest official, is indicated by a memo to Gamble from Tom Curtis, assistant manager of the Brown Franchise Stores Division, which reads as follows:

Dick Dutrey, son of Paul Dutrey who wrote you the attached letter, telephoned us about this situation on Monday of this week. I, personally, talked to Paul Dutrey this morning prior to having learned that he had written you and had sent in copies of the ads. In my conversation, I assured him that this will be properly taken care of with Pomeroy's, in keeping with our pricing policies.

Initial Decision

62 F.T.C.

I have discussed the Roblee under-pricing with Stan Bozaich and understand we had this same difficulty with Pomeroy's earlier this year. Stan is writing John Mirra, the Roblee Sales Representative selling Pomeroy's, instructing him to contact the account for the purpose of getting this straightened out so there will be no reoccurrence of under-pricing.

56. Some of respondent's dealers occasionally vary their resale prices from respondent's suggested prices by 50 cents or a dollar on some styles without complaint from respondent or any competitor, but there is no evidence that their competitors or respondent were aware of these deviations.

57. Respondent has required, and attempted to require, certain of its customers to agree to maintain resale prices established by respondent, and through the use of such policy and practice has suppressed and eliminated price competition between customers.

CONCLUSION

The acts and practices of respondent as herein found are all to the prejudice of competitors and customers of the respondent and of the public, have a tendency to hinder, prevent and restrain, and have actually hindered, prevented and restrained, competition in the purchase and sale of shoes in interstate commerce, and constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Brown Shoe Company, Inc., its officers, representatives, agents, employees, subsidiaries, successors, and assigns, directly or through any corporate or other device, in or in connection with the offering for sale, sale and distribution of shoes, in interstate commerce, do forthwith cease and desist from:

1. Entering into, continuing in operation or effect, or enforcing any agreement or understanding with any customer or prospective customer or imposing any condition upon any customer or prospective customer, which has the purpose or effect of precluding such customer or prospective customer from independently determining whether shoes will be purchased by such customer or prospective customer from any competitor of respondent or from independently determining the volume of such shoes to be purchased.

2. Obtaining or attempting to obtain from any customer or prospective customer any agreement, understanding or assurance concerning the price at which any shoes are to be resold.

3. Entering into, continuing, or enforcing any agreement or understanding with any customer or prospective customer concerning the price at which any shoes are to be resold.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

I

Complaint, Initial Decision, and Respondent's Exceptions

This matter is before us on the exceptions of respondent, Brown Shoe Company, Inc. (Brown), to the initial decision and order of the hearing examiner holding that respondent violated Section 5 of the Federal Trade Commission Act by virtue of its franchise agreements with independent shoe retailers as well as by its activities in connection with resale price maintenance.

Specifically, Count I of the complaint charges that respondent, through its Brown Franchise Stores Division, has been and is now engaged in unfair acts and practices by entering into contracts or franchises with a substantial number of independent shoe retailers, requiring such customers to restrict their purchases of shoes for resale to respondent's lines and precluding such retailers from purchasing the products of Brown's competitors. The complaint alleges further in this connection that franchisees under the plan receive valuable benefits and services and that in consideration therefor they were required to concentrate their purchases on the grades and price lines of shoes sold by Brown and to refrain from selling the shoes of competitors. The complaint charges that dealers who violate the agreement to concentrate on respondent's shoes and to refrain from handling lines conflicting with those of respondent are dropped from the Brown franchise plan and deprived of its attendant benefits. The complaint states that the purpose, intent or effect of respondent's franchise plan may be substantially to lessen and restrain competition in the purchase and sale of shoes in interstate commerce, to foreclose a substantial share of the retail dealer market in many trade areas to Brown's competitors, as well as to further enhance the dominant position of Brown in the industry and tend to create a monopoly in Brown in the purchase and sale of shoes in interstate commerce.

Count II of the complaint charges that respondent's requirement or its attempt to require that its retailer customers adhere to arbitrary and noncompetitive prices promulgated by Brown is an unfair method of competition.

The hearing examiner, in the initial decision, found that counsel

supporting the complaint had sustained the burden of proof under both counts of the complaint and ordered respondent to cease and desist from entering into or continuing agreements or understandings with the purpose or effect of precluding its customers from independently deciding whether shoes should be purchased from Brown's competitors, as well as the volume of such purchases. The order entered by the initial decision further prohibits respondent from obtaining or attempting to obtain agreements, understandings or assurances from its customers on the resale price of its shoes.

Although respondent takes numerous exceptions to the examiner's findings, the thrust of its argument on appeal may be briefly summarized. With respect to the allegations under Count I of the complaint, respondent contends there is no substantial evidence to support the finding that the restrictive provision in the franchise agreement requiring concentration on Brown's products and prohibiting purchase of lines conflicting with respondent's had been enforced or that the restrictive provision necessarily inhibited stores under the franchise plan from buying other brands which they would have purchased if not so restricted. Respondent further denies that the record justifies the inference that the restrictive provision in the written franchise agreement had been agreed to by the majority of franchise dealers who had not signed such an instrument. Respondent takes the position that the hearing examiner, in making the finding that the restrictive provision in issue here was enforced, erred in relying on the memoranda of Brown's employees and officials, when the inferences which could be drawn from these documents were rebutted by the testimony of respondent's witnesses. Respondent argues that accordingly such inferences were contrary to the weight of the evidence. Respondent contends further that its Brown franchise plan is lawful and that the services furnished under the program give Brown no leverage whereunder the franchisees can be forced to buy Brown brand shoes. Respondent further maintains that membership in the franchise program does not affect a retailer's ability to purchase the respondent's shoes under the same terms and conditions as all customers.

Respondent argues that there has been no showing that its competitors are foreclosed from selling to franchise stores or that the adverse effect of the franchise plan on competition has been substantial. In this connection, the respondent also claims that the examiner erred in delineating the relevant geographic market as the trading areas where a Brown franchise plan account is located. Brown states that the proper geographic market is the nation as a whole, since this is the area of effective competition between Brown and other shoe manufacturers. Respondent, in effect, claims that had the examiner cor-

rectly defined the relevant market, he would have been forced to find that Brown's sales to its franchise stores were not substantial.

In the case of the charges under Count II of the complaint, respondent argues that there is no substantial evidence to support the finding that it required or attempted to require its customers to maintain the resale prices which it established. Respondent argues that the record shows only that Brown encouraged its customers to obtain an adequate markup to cover their expenses. As in the case of its exceptions to the examiner's findings under Count I, respondent urges that the hearing examiner erroneously relied on inferences drawn from documentary evidence which the testimony of its customers, employees and officials had rebutted. In this connection, respondent argues that such inferences were therefore necessarily contrary to the weight of the evidence.

Brown also objects to the order entered below on the ground that it is vague and indefinite, excessively broad, and not in conformity with the complaint or the evidence in the record.

II

The Operation Of The Brown Franchise Program

The threshold question presented by respondent's exceptions to the examiner's findings under Count I is whether he correctly found that the restrictive provision against the handling of conflicting lines had been, and will continue to be, enforced and that it necessarily inhibits franchise holders from buying other brands which they would buy if not so restricted.¹

Respondent argues, in effect, that the restrictive provision is not enforced insofar as the signers of written franchise agreements are concerned and is not even a part of the agreement or understanding between respondent and those franchise holders who did not sign such an instrument. Upon a review of the evidence we are persuaded the finding in question is clearly supported by substantial evidence.

The franchise agreement states:

In return I will:

Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company.

The proviso on its face restricts franchisees as to the purchases they may make from competitors of Brown. Further, the manager of the Brown Franchise Stores Division, in the course of his testimony in this proceeding, expressly admitted that the restrictive provision was

¹ Initial Decision, paragraph 38.

equally applicable to signer and nonsigner franchise holders alike.² It is therefore difficult to understand respondent's bald assertion that there is no evidence demonstrating that the restrictive proviso was part of the agreement and understanding between respondent and those franchisees not signing the agreement.

The documentary evidence in the record on which the hearing examiner relied, namely, the instructions to fieldmen from the manager and assistant manager of the franchise program as well as the fieldmen's reports to their superiors, clearly support the finding that respondent's fieldmen were expected to, and did their utmost to, encourage concentration on Brown lines and elimination of conflicting lines.³ The following declarations by Brown fieldmen or their superiors support the hearing examiner's finding on this point:

* * * He has been urging us to allow him to carry "Town and Country" which are profitable for him in Willimantic and has been refused. I am leaving Risque in as a cushion for this problem. Time will have to settle that problem. (Brown Franchise Division Inter-Company Correspondence—McEmery to Lon Carrol dated February 4, 1957, re Prague Shoe Company, New London, Conn.)

Outside lines were discussed and she also agrees that most are not necessary and will be discontinued. This will eliminate many over-lapping patterns and types that she does not need in this low-volume store. (Report of fieldman Bob Taylor to Tom Curtis re White's Shoe Store, Lancaster, New Hampshire, July 19, 1958.)

He has already discontinued Heydays and will drop Jolene, Williams, and Show Offs for fall. He is concentrating more on our lines each season. (Report of fieldman T. R. Forgan to Franchise Division, dated April 26, 1958, re Ward's Bootery, Chanute, Kansas.)

I think it is time for a forthright discussion with Mr. Bump on what we attempt to accomplish with dealers who operate their business on our Franchise Program. If he does not see the wisdom of going along with the thought of operating these stores more progressively, avoid directly conflicting purchases, then I think we have no other alternative than to ask him to withdraw from the program. (Letter to fieldman T. R. Forgan from Dick Johnston, Manager of the Brown Franchise Stores Division, dated February 18, 1958, re Lloyd's Shoes, Wichita and Great Bend, Kansas.)

The one very important point that concerns me, T. R., is that you say he can get a better markup on men's Great Northern shoes and that his customers

² "Q. With respect to paragraph 1 of Exhibit 25-C [the restrictive provision] and its interpretation, do you make any distinction between the Brown franchisees who have signed one of these contracts and those who have not signed a contract?

"A. No, sir.

"Q. Would that be true of the provisions of the Brown franchise program as a whole? In other words, the services that a man can get and the requirements and obligations that he is supposed to live up to.

"A. Yes, that is correct. There would be no variation of service or items whether he signed the agreement or not."

If this statement is not to be taken as an express admission that the terms of the restrictive proviso are applied to both signers and nonsigners of the agreement alike, then the utility of the English language as a suitable means of communication is indeed subject to question.

³ Initial Decision, paragraphs 26 and 28.

want leather soles. If this be the case and he is determined to continue to carry Great Northern instead of Pedwin, then we have no other alternative than to ask him to withdraw from the Franchise Program. (Letter to Brown fieldman T. R. Forgan, from Dick Johnston, March 11, 1958, re Bump Shoe Stores, Wichita and Great Bend, Kansas.)

These statements and others in a similar vein are contained in memoranda pertaining to retailers who had signed the agreement as well as to nonsigners. They clearly demonstrate that Brown fieldmen, pursuant to the instructions of their superiors, followed a policy of discouraging the purchases of competitors' lines conflicting with Brown and urging the elimination of conflicting lines. These actions were obviously pursuant to the restrictive policy expressed in the written franchise agreement applicable to signers and nonsigners alike.

Another persuasive fact compelling the same conclusion is the legend "Encourage concentration on B.S.C. lines and elimination of conflicting lines" borne for some time on the fieldmen's reports. This slogan also supports the inference that the basic purpose of the program as far as Brown is concerned is to serve as a medium to persuade a selected group of stores, namely, its franchise dealers, to restrict their purchases of shoe lines conflicting with those of respondent.

Brown's argument that the restrictive provision is not enforced or a part of respondent's arrangement with all of the franchise stores, namely, the nonsigners, is not reconcilable with the admission in respondent's brief, obviously applicable to the franchise program as a whole, that:

The record shows that Brown franchise dealers are offered and given the benefits and services of the kind and character in evidence, in return for concentrating on Brown's lines, and carrying them in a representative manner. If and when a dealer decides to cease concentrating on Brown lines and to purchase the major portion of his requirements elsewhere, he may be asked to leave the franchise program (CX 28, 29). This is Brown's relationship to its Brown franchise dealers, both with and without written agreements.*

Even in the light of this rather euphemistic statement, the assertion that the restrictive provision was not a part of the understanding between respondent and all its franchise holders strains credulity. A more realistic appraisal of the actual situation as disclosed by the record is, of course, that the program requires respondent's franchisees to purchase the majority of their shoes from Brown and consequently they are sharply restricted in the purchases they may make from Brown's competitors.

The true nature of the relationship between Brown and its franchisees, however, is explicitly set forth in the answer by respondent

* Respondent's brief, page 19.

to interrogatories in *United States v. Brown Shoe Company, et al.*⁵ There respondent expressly stated that the handling of conflicting lines is one of the factors considered as a failure generally to comply with the conditions of the franchise program. In this connection, Brown's reply further stated: "This [conflicting lines] covers the situation where the franchise account sold shoes of another company which directly conflicted with a line or lines of shoes manufactured by Brown Shoe Company. This was completely contrary to the franchise agreement."⁶

Aarol C. Fleener, vice president of respondent, testified in *United States v. Brown Shoe Company, et al.*,⁷ that:

Q. Do you ever drop a dealer because he carries conflicting lines?

A. We will drop them from the franchise plan, yes, if they persist in carrying conflicting lines.⁸

Moreover, the record demonstrates specific instances where retailers have been separated from the franchise program in the course of enforcing the restrictive terms of the agreement pursuant to the policy enunciated by Mr. Fleener. For example, Samuels Shoe Store, Compton, California, Richards Shoes, Norwalk, California, Seymours Shoes, Evansville, Indiana, and Revell and McCall Store, Emporia, Kansas, among others, were all separated from the program at various times in the period November 1954 to April 1958 for carrying shoes conflicting with those of respondent's.

The memoranda of respondent's personnel demonstrating Brown's efforts to eliminate or restrict the franchise holders' purchases of conflicting lines, coupled with the language of the restrictive proviso in the written agreement, as well as the actual enforcement of that provision, shown by the separation of noncomplying retailers, evidence respondent's intent to restrict the access of other shoe manufacturers to retailers under the franchise plan. It is inconceivable that respondent, which obviously invested considerable time and effort and expense in the program, would permit a retailer to enter or enjoy the benefits of the plan unless he assented to what was clearly Brown's purpose in establishing the program. Our conclusion on this point is confirmed by the following testimony of Mr. Fleener also given during the course of the trial in *United States v. Brown Shoe Company, et al.*:

Q. During the past 5 or 6 years, have any franchises been discontinued because the franchisee didn't concentrate on Brown branded merchandise?

⁵ 179 F. Supp. 721 (E.D. Mo. 1959), *aff'd* 370 U.S. 294 (1962).

⁶ This material is incorporated into the record as CX 28. It may be noted that respondent's definition of its policy on its franchise holders' purchases from competitors (note 4, *supra*) which is based in part on this exhibit clearly glosses over the admission that purchases of conflicting lines are completely contrary to the franchise agreement.

⁷ *Supra* note 5.

⁸ Included in this record as CX 118.

679

Opinion

A. Yes, I would say there have been some.

Q. Before you dropped the franchisee, did you warn him that you're going to drop him?

A. Naturally, in dealing with our customers, we try to get them to follow the program and if we find they persist in not doing it, why, then there's no point in continuing this plan.

Q. You point out the various benefits of the plan and try to get them to concentrate on your lines?

A. Yes, we do.

Q. Do you feel that there's no point in continuing the plan if the firm won't concentrate on your lines?

A. As a franchise man, yes. We'll still sell them shoes, branded shoes.⁹

In the light of these considerations, we must concur with the hearing examiner's reliance on the documentary evidence in preference to the testimony of respondent's dealer witnesses. Respondent's accusation, that in not taking the testimony of its dealer witnesses at face value the hearing examiner arbitrarily and unjustly ignored the only substantial evidence in the record, is without merit. Documentary evidence subsequently contradicted or explained by participants to the events related therein or qualified by the authors or other witnesses, is of course, not by virtue of that fact inherently insubstantial or necessarily outweighed by such testimony.¹⁰

The fact is that the hearing examiner, in making the disputed findings, performed precisely the function for which he was appointed, that is, to evaluate and weigh the probative worth of conflicting evidence; this is a task which he is uniquely equipped to perform since he observed the demeanor and bearing of the witnesses during the course of their testimony. Respondent, in effect, would strip both the examiner and the Commission of the fact-finding function imposed upon them by statute. It is, of course, well settled that, even in those instances where substantial evidence supports inconsistent inferences, an administrative agency is not precluded from drawing one of them.¹¹

We now turn to respondent's related procedural argument that the examiner erred in refusing permission to adduce additional testimony from franchise dealers on their understanding of and experiences with the Brown franchise program. Respondent contends that this testimony should not have been curtailed until the examiner could make a finding that the remaining Brown franchise dealers, if called to testify, would testify along the same or similar lines as the thirty-six dealer witnesses whom respondent had already called to the stand.

Section 4.14(b) of the Commission's Rules of Practice, which re-

⁹ Id.

¹⁰ Cf. *United States v. United States Gypsum Co., et al.*, 333 U.S. 364, 396 (1948).

¹¹ *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942); *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461, 491 (9th Cir. 1959), cert. denied 361 U.S. 884 [6 S. & D. 598] (1959).

Opinion

62 F.T.C.

respondent cites in this connection, although providing that every party shall have the right to present evidence,¹² does not confer a license to present cumulative or unduly repetitive evidence.

In making the disputed ruling, the hearing examiner stated:

. . . I am not going to permit you to call any further dealer witnesses to testify in the same manner as the past dealers have testified.

* * * * *

. . . It seems to me that I have heard all of that kind of testimony that I need to hear. In fact, a lot of the testimony that we have heard has been cumulative. I certainly don't want to listen to any more of the same kind of testimony. . . ."

It is obvious from the ruling complained of that the hearing examiner took into consideration the probability that respondent could well call a great many more retailers who would testify along lines substantially similar to the testimony of previous dealer witnesses, but that this particular line of testimony would not gain in probative worth as far as he was concerned by virtue of repetition. An examination of the testimony of respondent's thirty-six dealer witnesses convinces us that the examiner had ample opportunity to properly evaluate this evidence and that he rightly concluded that pyramiding additional testimony of this nature would not aid him in resolving the issues presented.

The examiner who has heard the witnesses must have the discretion to prohibit cumulative testimony on those points where he is satisfied that the issues have been thoroughly presented and that additional evidence of a cumulative nature would not assist him in arriving at the truth. Moreover, ". . . It has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment or whim. . . ." ¹³ The principle that the extent to which cumulative evidence will be received rests within the sound discretion of the trial court is well established.¹⁴ Were it otherwise, neither the Commission nor the hearing examiner would be able to dispatch the business before them.

Respondent further argues that the examiner wrongly construed the documentary evidence as proof of enforcement of the restrictive provision when in fact many of the statements therein reflected only the concern of Brown's manager or fieldman for inventory situations wherein a retailer had too many overlapping patterns or styles or was

¹² "Every party . . . shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing."

¹³ VI. Wigmore, "A Treatise on the Anglo-American System of Evidence in Trials at Common Law," Section 1907, 3d Edition, 1940.

¹⁴ See *Suhay, et al. v. United States*, 95 F. 2d 890, 894 (10th Cir. 1938), cert. denied 304 U.S. 580 (1938); *Hauge v. United States*, 276 Fed. 111, 113 (9th Cir. 1921).

carrying too many lines of shoes. Respondent argues that the principle of line concentration, viz, concentrating on one brand line of shoes in a given price range and thus avoiding conflicting lines, which increase inventory and duplicate patterns without bringing in additional sales, is a principle of good shoe retailing.

An examination of the fieldmen's reports and the memoranda of their superiors convinces us that while respondent's employees may well have been concerned about the inventory situation of certain franchise stores, their altruism in this respect was not unalloyed and that the overriding concern was the elimination of competitor's conflicting lines and concomitantly promoting an increase in the volume of purchases from Brown.

We need not concern ourselves here with the arguments of respondent and counsel supporting the complaint about the intrinsic economic merits of line concentration against the advantages of selecting only the best items from several lines in the same price and style ranges. We suspect that the validity of the principle may vary with the individual situation of the particular retailer.

The economic justification, if any, of line concentration is irrelevant to the issues presented to us here. While line concentration itself may or may not be economically justifiable, there is no economic justification for making the adherence to this doctrine the subject of agreement between buyer and seller and enforcing the agreement to the latter's advantage.

We are here concerned with the question of whether the franchise plan operates to foreclose Brown's competitors from a segment of the market. If the operation of the franchise plan is, in fact, an illegal restraint of trade, its reasonableness may not be justified on economic or other grounds.¹⁵ The short run advantage, if any, to respondent's franchise dealers of systematic application of the principle at the urging of respondent because of their membership in the franchise program cannot outweigh the long range interest of the community in the removal of restraints on competition.¹⁶

Respondent, by incorporating its insistence on line concentration (on Brown products) as a basic tenet of its franchise program, has achieved a measure of control over the purchasing operations of the dealers under that program. Respondent's basic mechanism for achieving such control and influencing the purchasing decisions of its franchise stores are the detailed reports on inventory, purchases, etc., to be submitted to respondent's franchise division or fieldmen for their information, analysis, and suggestions, as well as the conferences be-

¹⁵ See *Sandura Company*, Docket 7042 [61 F.T.C. 756] (1962).

¹⁶ See *Standard Oil Co. of California, et al. v. United States*, 337 U.S. 293, 309 (1949).

tween the retailers and fieldmen on the inventory situation and future purchases.

The record demonstrates that the retailer's prime motivation for joining and staying in the franchise program was the benefits and services available to him as a franchise dealer. These benefits have been fully described in the initial decision and that task need not be duplicated here.¹⁷ Not every dealer utilized all of the benefits or services available, but it is apparent that the services collectively achieved the effect desired by Brown, namely, attracting retailers to the program and inducing them to comply with its requirements.

Respondent apparently contends that the franchise program is inherently lawful and in support of that contention cites *Federal Trade Commission v. Sinclair Refining Company*,¹⁸ and *The Timken Roller Bearing Company v. Federal Trade Commission*.¹⁹ In our view, however, neither precedent supports the position of respondent. Both the *Timken* and *Sinclair* cases turned on factors not applicable to the instant proceeding. While it is true that in *Sinclair* the gasoline dealer could purchase respondent's products with or without the equipment subject to the restrictive lease and that in the instant case a retailer may purchase Brown's products irrespective of his membership in the franchise plan, the restrictions attendant on the franchise program are considerably more far-reaching than the arrangements upheld in *Sinclair*. In *Sinclair*, the agreement only purported to limit the gasoline which could be dispensed through the pumps leased by respondent, the dealer being free to secure additional equipment through which he might dispense whatever gasoline he desired. On these facts, the Court held that *Sinclair's* leases did not undertake to limit the leasee's right to use or deal in the goods of a competitor of *Sinclair*.

In this case, Brown's franchise dealers are expressly prohibited from purchasing lines of shoes conflicting with those of respondent and are required to concentrate on respondent's products; the prohibition extending to the franchisee's entire business as long as he is under the program. Under the terms of the restrictive provision under consideration here, the dealer, unlike the gasoline dealer in *Sinclair*, is foreclosed from exercising his own judgment as to the

¹⁷ "Among the benefits and services which a dealer will receive by being on the franchise plan are: architectural plans, service of a field representative, merchandising records, retail sales training program, accounting system, national and regional meetings, and group purchasing of insurance, rubber footwear, and display material." (Initial Decision, paragraph 13.) See also paragraphs 14-21 of the examiner's findings.

¹⁸ 261 U.S. 463 [1 S. & D. 306] (1923).

¹⁹ 299 F. 2d 839 [7 S. & D. 362] (6th Cir. 1962), cert. denied 371 U.S. 861 (1962).

purchases he may make from his supplier's competitors.²⁰ In *Sinclair*, the Court further found that limiting the leased equipment to the sale of Sinclair fuel protected the integrity of the Sinclair brand from possible debasement through the sale of inferior fuels. The franchise program cannot be justified on such grounds. The analogy advanced by respondent is neither relevant nor appropriate and does not support the conclusion that somehow the Brown franchise program is inherently lawful.

Respondent cites the *Timken* case²¹ in support of the assertion that "its program of giving benefits and services to shoe retailer customers who concentrate on Brown brand lines is entirely lawful." Specifically, respondent relies upon the holding by the court that a manufacturer is not prohibited from selecting dealers who will devote their energies to his products nor compelled to retain dealers with divided loyalties and that the seller has the right to select his own customers. The rule in *Timken*, on which respondent relies, predicated on the finding that no agreement between respondent and its dealers had been shown is not applicable to the circumstances of this record. In the instant case, as heretofore noted, the evidence demonstrates agreements and understandings between Brown and its franchise holders expressly prohibiting the latter from purchasing lines conflicting with those of respondent.

The examiner's holding that the franchise plan was a major factor in foreclosing markets to competitors of respondent is supported by the record. In disputing this finding, respondent directs our attention to fragments of the testimony of representatives of its competitors and to the statements of its retailer witnesses in order to rebut the inferences which must be drawn from the operation of the plan as a whole. We have already noted that the terms of the restrictive proviso prohibiting the purchase of conflicting lines and demanding concentration on Brown products was part of the understanding between respondent and the retailers of the franchise plan, which by October 1961 numbered 766 stores, whether they had signed a written agreement or not. We have also noted the activity of respondent's officials and employees in enforcing this understanding. The record is indisputable that franchisees have been expelled from the program for handling lines conflicting with those of respondent. In short, the record demonstrates that the restrictive proviso under consideration here has been enforced. The fact that the restrictive

²⁰ The Supreme Court in subsequently analyzing the import of *Sinclair* held: ". . . there is marked difference between a contract which confines an entire retail outlet to the sale of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand . . ." *Standard Oil Co. of California, et al. v. United States*, *supra* note 16, at p. 304, n. 6.

²¹ *Supra* note 19.

understanding between Brown and its franchisees has been effectively enforced is documented by the testimony of Aarol C. Fleener, Brown's vice president, in *United States v. Brown Shoe Company, et al.*,²² that on an overall basis Brown franchise dealers' sales of shoes purchased from respondent would constitute 75% of their total sales. This percentage, according to the witness, in the case of individual stores may vary from 60% to a high of 95%. Moreover, the extent to which competitors' conflicting lines are excluded from the franchise dealers' shelves is undoubtedly higher than these figures indicate, for this witness also stated that purchases from respondent's competitors in individual instances would be dictated by a need for either higher or lower price shoes than those made by respondent.

The foregoing summary of the facts establishing that conflicting lines of competitors are excluded by virtue of the enforcement of the terms of the restrictive proviso in the franchise agreement, and that such enforcement of the proviso was substantially effective, is sufficient to support the examiner's finding that respondent's competitors are foreclosed from selling to the market represented by the franchise dealers. Respondent's further contention that its competitors are not foreclosed because franchise holders are free to leave the plan without restriction is without merit; this proceeding, of course, is concerned with the foreclosure arising with respect to those retailers under the plan. While the record does indicate some attrition in the membership of the plan, we are satisfied that, on the whole, the relationship between Brown and its franchisees is a reasonably stable one.

The examiner, in making this finding, also properly relied on the testimony of six representatives of respondent's competitors who corroborated the necessary inference from the very nature of the Brown franchise program and its operation that the inevitable occurred, namely, that for practical purposes they were foreclosed from selling to the Brown franchise holders. Respondent attacks the testimony of these six representatives as hearsay and speculation on the part of obviously biased witnesses. The question of bias on the part of these witnesses is, of course, best resolved by the examiner who heard them and observed their demeanor. The record does not suggest that he abused his discretion in this respect. Further, the fact that the witnesses' knowledge as to loss of sales or difficulty of making sales to retailers under respondent's franchise plan was largely derived from reports of their salesmen does not rob the evidence of probative value.²³ Obviously, this is the type of knowledge upon which businessmen must rely if they are to conduct their business. In fact,

²² *Supra* note 5. (This testimony is incorporated in the record as CX 118.)

²³ Certain of the witnesses who experienced personal rebuffs from franchise dealers were, of course, also testifying from firsthand knowledge.

the record shows that Brown's competitors utilized this knowledge in formulating sales policy, namely, the determination on the part of some not to actively solicit Brown franchise stores because they were convinced this constituted a waste of sales effort. Since it is apparent that the witnesses themselves relied on this knowledge in their conduct of the business, it is sufficiently trustworthy for consideration by the examiner and the Commission in resolving the issues presented.

The record, moreover, demonstrates specific losses of sales by other shoe manufacturers traceable to the operation of the franchise plan, as shown by the following examples documented by sales data from Brown's competitors:

Franchise shoe store	Date it joined plan	Name of competitor	Competitors' sales to franchise store	Total pairs of shoes
Fisher Shoe Store, Plymouth, Mich. ²⁴	Dec. 17, 1952	Juvenile Shoe Co....	1951	1, 224
			1952	1, 530
			1953	246
			1954	240
			1955	252
			1956	381
			1957	228
			1958	188
			1959	²⁵ 314

²⁴ The vice president of the Juvenile Shoe Co. testified that the owner of this store advised him that purchases would be curtailed because of Fisher's participation in the franchise program.

²⁵ Commencing with 1953, the majority of sales were of the "short" Clinic line. E.g., out of 246 pairs sold in 1953, 234 were Clinic.

Franchise store	Date it joined plan	Name of competitor	Competitors' sales to franchise store	Dollar volume
Blynn's Shoe Stores, Inc., Pittsburgh, Pa.	Feb. 27, 1959	Weyenberg Shoe Co....	²⁶ 1957	636
			1958	2, 782
			1959	376
			1960	-----
			1961	1, 581
Gryder Co., Biloxi, Miss.-----	May 11, 1955	Weyenberg Shoe Co....	1952	5, 803
			1953	8, 388
			1954	3, 219
			1955	428
			1956	186
Meyers Shoe Store, Watertown, Wis.-----	Aug. 2, 1956	Leverenz Shoe Co.-----	1953	397. 30
			1954	1, 316. 10
			1955	2, 399. 12
			1956	886. 25
			1957	-----

²⁶ New account November 1957.

The fact that some representatives of Brown's competitors erred in their testimony relating to certain accounts to whom they allegedly lost sales because of the operation of the franchise plan, or that certain of Brown's dealers may have withheld purchases from Brown's competitors for reasons other than the existence of the franchise agreement, does not significantly detract from the force of this evidence.

The record, as we have noted, does show concrete examples of such losses, but more significant is the testimony of these witnesses on the over-all impact of respondent's program and similar programs of other manufacturers on their sales opportunities generally.

Respondent, conceding that its franchisees concentrated on its lines, directs our attention to the testimony of certain dealers to the effect that their choice to enter the franchise program was governed by the quality and performance of respondent's product, and contends further, in effect, that the decision to concentrate was, therefore, a voluntary choice, quite unlike the situation where the manufacturer prohibits the purchase of competitor's goods. We are not persuaded. Respondent glosses over the fact that whatever a dealer's reasons may have been for entering the program, once he became a participant he was subject to the agreement or understanding requiring him to refrain from purchasing a competitor's conflicting lines and to concentrate on respondent's products. The record is plain that whatever the merit of its products, respondent added to its competitive arsenal the franchise plan embodying restrictions, which necessarily foreclosed competitors from effectively selling to the select group of retailers under that program.

Respondent also directs our attention to its "Outside Line Survey" as conclusive proof of the fact that Brown's competitors are not foreclosed from selling to retailers on the franchise plan. The survey, according to respondent, demonstrates that approximately five out of six franchise stores carried at least one conflicting line, while many carried two or more. The hearing examiner's analysis of this evidence agrees with respondent's contention to the extent of finding that five out of six of respondent's franchisees did carry at least one line competing to some extent with a Brown line. However, the examiner's other findings pertinent to the survey data puts this evidence in its proper context and precludes the inference which respondent urges on us on the basis of the "Outside Line Survey." The following findings of the examiner are crucial on this point:

Respondent also contends that most franchise holders carry other lines, some of which are conflicting, and that this shows a lack of effectiveness of any restrictions if any there be. Most of the important conflicting lines carried by the franchise holders are short lines of specialty shoes, such as Clinics (primarily for nurses) and Hush Puppies (loafers), which are condoned, . . . (Initial Decision, Paragraph 40.)

and

. . . Over the years most of these dealers have learned that respondent will condone some duplication of lines, particularly if the outside line is a short line or a specialty line or if the real volume is in respondent's lines, because five out of six of them carry at least one line that competes to some extent with a Brown

line. There is a point beyond which outside lines will not be tolerated by Brown, and it is believed that generally the dealers know what it is." (Initial Decision, Paragraph 35.)

Significantly, respondent, although taking exception to other findings in paragraphs 35 and 40 of the initial decision, has not taken exception to the excerpts quoted above. We may take these findings as undisputed, therefore. Our own review of the evidence, moreover, persuades us that the findings of the examiner are amply supported by the record. For example, J. R. Johnston, the manager of Brown's franchise program, under whose direction and supervision the survey was made, testified that a franchisee might simply be carrying a few patterns of a conflicting line and yet be listed by the survey as carrying a conflicting line. This witness further stated that even in those instances where only certain patterns in a competitor's line conflicted with respondent's shoes, if the reporting retailer carried any pattern in the line, he would be recorded as carrying a conflicting line. This witness conceded that the overlap in the Brown line and the competitor's line might extend only over a small part of either line, that is, the higher price shoes of one and the lower price shoes of the other, and yet still be considered as conflicting lines for the purposes of the survey. Of particular significance in evaluating the probative worth of this data is the further fact that the survey does not disclose the volume either in pairs or dollars of purchases of conflicting lines by the reporting franchisees; yet the record shows that the sales of competitors, whose representatives testified in this proceeding, to certain franchisees were minimal.

In the light of the examiner's findings, therefore, the "Outside Line Survey" does not demonstrate, conclusively or otherwise, that Brown's competitors were not foreclosed, as a practical matter, from selling to retailers under the Brown franchise plan; nor does it rebut the other evidence of record clearly indicating that respondent has effectively restricted access to the market represented by its franchisees to vendors of conflicting lines.

In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act. Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anticompetitive.

Brown, on the other hand, contends that the legality or illegality of its franchise plan may be determined only after an examination

of the competitive impact of the plan throughout the nation. Brown further argues that the franchise plan involves only an insubstantial share of the national market either in terms of shoes sold or number of retail outlets involved. In this connection, respondent points out that the shoes which it sells to its franchise holders constitute less than one percent of shoe sales nationally and further argues that the same conclusion must be reached after comparison of the 766 stores under the Brown franchise plan in October of 1961 against either the 100,000 retail outlets in the country which sold shoes in 1958 or the 70,000 stores within that total classified as retail shoe outlets. Respondent concedes that the total number of outlets selling shoes included cobbler shops, drugstores, and other outlets having a limited selection of shoes or which carried few shoes in relation to their total inventory. The proper comparison, under respondent's argument, must therefore relate the number of Brown franchise accounts to the 70,000 retailers classified as retail shoe outlets. The stores under the franchise plan constitute approximately one percent of that figure.

In making the argument that the amount of commerce involved in the franchise plan is not substantial in the context of the nation as a whole, Brown relies heavily on *Tampa Electric Co. v. Nashville Coal Co., et al.*,²⁷ and *Rural Gas Service, Inc.*²⁸ In effect, respondent urges us to apply, in a proceeding under Section 5 of the Federal Trade Commission Act, the test of illegality applicable to Section 3 of the Clayton Act to practices not coming within the narrow restraint encompassed by that statute. The Commission recently rejected a similar argument in *Luria Brothers and Company, Inc., et al.*²⁹ Moreover, neither case supports the quantitative insubstantiality rule Brown urges us to follow. Certainly, it would not be appropriate to promulgate a higher standard of illegality for proceedings under Section 5 of the Federal Trade Commission Act than for actions under the Clayton Act, at the urging of respondent, when the former Act was designed ". . . to stop in their incipiency acts and practices which, when full blown, would violate [the Clayton Act] . . ." ³⁰

If respondent's argument were material to the issue presented by Count I of this complaint, it should be weighed in the light of the holding of the Supreme Court in *Brown Shoe Co., Inc. v. United States*.³¹ There the Court, in considering the vertical aspects of an acquisition, found the probability of a substantial lessening of com-

²⁷ 365 U.S. 320 (1961).

²⁸ Docket 7065 [59 F.T.C. 912] (1961).

²⁹ Docket 6156 [p. 243 herein] (1963).

³⁰ *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394 [5 S. & D. 498] (1953).

³¹ 370 U.S. 294 (1962).

petition despite the fact that Brown's sales to the acquired concern, G. R. Kinney Company, Inc., constituted less than one percent of shoe sales nationally after the acquisition. Holding that the market foreclosure demonstrated was neither of *de minimis* nor monopoly proportions, the Court ruled that in such cases the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive and that it was, therefore, necessary to examine the various economic and historical factors in the relevant market to make the determination of whether the supplier-customer relationship is the type of arrangement which Congress sought to proscribe.³² Factually there is a close parallel between this proceeding and the merger action involving Brown's acquisition of the G. R. Kinney Company.³³

We have found that Brown's operation of the franchise plan constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act. We conclude, therefore, that Count I of the complaint has been sustained. Moreover, an examination of the market facts of the shoe industry, as developed in this record in the light of the *Brown Shoe* decision,³⁴ persuades us that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met.

We recognize that a consideration of the economic context in which a challenged act or practice takes place of the nature pursued by the Supreme Court in *Brown Shoe*,³⁵ is primarily germane to a determination of legality or illegality under the Clayton Act. However, an important question remaining to be resolved under Count I is the nature and scope of the remedy to be applied. Economic factors affecting the shoe industry have a direct bearing and provide a significant guide in this respect. We turn now to a consideration of the market facts of the shoe industry for that purpose.

The structure of the shoe industry is significant. Although there are a large number of shoe manufacturers, a few companies occupy a commanding position. Of the approximately 1,000 shoe manufacturers in 1959, the top 70 manufacturers accounted for approximately 54 percent of the shoe production in that year. The 5 largest manufacturers, it should be noted, produced 24 percent of total pairs of shoes

³² *Id.* at p. 329.

³³ Kinney, at the time of acquisition, had about 1.2 percent of all national retail shoe sales by dollar volume and 1.6 percent in terms of pairs of shoes sold. Kinney, which obtained 20 percent of its shoe requirements from its own plants, subsequent to the acquisition, purchased 7.9 percent of its requirements from Brown, an amount obviously considerably less than 1 percent of sales of all shoes sold nationally. At the time of trial, there were over 400 stores involved in Kinney's retail operation. *Id.* at pp. 303, 304.

³⁴ *Supra* note 31.

³⁵ *Id.*

produced in 1959 and their production further constituted 45 percent of the product manufactured by the top 70 manufacturers. Even within the group of the 70 largest manufacturers there is a considerable gap between the 4 or 5 largest and the remaining manufacturers. Brown, in 1959, held third rank in shoe production and second in dollar volume.³⁶ Of particular significance, in our view, is the fact that Brown's sales of \$24,675,617 to the retailers under the franchise plan for the year ending October 31, 1959, alone exceeded by almost two million dollars the sales of the tenth ranking company in that year. This fact convincingly demonstrates the competitive disparity between respondent and the vast majority of shoe manufacturers.

The shoe retailers under the Brown franchise program are a select group, according to the testimony of respondent's own officials, and the representatives of Brown's competitors.³⁷ Only the better credit risks are permitted to remain in the program. Retailers may be, and are, separated from the program because their financing is inadequate to support credit necessary for the volume of purchases expected of a franchise store, although they may have sufficient credit to purchase as a general account. The desirability of the Brown franchise plan accounts is further enhanced by the fact that while the average return of investment for independent shoe retailers generally was 11.8 percent, Brown's franchise holders enjoyed an average 16 percent return.

In the period 1959-1961, the number of stores enrolled under respondent's program showed an increase of approximately 12 percent. The increase is significant, since it demonstrates an intent to expand the program at a time, when according to the testimony of the repre-

³⁶ See the following table for 1959:

Manufacturer	Rank	Pairs of shoes produced	Manufacturer	Dollar volume
International Shoe Co.....	1	51,529,543	International Shoe Co.....	283,260,000
Endicott Johnson Corp.....	2	32,407,012	Brown Shoe Co.....	276,549,164
Brown Shoe Co.....	3	29,681,274	Genesco.....	276,422,000
Genesco.....	4	29,520,000	Endicott Johnson Corp.....	146,099,113
Shoe Corp. of America.....	5	11,050,000	Shoe Corp. of America.....	117,100,000
Evy Footwear Co., Inc.....	6	8,010,000	U.S. Shoe Corp.....	50,858,933
Sudbury Footwear.....	10	6,200,000	Consolidated Nat'l Shoe Corp..	22,864,000
Kessler Shoe Co.....	20	3,203,676	Five Star Shoe Co.....	15,050,000
Vaisey-Bristol Shoe Mfg.....	30	2,517,262	Mid-States Shoe Co.....	10,100,000
Evangeline Shoe Co.....	40	2,224,300	Williams Shoe Mfg. Co.....	7,850,000
Connors-Hoffman Footwear.....	50	2,035,000	Laconia Shoe Co.....	5,510,000
Juvenile Shoe Corp.....	60	1,650,000	M. Beckerman & Sons, Inc.....	4,150,000
Liberty Shoe Co.....	70	1,450,000	Sham-O-Kin Shoe Corp.....	2,312,000

(CX 89 A-B. These figures are exclusive of slippers and rubber, canvas, or plastic footwear.)

³⁷ Respondent's descriptive brochure states that the franchise program is not available to everyone, but that the program is best fitted for the outstanding dealer or prospective dealer in each community. (CX-22U).

representatives of other shoe manufacturers, the prospective number of good, independent retailer accounts available to independent manufacturers is diminishing.

The record evidences a trend in the shoe industry generally and on the part of respondent in particular to vertical integration by way of merger or other arrangements which naturally has a tendency to dry up otherwise available sales outlets to independent shoe manufacturers competing with Brown.

Respondent, as the hearing examiner noted, has several wholly owned subsidiary corporations engaged in the retailing or wholesaling of shoes. In this connection, the Wohl Shoe Company, one of respondent's subsidiaries, sells shoes at wholesale to approximately 3,200 customers located throughout the United States, and more significantly, in 1958, 208 of these customers operated on the "Wohl Plan." Wohl plan accounts, as the hearing examiner found, are independent retail outlets partially financed by Wohl and generally buying most of their women's shoes from Wohl. In addition, Wohl, in 1958, re-tailed shoes to some 457 leased department stores in 243 stores. The Regal Shoe Company, a wholly owned subsidiary of respondent, had a chain of 92 retail outlets in which its shoes were sold. Finally, the G. R. Kinney Company, whose acquisition by respondent was found illegal by the Supreme Court, in 1959 operated and owned a chain of 488 retail family shoe stores.

The testimony of representatives of Brown's competitors supports the finding that the smaller manufacturers depend to a great extent on the purchases of independent shoe retailers. These witnesses stated, however, that at this time they are faced with a diminishing number of retail outlets available to them as a practical matter. According to their testimony, this trend is due in large part either to the purchase of such outlets by the larger manufacturers or to the fact that many independent retailers have come under the control of manufacturers by virtue of franchise plans or other arrangements.

The testimony of these witnesses on the subject of a trend to vertical integration in the shoe industry is graphically corroborated by respondent's own exhibits relating to the franchise plans of the International Shoe Company and of the General Shoe Company, the first and fourth ranking companies in terms of shoe production in 1959. As of 1961, International Shoe had some 1,400 independent retailers under its Merchants Service Plan, while some 317 shoe retailers were members of General Shoe's Friendly Franchise Store Plan. Most significantly, the evidence shows that in the period June 1959 to June 1961, the number of participants in the Merchants Service Plan had increased by approximately 16 percent.

An examination of the terms of the programs of General Shoe and of International Shoe supports the testimony of the manufacturer witnesses in this proceeding that the franchise plans of the larger manufacturers generally had the effect of restricting their access to stores under such programs. Under these plans, retailers are required to feature the shoes of the sponsor and to handle the sponsor's shoes in a representative manner (Merchants Service Plan) or to purchase sufficient quantities of footwear to assure the presence of an adequate and representative stock of the sponsor's shoes in the franchise store at all times (Friendly Franchise Store Plan). Under both plans retailers are required to furnish detailed reports of their business to the sponsoring manufacturers.

Certain of Brown's competitors whose representatives testified in this proceeding make no serious effort to sell to stores under the franchise plan because of the feeling that it would be a waste of time. This, in our view, is a most significant indication of a deteriorating competitive situation, demonstrating as it does that respondent's competitors have lost the incentive to energetically strive for sales in an important segment of the market.

In assessing the need for Commission action, we must take account of the fact that historically one of the purposes of the antitrust laws, over and above purely economic considerations, has been to preserve ". . . an organization of industry in small units which can effectively compete with each other. . . ." ³⁸ To foster the competitive position of the smaller manufacturers, Brown should be prohibited from entering into arrangements with its customers interfering with the latter's independent judgment in making purchasing decisions.

III

Resale Price Maintenance

Count II of the complaint alleges that Brown engaged in unfair acts and practices violative of the Federal Trade Commission Act by requiring, or attempting to require, its customers to adhere to the arbitrary noncompetitive resale prices which it established.

Brown communicates its suggested resale prices on the shoes it manufactures in various ways. In the case of certain selling divisions, the suggested resale price is also included on the wholesale price list. The wholesale price list of the women's and girls' lines do not give the suggested resale price but dealers are advised orally of the 44 to 45 percent markup on these shoes by Brown's salesmen; the dealers, therefore, automatically know the suggested resale price on the shoes

³⁸ *United States v. Aluminum Co. of America, et al.*, 148 F. 2d 416, 429 (2d Cir. 1945); see also *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

in these lines. Most of respondent's selling divisions send schedules of suggested resale prices each season to their accounts. In addition, respondent publishes the suggested resale prices for some of its shoes in advertisements inserted in magazines of national circulation. Brown, apparently to prevent conflict among its dealers, also suggests the starting and the closing dates of sales at the end of each six-month selling season.

Respondent, according to its vice president and board member, Aarol C. Fleener, will attempt to dissuade a dealer from selling below suggested resale prices if other customers complain about the practice in order to prevent the loss of business to the complaining retailer.

The finding that it is Brown's policy to require adherence by its dealers to the suggested resale prices on its products is specifically supported by evidence that Brown sought to bring the pricing practices of Fraver's Shoe Store, Chambersburg, Pa., and Pomeroy's Department Store in Harrisburg, Pa., into line with its suggested retail prices at the urging of another account, their competitor, Dutrey's Shoes, with stores located in Waynesboro and Carlisle, Pa.

Brown, although it concedes that the documentary evidence in the record relating to these events raises inferences of illegal price activity on its part, contends that such inferences were completely rebutted by the testimony of its witnesses. The primary question to be resolved on respondent's exceptions is whether the hearing examiner properly weighed the conflicting evidence when he found that the allegations under Count II of the complaint had been sustained. A detailed examination of these occurrences is therefore warranted.

The record demonstrates that Brown went to considerable lengths to secure adherence to its suggested resale prices on the part of the Fraver Shoe Store in Chambersburg, Pa., at the insistence of Fraver's competitor, Dutrey's Shoes, in neighboring Carlisle. In September of 1956, after Dutrey's notification that Fraver had cut prices on respondent's merchandise, Brown's fieldman, George Croker, called upon Fraver pursuant to Dutrey's complaint about Fraver's pricing. Croker testified that he advised Fraver that Dutrey felt that the former was not getting the proper markup on his shoes and suggested that Fraver meet with Dutrey so that they could discuss their pricing differences among themselves. The witness, who at one point in the proceeding denied that he had asked Fraver to enter into any agreement as to the resale price of respondent's merchandise, subsequently admitted that Fraver had agreed to place his regular markup on Brown's shoes. Croker's subsequent contention that he and Fraver had not discussed specific prices is therefore irrelevant.

In advising his superior, J. R. Johnston, manager of the Franchise

Division, as to the results of the conference with Mr. Fraver, Croker stated in his memorandum of September 9, 1956: "Mr. Fraver has invited Dick Dutrey to call on him so that they can have an agreement on the prices on their shoes and Mr. Fraver has assured me he will maintain the prices on our shoes so there will be no confliction [sic] in the future." Johnston replied, advising Croker that he was glad the situation was straightened out once and for all and that Fraver's willingness to cooperate was appreciated.

A year later, in October of 1957, Dutrey again complained to Brown about Fraver's pricing. In response to that complaint, T. R. Curtis of the Brown Franchise Division, advised Dutrey that George Croker, Brown's field representative, had been requested to "personally, contact Fraver for the purpose of having a thorough understanding that he must discontinue this practice [price cutting]." In fact, Curtis did order Croker to make the call, instructing him to discuss with Fraver "the necessity of his selling our lines at our recommended retail prices" and Croker was further instructed to advise Fraver that if the latter underpriced Brown's merchandise in the future it would be necessary for Brown to discontinue its business relationship with Fraver. Copies of these instructions were sent to representatives of three of respondent's sales divisions in Fraver's area.

Croker, testifying in behalf of respondent, stated that he took no action on the letter from Curtis because he regarded these instructions as improper. This testimony is difficult to believe, since it is clearly inconsistent with his actions of the preceding year. At any rate, it is indisputable that Croker's superior in the Franchise Division, J. R. Johnston, did not let the matter rest but took personal action. On October 16, 1957, he advised Mr. Dutrey by telegram that Fraver had agreed to abide by the suggested resale prices on all patterns of the Brown Shoe Company which he carried. Johnston's follow-up letter to the telegram assured Dutrey that he had talked at considerable length with Fraver "on why it was necessary that we ask him to abide by our suggested retail prices and he agreed to do just that." Johnston further advised Dutrey that Fraver would remark any patterns necessary at once and that he was confident that there would be no recurrence of such price cutting since he knew that Fraver could be counted on to keep his word.

Respondent argues, in its brief, that Johnston's testimony in this proceeding must dispel any inferences of illegality which may be drawn from respondent's memoranda concerning Fraver's pricing policy. Respondent summarizes Johnston's testimony as follows:

Johnston testified that he did not ask Fraver for any commitment as to the prices he would charge for Brown brand shoes and that he did not ask Fraver to raise his prices. (R. 418) He said that the terms "agree" or "agreement"

used in his correspondence to Dutrey related only to the fact that Fraver "agreed that the philosophy of raising (his) prices to afford him a reasonable markup on the basis of replacement cost made sense." (R. 418, 458-59) Johnston said that no threat to discontinue any line of shoes or anything like that, was made to Fraver. (R. 420)⁸⁹

The argument is without merit since this testimony cannot be construed as simply explaining the statements in these memoranda; plainly, the statements of Johnston relied upon by respondent are in irreconcilable conflict with the documentary evidence. This conclusion is inescapable after a reading of Johnston's letter of October 16, 1957, to the personnel of respondent's sales divisions arranging for the policing of Fraver's resale prices in the following terms:

Dutrey's were very firm again in their request to have Mr. Fraver abide by our suggested retail prices and if this is not corrected once and for all it could mean losing Dutrey's account.

May I recommend that when you call on Mr. Fraver from time to time that you check the retail prices for your particular line of shoes and make sure he is abiding by your suggested prices other than during clearance sale periods.

We are equally convinced that Fraver's testimony that he had never been asked to enter into any agreements by Johnston or that he had never entered into any agreement with respondent on pricing practices is similarly entitled to little credit. His testimony in this regard, like the statements relied upon by respondent on the part of Johnston and Croker, simply cannot be reconciled with the contemporaneous records of the events described, unbiased by the publicity or possible consequences of litigation.

Dutrey, on June 15, 1956, also complained about the advertisements of Pomeroy's, a department store in Harrisburg, Pa., promoting respondent's shoes below the suggested resale prices. In response, the manager of the Roblee Division, on June 28, contacted John Mirra, his salesman in the area, instructing him to find out why Pomeroy's ran the advertisement and pointing out further that this customer had been previously definitely advised of the program on Roblee sales. Subsequently, on August 10, the Roblee sales manager again contacted Mirra with respect to Pomeroy's advertisement of June 15, advising that Roblee shoes went on sale only twice a year, namely, in July and January, and that any other sale promotion on Roblee shoes was not to be advertised as such. Significantly, Roblee's sales manager stated: "I believe you know the policy of the Company and this is definitely not allowed." These instructions concluded with the admonition to straighten the matter out with Al Schwartz of Pomeroy's so that there would be no recurrence.

Subsequently, J. R. Johnston, manager of the Franchise Division,

⁸⁹ Respondent's brief, p. 47.

Opinion

62 F.T.C.

advised Dutrey that both the Roblee salesman and sales manager had authorized him to give Dutrey their assurance that there would not be a recurrence of Pomeroy's advertisement of price cuts on Roblee shoes in advance of the sale period for Roblee shoes.

By September of 1956, Pomeroy's had again advertised Brown's shoes below the suggested resale price. In this instance, both the Roblee and Buster Brown brands were involved. Another complaint by Dutrey ensued. This time the irate customer complained directly to the president of Brown, Clark R. Gamble. By letter of September 12, 1956, Mr. Gamble advised Dutrey that his complaint would be given thorough attention and that he would hear from Brown as soon as a complete investigation had been made. A copy of this letter was sent to Tom Curtis of the Brown Franchise Division. Curtis advised respondent's president that the manager of the Roblee Division was writing Mirra, the Roblee sales representative in the area, instructing the latter to contact Pomeroy's for the purpose of getting the price cutting situation straightened out and to insure there would be no repetition.

The sales manager of Roblee did, in fact, instruct his salesman to visit Pomeroy's to correct this situation to insure there would be no recurrence of such advertising in the future. Mirra was advised that if there were a repetition of this advertising Brown would be forced to withdraw the Roblee line from the Pomeroy store in Harrisburg. The salesman of the Buster Brown Division was given similar instructions by his sales manager.

Respondent, to rebut the documentary evidence, adduced testimony from the salesmen of the Roblee and Buster Brown Divisions as well as from Messrs. Schwartz and Moscovitz, division manager of shoes for Pomeroy's and assistant division manager, respectively. Schwartz and Moscovitz both testified that they had set shoe prices independently and that no one from Brown had ever complained to them about their pricing decisions. Mirra testified that he did not discuss the June 15 advertisement complained of by Dutrey with Pomeroy's and had done absolutely nothing with respect to the instructions from the sales manager ensuing from Dutrey's first complaint. With respect to Dutrey's second complaint, Mirra admitted that he asked Pomeroy's not to advertise the sales but "just sell them [the shoes], put them on the table and sell them so I could get Mr. Dutrey off my back. Tufton, the Buster Brown salesman, testified that he might have received a memorandum from the Buster Brown sales manager on Dutrey's complaint on Pomeroy's pricing but had never made any calls pursuant to such a memorandum.

This testimony is simply not credible in the light of the documentary

evidence. It is inconceivable that respondent's personnel did nothing or as little as one might believe, taking their testimony at face value, since J. R. Johnston, manager of the Franchise Stores Division, stated in a letter to his fieldman, George Croker, referring to Pomeroy's advertising of the Roblee and Buster Brown shoes, that "Mr. Gamble has insisted that the sales managers of these divisions get this situation straightened out and I am sure it will be." Mirra's denial that he had discussed Dutrey's first complaint with Pomeroy's cannot be reconciled with J. R. Johnston's letter of August 16, 1956, advising that both Mirra and the sales manager of the Roblee Division had authorized Johnston to give Dutrey their assurance that there would be no repetition of the Pomeroy advertising complained of. The conclusion is inescapable that either Johnston was giving Dutrey's false assurances in 1956 or that Mirra was not telling the truth in the course of his testimony in 1961. The denial by the Buster Brown salesman, Tufton, that he took any action is contradicted flatly by the memorandum of October 9, 1956, to Tom Curtis of the Franchise Division by the sales manager of Buster Brown, advising Curtis that Tufton had contacted Pomeroy's and had the account's assurance that there would be "no further cut-price promotions on our shoes at any time other than our Semi-Annual Sale periods."

The extent to which Fraver's and Pomeroy's acquiesced in respondent's attempt to suppress price competition is not altogether clear. The fact that respondent took active steps to achieve that goal is beyond the dispute.

The conclusion that Brown's activities designed to suppress price competition between Dutrey and Fraver as well as Pomeroy's were not isolated instances but rather a part of respondent's general policy is supported by the testimony of Aarol C. Fleener, vice president and board member of Brown, who admitted in this proceeding that:

Well, I will go back again; that we have to go over and see this fellow [a price cutting retailer] and try to dissuade him from that practice, because we get these protests from other people, and we have to go to it and attend to it.

There are many, as I say, that will take place [instances of price cutting], and if it doesn't affect anything there is nothing done. But if it does affect another merchant you have got to make your peace over in that area or you will lose several customers. So you have got to straighten it out.

* * * * *

. . . if a man is a persistent price cutter on his shoes and other merchants are complaining about it, we have got to see to it that he straightens out his practice.

These admissions of the witness compel the inference that respondent followed a policy of seeking adherence to its suggested resale prices at least in those instances where price cutting was the cause of friction among its dealers, as well as the further inference that re-

spondent must have had an agreement or understanding with its dealers that prices be maintained, going beyond a mere unilateral announcement of policy to its customers coupled with the retailer's independent decision to adhere to the prices announced. In the absence of such an understanding, respondent's dealers would have no reason for complaint to Brown and the latter would have no reason for taking steps to "straighten out" errant retailers. It strains credulity to believe that respondent would act as arbitrator in such instances in the absence of any agreement.

The hearing examiner's finding that respondent is rarely faced with problems posed by price cutting on the part of its dealers is supported by the following exchange between the examiner and Mr. Fleener:

HEARING EXAMINER CREEL: When you take a new outlet that hasn't been in the shoe business you wouldn't know whether he is going to be a price cutter or not?

THE WITNESS: Oh, yes. You talk to him quite a while before you sell him telling him what is expected of him. . . .

Respondent contends that in making the findings complained of, the examiner took Mr. Fleener's statement out of the context of his testimony as a whole, which reflected only a fundamental concern that Brown's retailers obtain a sufficient return on their product to stay in business. While respondent may well have been concerned with the profit picture of its dealers, it is equally true that respondent's prime motivation in straightening out price cutting situations, as is apparent from this witness' testimony, was to satisfy the complaints of competitors of the price cutting retailers.

The hearing examiner's finding that respondent had a policy of seeking adherence to suggested resale prices and that it required or attempted to require agreements to that effect from its dealers is not vitiated by Mr. Fleener's disclaimers irreconcilable with the documentary evidence that Brown could not dictate the price at which its customers were to sell. When Brown, at the behest of one dealer, confers with another dealer for the purpose of persuading the latter to raise prices or to refrain from advertising cut prices except at certain sale periods, it matters not whether respondent attempts to achieve the desired end by simple persuasion, appeals to the dealer's self interest, or threats of refusal to sell.⁴⁰ In either event, respondent has gone beyond the mere unilateral declaration of policy coupled with a refusal to sell, sanctioned by *United States v. Colgate & Com-*

⁴⁰ ". . . whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. . . ." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

pany.⁴¹ Clearly, the *Colgate* doctrine extends only to those cases where the dealer independently decides to adhere to the prices of the manufacturer; it does not sanction respondent's attempt to suppress price competition among its retailers at the request of certain of its customers. Once respondent takes steps of this nature, neither its own pricing decisions nor that of its customers may be considered unilateral.⁴²

We have already held in connection with the charges under Count I of the complaint that the fact that contemporaneous documents and the subsequent testimony of the author of the documents and other participants to the events described are in conflict does not prevent the trier of fact from resolving the conflict on the basis of the documentary evidence. The hearing examiner is, of course, in the best position to evaluate the credibility of the witnesses who have appeared before him in the light of all the evidence. An examination of the record here convinces us that his finding that respondent has illegally taken steps to suppress and eliminate price competition between its customers is amply supported by the record.

Respondent's objections that the order entered below is too vague and indefinite to be enforceable and that it does not conform to the allegations of the complaint or to the evidence are without merit. The order merely prohibits respondent from further pursuing the unfair trade practices evidenced by this record and defines Brown's obligations thereunder with clarity.

The exceptions of respondent are denied and the initial decision as modified in the accompanying order is adopted as the decision of the Commission.

Commissioner Elman, considering that the exclusive vertical arrangements shown by the record have the requisite competitive effects, *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-324 (1962), concurs in the Commission's decision and order.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter.

⁴¹ 250 U.S. 300 (1919).

⁴² See *United States v. Parke, Davis & Co.*, *supra* note 40, at p. 46, where the Court held: ". . . It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies, his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's acquiescence is not then a matter of free individual choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price maintenance combination or conspiracy in violation of the Sherman Act. . . ."

Syllabus

62 F.T.C.

FINAL ORDER

This matter having come on to be heard upon respondent's exceptions to the initial decision of the hearing examiner and upon briefs and oral argument in support of said exceptions and in opposition thereto, and counsel for both parties having filed on September 4, 1962, a "Joint Motion for Correction of Record"; and

The Commission having rendered its decision denying the exceptions of respondent and having determined that the aforesaid "Joint Motion for Correction of Record" should be granted:

It is ordered, That the hearing examiner's initial decision be modified by striking therefrom paragraphs 41 and 42 of the findings and substituting therefor the findings embodied in the accompanying opinion beginning on page 715 with the words "In short, from our review of the record," and ending on page 720 with the words "interfering with the latter's independent judgment in making purchasing decisions."

It is further ordered, That the hearing examiner's initial decision, as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the "Joint Motion for Correction of Record" filed September 4, 1962, be, and it hereby is, granted.

It is further ordered, That respondent, Brown Shoe 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 this order.

Commissioners Anderson and Higginbotham not participating.

IN THE MATTER OF

INLAND RUBBER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF SEC. 2(a)
OF THE CLAYTON ACT

Docket 8052. Amended Complaint, Sept. 11, 1961—Decision, Feb. 25, 1963

Consent order requiring manufacturers in Mansfield, Ohio, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act in the sale of its automobile tires and tubes and repair materials by (1) granting rebates in price based on the annual volume of sales; (2) allowing various combinations of quantities of products to be made which resulted in differing prices;

and (3) charging some customers classified as "Warehouse Distributors" and including "group buyers", prices as much as 18% lower than it charged competing purchasers.

AMENDED COMPLAINT

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

PARAGRAPH 1. Respondent Inland Rubber Corporation, sometimes hereinafter referred to as respondent Inland, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 515 Newman Street, Mansfield, Ohio.

PAR. 2. Respondent Inland, for many years has been, and is now, engaged in the production, sale and nationwide distribution of automobile tire tubes and tire and tube repair materials. Its sales of such products have been substantial. It also sells and distributes on a nationwide basis valve products manufactured by others.

Respondent's customers are variously classified by it as "wholesalers" or "jobbers" and, since about May 1958, the classification of "warehouse distributors" has been added.

PAR. 3. Respondent Inland, in the course and conduct of its said business, has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed its products to purchasers thereof in States other than the State of origin of shipment and, either directly or indirectly, has caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States, for use, consumption or resale within the United States. There is now and has been a constant course and flow of trade and commerce in such products between said respondent in the State of origin and purchasers thereof located in other States.

PAR. 4. In the course and conduct of its business in commerce as aforesaid, respondent Inland has sold, and now sells, its products to the said purchasers thereof, many of whom have been and are in competition with each other and with customers of competitors of respondent in the purchase and resale and distribution of such products.

PAR. 5. Respondent, either directly or indirectly, has been since at least 1956, and is now, discriminating in price between different purchasers of its tire and tube repair materials and valve products by

Complaint

62 F.T.C.

selling such products to some purchasers at prices substantially higher than the prices at which respondent sells such products of like grade and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products.

Respondent, in connection with its sale of certain type automobile tire tubes of like grade and quality, has also discriminated in price between so-called group-buying purchasers and other purchasers as hereinafter more fully set forth and described.

In the sale of its tire and tube repair materials, prior to May 1958, respondent has, for example, granted different rebates in price based on the cumulative annual dollar volume of purchases. The following is a schedule of percentages of rebates granted to different purchasers by respondent depending on the annual dollar volume of its repair materials.

<i>Volume</i>	<i>Percentage</i>
\$1,000 to \$2,499-----	2
\$2,500 to \$4,999-----	3
\$5,000 to \$7,499-----	4
\$7,500 to \$9,999-----	5
\$10,000 to \$12,499-----	6
\$12,500 to \$14,999-----	8
\$15,000 and over-----	10

As a result of using the aforesaid volume discount schedule, said respondent has sold its tire and tube repair materials to some jobbers or wholesalers at prices higher than those charged to other competing jobbers or wholesalers for products of like grade and quality.

In addition, said respondent in computing the annual volume of purchases of its various individual customers, has allowed certain purchasers to combine their purchases so as to qualify for higher rebates in accordance with the above volume rebate schedule. Respondent has thus charged higher prices for such products of like grade and quality sold to other competing purchasers who have not been permitted to combine their individual purchases.

Also, prior to May 1958, respondent, in the sale of valve products, has allowed certain purchasers to combine their purchases of such valve products with their purchases of tire and tube repair materials so as to receive a larger rebate on repair materials than other competing purchasers of such products of like grade and quality.

Such favored purchasers who have been permitted to combine their quantities of purchases of such products, are commonly referred to collectively as "group buyers." They normally consist of jobbers or wholesalers of automotive parts and accessories who buy and resell respondent's repair materials and valve products, and have combined in these buying organizations for the purpose of qualifying for the

volume discounts or rebates which they would not otherwise receive in their individual capacities.

Since May 1958 respondent has discontinued its volume rebate schedule and has established a classification of customers called "warehouse distributors". Such customers consist of jobbers or wholesalers of automotive parts and accessories, who are to maintain a minimum inventory at all times of respondent's tire and tube repair materials and valve products in the amount of \$1,000. Said respondent has, since May 1958, sold its repair materials to those of its purchasers classed as warehouse distributors at net prices which were 18% lower than those charged to other jobber or wholesaler purchasers competing in the resale of such products of like grade and quality. During the same time respondent has sold valve products to those purchasers classed as warehouse distributors at net prices which were 5% below the wholesaler list prices charged to other jobber or wholesaler purchasers competing in the resale of such products of like grade and quality.

In qualifying a jobber or wholesaler as a warehouse distributor respondent has permitted those purchasers who are members of buying groups to combine their inventories of such products so as to reach the minimum of \$1,000 and thus receive the 18% discount on repair materials and the 5% discount on valve products, granted only to its warehouse distributor customers. Respondent has thus discriminated in price against those independent jobber or wholesaler purchasers who are not members of buying groups but who compete with purchasers classified as warehouse distributors and receiving the lower prices because of their buying-group affiliation.

In the sale of automobile tire tubes of a certain type respondent has, since May 1958, granted an extra discount of approximately 5% off the wholesaler list price to those jobber or wholesaler purchasers who order in quantities of 5000 tubes or more. In qualifying for such discount respondent has allowed certain jobber or wholesaler purchasers to combine their individual orders of such tubes as a group and thus respondent has allowed a 5% discount to the members of group buying organizations, resulting in preferential prices which are not granted or allowed to other jobber or wholesaler purchasers, some of whom are in competition with the preferred purchasers, members of the buying groups, in the resale of such products.

PAR. 6. The effect of the discrimination in price, alleged in Paragraph 5 herein, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which the purchasers receiving the preferential prices are engaged, or to prevent, injure

Decision and Order

62 F.T.C.

or destroy competition between and among said purchasers of such products from respondent.

PAR. 7. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

DECISION AND ORDER

This matter having come on to be heard by the Commission upon a record consisting of the Commission's amended complaint charging the respondent named in the caption hereof with violation of subsection (a) of Section 2 of the Clayton Act, as amended, and an agreement by and between the respondent and counsel supporting the complaint, which agreement contains an order to cease and desist, an admission by the respondent of all the jurisdictional facts alleged in the amended complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in the amended complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement and order contained therein and being of the opinion that the agreement provides an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Inland Rubber Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 515 Newman Street, in the city of Mansfield, State of Ohio.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent, Inland Rubber Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of tire and tube repair materials and valve products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating in price by selling such products of like grade and quality to any purchaser at net prices higher than those granted to any other purchaser, who in fact competes with the purchaser paying the higher price in the resale and distribution of such products;

Complaint

It is further ordered, That respondent, Inland Rubber Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of automobile tire tubes in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in price by selling such products of like grade and quality to any purchaser at net prices higher than those granted to other competing purchasers, who are permitted to combine their purchases with those of other purchasers and are thereby granted lower prices.

For the purposes of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the respondent herein 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 this order.

 IN THE MATTER OF

WALLACE TOBACCO BOARD OF TRADE, INC., ET AL.

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

Docket 8132. Complaint, Sept. 30, 1960—Decision, Feb. 25, 1963

Order requiring the Tobacco Board of Trade of Wallace, N.C., and its tobacco auction warehousemen members, dealing in leaf tobacco, to cease excluding new competition from the Wallace tobacco market through such practices as misuse of its "Floor Space System" whereby they allocated selling time to an excessive number of purported warehouses—including "sheds" and "poultry houses" with dirt floors—many of which were unsuitable and not available for the auction sale of tobacco, with the result that during the 1957-1960 selling seasons, 54.38 percent of the total number of square feet of floor space allocated by the Board were not used in the auction sale of tobacco.

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 each and all of the parties named in the caption hereof, and hereinafter more particularly described, designated and referred to as respondents, have violated

Complaint

62 F.T.C.

and are violating the provisions of Section 5 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. The following is a description of the respondents:

(1) Respondent Wallace Tobacco Board of Trade, Inc., hereinafter referred to as respondent Board, is a corporation duly organized under the laws of the State of North Carolina, with its principal office and place of business located in the town of Wallace, State of North Carolina. The membership of respondent Board is composed of corporations, partnerships and individuals, including warehousemen, who are generally engaged in either selling, buying, rehandling or otherwise dealing in leaf tobacco.

The following named individuals are now, or have been during the time mentioned herein, officers of said respondent Board and as such and individually are named as respondents herein, and in such capacity have dominated, controlled and directed, and are now dominating, controlling and directing, the affairs of said respondent Board, including the policies and practices as set forth herein:

William L. Hussey, Jr.—President

Granville L. Sheffield—Vice President

Hugh M. Morrison—Secretary-Treasurer

Although respondent Board was organized and chartered with the announced and stated purpose of associating together those persons, firms and corporations interested in the buying, selling and handling of leaf tobacco on the Wallace tobacco market, and its tobacco trade territory, and for the purpose of adopting and maintaining such reasonable rules, regulations and requirements as are necessary to promote the honest and efficient conduct of said tobacco business and build up the tobacco market and protect the interest of growers, planters, buyers and handlers of leaf tobacco on the Wallace tobacco market, including the allocation of selling time to each tobacco auction warehouse operating on said market, it is now and has been for a number of years last past a mere instrumentality or vehicle through which respondent members place into effect and carry out the illegal policies and practices as hereinafter set forth.

(2) Respondents William L. Hussey, Jr., and John H. Sheffield are copartners trading under the name and style of Sheffield's Warehouse, a partnership, engaged in the business of operating a tobacco auction warehouse, with their principal office and place of business located in or near the town of Wallace, State of North Carolina, and as such and individually are named as respondents herein. Said

respondents are members of respondent Wallace Tobacco Board of Trade, Inc.

(3) Respondent Blanchard & Farrior Warehouse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located in the town of Wallace, State of North Carolina, and engaged in operating a tobacco auction warehouse. Respondent Blanchard & Farrior Warehouse, Inc., is a member of respondent Wallace Tobacco Board of Trade, Inc.

The following named individuals are now, and have been during the time mentioned herein, officers of said respondent Blanchard & Farrior Warehouse, Inc., and as such and individually are named as respondents herein:

O. C. Blanchard, Sr.—President
Tyson Lanier—Vice President
O. C. Blanchard, Jr.—Secretary-Treasurer

(4) Respondents Joseph D. Bryant, Joseph H. Bryant, Granville L. Sheffield and William L. Hussey, Sr., are copartners trading under the name and style of Hussey's Warehouse, a partnership, engaged in operating a tobacco auction warehouse, with their principal office and place of business located in or near the town of Wallace, State of North Carolina, and as such and individually are named as respondents herein. Said respondents are members of respondent Wallace Tobacco Board of Trade, Inc.

(5) The membership of respondent Wallace Tobacco Board of Trade, Inc., includes, in addition to those warehouse members hereinabove described, other members whose names are not known at this time to the Federal Trade Commission but who may possess or own interests in one or more of the different warehouses operating on the Wallace tobacco market and thus be eligible under respondent Board's Constitution and Bylaws to vote on matters pertaining to the allocation of selling time to said warehouses operating on the Wallace market. Furthermore, such membership of said respondent Board is, or may be, changed from time to time by the addition and withdrawal of such members. For these reasons, all of such members of said respondent Board at any given time cannot be properly described and set forth herein for the purpose of naming them as respondents without considerable inconvenience and delay. Wherefore, the respondents hereinbefore named as respondents, as such officers and warehouse members, are also made respondents as generally and fairly representative of and as representing all of the warehouse members of said respondent Board, including those not herein specifically named and described.

Complaint

62 F.T.C.

PAR. 2. Tobacco produced in the States of North Carolina and South Carolina is brought by the growers thereof to the tobacco auction warehouses, operated and controlled by different members of respondent Board where it is sold at auction to purchasers or agents or representatives thereof, who are also members of said respondent Board and who are, in a great many instances, engaged in the export tobacco trade or in the domestic manufacture of tobacco products in States other than North Carolina. Said tobacco is shipped or otherwise transported by such purchasers from said State of North Carolina to other States within the United States and the District of Columbia and foreign countries. There has been, and now is, a constant current and course of trade in commerce in said tobacco and tobacco products between and among the several States of the United States and the District of Columbia and with foreign countries.

PAR. 3. The State of North Carolina is one of the largest, if not the largest, producer of flue-cured tobacco. According to the area of production flue-cured tobacco is classified as follows:

Type 11: Old Belt and Middle Belt flue-cured, produced in the Piedmont sections of Virginia and North Carolina;

Type 12: Eastern North Carolina flue-cured, produced in the coastal sections of North Carolina, north of the South River;

Type 13: South Carolina and Border North Carolina flue-cured, produced in the coastal sections of South Carolina and the southeastern sections of North Carolina, south of the South River;

Type 14: Georgia and Florida flue-cured, produced in southern Georgia and northern Florida.

The flue-cured tobacco farmer plants his tobacco seeds early in the winter in sheltered, specially treated and well tended plant beds. They are covered with a very thin porous cotton cloth. Some three months later the individual plants, then about finger size, are taken from the plant beds and are set out in the growing field in even, well spaced rows. The field growing season is about 6 to 8 weeks. The leaves ripen from the bottom of the stalk progressively upward. The "lugs" or bottom leaves ripen first and the "tips" or top leaves ripen last. Each ripe leaf is plucked by hand. Those plucked leaves, still green in color and heavy in weight but having indications of ripeness plain to an expert "cropper," are taken to a curing barn where they are strung on sticks. The sticks are placed on racks so that there is ample space and free ventilation between each stick. The barn is then closed and heat is applied.

Flue-cured tobacco is commonly referred to as bright tobacco and derives its name from the curing process, the distinctive feature of which is that the barn in which the curing takes place is provided with a system of large pipes, or flues, that carry off the fuel gases and rad-

iate heat. Smoke does not come into contact with the tobacco. Furnaces suited to the fuel being burned are employed and while a barn temperature only a few degrees above the temperature prevailing outside is used at the beginning, a temperature of 170° F. or more is reached at the end of the process. One of the principal factors controlling the value of the leaf cured by this method is the color. In flue-curing, as well as air-curing, the main changes in composition must be brought about before the leaf is killed. Flue-cured tobacco at time of harvesting is riper than most tobaccos cured without use of heat. Partly on this account and also because of the character of the soil on which it is grown, this type of leaf is richer in starchy matter and poorer in coloring. Flue-curing consists of speeding up and shortening the first stage in air-curing which is the yellowing. Unlike the air-curing process, which goes through a second stage to develop the brown or red color of the leaf, the flue-cured process stops with the yellowing.

At this time the tobacco leaves are a light yellow or gold or lemon in color and are very dry and brittle. If handled in that condition, they would crumble and their value would be destroyed. To get the tobacco in condition for handling, the curing barn doors are opened and the tobacco absorbs moisture from the night and early morning air. When so moistened it can be moved from the curing barn to the pack barn and placed in storage, still on its curing sticks, and the barn doors and windows closed. In that closed barn, the tobacco again dries out and becomes brittle. This is important because if moisture remains in the tobacco long, the tobacco will spoil. After putting the tobacco in the pack barn, the farmer goes out and gathers the additional tobacco which has ripened in the field during the past week. Then he cures another barn. An average barn will cure about one thousand pounds of tobacco, cured weight. The harvesting of a field of tobacco, the progressive ripening and plucking of the leaves and the curing of those leaves will cover a period of approximately 6 weeks. Tobacco can be left in a pack barn almost indefinitely if the barn is in sound condition.

When the farmer is ready to market his tobacco, he must then get the tobacco from the storage barn into the pack house. At this time the tobacco leaf is very brittle and it must be gotten into a pliant condition in which it may be handled without crumbling. Tobacco is hygroscopic in nature. In normal weather pliancy may be accomplished by opening the storage barn doors and windows and allowing the damp night and early morning air to come in. In very hot, dry weather it sometimes happens that a farmer will have to wait several days until the arrival of a moist evening or morning. Tobacco is

ready for handling when it is pliant enough to fold by closing the hand on the leaf without breaking the stem or leaf. Getting the tobacco ready for the market is an operation of the entire family and in the industry it is called the "family machine." At this time, the family or such employees as the farmer may hire, sit down and grade the tobacco into different lots or grades and tie it into hands with 15 or 20 leaves. As a rule, the different primings are handled separately and only a few lots are made of each. Six to ten different grades will usually be all that is made of the entire crop. On the farm, the leaf from the early priming may be separated in lots commonly called trash lugs, sand lugs and good lugs. Lots from later primings are usually known as best leaf, second leaf, tips and green tips. The separation is based mainly on the position of the leaf on the stalk, color and extent of injury. Also, such other leaf characters as thickness, elasticity and texture are highly important in the established market system of classification and are considered. After the tobacco is graded and tied into hands, a pile is made of each grade up to a weight of 300 pounds and it is then ready to be loaded for conveyance to the market.

In eastern North Carolina, tobacco is raised on farms with tobacco acreage allotments ranging from 3 to 4 acres or to over 100 acres. The farms in and around Wallace in Duplin County, North Carolina, are mostly small farms.

The Secretary of Agriculture under the provisions of the Tobacco Inspection Act of 1935 is empowered to designate an auction market where tobacco is offered for sale at auction as a mandatory market where two-thirds of the growers voting in the referendum for that particular market favor the designation of such market. All tobacco offered for sale at auction on such a designated market shall be certificated and inspected by representatives of the Secretary of Agriculture. Thus, every mandatory or designated market has a number of graders assigned to it for the purpose of grading the tobacco prior to its sale at auction. The auction market at Wallace, North Carolina, is a designated market. Flue-cured tobacco is classified on the market into six groups, which are determined mainly by the character of the leaf. Beginning at the lower part of the plant, the normal groups are lugs, cutters and leaf. Another group, known as wrappers, consists of leaves that are almost perfect, selected from the leaf and cutter group. Finally, two subgroups are made—primings in the lugs group and smoking leaf in the leaf group. The groups are further separated into three to six qualities, and each quality is again divided into colors. The most desirable colors, in order of preference, are lemon, orange, red, dark red and green. The system of classifica-

tion provides for a large number of possible grades and permits close grading of all lots marketed. The tobacco of the different groups is used for different purposes. In general that from the lower part of the plant is used in cigarettes, while that from the upper part is used in smoking and chewing tobacco. The prices obtained on the market are greatly influenced by the care and skill used in grading.

All auction tobacco warehouses operating in the five belts, with a few exceptions, are members of the Bright Belt Warehouse Association. This association was organized under the laws of North Carolina in June, 1945. It is a nonstock, nonprofit membership organization. It is a trade organization designed to provide a code of ethics and a pattern of performance for the organized tobacco auction warehousemen. Membership in the Bright Belt Warehouse Association is obtained by the local warehouses operating on a market through their belt association. For example, the warehousemen in Wallace, North Carolina, are members of the Eastern Carolina Warehouse Association. The Eastern Carolina Warehouse Association is a member of the Bright Belt Warehouse Association. Therefore, Eastern Carolina Warehouse Association members are members of the Bright Belt Warehouse Association. The Bright Belt Warehouse Association adopts various regulations for the conduct of the warehouses' operation on the auction market in the five belts, excluding the allocation of selling time to individual warehouses in each market. The Wallace Tobacco Board of Trade accedes to and adheres to the regulations promulgated by the Bright Belt Warehouse Association.

The tobacco is brought to market in hands or bundles strung on sticks about 4 feet long which have been used to pack the tobacco down. When the farmer drives into the auction warehouse with a load of tobacco, he is assigned laborers to pack the tobacco as he hands it off his truck. Those sticks are handed off to the laborers. The tobacco is then taken off the sticks and it is packed as neatly as can be in a basket, one grade to a basket, until such time as the farmer indicates that he has handed off the last stick of a particular grade of tobacco, which he made at the time he graded it back on the farm.

The tobacco is then trucked to the scales to be weighed by a licensed weighmaster. At that time a printed cardboard-backed ticket consisting of three duplicate originals is filled out by the weighmaster, containing the weighmaster's number, his identification mark as a weigher, and the name and initials of the grower. There is also a blank on this form for the poundage as well as a space for the grade, or whichever it may be, to be inserted by an inspector of the U.S. Department of Agriculture under the Tobacco Inspection Act. This card is placed in the end of a cleft stick, which is pointed on the bot-

tom, and, after the weight of the tobacco is indicated thereon, the ticket is then handed to an employee who inserts the cardboard form into the cleft end of the stick and the stick stuck into the pile of tobacco in an upright position of what will eventually be the farmer's bill.

The weighmaster continues to list those piles as they are unloaded and brought across to the scales until the farmer indicates that he has brought to the scales all of the tobacco he desires to sell on that particular bill. The piles of tobacco are then rolled out on the warehouse floor and placed on the floor in accordance with the specifications set up in the warehouse's contract with the Stabilization Corporation and the rules and regulations of the Bright Belt Warehouse Association. The Bright Belt Warehouse Association's regulations prescribe that baskets of tobacco displayed for sale on auction warehouse floors shall have a minimum space of 18 inches between rows and a minimum space of 24 inches at each end of the row between the basket and the wall, provided, however, where any warehouseman shall mark his rows and the widths of his baskets plus 26 inches for the aisle between rows and shall place his baskets in accordance with those markings, he shall be deemed to be in compliance with this provision. The warehousemen are required to exercise every reasonable effort to insure that there shall be a space of not less than 6 inches in the row between butts at the nearest point and that the butts shall not touch at any point.

In the event the tobacco is placed on the warehouse floor in the afternoon and must lie over that night prior to sale, the warehouse generally furnishes a cover to keep it from fading out or to protect it from the sunlight or to keep it from acquiring an undue amount of moisture if the weather is hot and humid. The next morning, prior to the time the tobacco will be sold, the warehouseman uncovers the tobacco, straightens up the row and gets it ready for sale. Before the sale, the government grading service comes into the warehouse and grades each pile of tobacco, beginning with the first pile on the first row and grades right down the row and back up the next row until all of the tobacco is graded that may be sold by that particular warehouse that day, according to the selling time allotted that warehouse. The government grader indicates on the ticket the particular government grade assigned each pile of tobacco. That is taken from a sheet which is furnished daily by the government, which also indicates the support price for that grade and the average selling price such grade has been bringing in the market. This sheet is a government-printed document, furnished by the government, and is distrib-

uted by the warehouse to the farmer for his information in selling his crop.

After the tobacco has been inspected and a grade placed on the tobacco by the United States grader, the warehouse forms a sale at the beginning of the first row or first pile. The sales group is composed on one side of the row of a man representing the warehouse who walks just ahead of the auctioneer and starts the bid on each pile of tobacco. This man is known as the "starter." The first bid is not a "firm" bid. Following the auctioneer is another representative of the warehouse called the "man in the hole." Actually, he is the sales manager of the warehouse who carries the bidding on up after the starting bid has been put on by the starter. Behind him there are other buyers representing the various tobacco companies. A ticket marker is also in this group to mark the ticket when the tobacco is sold with the price it brought, the name of the purchaser and the company grade which the purchaser calls out to him. The company buyer has a symbol that represents the grade of tobacco that he is buying. On the other side of the row, there are buyers from the various other buying companies who follow the sales and such speculators as elect to attend the sale and bid on the tobacco. After the opening bid is put on the first pile of tobacco by the "starter" representing the warehouse, the auctioneer takes this figure up and begins to call or chant the bid and to accept bids from buyers on either side of the row or from the warehouse's "man in the hole." Some of the buying companies have particular spots that the buyer prefers to be in at the time the sale is progressing. Sometimes the bids by the buyers are made vocally, sometimes by a nod of the head or wink of an eye and, frequently, by the buyer continuing to look at the auctioneer so long as the auctioneer continues to cry the bid, and, when he drops his eye, the auctioneer knows he is no longer bidding and will cease taking bids from him. There are many ways that the buyers use to indicate their desire to bid and the amount they want to bid. After the sale of each pile of tobacco, the ticket marker inserts the price the tobacco brought at the sale in the blank space provided on a ticket. This ticket also has the name of the warehouse, the name of the company buyer and company grade. After the ticket marker makes these notations on the ticket, he drops it back on the pile of tobacco. If a farmer is dissatisfied with the last bid received for his tobacco, he then has the privilege of "turning the ticket," which is rejection of the bid. This is done, ordinarily, by tearing off the name of the buyer or by folding the ticket or by just tearing the bottom part of it.

Records are kept by the warehouse on what are known as floor

sheets. This is a permanent record of the warehouse of all tobacco received from individual farmers, showing the date it is received, the lot number and the weight of each individual pile of tobacco. This sheet is made out by the weighmaster at the time the tobacco is weighed. The number of items on the floor sheet correspond to the warehouse tickets placed on the different piles of tobacco. At the time of sale the floor sheets are delivered to the office where a clerk copies off this information onto what is known as a farmer's bill. The floor sheet and the farmer's bill are then placed on clip boards which are kept in numerical order. The farmer's bill is retained in the office. The floor sheet is turned over to what is known as a book man who follows the sale. The book man takes this floor sheet and, as the sale progresses, he inserts on the floor sheet the price at which the tobacco sold, its grade and the name of the buyer. When the bill is completed, he adds the totals and hands these bills to what is called a bill carrier. They are then turned in to the billing room where they are verified to see that the figures are correct and to indicate on the farmer's bill any piles of tobacco that are delivered to the government. The farmer's bill is then turned over to a clerk who figures the warehouse charge. The farmer's bill has space thereon for warehouse charges, auction fees and commissions. After the sale, the farmer presents a claim check which corresponds to the number on the bill and also presents his allotment book. If the sale of the farmer's tobacco is within his allotment or quota, the clerk deducts from the amount due the farmer 10 cents per acre as a fee for "Tobacco Associates." At the same time, the clerk also determines whether any cash loans are outstanding and whether there are any outstanding government loans to be collected. After this operation is completed, if there is no Stabilization tobacco on the bill, it is then turned over to a clerk representing the federal government who fills out the government warrants on the tobacco. The government clerk then returns the bills to the warehouse clerk at which time checks are written and delivered to the farmer for the amount of tobacco sold minus the auction fees and warehouse charges and such other deductions as may be proper. The check, with the farmer's bill and allotment card, is then turned over to the farmer.

One of the primary functions of the warehouse in its relation to the farmer is to try and obtain the best possible price for his tobacco. For that reason, the "man in the hole" who represents the warehouse and who is an expert judge of the grade of tobacco, will do everything possible to keep the bidding lively so as to get the top dollar for the producer's tobacco. In attempting to do this, it is not infrequent that a pile of tobacco is "knocked down" or sold to the warehouse. This

is charged to the warehouse's leaf account which is operated mainly for this purpose.

The auction tobacco market openings normally follow the seasons. The auction markets open about the time the tobacco in a belt is ready for sale. That means, usually, opening in the Florida-Georgia Belt a little after mid-July, opening in the South Carolina Border Belt later in July or about August 1st, opening in the Eastern Carolina Belt about mid-August, opening in the Middle Belt about the first of September, and opening in the Old Belt in middle or late September. As the openings move northward, the flow of tobacco over the auction floors to buyers and to their redriers increases. Eastern North Carolina markets, with the huge eastern North Carolina crop to sell, will be in full swing at the same time that at least two other belts are also in operation. First, eastern North Carolina will operate at the same time that the South Carolina and Middle Belts are operating. Later, as the South Carolina Belt closes, eastern North Carolina will be in operation with the Middle Belt and the Old Belt. The simultaneous operation of auction warehouses in the three belts result in the movement of huge quantities of tobacco each day. This means that in the 91 flue-cured tobacco auction markets, a great number are being operated simultaneously. The presence of buyers at these sales, representing the major tobacco manufacturing companies and independent buying companies, as well as speculators, is essential to the success of the auction sale. It is sometimes the practice to suspend operations of a market where the full set or quota of buyers are not present. Each auction market generally has from one to five sets of buyers purchasing on the market. A set of buyers consists of one buyer from each purchasing company.

The number of "sets of buyers" purchasing tobacco on any given market, including the Wallace Tobacco Market, is determined solely by the number of buyers that each individual buying company chooses to send to that market. Since the buying companies send one buyer to the Wallace Tobacco Market, that market has one set of buyers and is referred to as a "one set" market.

The sale of every pile of tobacco by means of the auction system is encouraged. That is necessary so that there be competition in the bidding by the buyers for the producers' tobacco. It is the competition in bidding among the buyers that determines the price received by the farmer for his tobacco. The contract entered into between the Stabilization Corporation and the warehouse discourages the selling of tobacco at private sales and contains provisions for suspension of the warehouse's contract where this practice is engaged in. The Wallace market is allotted 2,200 baskets or piles daily for a 5 hour selling

Complaint

62 F.T.C.

day. The rate of speed of a sale is 400 baskets minimum per hour per set of buyers. This is determined and set by the Bright Belt Warehouse Association.

After the tobacco is purchased at the auction, it is removed from the warehouse floor and shipped to the redrying plants of the purchaser in its green state or hauled to local redrying plants and subsequent shipment to the tobacco manufacturing plant for further processing.

Tobacco, being a perishable commodity, must be heat treated (referred to in the trade as redrying) within a short period of time after purchase and removal from the warehouse floors. The aggregate facilities of the tobacco buying companies and dealers for the redrying of producers' tobacco in the flue-cured area have a maximum capacity of 120,000,000 pounds weekly. The limit of this capacity is such that the volume of tobacco sold at auction in any one week must be regulated in order to prevent tobacco from deteriorating before it can be processed. In the final analysis, the precise amount of tobacco which can be sold on any market in any one day is controlled by the number of sets of buyers on the market. The number of sets of buyers assigned to a market is determined exclusively by the buying companies and the Bright Belt Warehouse Association has nothing to do with the assignment of buyers to a market. Thus, if the buying companies choose to send another set of buyers to a particular market, that market would automatically be able to auction more tobacco per day.

The maximum combined redrying capacity of the buying companies being approximately 120,000,000 pounds weekly, sales on the markets must be geared to such capacity because there are redrying facilities on some markets and not on others resulting in a cross movement of tobacco between markets for processing. The sales committee of the Bright Belt Warehouse Association obtains a daily report from the United States Department of Agriculture of the total pounds sold on all markets on the preceding day and in this way keeps a check on tonnage flow of tobacco to see that it does not exceed maximum processing capacity. Also, a particular buying company may notify the sales committee that their purchases have been so heavy that their redrying facilities cannot handle the tobacco and may request a curtailment of sales hours for a period of time. The sales committee gives serious consideration to such a request because it is to the interest of the farmers and the auction market system as a whole that buyers of a particular company not be withdrawn from the market because of the inability of that company to process its purchases. When in the considered judgment of the sales com-

Complaint

mittee the public interest requires a temporary curtailment of the volume of tobacco flowing through the warehouses to the processing plants, it takes remedial action by either reducing sales hours or suspension of all sales until processing can catch up. The authority for this action by the Association derives from the consent of its membership and the farmers and industry generally. There is no statutory authority. The Association takes no action with respect to the internal allocations of selling time among warehouses on any market.

PAR. 4. The Wallace tobacco market is located in the southeastern neck of the State of North Carolina, being one of the nearest flue-cured markets to the South Carolina and border North Carolina flue-cured area. The Wallace market is permitted to sell 2,200 baskets or piles of tobacco daily in accordance with an allotment of 5½ hours of daily selling time by the Bright Belt Warehouse Association, calculated at the rate of 400 piles or baskets per hour.

Wallace is one of the 15 North Carolina flue-cured markets producing what is known as "type 12" flue-cured tobacco. The producers' sales, as well as dealers and warehouse resales on the Wallace tobacco market beginning with the 1954 crop were as follows:

Year	Producer sales (pounds)	Dealer resales (pounds)	Warehouse resales (pounds)	Gross sales (pounds)
1954.....	14, 906, 000	579, 511	1, 363, 560	16, 848, 656
1955.....	15, 557, 000	262, 682	928, 550	16, 838, 652
1956.....	15, 279, 000	344, 922	499, 890	16, 123, 244
1957.....	11, 529, 000	274, 804	744, 966	12, 548, 256
1958.....	12, 225, 000	216, 562	578, 026	13, 074, 910

PAR. 5. Said respondent Board acting under and through the direction, control and authority of its officers and directors, as well as its warehouse members, has in the past and now continues to conduct and exercise control over the operations of the Wallace tobacco auction market under certain bylaws, rules and regulations, prescribed, approved and promulgated by said respondent Board, and, among other things, allots, apportions, regulates and adjusts the selling time among the said auction warehouses, passes upon applications for membership in said respondent Board, imposes fines and penalties for violations of its bylaws, rules and regulations, and at all times herein mentioned, the Wallace tobacco market has been dominated and controlled and is now under the domination and control of respondent Board and its warehouse members.

The authority of said respondent Board is respected, accepted and adhered to by the buyers, agents and representatives of the principal

tobacco manufacturing companies and by independent buyers whose presence is necessary for a successful tobacco auction sale so that it is virtually impossible for any person, firm or corporation to engage in the tobacco auction warehouse business, in the Wallace market, without first having been admitted into membership in respondent Board and becoming obligated to adhere to the bylaws, rules and regulations promulgated and prescribed by said respondent Board.

Membership in respondent Board is open to any person, firm or corporation that is engaged or about to engage at the time of application for membership in either the selling, buying, rehandling or otherwise dealing in tobacco on the Wallace tobacco market. However, no member of respondent Board, except those owning warehouses or interests in warehouses operating on the Wallace tobacco market, is permitted, under said respondent Board's Constitution and Bylaws, to vote on matters pertaining to the allocation of selling time to warehouses. Each warehouse firm or corporation is entitled to one vote on all matters that may arise. No person, firm or corporation may purchase tobacco or operate a tobacco auction warehouse on the Wallace tobacco market who is not a member in good standing of respondent Board.

The successful operation of a tobacco auction warehouse is dependent upon receiving a portion of the total selling time allocated to a tobacco auction market. Under the regulations in effect in this market, the allotted selling time to each warehouse is based on what is known as the floor space system. Under such system the percentage of the total selling time allocated to the market is in turn allocated to each warehouse according to the percentage of floor space such warehouse bears to the entire warehouse floor space on the market.

The warehouse members of respondent Board constitute the controlling voting majority of said Board. As a result thereof, respondent Board has been and is now under the domination and control of said members and has been and is now an instrumentality or medium for effectuating and carrying out the designs and purposes of those respondents who own, control or operate tobacco auction warehouses in this market, and who through the exercise of their influence and voting privileges possess the means and ability to formulate, adopt, put into effect, execute and carry out any rule, regulation, system, plan or scheme which they may decide to pursue, including the unlawful acts and practices hereinafter set forth.

PAR. 6. Said respondent warehouse members are in competition with each other in the purchase, sale and handling of tobacco through

the facilities owned or operated by them for the purpose of conducting auction sales of the tobacco brought to the market and placed on the auction warehouse floors for sale by the growers as described herein, and in the buying and selling of such tobacco for export to foreign countries or for domestic use in the manufacture of cigarettes and other tobacco products for sale and distribution in the various States of the United States and in the District of Columbia except insofar as their said competition has been hindered, lessened or restrained, or potential competition among them, and with others, forestalled, prevented, hindered and suppressed by the unfair acts, practices, methods and policies of said respondents as hereinafter set forth.

PAR. 7. Respondent warehouse members acting between and among themselves and also through and by means of respondent Board for a number of years last past, and particularly since about 1955, and continuing to the present time, have, by means of agreements and understandings between and among themselves and by other means and methods, conspired and combined, together and with others, and have united in and pursued a planned common course of action and course of dealing, to adopt, carry out and maintain, and have adopted, carried out and maintained, in commerce between and among the several States of the United States and in the District of Columbia and with foreign countries, an undue and unreasonable hindrance, restriction, suppression and prevention of the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of leaf tobacco on the Wallace tobacco market.

PAR. 8. Pursuant to, and in furtherance and effectuation of, the aforesaid agreements and planned common course of action and course of dealing, respondent warehouse members have done and performed the following things:

(1) Caused to be included as a basis for the allocation of selling time on this market under the provisions of the floor space system of allocating selling time various buildings which are not available for use in any capacity in connection with the sale of tobacco at auction on this market except as a basis for the allocation of additional selling time to those persons, firms or corporations who own, lease, rent or otherwise control such buildings.

(2) Caused a percentage of the total selling time available to this tobacco market to be allocated to persons, firms and corporations operating tobacco auction warehouses on said market who own, lease, rent or otherwise control buildings not available in any capacity

in connection with the sale of tobacco at auction on this market except as a basis for the allocation of additional selling time.

(3) Adopted and used a policy and practice of restricting, preventing and foreclosing persons, firms and corporations from engaging in the business of buying and selling tobacco on the Wallace market.

(4) Adopted a policy to discourage and prevent, and acted thereunder for the purpose and with the effect of discouraging and preventing, persons, firms and corporations from erecting, building or operating any new auction warehouse in or near the Wallace tobacco market area.

(5) Adopted a policy to discourage and prevent, and acted thereunder for the purpose and with the effect of discouraging and preventing persons, firms and corporations from expanding their present tobacco auction warehouse facilities in the Wallace tobacco market.

PAR. 9. Each of the respondent warehouse members herein has directly or indirectly participated in, approved or adopted the aforesaid agreements, understanding and planned common course of action and the acts and practices done in furtherance of and pursuant thereto.

PAR. 10. The aforesaid agreements, combination, conspiracy, planned common course of action, policies, acts and practices of the respondent warehouse members and respondent Board, as hereinbefore alleged, each and all operated to prevent a substantial volume of tobacco from being sold or purchased by persons, firms and corporations who sought to compete in the market operations of the Wallace tobacco market, and thereby unduly and unreasonably hindered, restricted, suppressed and prevented competition in the sale and purchase of tobacco on the Wallace tobacco market. Among the specific effects in that respect are the following:

(1) Persons, firms and corporations seeking to erect, expand and use tobacco warehouse facilities in market operations on the Wallace tobacco market were and are now being prevented from doing so.

(2) Persons, firms and corporations as potential competitors of respondent warehouse members have been discouraged, persuaded and prevented from further consideration of engaging in competition with respondents on the Wallace tobacco market in the purchase and sale of tobacco.

(3) Farmers have been restricted, obstructed and prevented from selling their tobacco at the warehouse of their choice on the Wallace tobacco auction market.

(4) Respondent warehouse members have acquired control of such nature and to such an extent over the purchase and sale of tobacco on the Wallace tobacco market that it has created or tends to create, and

threatens to perpetuate, in them a monopoly in the business of buying and selling tobacco on that market.

PAR. 11. The agreements, combination, conspiracy and planned common course of action and course of dealing and the acts and practices carried out pursuant thereto, as hereinbefore alleged, all and singularly are contrary to public policy because they have a dangerous tendency unduly to hinder competition and create a monopoly and because they have in fact hindered, restricted, suppressed and prevented the entrance of new warehouse competitors and the expansion and establishment of other warehouse facilities, market opportunities and competition in the sale and purchase of tobacco on the Wallace tobacco market in commerce, as "commerce" is defined in the Federal Trade Commission Act, and are therefore to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 12. The acts and practices of said respondents, and the things done and performed by them as herein alleged, are all to the prejudice of the public; have a dangerous tendency to hinder and prevent and have actually hindered and prevented competition and restrained trade between and among said respondents and others in the sale, purchase, manufacture and distribution of tobacco and tobacco products in commerce within the intent and meaning of the Federal Trade Commission Act; and have placed in respondents the power to control and enhance prices and other terms and conditions in connection with the sale, purchase, manufacture and distribution of the said tobacco and tobacco products; have a dangerous tendency to create in said respondents a monopoly in the auction sale of tobacco, in said commerce; have unreasonably restrained such commerce in the said tobacco and tobacco products and 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.

Mr. Rufus E. Wilson and *Mr. Americo M. Minotti* for the Commission.

Mr. Jesse A. Jones, of Kinston, North Carolina, for respondents: Wallace Tobacco Board of Trade, William L. Hussey, Jr., Granville L. Sheffield, Hugh M. Morrison, Joseph D. Bryant, Joseph H. Bryant, and William L. Hussey, Sr.

Mrs. Winifred T. Wells, of Wallace, North Carolina, for respondents: Blanchard & Farrior Warehouse, Inc., O. C. Blanchard, Sr., Tyson Lanier, and O. C. Blanchard, Jr.

Initial Decision

62 F.T.C.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

DECEMBER 4, 1961*

TABLE OF CONTENTS

	<i>Page</i>
ALLEGED CHARGES.....	750
RESPONDENTS' POSITIONS.....	752
FINDINGS OF FACT.....	754
1. Description of Respondents.....	754
2. Interstate Commerce.....	755
3. Tobacco Production and Marketing.....	755
4. The Wallace Tobacco Board of Trade.....	765
5. Allocation of Selling Time Under the Floor Space System.....	766
6. The Combination and Conspiracy.....	767
7. The Floor Space System Inhibitive of Competition.....	770
DISCUSSION OF EVIDENCE AND APPLICABLE LAW.....	770
1. Interstate Commerce.....	770
2. The Public Interest Issue.....	772
3. Board of Trade Administration of Floor Space System.....	772
4. The Combination and Conspiracy.....	774
5. The Effects and Illegality of the Conspiracy.....	780
6. Restrictive Effect of the Floor Space System as a Method of Allocating Selling Time.....	785
7. Invalidity of Respondents' Motion to Strike Portions of the Answer of Respondents Blanchard & Farrior Warehouse, Inc., et al.....	787
CONCLUSIONS.....	788
ORDER.....	788

The Federal Trade Commission issued its complaint against the above-named respondents on September 30, 1960, charging them with violating Section 5 of the Federal Trade Commission Act.

THE ALLEGED CHARGES

The crux of the alleged charges is set forth in Paragraph 7 through 11 of the complaint, which are as follows:

Respondent warehouse members¹ acting between and among themselves and also through and by means of respondent Board for a number of years last past, and particularly since about 1955, and continuing to the present time, have, by means of agreements and understandings between and among themselves and by other means and methods, conspired and combined, together and with others, and have united in and pursued a planned common course of action and course of dealing, to adopt, carry out and maintain, and have adopted, carried out and maintained, in commerce between and among the several States of the United States and in the District of Columbia and with foreign countries, an undue and unreasonable hindrance, restriction, suppression and prevention of the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of leaf tobacco on the Wallace tobacco market.

*Reported as supplemented August 22, 1962.

¹Members of the Wallace Tobacco Board of Trade, Inc., a respondent herein.

Pursuant to, and in furtherance and effectuation of, the aforesaid agreements and planned common course of action and course of dealing, respondent warehouse members have done and performed the following things:

(1) Caused to be included as a basis for the allocation of selling time on this market, under the provisions of the floor space system of allocating selling time, various buildings which are not available for use in any capacity in connection with the sale of tobacco at auction on this market except as a basis for the allocation of additional selling time to those persons, firms or corporations who own, lease, rent or otherwise control such buildings.

(2) Caused a percentage of the total selling time available to this tobacco market to be allocated to persons, firms and corporations operating tobacco auction warehouses on said market who own, lease, rent or otherwise control buildings not available in any capacity in connection with the sale of tobacco at auction on this market except as a basis for the allocation of additional selling time.

(3) Adopted and used a policy and practice of restricting, preventing and foreclosing persons, firms and corporations from engaging in the business of buying and selling tobacco on the Wallace market.

(4) Adopted a policy to discourage and prevent, and acted thereunder for the purpose and with the effect of discouraging and preventing, persons, firms and corporations from erecting, building or operating any new auction warehouse in or near the Wallace tobacco market area.

(5) Adopted a policy to discourage and prevent, and acted thereunder for the purpose and with the effect of discouraging and preventing persons, firms and corporations from expanding their present tobacco auction warehouse facilities in the Wallace tobacco market.

Each of the respondent warehouse members herein has directly or indirectly participated in, approved or adopted the aforesaid agreements, understanding and planned common course of action and the acts and practices done in furtherance of and pursuant thereto.

The aforesaid agreements, combination, conspiracy, planned common course of action, policies, acts and practices of the respondent warehouse members and respondent Board, as hereinbefore alleged, each and all operated to prevent a substantial volume of tobacco from being sold or purchased by persons, firms and corporations who sought to compete in the market operations of the Wallace tobacco market, and thereby unduly and unreasonably hindered, restricted, suppressed and prevented competition in the sale and purchase of tobacco on the Wallace tobacco market. Among the specific effects in that respect are the following:

(1) Persons, firms and corporations seeking to erect, expand and use tobacco warehouse facilities in market operations on the Wallace tobacco market were and are now being prevented from doing so.

(2) Persons, firms and corporations as potential competitors of respondent warehouse members have been discouraged, persuaded and prevented from further consideration of engaging in competition with respondents on the Wallace tobacco market in the purchase and sale of tobacco.

(3) Farmers have been restricted, obstructed and prevented from selling their tobacco at the warehouse of their choice on the Wallace tobacco auction market.

(4) Respondent warehouse members have acquired control of such nature and to such an extent over the purchase and sale of tobacco on the Wallace tobacco market that it has created or tends to create, and threatens to perpetuate, in them a monopoly in the business of buying and selling tobacco on that market.

Initial Decision

62 F.T.C.

The agreements, combination, conspiracy and planned common course of action and course of dealing and the acts and practices carried out pursuant thereto, as hereinbefore alleged, all and singularly are contrary to public policy because they have a dangerous tendency unduly to hinder competition and create a monopoly and because they have in fact hindered, restricted, suppressed and prevented the entrance of new warehouse competitors and the expansion and establishment of other warehouse facilities, market opportunities and competition in the sale and purchase of tobacco on the Wallace tobacco market in commerce, as "commerce" is defined in the Federal Trade Commission Act, and are therefore to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

RESPONDENTS' POSITIONS

Respondents, Blanchard & Farrior Warehouse, Inc., O. C. Blanchard, Sr., O. C. Blanchard, Jr., Tyson Lanier estate, and R. H. Lanier, individually, as administrator of Tyson Lanier estate, all individually or as members of the Wallace Tobacco Board of Trade, Inc., appear to concede the existence of a conspiracy restricting competition but claim they have not at any time during the period covered by the complaint been parties to any conspiracy, agreements, or acts, in violation of the Federal Trade Commission Act, as amended, which had as its purpose the lessening, restraining, or elimination of competition on the Wallace tobacco market.

The position of the other respondents against whom charges have been filed by the Commission as aforesaid, is stated as follows:

(1) The allocation of sales time among warehouses engaged in the auction sale of leaf tobacco upon the Wallace, North Carolina tobacco market by the respondent Board of Trade, through its committees and members in accordance with its reasonable rules and regulations, is not an act or acts "in" interstate commerce within the terms and provisions of the Federal Trade Commission Act.

The Federal Trade Commission Act (15 USCA 41, et seq.) is limited to acts "in" interstate commerce and does not extend to acts "affecting interstate commerce."

(2) This action should be dismissed because of the absence of specific and substantial public interest therein, and because it involves private interests only. The existence of a "specific and substantial public interest" is a jurisdictional prerequisite for the Commission. *Federal Trade Commission v. Klesner*, 280 U.S. 19.

The burden is upon counsel in support of the complaint to establish the existence of public interest. This is a fundamental rule first enunciated in the Klesner case, *supra*, and has been recently reaffirmed by the United States Supreme Court in *American Air Lines v. North American Air Lines*, 351 U.S. 79.

(3) This case should be dismissed upon the respondents' motions made at the close of the Commission's evidence and renewed at the close of all the evidence, for the reason that the evidence adduced at the hearing is not sufficient to affirmatively establish that the respondents, or either of them have committed any act

or acts individually or collectively constituting unfair methods of competition in commerce, or unfair or deceptive acts or practices in commerce.

There is no evidence in this case that the respondents, or either of them, committed any act or acts by means of agreements and understandings between themselves or planned or pursued a common course of action to unduly or unreasonably hinder, restrict, suppress or prevent the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of leaf tobacco on the Wallace Tobacco Market in any of the manners and respects alleged in the complaint filed in this case.

(4) That the order of the hearing examiner denying the motion of the respondents Board of Trade, et al., to strike portions of the answer of the respondents, Blanchard & Farris Warehouse, Inc., et al., should be reversed, and the said motion sustained.

A person who deems himself aggrieved by the use of an unfair method of competition has no right to institute proceedings before the Federal Trade Commission. He may bring the matter to the attention of the Commission and request it to file a complaint. He does not become a party to the proceeding by such a request or have any control over it. This position is sustained in *52 AM. JUR., Para. 212, page 668*, in which it is further held that a stockholder of a corporation against which a proceeding was instituted for the purpose of obtaining a cease and desist order, could not properly be joined as a defendant "even though he (stockholder) originated such advertising (subject of attack) and holds practically all of the stock of the corporation which took over the business in which the advertising was used."

To the same effect is the holding of the U.S. Supreme Court in the case of *Federal Trade Commission v. Alfred Klesner*, 280 U.S. 19, in which the Court stated:

"Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may, of course, bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

The respondents Blanchard & Farris Warehouse, Inc., a corporation, and O. C. Blanchard, Sr., O. C. Blanchard, Jr., (R. H. Lanier, individually, and R. H. Lanier, Administrator of the estate of Tyson Lanier), individually and as officers of said corporation, filed answer in this case taking issue with the other respondents, and undertaking to prejudice, through their said pleading, the rights of the other respondents in the defense of the said action. They actively participated in the hearing of the said cause before the hearing examiner; all of which was and is in furtherance of their private purpose and interest; and all of which is in violation of the terms and provisions of the Federal Trade Commission Act, its rules and regulations, and the holdings of the Court in the authorities cited.

Proposed findings of fact and conclusions of law have been timely filed by counsel in support of the complaint and counsel for the re-

spondents on or before October 16, 1961. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following:

FINDINGS OF FACT

1. Description of Respondents

a. Respondent Wallace Tobacco Board of Trade, Inc., hereinafter referred to as respondent Board, is a corporation duly organized under the laws of the State of North Carolina, on June 22, 1955, with its principal office and place of business located in the town of Wallace, State of North Carolina.

b. The membership of respondent Board is composed of corporations, partnerships and individuals, including warehousemen, who are generally engaged in either selling, buying, rehandling or otherwise dealing in leaf tobacco.

c. The following named individual respondents were at the time of the institution of this proceeding, or are now, officers of respondent Board, and in such capacity have directed, or are now directing, the affairs of said respondent Board, including the wishes of the controlling voting members of said respondent Board as hereinafter referred to and set forth:

William L. Hussey, Jr., President;
Granville L. Sheffield, Vice President;
Hugh M. Morrison, Secretary-Treasurer.

d. Respondents William L. Hussey, Jr., and John H. Sheffield are copartners trading under the name and style of Sheffield's Warehouse, a partnership, engaged in the business of operating a tobacco auction warehouse, with their principal office and place of business located in or near the town of Wallace, State of North Carolina, and as such and individually are named as respondents herein. Said respondents are members of respondent Wallace Tobacco Board of Trade, Inc.

e. Respondent Blanchard & Farrior Warehouse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located in the town of Wallace, State of North Carolina, and engaged in operating a tobacco auction warehouse. Respondent Blanchard & Farrior Warehouse, Inc., is a member of respondent Wallace Tobacco Board of Trade, Inc.

f. The following named individuals are now, and have been during the time mentioned herein, officers of said respondent Blanchard & Farrior Warehouse, Inc.,² and as such and individually are named as respondents herein:

O. C. Blanchard, Sr., President;
O. C. Blanchard, Jr., Secretary-Treasurer.

g. Respondents Joseph D. Bryant, Joseph H. Bryant, Granville L. Sheffield and William L. Hussey, Sr., are copartners trading under the name and style of Hussey's Warehouse, a partnership, engaged in operating a tobacco auction warehouse, with their principal office and place of business located in or near the town of Wallace, State of North Carolina, and as such and individually are named as respondents herein. Said respondents are members of respondent Wallace Tobacco Board of Trade, Inc.

2. Interstate Commerce

Tobacco produced in the States of North Carolina and South Carolina is brought by the growers thereof to the tobacco auction warehouses, operated and controlled by different members of respondent Board where it is sold at auction to purchasers or agents or representatives thereof, who are also members of said respondent Board and who are, in a great many instances, engaged in the export tobacco trade or in the domestic manufacture of tobacco products in States other than North Carolina. Said tobacco is shipped or otherwise transported by such purchasers from said State of North Carolina to other States within the United States and the District of Columbia and foreign countries. There has been, and now is a constant current and course of trade in commerce in said tobacco and tobacco products between and among the several States of the United States and the District of Columbia and with foreign countries.

3. Tobacco Production and Marketing

a. Factors in the Production and Marketing of Flue-Cured Tobacco.

² Tyson Lanier, former vice president of respondent Blanchard & Farrior Warehouse, Inc., was named originally in the complaint as a party respondent, both individually and as an officer. In the answer to the complaint it was alleged by respondents that Mr. Tyson Lanier had since died. At the pre-trial conference, held on July 25, 1961, Mrs. Winifred T. Wells appeared as counsel for Blanchard & Farrior, Inc., O. C. Blanchard, Sr., O. C. Blanchard, Jr., and Tyson Lanier's Estate and the pleadings were corrected accordingly. Mr. Tyson Lanier's successor, R. H. Lanier, was substituted as a party respondent by consent.

(1) *Planting and Curing*

The State of North Carolina is one of the largest, if not the largest, producer of flue-cured tobacco. According to the area of production flue-cured tobacco is classified as follows:

Type 11: Old Belt and Middle Belt flue-cured, produced in the Piedmont sections of Virginia and North Carolina;

Type 12: Eastern North Carolina flue-cured, produced in the coastal sections of North Carolina, north of the South River;

Type 13: South Carolina and Border North Carolina flue-cured, produced in the coastal sections of South Carolina and in the southeastern sections of North Carolina, south of the South River;

Type 14: Georgia and Florida flue-cured, produced in southern Georgia and northern Florida.

The flue-cured tobacco farmer plants his tobacco seeds early in the winter in sheltered, specially treated and well tended plant beds. They are covered with a very thin porous cotton cloth. Some three months later the individual beds are set out in the growing field in even, well spaced rows. The field growing season is about 6 to 8 weeks. The leaves ripen from the bottom of the stalk progressively upward. The "lugs" or bottom leaves ripen first and the "tips" or top leaves ripen last. Each ripe leaf is plucked by hand. Those plucked leaves, still green in color and heavy in weight but having indications of ripeness plain to an expert "cropper," are taken to a curing barn where they are strung on sticks. The sticks are placed on racks so that there is ample space and free ventilation between each stick. The barn is then closed and heat is applied.

Flue-cured tobacco is commonly referred to as bright tobacco and derives its name from the curing process, the distinctive feature of which is that the barn in which the curing takes place is provided with a system of large pipes, or flues, that carry off the fuel gases and radiate heat. Smoke does not come into contact with the tobacco. Furnaces suited to the fuel being burned are employed and while a barn temperature only a few degrees above the temperature prevailing outside is used at the beginning, a temperature of 170° F. or more is reached at the end of the process. One of the principal factors controlling the value of the leaf cured by this method is the color. In flue-curing, as well as air-curing, the main changes in composition must be brought about before the leaf is killed. Flue-cured tobacco at time of harvesting is riper than most tobacco cured without use of heat. Partly on this account and also because of the character of the soil in which it is grown, this type of leaf is richer in starchy matter and poorer in coloring. Flue-curing consists of speeding up and shortening the first stage in air-curing which is the yellowing. Unlike the air-curing process, which goes through a second stage to

develop the brown or red color of the leaf, the flue-cured process stops with the yellowing.

At this time the tobacco leaves are a light yellow or gold or lemon in color and are very dry and brittle. If handled in that condition, they would crumble and their value would be destroyed. To get the tobacco in condition for handling, the curing barn doors are opened and the tobacco absorbs moisture from the night and early morning air. When so moistened it can be moved from the curing barn to the pack barn and placed in storage, still on its curing sticks, and the barn doors and windows closed. In that closed barn, the tobacco again dries out and becomes brittle. This is important because if moisture remains in the tobacco long, the tobacco will spoil. After putting the tobacco in the pack barn, the farmer goes out and gathers the additional tobacco which has ripened in the field during the past week. Then he cures another barn. An average barn will cure about one thousand pounds of tobacco, cured weight. The harvesting of a field of tobacco, the progressive ripening and plucking of the leaves and the curing of those leaves will cover a period of approximately 6 weeks. Tobacco can be left in a pack barn almost indefinitely if the barn is in sound condition.

When the farmer is ready to market his tobacco, he must then get the tobacco from the storage barn into the pack house. At this time the tobacco leaf is very brittle and it must be gotten into a pliant condition in which it may be handled without crumbling. Tobacco is hygroscopic in nature. In normal weather pliance may be accomplished by opening the storage barn doors and windows and allowing the damp night and early morning air to come in. In very hot, dry weather it sometimes happens that a farmer will have to wait several days until the arrival of a moist evening or morning. Tobacco is ready for handling when it is pliant enough to fold by closing the hand on the leaf without breaking the stem or leaf. Getting the tobacco ready for the market is an operation of the entire family and in the industry it is called the "family machine." At this time, the family or such employees as the farmer may hire, sit down and grade the tobacco into different lots or grades and tie it into hands with 15 or 20 leaves. As a rule, the different primings are handled separately and only a few lots are made of each. Six to ten different grades will usually be all that is made of the entire crop. On the farm, the leaf from the early priming may be separated in lots commonly called trash lugs, sand lugs, and good lugs. Lots from later priming are usually known as best leaf, second leaf tips and green tips. The separation is based mainly on the position of the leaf on the stalk, color and extent of injury. Also, such other leaf characters as thickness, elasticity

and texture are highly important in the established market system of classification and are considered. After the tobacco is graded and tied into hands, a pile is made of each grade up to a weight of 300 pounds and it is then ready to be loaded for conveyance to the market.

In eastern North Carolina, tobacco is raised on farms with tobacco acreage allotments ranging from 3 to 4 acres or to over 100 acres. The farms in and around Wallace in Duplin County, North Carolina, are mostly small farms.

(2) *Designated Markets and Grading*

The Secretary of Agriculture under the provisions of the Tobacco Inspection Act of 1935 is empowered to designate an auction market where tobacco is offered for sale at auction as a mandatory market where two-thirds of the growers voting in the referendum for that particular market favor the designation of such market. All tobacco offered for sale at auction on such a designated market shall be certificated and inspected by representatives of the Secretary of Agriculture. Thus, every mandatory or designated market has a number of graders assigned to it for the purpose of grading the tobacco prior to its sale at auction. The auction market at Wallace, North Carolina, is a designated market. Flue-cured tobacco is classified on the market into six groups, which are determined mainly by the character of the leaf. Beginning at the lower part of the plant, the normal groups are lugs, cutters and leaf. Another group, known as wrappers, consists of leaves that are almost perfect, selected from the leaf and cutter group. Finally, two subgroups are made—primings in the lugs group and smoking leaf in the leaf group. The groups are further separated into three to six qualities, and each quality is again divided into colors. The most desirable colors, in order of preference, are lemon, orange, red, dark red, and green. The system of classification provides for a large number of possible grades and permits close grading of all lots marketed. The tobacco of the different groups is used for different purposes. In general that from the lower part of the plant is used in cigarettes, while that from the upper part is used in smoking and chewing tobacco. The prices obtained on the market are greatly influenced by the care and skill used in grading.

(3) *Role of the Auction Warehouse and the Mechanics of its Operation*

The tobacco is brought to market in hands or bundles strung on sticks about 4 feet long which have been used to pack the tobacco down. When the farmer drives into the auction warehouse with a load of tobacco, he is assigned laborers to pack the tobacco as he hands it off his truck. Those sticks are handed off to the laborers. The tobacco is then taken off the sticks and it is packed as neatly as can be in a

basket, one grade to a basket, until such time as the farmer indicates that he has handed off the last stick of a particular grade of tobacco, which he made at the time he graded it back on the farm.

The tobacco is then trucked to the scales to be weighed by a licensed weighmaster. At that time a printed cardboard-backed ticket consisting of three duplicate originals is filled out by the weighmaster, containing the weighmaster's number, his identification mark as a weigher, and the name and initials of the grower. There is also a blank on this form for the poundage as well as a space for the grade, or whichever it may be, to be inserted by an inspector of the U.S. Department of Agriculture under the Tobacco Inspection Act. This card is placed in the end of a cleft stick, which is pointed on the bottom, and, after the weight of the tobacco is indicated thereon, the ticket is then handed to an employee who inserts the cardboard form into the cleft end of the stick and the stick stuck into the pile of tobacco in an upright position of what will eventually be the farmer's bill.

The weighmaster continues to list those piles as they are unloaded and brought across to the scales until the farmer indicates that he has brought to the scales all of the tobacco he desires to sell on that particular bill. The piles of tobacco are then rolled out on the warehouse floor and placed on the floor in accordance with the specifications set up in the warehouse's contract with the Stabilization Corporation and the rules and regulations of the Bright Belt Warehouse Association. The Bright Belt Warehouse Association's regulations prescribe that baskets of tobacco displayed for sale on auction warehouse floors shall have a minimum space of 18 inches between rows and a minimum space of 24 inches at each end of the row between the basket and the wall, provided, however, where any warehouseman shall mark his rows and the widths of his baskets plus 26 inches for the aisle between rows and shall place his baskets in accordance with those markings, he shall be deemed to be in compliance with this provision. The warehousemen are required to exercise every reasonable effort to insure that there shall be a space of not less than 6 inches in the row between butts at the nearest point and that the butts shall not touch at any point.

In the event the tobacco is placed on the warehouse floor in the afternoon and must lie over that night prior to sale, the warehouse generally furnishes a cover to keep it from fading out or to protect it from the sunlight or to keep it from acquiring an undue amount of moisture if the weather is hot and humid. The next morning, prior to the time the tobacco will be sold, the warehouseman uncovers the tobacco, straightens up the row and gets it ready for sale. Before the sale, the government grading service comes into the warehouse and grades

each pile of tobacco, beginning with the first pile on the first row and grades right down the row and back up the next row until all of the tobacco is graded that may be sold by that particular warehouse that day, according to the selling time allotted that warehouse. The government grader indicates on the ticket of the particular government grade assigned each pile of tobacco. That is taken from a sheet which is furnished daily by the government, which also indicates the support price for that grade and the average selling price such grade has been bringing in the market. This sheet is a government-printed document, furnished by the government, and is distributed by the warehouse to the farmer for his information in selling his crop.

After the tobacco has been inspected and a grade placed on the tobacco by the United States grader, the warehouse forms a sale at the beginning of the first row or first pile. The sales group is composed on one side of the row of a man representing the warehouse who walks just ahead of the auctioneer and starts the bid on each pile of tobacco. This man is known as the "starter." The first bid is not a "firm" bid. Following the auctioneer is another representative of the warehouse called the "man in the hole." Actually, he is the sales manager of the warehouse who carries the bidding on up after the starting bid has been put on by the starter. Behind him there are other buyers representing the various tobacco companies. A ticket marker is also in this group to mark the ticket when the tobacco is sold with the price it brought, the name of the purchaser and the company grade which the purchaser calls out to him. The company buyer has a symbol that represents the grade of tobacco that he is buying. On the other side of the row, there are buyers from the various other buying companies who follow the sales and such speculators as elect to attend the sale and bid on the tobacco. After the opening bid is put on the first pile of tobacco by the "starter" representing the warehouse, the auctioneer takes this figure up and begins to call or chant the bid and to accept bids from buyers on either side of the row or from the warehouse's "man in the hole." Some of the buying companies have particular spots that the buyer prefers to be in at the time the sale is progressing. Sometimes the bids by the buyers are made vocally, sometimes by a nod of the head or wink of an eye and, frequently, by the buyer continuing to look at the auctioneer so long as the auctioneer continues to cry the bid, and when he drops his eye, the auctioneer knows he is no longer bidding and will cease taking bids from him. There are many ways that the buyers use to indicate their desire to bid and the amount they want to bid. After the sale of each pile of tobacco, the ticket marker inserts the price the tobacco brought at the sale in the blank space provided on a ticket. This ticket also has the name of the warehouse, the name of the company

buyer and company grade. After the ticket marker makes these notations on the ticket, he drops it back on the pile of tobacco. If a farmer is dissatisfied with the last bid received for his tobacco, he then has the privilege of "turning the ticket," which is rejection of the bid. This is done, ordinarily, by tearing off the name of the buyer or by folding the ticket or by just tearing the bottom part of it.

Records are kept by the warehouse on what are known as floor sheets. This is a permanent record of the warehouse of all tobacco received from individual farmers, showing the date it is received, the lot number and the weight of each individual pile of tobacco. This sheet is made out by the weighmaster at the time the tobacco is weighed. The number of items on the floor sheet correspond to the warehouse tickets placed on the different piles of tobacco. At the time of the sale the floor sheets are delivered to the office where a clerk copies off this information onto what is known as a farmer's bill. The floor sheet and the farmer's bill are then placed on clip boards which are kept in numerical order. The farmer's bill is retained in the office. The floor sheet is turned over to what is known as a book man who follows the sale. The book man takes this floor sheet and, as the sale progresses, he inserts on the floor sheet the price at which the tobacco sold, its grade and the name of the buyer. When the bill is completed, he adds the totals and hands these bills to what is called a bill carrier. They are then turned in to the billing room where they are verified to see that the figures are correct and to indicate on the farmer's bill any piles of tobacco that are delivered to the government. The farmer's bill is then turned over to a clerk who figures the warehouse charge. The farmer's bill has space thereon for warehouse charges, auction fees and commissions. After the sale, the farmer presents a claim check which corresponds to the number on the bill and also presents his allotment book. If the sale of the farmer's tobacco is within his allotment or quota, the clerk deducts from the amount due the farmer 10 cents per acre as a fee for "Tobacco Associates." At the same time, the clerk also determines whether any cash loans are outstanding and whether there are any outstanding government loans to be collected. After this operation is completed, if there is no Stabilization tobacco on the bill, it is then turned over to a clerk representing the federal government who fills out the government warrants on the tobacco. The government clerk then returns the bills to the warehouse clerk at which time checks are written and delivered to the farmer for the amount of tobacco sold minus the auction fees and warehouse charges and such other deductions as may be proper. The check, with the farmer's bill and allotment card, is then turned over to the farmer.

One of the primary functions of the warehouse in its relation to the farmer is to try and obtain the best possible price for his tobacco. For that reason, the "man in the hole" who represents the warehouse and who is an expert judge of the grade of tobacco, will do everything possible to keep the bidding lively so as to get the top dollar for the producer's tobacco. In attempting to do this, it is not infrequent that a pile of tobacco is "knocked down" or sold to the warehouse. This is charged to the warehouse's leaf account which is operated mainly for this purpose.

(4) *The Role of the Buyer*

The auction tobacco market openings normally follow the seasons. The auction markets open about the time the tobacco in a belt is ready for sale. That means, usually, opening in the Florida-Georgia Belt a little after mid-July, opening in the South Carolina Border Belt later in July or about August 1st, opening in the Eastern Carolina Belt about mid-August, opening in the Middle Belt about the first of September, and opening in the Old Belt in middle or late September. As the openings move northward, the flow of tobacco over the auction floors to buyers and to their redriers increases. Eastern North Carolina markets, with the huge Eastern North Carolina crop to sell, will be in full swing at the same time that at least two other belts are also in operation. First, Eastern North Carolina will operate at the same time that the South Carolina and Middle Belts are operating. Later, as the South Carolina Belt closes, Eastern North Carolina will be in operation with the Middle Belt and the Old Belt. The simultaneous operation of auction warehouses in the three belts result in the movement of huge quantities of tobacco each day. This means that in the 91 flue-cured tobacco auction markets, a great number are being operated simultaneously. The presence of buyers at these sales, representing the major tobacco manufacturing companies and independent buying companies, as well as speculators, is essential to the success of the auction sale. It is sometimes the practice to suspend operations of a market where the full set or quota of buyers is not present. Each auction market generally has from one to five sets of buyers purchasing on the market. A set of buyers consists of one buyer from each purchasing company.

The number of "sets of buyers" purchasing tobacco on any given market, including the Wallace Tobacco Market, is determined solely by the number of buyers that each individual buying company chooses to send to that market. Since each buying company sends one buyer to represent them in the Wallace Tobacco Market, this market has only one set of buyers. Thus Wallace is referred to and known as a "one set" market.

The sale of every pile of tobacco by means of the auction system is encouraged. That is necessary so that there be competition in the bidding by the buyers for the producers' tobacco. It is the competition in bidding among the buyers that determines the price received by the farmer for his tobacco. The contract entered into between the Stabilization Corporation and the warehouse discourages the selling of tobacco at private sales and contains provisions for suspension of the warehouse's contract where this practice is engaged in.

After the tobacco is purchased at the auction, it is removed from the warehouse floor and shipped to the redrying plants of the purchaser in its green state or hauled to local redrying plants and subsequent shipment to the tobacco manufacturing plants for further processing.

Tobacco, being a perishable commodity, must be heat treated (referred to in the trade as redrying) within a short period of time after purchase and removal from the warehouse floors. The aggregate facilities of the tobacco buying companies and dealers for the redrying of producers' tobacco in the flue-cured area have a maximum capacity of 120,000,000 pounds weekly. The limit of this capacity is such that the volume of tobacco sold at auction in any one week must be regulated in order to prevent tobacco from deteriorating before it can be processed. In the final analysis, the precise amount of tobacco which can be sold on any market in any one day is controlled by the number of sets of buyers on the market. The number of sets of buyers assigned to a market is determined exclusively by the buying companies and the Bright Belt Warehouse Association has nothing to do with the assignment of buyers to a market. Thus, if the buying companies choose to send another set of buyers to a particular market, that market would automatically be able to auction more tobacco per day.

The maximum combined redrying capacity of the buying companies being approximately 120,000,000 pounds weekly, sales on the markets must be geared to such capacity because there are redrying facilities on some markets and not on others resulting in a cross movement of tobacco between markets for processing. The sales committee of the Bright Belt Warehouse Association obtains a daily report from the United States Department of Agriculture of the total pounds sold on all markets on the preceding day and in this way keeps a check on tonnage flow of tobacco to see that it does not exceed maximum processing capacity. Also, a particular buying company may notify the sales committee that their purchases have been so heavy that their redrying facilities cannot handle the tobacco and may request a curtailment of sales hours for a period of time. The sales

committee gives serious consideration to such a request because it is to the interest of the farmers and the auction market system as a whole that buyers of a particular company not be withdrawn from the market because of the inability of that company to process its purchases. When in the considered judgment of the sales committee the public interest requires a temporary curtailment of the volume of tobacco flowing through the warehouses to the processing plants, it takes remedial action by either reducing sales hours or suspension of all sales until processing can catch up. The authority for this action by the Association derives from the consent of its membership and industry generally. There is no statutory authority. The Association takes no action with respect to the internal allocations of selling time among warehouses on any market.

All auction tobacco warehouses operating in the five belts, with a few exceptions, are members of the Bright Belt Warehouse Association. This association was organized under the laws of North Carolina in June 1945. It is a nonstock, nonprofit membership organization. It is a trade organization designed to provide a code of ethics and a pattern of performance for the organized tobacco auction warehousemen. Membership in the Bright Belt Warehouse Association is obtained by the local warehouses operating on a market through their belt association. For example, the warehousemen in Wallace, North Carolina, are members of the Eastern Carolina Warehouse Association. The Eastern Carolina Warehouse Association is a member of the Bright Belt Warehouse Association. Therefore, Eastern Carolina Warehouse Association members are members of the Bright Belt Warehouse Association. The Bright Belt Warehouse Association adopts various regulations for the conduct of the warehouses' operation on the auction market in the five belts, excluding the allocation of selling time to individual warehouses in each market.

(5) *Allotment of Selling Time*

The allotment of selling time originates through the Bright Belt Warehouse Association. This association allocates selling time to the various markets which, in turn, is allocated by the local boards of trade to the auction warehouses operating on those markets.

The Wallace Tobacco Board of Trade accedes to and adheres to the regulations promulgated by the Bright Belt Warehouse Association, insofar as selling time allotted to the market is concerned.

The Wallace tobacco market is located in the southeastern neck of the State of North Carolina, being one of the nearest flue-cured markets to the South Carolina and border North Carolina flue-cured area. The Wallace market is permitted to sell 2,200 baskets or piles of tobacco daily in accordance with an allotment of 5½ hours of daily

733

Initial Decision

selling time by the Bright Belt Warehouse Association, calculated at the rate of 400 piles or baskets per hour.

Wallace is one of the 15 North Carolina flue-cured markets producing what is known as "type 12" flue-cured tobacco. The producers' sales, as well as dealers and warehouse resales and gross dollar sales by each of the said three warehouses on the Wallace tobacco market beginning with the 1955 crop were as follows:

Year	Warehouse	Producer sales (pounds)	Dealer resales (pounds)	Warehouse resales (pounds)	Gross sales (pounds)	Gross dollars
1955	Hussey No. 1	8,548,928	223,292	546,962	9,319,182	4,666,660
	Sheffield	3,416,334	22,168	246,874	3,685,376	1,873,933
	Blanchard & Farris	3,592,158	7,222	134,714	3,734,094	1,915,629
	Total	15,557,000	262,682	923,550	16,838,652	8,456,222
1956	Hussey No. 1	8,223,214	290,942	260,830	8,774,986	4,711,231
	Sheffield	3,400,994	25,244	184,292	3,610,530	1,935,115
	Blanchard & Farris	3,654,584	28,736	54,768	3,737,728	2,032,490
	Total	15,278,792	344,922	499,890	16,123,244	8,678,836
1957	Hussey No. 1	6,222,108	247,786	395,298	6,865,192	3,840,459
	Sheffield	2,747,738	15,742	271,206	3,034,686	1,719,149
	Blanchard & Farris	2,558,640	11,276	78,462	2,648,378	1,506,012
	Total	11,528,486	274,804	744,966	12,548,256	7,066,220
1958	Hussey No. 1 and No. 2	6,630,640	210,118	262,006	7,102,764	4,121,984
	Sheffield	2,811,020	55,112	234,714	3,100,846	1,779,669
	Blanchard & Farris	2,783,550	6,444	81,306	2,871,300	1,705,542
	Total	12,225,210	216,562	578,026	13,074,910	7,607,195

4. The Wallace Tobacco Board of Trade

a. The respondent Board acting under and through the direction, control and authority of its officers and directors, as well as committees composed of its warehouse members, has in the past and now continues to conduct and exercise control over the operations of the Wallace tobacco auction market under certain bylaws, rules and regulations, prescribed, approved and promulgated by said respondent Board, and, among other things, allots, apportions, regulates and adjusts the selling time among the said auction warehouses, passes upon applications for membership in said respondent Board, imposes fines and penalties for violations of its bylaws, rules and regulations, advertises for the selling season, and at all times herein mentioned, the Wallace tobacco market has been dominated and controlled and is now under the domination and control of respondent Board and its warehouse members.

b. The authority of said respondent Board is respected, accepted and adhered to by the buyers, agents and representatives of the principal tobacco manufacturing companies and by independent buyers whose presence is necessary for a successful tobacco auction sale so

that it is virtually impossible for any person, firm or corporation to engage in the tobacco auction warehouse business, in the Wallace market, without first having been admitted into membership in respondent Board and becoming obligated to adhere to the bylaws, rules and regulations promulgated and prescribed by said respondent Board.

c. Membership in respondent Board is open to any person, firm or corporation that is engaged or about to engage at the time of application for membership in either the selling, buying, rehandling or otherwise dealing in tobacco on the Wallace tobacco market. No person, firm or corporation may purchase tobacco or operate a tobacco auction warehouse on the Wallace tobacco market who is not a member in good standing of respondent Board.

d. Each warehouse firm or corporation is entitled to one vote on all matters that may arise. However, no member of respondent Board, except those owning warehouses or interests in warehouses operating on the Wallace tobacco market, is eligible to vote on matters pertaining to the allocation of selling time to warehouses.

5. Allocation of Selling Time Under Floor Space System

a. Upon incorporation of the respondent Board on June 22, 1955, "Constitution and Bylaws" governing the operation of the Wallace tobacco market were duly adopted. Section 1 of Article VII of the Constitution provides:

Allocation of selling time for warehouses on the Wallace Tobacco market shall be based on the "Floor Space System", and each warehouse shall receive its allocation according to the available space it contains as provided in the Bylaws and regulations of the Wallace Tobacco Board of Trade, Incorporated.

Section 1 of Article II of the Bylaws and Regulations provides:

Section 1: The method now in use on the Wallace tobacco market for allocation of selling time and known as the "Floor Space System" shall be continued in use on the Wallace tobacco market. Such system and method may be modified and changed from year to year as the Board of Trade may deem necessary and expedient for the efficient marketing of leaf tobacco and the best interest of the Wallace tobacco market. Each warehouse shall receive its allocation of selling time according to its available space as hereinafter provided.

Under such system the percentage of the total selling time allocated to the market is in turn allocated to each warehouse according to the percentage of floor space such warehouse bears to the entire warehouse floor space on the market.

b. There is a generally understood meaning of the term "available space" among respondent warehousemen as well as throughout the tobacco trade as a whole. It applies in connection with the "Floor

Space System" as it relates to warehouse space which is not only available if required for the auction sale of leaf tobacco, but available for use in connection with the tobacco market during the marketing season in which selling time is allocated to such space. It must be at the same time, space which is *suitable* and thus "*available*" for auction sale of leaf tobacco or for use directly connected with the tobacco market during the marketing season in which selling time is allocated to that space.

c. Following a precedent set by its predecessor the unincorporated board of trade, through agreements by and between the then owner-members of the several warehouses engaged in the auction sale of leaf tobacco upon the said Wallace tobacco market, and the then operators of the several warehouses and under rules and regulations of the former unincorporated Board of Trade, respondent Board adopted and followed the method, policy and practice of including warehouse space as a basis for the allocation of selling time which was not being actually used in the auction sale of leaf tobacco in said market.

6. The Combination and Conspiracy

a. The warehouse members of respondent Board constitute the controlling voting majority of said Board. As a result thereof, respondent Board has been and is now under the domination and control of said members and has been and is now merely an instrumentality or medium for effectuating and carrying out the designs and purposes of those respondents who own, control or operate tobacco auction warehouses in this market, and who through the exercise of their influence and voting privileges possess the means and ability to formulate, adopt, put into effect, execute and carry out any rule, regulation, system, plan or scheme which they may decide to pursue.

b. The respondent warehouse members are in competition with each other in the purchase, sale and handling of tobacco through the facilities owned or operated by them for the purpose of conducting auction sales of the tobacco brought to the market and placed on the auction warehouse floors for sale by the growers as described herein, and in the buying and selling of such tobacco for export to foreign countries or for domestic use in the manufacture of cigarettes and other tobacco products for sale and distribution in the various States of the United States and in the District of Columbia except insofar as their said competition has been hindered, lessened or restrained, or potential competition among them, and with others forestalled, prevented, hindered and suppressed by the unfair acts, practices, methods and policies of respondent Board hereinafter referred to and set forth.

c. Respondent warehouse members acting between and among themselves and also through and by means of respondent Board for a number of years last past, and particularly since about 1955, and continuing to the present time, have, by means of agreements and understandings between and among themselves and by other means and methods, conspired and combined, together and with others, and have united in and pursued a planned common course of action and course of dealing, to adopt, carry out and maintain, and have adopted, carried out and maintained, in commerce between and among the several States of the United States and in the District of Columbia and with foreign countries, an undue and unreasonable hindrance, restriction, suppression and prevention of the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of leaf tobacco on the Wallace tobacco market, and that pursuant thereto and in furtherance and effectuation of the aforesaid agreements and planned common course of action and course of dealing, respondent warehouse members have done and performed the following things:

(1) Caused to be included as a basis for the allocation of selling time on this market under the provisions of the floor space system of allocating selling time various buildings which are not available for use in any capacity in connection with the sale of tobacco at auction on this market except as a basis for the allocation of additional selling time to those persons, firms or corporations who own, lease, rent or otherwise control such buildings.

(2) Caused a percentage of the total selling time available to this tobacco market to be allocated to persons, firms and corporations operating tobacco auction warehouses on said market who own, lease, rent or otherwise control buildings not available in any capacity in connection with the sale of tobacco at auction on this market except as a basis for the allocation of additional selling time.

(3) Adopted and used a policy and practice of restricting, preventing and foreclosing persons, firms and corporations from engaging in the business of buying and selling tobacco on the Wallace market.

(4) Adopted a policy to discourage and prevent, and acted thereunder for the purpose and with the effect of discouraging and preventing, persons, firms and corporations from erecting, building or operating any new auction warehouse in or near the Wallace tobacco market area.

(5) Adopted a policy to discourage and prevent and acted thereunder for the purpose and with the effect of discouraging and preventing persons, firms and corporations from expanding their present tobacco auction warehouse facilities in the Wallace tobacco market.

(6)* Also, in consummation of the foregoing combination and conspiracy and in the furtherance thereof, some of the respondents herein, as hereinafter named, entered into a written agreement on April 11, 1957, corroborative of the policy of the respondents hereinbefore enunciated. This agreement is as follows:

This agreement made and entered into this the 11th day of April, 1957, by and between the parties, hereafter referred to as Hussey's Warehouse, Joe Bryant Warehouse, Inc., Wallace Strawberry Exchange, Inc., H. G. Perry Warehouse, Inc., Mrs. Joseph H. Bryant Warehouse, Inc., and Sheffield's Warehouse.

Whereas all parties herein agree the following measurements be used in determining the available sales space for the sale of leaf tobacco at auction beginning with the 1957 Sales season and running consecutively for each season through December 1, 1962:

Hussey's Warehouse—374,915 sq. ft.

Joe Bryant Warehouse, Inc.—131,102 sq. ft.

Wallace Strawberry Exchange, Inc.—75,900 sq. ft.

H. G. Perry Warehouse, Inc.—93,000 sq. ft.

Mrs. Joseph H. Bryant Warehouse, Inc.—135,000 sq. ft.

Sheffield's Warehouse—330,991 sq. ft.

It is agreed by all parties herein that Sheffield's new houses consisting of 135,744 sq. ft. will be counted as Sales space for leaf tobacco without any floors other than the ground as floors. It is further agreed that any of the warehouses now being constructed and herein referred to by the parties herein have the same option as to flooring as outlined for Sheffield's new houses.

It is further agreed by the parties herein that any space herein referred to may be used for any purpose so desired by the owners thereof without affecting the Sales time allotted each of the said houses for the duration of this agreement. (See Commission's Exhibit 84)

d. Each of the respondent warehouse members herein has directly or indirectly participated in, approved or adopted the aforesaid agreements, understanding and planned common course of action and the acts and practices done in furtherance of and pursuant thereto, and the aforesaid agreements, combination, conspiracy, planned common course of action, policies, acts and practices of the respondent warehouse members and respondent Board, as hereinbefore alleged, each and all operated to prevent a substantial volume of tobacco from being sold or purchased by persons, firms and corporations who sought to compete in the market operations of the Wallace tobacco market, has thereby unduly and unreasonably hindered, restricted, suppressed and prevented competition in the sale and purchase of tobacco in the Wallace tobacco market. Among the specific effects in that respect are the following:

(1) Persons, firms and corporations seeking to erect, expand and use tobacco warehouse facilities in market operations on the Wallace tobacco market were and are now being prevented from doing so.

*Supplemental Findings of Fact of August 22, 1962.

(2) Persons, firms and corporations as potential competitors of respondent warehouse members have been discouraged, persuaded and prevented from further consideration of engaging in competition with respondents on the Wallace tobacco market in the purchase and sale of tobacco.

(3) Farmers have been restricted, obstructed and prevented from selling their tobacco at the warehouse of their choice on the Wallace tobacco auction market.

(4) Respondent warehouse members have acquired control of such nature and to such an extent over the purchase and sale of tobacco on the Wallace tobacco market that it has created or tends to create, and threatens to perpetuate, in them a monopoly in the business of buying and selling tobacco on that market.

7. The Floor Space System Inhibitive of Competition

The system of allocating selling time to the tobacco auction warehouses on the Wallace tobacco market, commonly known and referred to as the "Floor Space System", is, in and of itself, an unreasonable basis or method of allocating selling time among the various warehouses on the Wallace tobacco market, and is in part conducive to the restrictive practices inhibiting competition hereinbefore cited.

DISCUSSION OF EVIDENCE AND APPLICABLE LAW

1. Interstate Commerce

Contrary to the position taken by some of the respondents, the interstate commerce jurisdiction of the Commission appears to have been thoroughly established under the interstate movement of goods concept involving the flow of tobacco products in interstate commerce. Interstate sales are also involved. As stated by the Supreme Court of the United States, in *Currin v. Wallace, Secretary of Agriculture*, 306 U.S. 1 (1939), sales consummated on the flue-cured tobacco auction market at Oxford, North Carolina, are "Predominately sales in interstate and foreign commerce." In this connection the Court further indicates "the principal purchasers are few in number and in the main are engaged in the export trade and are in the manufacture of tobacco products in other states. It appears that in a given week, shortly before the beginning of this suit approximately 2 million pounds of tobacco were sold on the Oxford market, only 15.3 percent of which were definitely destined for manufacture in North Carolina. About 14 percent were in part for manufacture in North Carolina and in part for other States, and about 62 percent moved directly into foreign commerce. The fact that the growers are not bound to

accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulations. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation." *Swift & Co. v. United States*, 196 U.S. 375, 398 and 399; *Dahnke-Walker Milling Company v. Bondurant* 257 U.S. 282, 290, 291; *Lemke v. Farmers Grain Company* 258 U.S. 50, 54; *Stafford v. Wallace* 258 U.S. 495, 519; *Flanagan v. Federal Coal Company* 267 U.S. 222 to 225; *Shafer v. Farmers Grain Company* 268 U.S. 189, 198; *Foster-Fountain Packing Company v. Haydel* 278 U.S. 1, 10. In the case of *Welton v. Missouri* 91 U.S. 275, 278: "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities."

The movement of the stream of commerce begins its flow when the tobacco farmer packs his tobacco on his truck or other means of conveyance and transports it to the auction warehouse located in Wallace, North Carolina for sale. Here it is purchased at auction by the major domestic and foreign tobacco manufacturing companies and, after purchase, shipped, hauled or transported from the auction warehouses to the purchasers' places of manufacture, including the redrying or processing plants from which, in finished form cigarettes or other tobacco products are produced or manufactured and transported to the various States of the United States, the District of Columbia, and to foreign countries. The Commission in the *Wilson Tobacco Board of Trade* case (Docket 6262) [53 F.T.C. 141] and the *Asheville Tobacco Board of Trade* case (Docket 6490) [54 F.T.C. 1043] decided that the acts and practices questioned by the complaints in those cases were "in commerce." This finding was upheld by the Fourth Circuit in *Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F. 2d 502, 508, 509 [6 S.&D. 507] (1959).

In cases involving trade associations, the Commission has ruled that it does have jurisdiction and such rulings have been given approval by the Courts. In *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 691 [1 S.&D. 502, 520] (1926), for example, it was contended that the Chamber was not engaged in interstate commerce. In rejecting this contention the Court stated (page 691): "The Federal Trade Commission Act was enacted under

the power of Congress to regulate interstate and foreign commerce and by its express terms (Sec. 4) deals only with such commerce. Although the Chamber is not itself engaged in any commerce in the sense of being a trader or shipper, yet it is an instrumentality in the current of interstate commerce which directly affects such commerce and is within the regulatory power of Congress."

2. The Public Interest Issue

Respondent Board was incorporated as a nonstock corporation by respondent Warehousemen Granville L. Sheffield, W. L. Hussey and O. C. Blanchard, Sr., under the provisions of Section 465, Chapter 106, of the General Statutes of North Carolina, and its members are warehousemen and purchasers of leaf tobacco at auction of the Wallace Market. Respondent Board is authorized by statute "to make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction on the warehouse floors", of Wallace, but it is not authorized to make rules and regulations "In Restraint of Trade."

In this connection, even before the enactment of the above statute, the Supreme Court of North Carolina upheld the principle that the business of operating warehouses for the public marketing of tobacco is one affected with a public interest, and subject to reasonable, public regulations. The Court so held in *Gray v. Central Warehouse Co.*, 181 N.C., 166, 106 S.E. 657, 659 (1921).

In the *Gray* case, *supra*, Clark, C. J., in writing the main opinion, quotes this principle: "The sale of tobacco at auction at tobacco warehouses is a business affected with a public interest, and those carrying it on are under the duties and obligations by common law to carry it on in a way that is reasonable and beneficial to the tobacco trade . . ." And Hoke, J., in a concurring opinion in the *Gray* case, *supra*, states: "Subject to such reasonable rules and regulations as may be established by the public agencies, and when not interfering with same, the authorities in control and management of those warehouses have the power to establish for themselves such reasonable rules and regulations as may be required to promote business efficiency and insure fair and honest dealing in the transactions occurring."

3. Board of Trade Administration of Floor Space System

The purpose for which respondent Board was created, as stated in its Articles of Incorporation are as follows:

To create an organization of individuals, firms and corporations interested in the buying, selling, and handling of tobacco in the Town of Wallace, State of North Carolina, and its tobacco trade territory, whereby proper and uniform

rules, regulations, and requirements may be stipulated, adopted, and maintained in order to promote the efficient conduct of said tobacco business, and to build up the tobacco market for the said Town of Wallace and its tobacco trade territory.

To maintain an organization for the purpose of promoting, developing, and enlarging the sale, buying, and handling of leaf tobaccos on the market of the Town of Wallace, and elsewhere in its tobacco trade territory, and to provide a uniform system of rules, regulations and requirements related and pertaining thereto so as to promote and protect the interest of the growers, sellers, buyers, and handlers of leaf tobacco in the Town of Wallace, State of North Carolina, and its tobacco trade territory.

In this connection, it was stipulated between counsel in this proceeding, that respondent Board succeeded an unincorporated tobacco board of trade through which persons, firms and corporations engaged in the tobacco industry conducted a tobacco auction sale market in Wallace, North Carolina, for at least 30 years prior to June 22, 1955, in accordance with rules and regulations considered reasonable and duly adopted by the said unincorporated board of trade. Said rules and regulations included rules and regulations for the allocation of selling time between the several warehouses operated as a part of the said tobacco auction sale market on the basis of the floor space. Hence, upon its incorporation on June 22, 1955, respondent Board did, as reflected by Section 1 of Article I of the Bylaws (Rules and Regulations) continue the method known as the "Floor Space System" then in use on the Wallace tobacco market for allocation of selling time. In this same connection, following a precedent set by its predecessor unincorporated Board of Trade through its use of the "Floor Space System", respondent Board adopted and followed the method, policy and practice of allocating selling time to warehouse space not used in the auction sale of leaf tobacco upon said market.

Under the "Floor Space System" in effect in this market, the warehouseman is permitted to sell a certain number of baskets of tobacco per day. The number of baskets allotted to him, in relation to the total number of baskets allotted to the entire market, is in the same ratio as the number of square feet of floor space in the warehouse or warehouses, owned, leased and controlled by him, bears to the total number of square feet of floor space in all of the warehouses on the market. For example, if he owns, leases and controls 10 percent of the warehouse floor space on the market, he receives 10 percent of the total daily basket allotment for the market.

As previously stated, respondent Board is a member of the Bright Belt Tobacco Warehouse Association. Said Association prescribes rules and regulations governing the auction sales of tobacco on all flue-cured tobacco markets, including the Wallace Market. The Wallace Market is known as a "One-Set Market", that is, for its selling

season it has only one set of buyers. This market is permitted to sell 2,200 baskets or piles of tobacco in a 5½ hour day, five days per week, during the selling season. In 1955 the market was opened on August 25 on a five and one-half (5½) hour selling time. After a few days the selling time was reduced by the Association to three and one-half (3½) hours, and the selling time was kept on this basis for most of the season. This shorter selling time reduced considerably the number of pounds of tobacco that this market would have sold had it been allowed the longer or regular hours, selling time. The same allocation of 2,200 baskets or piles of tobacco on the basis of a five and one-half (5½) hour sale per day and five days per week was made by the Association to the Wallace Market from 1956 to 1961, inclusive.

4. The Combination and Conspiracy.

According to the testimony and documentary evidence contained in the record the conspiracy or course of dealing between and among these respondents as charged in the complaint actually had its origin with the beginning of the 1955 selling season as a result of the respondent Board allocating selling time to two structures described in the record as the "Strawberry Exchange" (sometimes also called the "Shed") and the "Joseph H. Bryant Warehouse" (sometimes also called the Bryant-Blanchard Warehouse). Prior to the incorporation of respondent Board in 1955, there was on the Wallace tobacco market an unincorporated tobacco Board of Trade which was then using the "Floor Space System" of allocating selling time to warehouse space on the market which was available but not used in the actual sale of tobacco or for other purposes in connection with the sale of tobacco at auction. The existence of more available space than is needed for auction sale of the tobacco crop is evident in all of the markets using the "Floor Space System" of allocating selling time and not in Wallace only. Hence, upon incorporation respondent Board, following the precedent set by its predecessor, adopted and placed in effect the system of allocating selling time to the warehouses there on the market known as the "Floor Space System" and with it the method, policy and practice of allocating selling time to warehouse space which *was available* but not needed and therefore not used in connection with the sale of leaf tobacco at auction. However, beginning with the incorporation of respondent Board in June 1955, respondent warehouse members acting between and among themselves and through respondent Board, departed from the practice of allocating selling time to warehouses that had floor space *actually available* for the sale of tobacco at auction and instituted the practice of allocating selling time to warehouses whose floor space was unsuitable and unavailable for the sale of tobacco

at auction or for other purposes in connection with the sale of tobacco at auction. A meeting of the respondent Board's Sales Committee was held in June 1955. Present at the meeting were respondents W. L. Hussey, Sr., O. C. Blanchard, Sr., and G. L. Sheffield. It was agreed by respondent Board through its Sales Committee at this time that sales time would be allotted on floor space using outside measurements and each warehouse would be surveyed and plotted with the Joe Bryant Warehouse, commonly referred to as Bryant No. 2, the Strawberry Exchange, or the "Shed", owned jointly by respondent Joseph H. Bryant and respondent Blanchard & Farrior Warehouse to be shown separately on the plot. It was also agreed that the sales card would be prepared by the secretary using the floor space shown on the surveyor's report and fixing the selling time each house would have, and furnishing one to each warehouse. Such a survey of the floor space of each warehouse of each respondent warehouseman was carried out as agreed. As a result of this agreement, the selling time allocated to each of the above respondent warehousemen (i.e., firms) and the warehouses for the selling season of 1955 is as follows:

Firm and name of warehouse	Number of square feet	Percentage of floor and time allocated	Date of construction	Number of baskets for each warehouse based on 400 baskets per hour, per day
Hussey's:				
Hussey's No. 1.....	244, 572	-----	Prior to 1955..	
Hussey's No. 2.....	43, 531	-----	do.....	
Hussey's No. 3.....	59, 320	-----	do.....	
Hussey's No. 4.....	27, 492	-----	do.....	
Joe Bryant No. 1 (a/k/a Bryant-Blanchard) ..	131, 102	-----	do.....	
74.28% of Strawberry Exchange (a/k/a Joe Bryant No. 2 and the "Shed").	56, 325	-----	1955.....	
Total.....	562, 342	59. 1272	-----	1, 300. 8
Blanchard & Farrior:				
Blanchard & Farrior No. 1.....	112, 384	-----	Prior to 1955..	
Blanchard & Farrior No. 2.....	61, 524	-----	do.....	
25.72% of Strawberry Exchange (a/k/a Joe Bryant No. 2 and the "Shed").	19, 575	-----	1955.....	
Total.....	193, 483	20. 343	-----	447. 5
Sheffield's:				
Sheffield's No. 1.....	108, 847	-----	Prior to 1955..	
Sheffield's No. 2.....	86, 400	-----	do.....	
Total.....	195, 247	20. 529	-----	451. 7

Market totals 951.072 equals 100.0000%—2200.0.

Thus, beginning with the 1955 selling season respondent warehousemen acting through respondent Board, and pursuant to agreement among them, caused selling time to be allocated to the owners and/or operators of the Strawberry Exchange (Shed). Under the established criteria requiring a warehouse to be suitable and thus available for the auction sale of leaf tobacco, the Strawberry Exchange, containing

75,900 square feet, was during the 1955 tobacco selling season *not* "available" since it was *not* suitable for the actual sale of leaf tobacco at auction or for any use connected with the Wallace tobacco market because it had no walls. Notwithstanding this fact respondent Board, at the instance of respondent warehousemen members, proceeded to allocate selling time to this structure. In this connection respondent warehouseman Joseph H. Bryant testified as follows:³

By Mr. Jones:

Q. Did you attend any of the meetings in which Mr. O. C. Blanchard, Sr., was present—

A. Yes, sir.

Q. Before the agreement to which you have referred and between 1955 and 1957, when the question of considering the unwallied-in Strawberry Exchange as floor space in allocating sales time was voted on in the meeting of the Board of Trade?

A. Yes, sir.

Q. Which way did he vote?

A. I voted to count it.

Q. I said, which way did Mr. Blanchard vote?

A. He voted to count it.

Furthermore, the record shows that this structure, although eventually walled in 1957, has never been used for the sale of leaf tobacco at auction or for any use whatsoever connected with the Wallace tobacco market except as a basis for allocating additional selling time to the owners thereof. In 1957, this same structure was leased to J. P. Stevens Co., Inc., for the storage of textile products.

Commencing with the 1955 selling season, selling time was also allocated to the Joseph H. Bryant Warehouse (also known as the Bryant-Blanchard Warehouse). The evidence shows that respondent warehouseman Joseph H. Bryant and wife, Thelma A. Bryant leased the Joseph Bryant Warehouse (Blanchard-Bryant) on July 26, 1955, containing 131,102 square feet of floor space to J. P. Stevens & Co., Inc., which is used for the year-round storage of textile products. Hence, this warehouse has *not been* "available" for the selling of tobacco since 1955, nor is said warehouse available now for the sale of tobacco at auction or for any other purpose connected with the sale of tobacco at auction. Notwithstanding its unavailability, the respondent Board, pursuant to the votes of its respondent warehouse members has continued to allocate selling time to its owners on the basis of the 131,102 square feet of floor space therein.

Of the total floor space on the market (i.e. 951,072 square feet) for the selling season 1955, only 744,070 square feet of such space was suitable and/or available for the purpose of selling tobacco at auction

³ Transcript of record, page 987.

or for other utilization in connection with the actual operations of the Wallace tobacco market other than to serve as a basis for the allocation of selling time.

At the annual meeting of the respondent Board on May 19, 1956, respondent Warehouseman G. L. Sheffield, who had originally objected to the inclusion of the Strawberry Exchange as a part of the floor space on the market for which selling time could properly be allocated for the reason that it "was not walled in", requested respondent Board to "go on record allowing Sheffield's Warehouse (known as Sheffield's No. 2) to count as floor space, the building then used for chicken raising." Respondent Board "voted unanimously to allow the Sheffield Warehouse to continue to use this warehouse for chicken raising and still count this as floor space for selling tobacco for the 1956 Selling Season." The allocation to G. L. Sheffield of additional selling time based on the floor space contained in this structure of 86,400 square feet together with the allocation of selling time by respondent Board to respondent warehouseman Joseph H. Bryant on the basis of floor space contained in the Strawberry Exchange and Joseph Bryant Warehouse, both being unsuitable and unavailable under respondent Board's Rules and Regulations decreased the allotment of selling time to the other respondent warehousemen in this market.

On November 12, 1956, a special meeting of the respondent Board of Trade was held. On this occasion, a resolution was presented by respondent Board to Granville L. Sheffield, calling on respondent Board to rigidly enforce the rules and regulations pertaining to the allocation of selling time on the basis of "available" floor space. Voting for the adoption of the resolution were: Blanchard & Farrior, Inc., and Sheffield's Warehouse; voting against the adoption of the resolution were Hussey's Warehouse, Joseph Bryant Warehouse (leased to J. P. Stevens & Co.) and the *Strawberry Exchange* (unsuitable). Pursuant to this vote, unavailable structures were used, contrary to respondent Board's own Rules and Regulations as a basis for allocating selling time. Furthermore, contrary to respondent Board's Rules and Regulations these structures served to give the Hussey or Bryant group two additional votes on matters coming before respondent Board. Respondent Warehousemen G. L. Sheffield and O. C. Blanchard, Jr., protested the vote of these two structures at this time.

Respondent Board's Rules and Regulations provide that only warehouses operating on the market are eligible to vote on matters pertaining to the allocation of selling time. The Joseph Bryant Warehouse was not an operating warehouse since it was leased to J. P. Stevens & Co., and therefore not "available." Although ineligible it improperly cast a vote. The Strawberry Exchange and Sheffield No. 2 also were

not operating warehouses in that they were not only "unsuitable" for the sale of tobacco at auction but also not "available" as required by respondent Board's Rules and Regulations. Thus both of these structures were ineligible to be used as a basis for voting but were so used because of the domination and control of respondent Board by the majority vote of respondent warehousemen.

At the November 21, 1956, meeting, respondent warehouseman Joseph H. Bryant filed with respondent Board notice of intention to build two new warehouses of 85,000 square feet each; one in the name of H. G. Perry, his nephew, and another in the name of Joseph D. Bryant, his son. This precipitated a building war between Hussey and Sheffield groups. Although Blanchard & Farrior's Nos. 1 and 2 had given notice at the May 19, 1956, meeting of its intention to construct an additional 100,000 square feet, it did not carry out the threat to do so and, in fact, has at this time only such warehouse floor space as it had in 1955.

In July 1957, the Hussey Group included Hussey's Nos. 1, 2, 3 and 4, containing 374,915 square feet. The Joseph H. Bryant Warehouse (also known and referred to as Bryant-Blanchard Warehouse) contained 131,102 square feet, the H. G. Perry Warehouse contained 90,339 square feet and a new warehouse which in 1959 became known as the Thelma D. Bryant Warehouse contained 162,942 square feet. At the same time, John H. Sheffield and Granville L. Sheffield, owners and operators of Sheffield Nos. 1 and 2, were well under way in the building of four additional structures, each containing 33,888½ square feet, or a total of 135,354 square feet.

Prior to the completion of the foregoing structures, respondent warehouseman G. L. Sheffield, brother of John H. Sheffield, and respondent warehouseman Joseph H. Bryant entered into a verbal agreement and understanding whereby each would cease construction of these structures.

At the annual meeting of respondent Board on May 14, 1957, after considerable discussion, the following motion was made by respondent warehouseman Joseph H. Bryant, representing Hussey's Group, seconded by respondent warehouseman G. L. Sheffield, and approved by respondent Board:

That present floor space as allocated be used and new buildings constructed or under process of construction be accepted as floor space.

As a result of the approval of this motion, an additional 388,635 square feet of floor space was added to the Wallace tobacco market, to be considered in the allocation of selling time. (i.e. Perry's Warehouse, 90,339 square feet; Thelma D. Bryant's Warehouse, 162,942

square feet; and four structures by Sheffield containing 135,354 square feet.) It appears that five of the total buildings and/or structures on which selling time was allocated to their respective owners as a result of the approval of this motion are "unsuitable" as tobacco auction warehouses and therefore are not available for any purpose connected with the sale of leaf tobacco at auction. These five buildings and/or structures described as the Perry's Warehouse, are used for the raising of chickens. The four structures built by the Sheffields are also used for the raising of chickens. According to the evidence, Perry's warehouse had dirt floors until just a few days before the hearings began in Wallace on August 21, 1961, at which time, paving was begun. The four structures of Sheffield's also have dirt floors and are therefore likewise "unsuitable" and not available for the sale of leaf tobacco at auction. Respondent warehouseman John H. Sheffield testified that the only reason he built these structures was to secure additional selling time.

The evidence also indicates other buildings and/or structures presently on the Wallace tobacco market are being counted in the allocation of selling time that have, since the incorporation of respondent Board, become unsuitable and thus not "available" for the sale of tobacco at auction. However justified the allocation of selling time to these buildings may have been several years ago, their condition for the last several tobacco selling seasons has not justified allocation. For example, the building known and described as Hussey's Warehouse No. 2, known and described in the record as such, containing 243,531 square feet; Hussey's No. 3 (old Carter Warehouse), containing 59,320 square feet and Hussey's No. 4 (Prize House), containing 27,492 square feet appears to have been for several years last past, totally "unsuitable" for selling tobacco at auction or for any other utilization, in connection with operation of the tobacco market, due to their bad state of repair.

This pattern of allocating selling time to "sheds", "poultry houses" and other structures totally unfit for the sale of tobacco at auction or for any other useful purpose in connection with the sale of tobacco at auction continued, according to the evidence, until August 21, 1961, the date of the commencement of hearings herein.

From 1957 through 1961, selling time was computed on the floor space of several additional warehouses and/or structures making total floor space of 1,339,707 square feet on the market owned or controlled by the same three warehousing groups. The percentage of selling time and number of baskets actually allocated to each of the three operating groups and the warehouses and/or structures (floor space)

that were the basis of this allocation for each year of the period 1957 through 1961 are as follows:

Operating group and name of warehouse and/or structures	Number of square feet in each	Percentage of space and time allotted to each operating group	Number of baskets
Hussey's:			
Hussey's No. 1.....	244, 572	60. 8808	1, 340
Hussey's No. 2.....	43, 531		
Hussey's No. 3.....	59, 320		
Hussey's No. 4.....	27, 492		
Bryant No. 1.....	131, 102		
Strawberry Exchange.....	56, 325		
Thelma Bryant.....	162, 942		
Horace G. Perry.....	90, 339		
Total.....	815, 623		
Blanchard & Farrior:			
Blanchard No. 1 & Farrior.....	112, 384	14. 4421	317
Blanchard & Farrior.....	61, 524		
Strawberry Exchange (25.79%).....	19, 575		
Total.....	193, 483		
Sheffield's:			
Sheffield's No. 1.....	108, 847	24. 6771	543
Sheffield's No. 2.....	86, 400		
4 structures.....	135, 354		
Total.....	330, 601		
Grand total.....	1, 339, 707	100	2, 200

It would therefore appear that the acts and practices of these respondents in allocating selling time to warehouses and/or structures which are "unsuitable" and thus not available for the sale of tobacco at auction, or use for any other purpose connected with the sale of tobacco at auction other than for the mere purpose of securing additional selling time calculated upon the floor space contained in such warehouses and/or structures is an unreasonable and improper exercise of the power and authority of the respondent Board, and thus constitutes a conspiracy, planned course of action and course of dealing to unduly hinder, restrict, suppress and prevent the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of tobacco in the Wallace tobacco market.

5. The Effects and Illegality of the Conspiracy.

The evidence suggests that because of the importance of selling time to the successful operation of a tobacco auction warehouse there is present in the tobacco markets a reluctance to have new competition enter the market or for a warehouseman already in the market to expand his present floor space. The apparent reason for this is that any new warehouse coming into the market or any expansion of an existing warehouse cuts into the selling time previously enjoyed by

the other warehouse operators. Loss of selling time means loss of profit to a warehouse operator when the market is full. This is understandable when one considers that tobacco is sold at the rate of 400 piles or baskets per hour and that the warehouseman received 3½ cents commission for every pound sold; auction fees of 25 cents on all piles or baskets in excess of 100 pounds, of 15 cents on all piles of 100 pounds or less; weighing and handling fees of 10 cents per pile on all piles of 100 pounds or less and 10 cents for each additional 100 pounds. In addition, the warehouse charges an auctioneer's fee of 25 cents per pile on all piles over 100 pounds. This is also charged to the farmer. Thus, one extra minute of selling time can, over a few years operation, mean hundreds of dollars to the warehouseman who gets the extra minute and has the tobacco on his floor for sale.

As in *American Federation of Tobacco Growers v. Neal*, 183 F. 2d. 869 (1950), *Marlboro* (Docket 5857) [48 F.T.C. 269], *Wilson* (Docket 6262) [53 F.T.C. 141] and *Asheville* (Docket 6490) [54 F.T.C. 1043], the reluctance on the part of the warehousemen then operating in the market to preserve their status quo and efforts to prevent new competition from entering the market or prevent operators from expanding their already existing floor space, sometimes manifests itself through the use of various practices by the warehouse members of the Board of Trade, acting through and by authority of the power reposed in said Board.

On other occasions, warehouse operators resort to various practices that have the effect of increasing their own respective selling time in a given market which, at the same time, act as a deterrent to potential new competition that may desire to enter the market as well as to expansion of warehouse facilities by other operators already in the market. In this instance respondent Board, pursuant to the votes of respondent warehouse members, has allocated selling time to various so-called warehouses and/or structures owned and/or operated or controlled by members of respondent Board which are unsuitable and unavailable for the sale of tobacco at auction, or for any other use in connection with the sale of tobacco at auction.

The result of the operation of this practice is to effectively foreclose the market to new tobacco warehouse competition. Experienced tobacco marketers testified that in order to sell one pile of tobacco on the Wallace tobacco market under the conditions as they exist in this market it would be necessary to construct a warehouse of approximately 600 square feet. This is an absurd result emanating from the "floor space system." Costs of warehouse construction, according to testimony in this case, would be well over \$1.25 per square foot. The new entrant, under the floor space system of allocating selling time is

Initial Decision

62 F.T.C.

also faced with the ever present threat of the owners or operators of old warehouses on the market building additional floor space in order to preserve their own selling time. In a market that has annual sales averaging around 13,000,000 pounds with 1,339,707 square feet already on the market this is anything but a good risk. The reverse would be true if selling time was allocated to the warehouses *actually* available and operating as tobacco warehouses on this market.

Tobacco warehouseman Carl B. Renfro, Wilson, North Carolina, corroborated the testimony of Mr. Deans in this respect as follows:

By Mr. Wilson:

Q. Would you as a warehouseman enter the Wallace Market as an operator of a tobacco auction warehouse under the facts as outlined to you?

Mr. Jones: Objection.

Hearing Examiner Buttle: If those facts are sufficient to enable you to render an opinion. Are they?

The Witness: Your Honor, am I permitted to elaborate and say what I would do?

Hearing Examiner: Yes.

The Witness: I certainly would hate to put good hard-earned money in a spot where you had 1,300,000 square feet of floor space with one set of buyers under the system.

By Mr. Wilson:

Q. Would it be a factor for considering a change in your opinion if the floor space to which selling time was allocated in the Wallace Market was reduced from 1,320,000 to around 700,000 square feet?

Mr. Jones: Objection.

Hearing Examiner Buttle: Overruled.

The Witness: I would consider it.⁴

The practice at issue also forecloses entrants already in the market from venturing sufficient capital to expand and even modernize the already existing warehouses. For example, as a result of the addition of the 388,635 square feet of space to the Wallace market by the Hussey's and Sheffield's Groups, the selling time of the Blanchard & Farrow Group was reduced from 20.343% or 447.5 piles of tobacco to 14.4421% or 318 piles of tobacco. In this connection, the testimony of O. C. Blanchard, Jr., is revealing:

Q. Mr. Blanchard, Mr. Jones asked yesterday, I believe, if you had considered expanding or why you hadn't expanded on the market if you had the same opportunity that the other warehouses had in expanding. Will you explain to the Court what your position is along that line?

A. If we were to expand we would have to build warehouses complete and we are also faced with the fact that we have only one vote on the Board of Trade and anyone having more, that could outvote us, could count anything

⁴ At pages 611 and 612 of the transcript, it was stipulated by counsel that if called as witnesses, Mr. W. B. Clark, Sr., and Mr. W. B. Clark, Jr., would testify substantially in all respects similar to the testimony of Mr. Renfro.

for floor space and would make our warehouse, if we were to build it, impractical.

Mr. Jones: Motion to strike the answer.

Hearing Examiner Buttle: Well, strike the "impractical." You mean it would increase your operating expense with the possibility that you wouldn't receive adequate return for the additional expense; is that right?

The Witness: We are faced with building——

Hearing Examiner Buttle: Well, is that it?

The Witness: Yes, sir.

Mr. Jones: We object, your Honor.

Hearing Examiner Buttle: Overruled.

The Witness: We would be faced with building a complete warehouse, whereas the fellow who had more votes than we had, he could build anything and call it a warehouse and would offset ours——

Hearing Examiner Buttle: Well, this is argument.

By Mrs. Wells:

Q. I will ask you if the practice on the Wallace Tobacco Board of Trade has been to count warehouses that were not available and were not suitable?

A. Yes it has.

Q. Have you determined how much additional warehouse space it would take on the Wallace tobacco market to give you 450 piles of tobacco for selling time? I believe that was what you testified yesterday it would take to operate, in your opinion, a warehouse.

A. I haven't determined it, but 200,000 feet would only give you 286 piles. But now I would have to do some mathematics to figure 450.

The eventual result of the foregoing practices restrictive of competition is monopoly. It not only imposes competitive injury upon the warehousemen but is also injurious to the farmers who take their tobacco to the Wallace market in that it deprives them of the competition that should exist between warehouses and limits their choice as to where they can sell their tobacco to the best advantage.

The allocation of selling time to the buildings which are unsuitable and unavailable for the sale of tobacco at auction is a device which has so constricted the Wallace tobacco market for the benefit of a few that it falls within the prohibition of the Sherman Act and is therefore an "unfair method of competition" within the meaning of Section 5(a) of the Federal Trade Commission Act. See *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 [5 S. & D. 498, 500] (1953).

Section 5 of the Federal Trade Commission Act was intended to reach a broad scope of restraints of an anticompetitive nature. Thus, in *F.T.C. v. Motion Picture Advertising Service Company*, 344 U.S. 392, 394 [5 S. & D. 498, 500] (1953), the Supreme Court said:

The unfair methods of competition, which are condemned by section 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.* pp. 310-312. It is also clear that the Federal Trade Commission was designed to supplement

Initial Decision

62 F.T.C.

and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441, 453)—to stop in their *incipiency acts and practices which, when full blown would violate those Acts* (see *Fashion Guild v. Federal Trade Commission*, 312 U.S. 457, 463, 466) as well as to condemn as unfair methods of competition existing violations of them. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691.

The *Motion Picture* case suggests that the concept of Section 5 was to reach practices that not only violate the Sherman Act, but those that offend its policy, as well as incipient practices which if allowed to mature would do so.

The legislative history of the Federal Trade Commission Act reveals:

“An abiding purpose” to vest the Commission “with adequate powers to hit at every trade practice then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient state. *FTC v. Cement Institute*, 333 U.S. 683, 693 [4 S. & D. 676, 685] (1948).

The effect of the acts of respondents in combination is to exclude actual or potential competitors from the relevant area of competition and thereby to dominate the market. See *American Tobacco Company v. United States*, 328 U.S. 781, 786, 809 (1946); *United States v. Aluminum Company of America*, 148 F. 2d 416 (1945); *Fashion Originator's Guild v. F.T.C.*, 312 U.S. 457 [3 S. & D. 345] (1941).

It is well settled that no formal agreement is necessary to bring into existence an unlawful conspiracy and that a combination prohibited by law may, and often must be, found in a course of dealing or other circumstances in the absence of any exchange of words (*United States Malsters Association v. Federal Trade Commission*, 152 F. 2d 161 [4 S. & D. 428]; *Milk and Ice Cream Institute v. Federal Trade Commission*, 152 F. 2d 479 [4 S. & D. 440]; *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441 [1 S. & D. 170] (1922).)

In the within case there was no formal agreement but there was agreement evidenced by the Board's adoption of a plan and acts in furtherance of a plan to unreasonably employ a method of allocating floor space which had a tendency to lessen competition and create a monopoly in the Wallace market, the benefits of which the members accepted. In this connection, the Court of Appeals for the Seventh Circuit in the case of *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 332 [4 S. & D. 117, 132] said, “The rule stated in *Interstate Circuit v. United States*, 306 U.S. 227, and *U.S. v. Masonite*, 316 U.S. 265, applies here:

“Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which if carried out, is restraint of interstate commerce is sufficient to establish unlawful conspiracy.

It is also sufficient to establish unfair methods of competition under the Federal Trade Commission Act."

Judge Learned Hand, in *United States v. Associated Press*, 52 Fed. Supp. 362, 369 (1943) states:

If a combination effectively excludes, or tries to exclude, outsiders from the business altogether, it is a monopoly or an incipient monopoly, and it is unconditionally unlawful.

In this case before the hearing examiner, the acts of respondent warehousemen in unreasonably causing respondent Board its instrumentality to allocate selling time to an excessive number of purported warehouses, many of which were unsuitable and not available in connection with the auction sale of tobacco, was tantamount to the exclusion of new competition from this market. The Commission is not required to establish actual exclusion of a particular competitor from the market. *American Tobacco Company* 328 U.S. 781 (1946).

The status of the respondent Board is somewhat analogous to the Guild combination, as enunciated in the case of *Fashion Originators Guild v. F.T.C.* 312 U.S. 457, 465 [3 S. & D. 345, 350] (1941). The Supreme Court states therein as follows:

. . . the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce . . .

6. Restrictive Effect of the Floor Space System as a Method of Allocating Selling Time.

Not only have the unlawful acts and practices of the respondents inhibited competition as the result of a misuse of the "Floor Space System", but the "Floor Space System" is in and of itself an unreasonable method for allocating selling time as demonstrated in the Wallace tobacco market because the facility with which it may be misused has a deleterious effect on competition.

Counsel in support of the complaint correctly contends that there is an overexpansion of floor space on the Wallace tobacco market brought about through use of the "Floor Space System" in allocating selling time. In this connection, it appears the system itself is conducive to excessive construction of unusable floor space. Fred S. Royster testified that this is not only true in the Wallace market but also in all of the tobacco markets located in the flue-cured tobacco area.

The evidence indicates that the total number of square feet on which selling time was allocated by respondent Board for the 1957-1960 selling seasons was 1,339,707. It is further shown that 728,563 square feet, or 54.38% of such total number of square feet of floor space on the Wallace tobacco market during the 1957-1960 selling seasons consisted of floor space not used in the auction sale of tobacco. It was

stipulated between counsel in this proceeding that typical of the floor space which has not been used in the auction sale of leaf tobacco in the Wallace tobacco market during this time but which was and is now included in the allocation of selling time is the floor space contained in the following described buildings and/or structures.

(a) A structure known and described as Sheffield's #2, consisting of 86,400 square feet.

(b) A building known and described as Bryant's Warehouse, containing 131,102 square feet.

(c) A building known and described as Hussey's Warehouse #2, containing 43,531 square feet.

(d) A structure known and described as Perry's Warehouse, containing 90,339 square feet.

(e) A building known and described as the Strawberry Exchange, containing 78,895 square feet.

(f) A building known and described as Thelma and Joe D. Bryant Warehouse, containing 162,942 square feet.

(g) Four structures, each containing 33,838½ square feet, or a total of 135,354 square feet.

The question of unnecessary floor space was considered by the Fourth Circuit recently in *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission* 294 F. 2d 619 [7 S. & D. 220, 229] (4th Cir. 1961). In recognizing the unreasonably restrictive nature and effects of the "Floor Space System", this Court adopted the opinion of the Commission by quoting the Commission as follows:

We emphasize that we do not intend by our order to foster or in any manner encourage overbuilding or uneconomic building of warehouses on the Asheville market. On the contrary, the Commission recognizes, as shown by its opinion in the Wilson case, that the addition of unnecessary warehouse facilities to a market is economically unsound and wholly undesirable.

The entry of *new* competition in a tobacco market has benefited the market and the farmers selling therein. *Asheville Tobacco Board of Trade, Inc.*, Docket No. 6490. The Fourth Circuit of Appeals in its recent decision on petition to review the order issued by the Commission in this case approvingly quoted the Commission as follows:

... there is substantial and reliable evidence that the new warehouse in 1954 benefited the farmers and the market as a whole. Not only did new competition result in better and more efficient service to the farmers by the established warehousemen but respondent Adams conceded that the new competition had benefited the market generally. *Asheville Tobacco Board of Trade, Inc. v. F.T.C.*, 294 F. 2d 619 [7 S. & D. 220, 227] (4th Cir. 1961).

The evidence is unequivocally clear that if the Wallace market is foreclosed to new competition from without and growth from within by the continued acts of the respondent Board, induced by a system⁵

⁵ The Floor Space System.

easily susceptible of misuse, in allocating selling time to buildings *neither suitable nor available* as tobacco auction warehouses, the market will remain competitively and otherwise stagnant as it now appears to be.

7. Invalidity of Respondents' Motion to Strike Portions of the Answer of Respondents Blanchard & Farrior Warehouse, Inc., et al.

There appears to be no merit whatsoever to the position taken by counsel for the Wallace Tobacco Board of Trade and others that Blanchard & Farrior Warehouse, Inc., et al., have instituted the within proceeding before the Federal Trade Commission against other respondents, or that their answer conceding a combination and conspiracy to which they claim no part in filing their answer is tantamount to the institution of such an action and should be stricken in part. However, counsel for the Board is quite correct in asserting that Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrong.

In resolving the issues in this case, the hearing examiner has not concerned himself with the aggrievement of Blanchard & Farrior Warehouse, Inc., or its officers who are also respondents. As stated in the case of *Federal Trade Commission v. Alfred Klesner, supra*:⁶

A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may, however, bring the matter to the Commission's attention and request it to file a complaint.

The court also in this case points out that if the request is granted and a proceeding is instituted, the aggrieved person does not become a party to it or have any control over it.

In the within case respondents Blanchard & Farrior Warehouse, Inc., et al., cited by counsel for the Wallace Tobacco Board of Trade, Inc., have had no control whatsoever over the proceedings. They have been named as respondents because the within case involves a combination and a conspiracy of which respondents Blanchard & Farrior Warehouse, Inc., and certain firm representatives, were a part in view of their continued participating membership in the Wallace Tobacco Board of Trade and partial participation in voting for some of the malpractices charged. Blanchard & Farrior have in no sense been made, theoretically or otherwise, a plaintiff or prosecuting party. They are a defending party and as alleged coconspirators may in their answer admit any facts or deny any acts with which they are charged. Such admissions are not unqualifiedly binding

⁶ 280 U.S. 19.

upon other coconspirators. Only declarations of a coconspirator in the furtherance of the conspiracy are admissible against all upon proof of the conspiracy.⁷ Such answer, therefore, even if it admits some of the charges that other respondents deny in no way prejudices the other respondents unless the concession made is with regard to a declaration of the answering coconspirator (i.e., Blanchard & Farrior). In the within case, the hearing examiner finds the respondent Blanchard & Farrior Warehouse, Inc., as well as its officers to be equally responsible with the other respondents for the combination and conspiracy in restraint of commerce regardless of their claimed nonparticipation in the acts of the conspiracy. The fact is that Blanchard & Farrior continued its membership and participated in the affairs of the Board even though at times they may have voiced opposition to its tenets as contravening the public interest as well as their own interests.

CONCLUSIONS

For the reasons hereinbefore set forth, the hearing examiner concludes that all respondents have violated Section 5 of the Federal Trade Commission Act, as amended.

Respondents' agreements, combination, conspiracy and planned common course of action and course of dealings and, their acts, and practices carried out pursuant thereto, all and singularly are contrary to public policy because they have a dangerous tendency unduly to hinder competition and create a monopoly and because they have in fact hindered, restricted, suppressed and prevented competition and restrained trade between and among said respondents and others in the sale, purchase and distribution of tobacco in commerce within the intent and meaning of the Federal Trade Commission Act, as amended.

It is further concluded that the Federal Trade Commission has jurisdiction of the acts and practices of the respondents in this proceeding, that this proceeding is in the public interest, and that the following order shall issue:

ORDER

It is ordered, That R. H. Lanier appearing in this proceeding as successor to respondent Tyson Lanier, now deceased, is substituted as a party respondent herein, and that the complaint is dismissed as to Tyson Lanier because of his demise and, it is

Further ordered, That respondents Wallace Tobacco Board of Trade, Inc., a corporation, and William L. Hussey, Jr., Granville L. Sheffield, and Hugh M. Morrison, individually and as officers of said

⁷ U.S. v. Kessel, 218 U.S. 601; U.S. v. Gypsum, 333 U.S. 364, 393.

corporation; Joseph D. Bryant, Joseph H. Bryant, Granville L. Sheffield, and William L. Hussey, Sr., copartners trading under the name and style of Hussey's Warehouse; William L. Hussey, Jr., and John H. Sheffield, copartners trading under the name and style of Sheffield's Warehouse; Blanchard & Farrior Warehouse, Inc., a corporation, and O. C. Blanchard, Sr., R. H. Lanier, and O. C. Blanchard, Jr., individually and as officers of said corporation; and all of the above-named persons as members and as representatives of all of the warehouse members of Wallace Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase or selling or offering for sale, leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, participating, continuing, cooperating in, or carrying out, or directing or instigating any planned common course of action, course of dealing, understanding, plan, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts and practices:

1. Allocate or cause to be allocated any selling time to tobacco auction warehouses operating on the Wallace tobacco market on the basis of the Floor Space System or any other system, plan, method, policy or practice for the purpose or with the effect of restricting, hindering, limiting, preventing or interfering with or foreclosing any person, firm or corporation from engaging in the tobacco business on the Wallace tobacco market either as a warehouse owner or operator, buyer, speculator, broker or rehandler of tobacco.

2. Allocate or cause to be allocated any selling time pursuant to any system or method of allocating selling time which includes floor space that is not suitable or available during the selling season for the sale of tobacco at auction in the Wallace tobacco market.

3. Adopt and place into effect or cause to be adopted and placed into effect any rule, regulation or bylaw that prohibits, or denies any person, firm or corporation who is now a member or may in the future become a member of the Wallace Tobacco Board of Trade from voting on any matter coming before the said Board including the allocation of selling time.

4. Adopting, using, adhering to or maintaining or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice that restricts, hinders, limits, prevents or forecloses any person, firm or corporation from engaging in the to-

Decision and Order

62 F.T.C.

bacco business on the Wallace tobacco market either as a warehouse owner or operator, buyer, speculator, broker or rehandler of tobacco.

5. Engaging in any act or practice or entering into any arrangement, agreement or understanding with the purpose or effect of foreclosing, preventing or hindering the entrance of a new tobacco warehouse on the Wallace tobacco market or any other tobacco warehouse already doing business on the Wallace tobacco market.

6. Engaging in any act or practice or entering into any arrangement, agreement or understanding with any respondent named herein or with any other person, firm or corporation with the purpose or effect of preventing, hindering, limiting or suppressing competition between and among the tobacco warehouses engaged in doing business on the Wallace tobacco market.

7. Engaging in any act or practice, the purpose or effect of which is to effectuate any understanding, agreement or combination prohibited herein.

8. Placing in effect or carrying out any act, practice, policy or method, prohibited by any provision or part of this order, through respondent Board or any other instrumentality, agent, agency, medium or representative.

DECISION AND ORDER

The Commission granted review of the initial decision in this matter on January 19, 1962. On May 10, 1962, the case was remanded to the hearing examiner for the purpose of ruling on an offer of additional evidence by complaint counsel and for making such revisions in the initial decision as may be appropriate. Accordingly, the examiner, on August 22, 1962, issued a supplemental decision containing additional findings of fact and otherwise reaffirming his initial decision. On October 25, 1962, the Commission issued an order providing for supplemental briefs and oral argument on respondents' appeal from the initial decision as supplemented.

On December 18, 1962, at the commencement of the scheduled oral argument, upon the request of counsel for the respondents, the Commission granted counsel for the respondents and complaint counsel thirty days in which to settle this case. It was provided that if the settlement was not reached within thirty days or if the settlement was not acceptable to the Commission, the Commission would forthwith decide the matter on the briefs and the record as submitted, without oral argument.

Within the period allotted, an agreement containing a consent order to cease and desist was entered into by counsel on both sides. The

Commission has considered this agreement and has determined that it is not an acceptable basis on which to dispose of this matter because it does not provide for the making of findings of fact and conclusions of law on the issues raised by the complaint. The agreement is not acceptable to the Commission, as a basis for disposing of the case in its present posture, for the further reason that it contains a provision that the agreement is for settlement purposes only and does not constitute an admission by respondents as to the matters set forth in the complaint. Accordingly, the Commission has proceeded to consider and decide this case on the briefs and the record.

The Commission has reviewed the initial decision of the hearing examiner as supplemented, the supporting evidence and the exceptions and the brief in support thereof filed by the respondents. The Commission has concluded that the findings of fact and the conclusions of law contained in the examiner's decision are supported by the evidence, and provide an adequate basis for the entry of the order contained in the examiner's decision with a minor revision incorporated below.

The decision of the examiner issued December 4, 1961, as thus amended, is hereby adopted as the decision of the Commission.

It is ordered, That R. H. Lanier appearing in this proceeding as successor to respondent Tyson Lanier, now deceased, is substituted as a party respondent herein, and that the complaint is dismissed as to Tyson Lanier because of his demise, and

It is further ordered, That respondents Wallace Tobacco Board of Trade, Inc., a corporation, and William L. Hussey, Jr., Granville L. Sheffield, and Hugh M. Morrison, individually and as officers of said corporation; Joseph D. Bryant, Joseph H. Bryant, Granville L. Sheffield, and William L. Hussey, Sr., copartners trading under the name and style of Hussey's Warehouse; William L. Hussey, Jr., and John H. Sheffield, copartners trading under the name and style of Sheffield's Warehouse; Blanchard & Farrior Warehouse, Inc., a corporation, and O. C. Blanchard Sr., R. H. Lanier, and O. C. Blanchard, Jr., individually and as officers of said corporation; and all of the above-named persons as members and as representatives of all of the warehouse members of Wallace Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase or selling or offering for sale, leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, participating, continuing, cooperating in, or carrying out, or directing or instigating any planned common course of action, course of dealing, understanding, plan, combi-

nation, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts and practices:

1. Allocate or cause to be allocated any selling time to tobacco auction warehouses operating on the Wallace tobacco market on the basis of any system, plan, method, policy or practice for the purpose or with the effect of restricting, hindering, limiting, preventing or interfering with or foreclosing any person, firm or corporation from engaging in the tobacco business on the Wallace tobacco market either as a warehouse owner or operator, buyer, speculator, broker or rehandler of tobacco.

2. Allocate or cause to be allocated any selling time pursuant to any system or method of allocating selling time which includes floor space that is not suitable and available during the selling season for the sale of tobacco at auction in the Wallace tobacco market.

3. Adopt and place into effect or cause to be adopted and placed into effect any rule, regulation or bylaw that prohibits, or denies any person, firm or corporation who is now a member or may in the future become a member of the Wallace Tobacco Board of Trade from voting on any matter coming before the said Board including the allocation of selling time.

4. Adopting, using, adhering to or maintaining or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice that restricts, hinders, limits, prevents or forecloses any person, firm or corporation from engaging in the tobacco business on the Wallace tobacco market either as a warehouse owner or operator, buyer, speculator, broker or rehandler of tobacco.

5. Engaging in any act or practice or entering into any arrangement, agreement or understanding with the purpose or effect of foreclosing, preventing or hindering the entrance of a new tobacco warehouse on the Wallace tobacco market or any other tobacco warehouse already doing business on the Wallace tobacco market.

6. Engaging in any act or practice or entering into any arrangement, agreement or understanding with any respondent named herein or with any other person, firm or corporation with the purpose or effect of preventing, hindering, limiting or suppressing competition between and among the tobacco warehouses engaged in doing business on the Wallace tobacco market.

7. Engaging in any act or practice, the purpose or effect of which is to effectuate any understanding, agreement or combination prohibited herein.

8. Placing in effect or carrying out any act, practice, policy or method, prohibited by any provision or part of this order, through respondent Board or any other instrumentality, agent, agency, medium of representative.

It is further ordered, That 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 to cease and desist.

IN THE MATTER OF

RONZONE'S OF LAS VEGAS, INC., ET AL.

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

Docket C-316. Complaint, Feb. 28, 1963—Decision, Feb. 28, 1963

Consent order requiring Las Vegas, Nev., retail furriers to cease violating the Fur Products Labeling Act by failing to disclose in newspaper advertising the names of animals producing certain furs and when fur products contained artificially colored or cheap or waste fur, and to describe as "natural" fur which was not bleached or dyed; by representing falsely in such advertising that purchasers of furs received on consignment might "Save 20% to 50% on Famous Brands . . . Special purchase . . .", etc.; by affixing labels bearing fictitious prices to fur products; by failing to maintain adequate records as a basis for price and value claims; and by failing in other respects to comply with requirements of the Act.

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 Ronzone's of Las Vegas, Inc., a corporation, and its officers, and Richard J. Ronzone and Peder R. Rasmussen, individually and as officers of said corporation, and as copartners trading as Nevada Fur Service, 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