

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

IN THE MATTER OF
GRIFF'S OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECTION 2 (c) OF THE CLAYTON ACT

Docket C-1256. Complaint, Sept. 25, 1967—Decision, Sept. 25, 1967

Consent order requiring a Dallas, Texas, corporation which operates and franchises hamburger stands to cease engaging in illegal brokerage activities in the sale of food products.

COMPLAINT

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

PARAGRAPH 1. Respondent Griff's of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 700 Tower Petroleum Building, Dallas, Texas.

PAR. 2. The respondent is now and for the past several years has been, engaged in the business of operating and franchising hamburger stands in the Middle West portion of the United States, known as Griff's Burger Bars. The respondent operates its own hamburger stands in the States of Kansas, Missouri, Oklahoma, Louisiana, Texas and New Mexico. Its franchised operations are located in more than 20 States, some of which are Kansas, Iowa, Texas, Missouri, Minnesota, Colorado and Kentucky. Respondent's total annual volume of sales including its franchised units, is in excess of \$20,000,000.

PAR. 3. In the course and conduct of its business for the past several years, the respondent named herein, directly or indirectly, has caused food commodities and other products, when purchased, to be transported from the State of origin to destinations in other

States. Thus, there has been at all times mentioned herein a continuous course of trade and commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, in said food commodities and other products across State lines between said respondent and the sellers of said products.

PAR. 4. In the course and conduct of its said business for the past several years, respondent has been collecting and receiving, directly or indirectly, commissions, brokerage or other compensations paid by suppliers on purchases of food commodities and other products by the respondent, either directly or through an intermediary.

It is further alleged that since on or about January 1, 1964, respondent either directly or indirectly, has received from two brokerage companies, first from United Sales, Inc., and from in or about August 1965 from Rheuark Brokerage, Inc., approximately 90% of the commissions, brokerage or other compensations paid by suppliers on purchases by respondent and its franchised hamburger stands and passed on by the above-named companies to respondent.

PAR. 5. The respondent in receiving or accepting, directly or indirectly, commissions, brokerage or other compensations on purchases of food commodities and other products from suppliers as above-alleged and described, is in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of subsection (c) of Section 2 of the Clayton Act, as amended; and

The respondent and counsel for the Commission having, pursuant to the Commission's 1963 Rules of Practice, executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of 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 such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondent has violated said Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, has accepted said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Griff's of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 700 Tower Petroleum Building, Dallas, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Griff's of America, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of food commodities and other products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of food commodities or any other product for respondent's own account or where respondent is the agent, representative or other intermediary acting for, or in behalf of, or is subject to, the direct or indirect control of, any buyer.

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

GRIFF'S OF AMERICA, INC., ET AL.

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

Docket C-1257. Complaint, Sept. 25, 1967—Decision, Sept. 25, 1967

Consent order requiring a Dallas, Texas, corporation which operates and franchises hamburger stands in several States and an Iola, Kansas, food wholesaler, to cease inducing the payment of illegal brokerage fees, entering into total-requirement contracts, and fixing resale prices of any commodity.

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 parties named in the caption and hereinafter referred to as respondents, have violated the provisions of Section 5 of the Federal Trade Commission 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 Griff's of America, Inc., sometimes hereinafter referred to as Griff's, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 700 Tower Petroleum Building, Dallas, Texas.

Respondent Bricc Wholesalers, Inc., sometimes hereinafter referred to as Bricc's, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 14 West Davis Street, Iola, Kansas.

Respondent Robert L. Fellers is an individual, sometimes referred to as Fellers, and from about the year 1960 to on or about November 30, 1966, has served as general manager and an officer of respondent Griff's and in such capacity has owned and controlled 49% of the outstanding capital stock of respondent Griff's.

Respondent Fellers principal place of business is now located at 901 Kentucky Street, Lawrence, Kansas.

PAR. 2. Respondent Griff's was organized in 1960 for the purpose of conducting a chain of hamburger stands under the name "Griff's Burger Bars," both company-owned and independently owned but franchised units.

Said respondent does business in some twenty States of the United States and its gross volume of business for the year 1965 including its franchised units, was approximately \$20,000,000.

In addition to operating and franchising hamburger stands, said respondent also purchases, either directly or indirectly, the supplies used by the various stands both company and independently owned units for shipment direct to the individual hamburger stands.

PAR. 3. Respondent Bricc's for several years last past has been engaged in the purchase of food commodities and other products and in the sale and distribution thereof at wholesale, to various

purchasers located principally in the Midwestern section of the United States.

PAR. 4. Respondent Fellers, for several years prior to November 1966, has actively directed and supervised the operations of respondent Griff's and has executed, on behalf of Griff's, contracts, and agreements and has entered into understandings with various suppliers of food commodities and other products, for shipment to the various hamburger outlets.

PAR. 5. In the course and conduct of their business for several years last past, respondents have caused food commodities and other products when purchased to be transported from the State of origin of shipment to destinations in other States and there is now and has been at all times mentioned herein a constant course of trade and commerce, as "commerce" is defined in the Federal Trade Commission Act, in said food commodities and other products across State lines between said respondents and the sellers of such products.

PAR. 6. In the course and conduct of their business, respondents have been and are now in competition with others in the purchase and sale and distribution of food commodities and other products in commerce.

PAR. 7. Among the products used by the various hamburger stands, both those owned and operated by respondent Griff's and those franchised by said respondent but independently owned, are paper products.

Respondent Fellers, in or about the year 1964, contacted Continental Can Company offering to purchase the entire paper cup requirements for all of respondent Griff's hamburger stands, both company owned and franchised, in exchange for a special price from Continental Can Company.

As a result of negotiations between and among respondent Fellers, respondent Griff's and representatives of Continental Can Company, the latter agreed to pay a brokerage fee to a broker who would be designated to represent respondents Griff's and Fellers.

The further result of the aforementioned negotiations was that Continental Can Company agreed to and did furnish all of the requirements of respondent Griff's of paper cups for a period of several years from 1964 and also agreed to the nominal sale of such products to a wholesale house, to be designated by respondents Fellers and Griff's, which wholesale house was designated as respondent Brice's.

As a further part of the above arrangement, Continental Can

Company agreed to and did pay brokerage to United Sales, Inc., a brokerage company owned jointly by respondent Fellers and one Ray Mickle, and designated initially by Fellers as the broker to handle all sales of paper products by Continental Can Company for shipment to Griff's Burger Bars.

In addition to the foregoing, respondent Fellers, in or about the year 1964, contacted respondent Brice's and an agreement was entered into whereby all purchases of paper products on behalf of respondent Griff's from Continental Can Company were to be billed to respondent Brice's and were to be drop-shipped by Continental Can Company to the various hamburger stands located throughout the Midwest and Western States of the United States. Continental Can Company performed pursuant to the foregoing agreement.

It was further agreed among the respondents that all discounts or rebates received from the purchase of Griff's entire requirements of paper cups from Continental Can Company were to be divided between respondent Griff's and respondent Brice's in accordance with a prearranged and established formula agreed to among all respondents.

Respondents also have agreed to and have fixed the prices at which such paper products purchased from Continental Can Company would be and have been resold to the various hamburger stands, including the independently owned and operated units.

In connection with the above referred-to agreement and understanding, early in the year 1966 respondent Brice's agreed to and did advance to respondent Griff's an amount of \$35,000. Most of this amount constituted an advance payment of respondent Griff's share of discounts or rebates to be realized from the sale of paper cups by Continental Can Company throughout the remainder of the year 1966, and was, in fact, realized from such sales as aforesaid. The remainder of said advance was a rebate received from Brice's on purchases of syrups and other products. Rebates derived from paper cup purchases were designated by respondents as "advertising allowances."

PAR. 8. The acts and practices of respondents, as herein alleged, have been to the prejudice of the public and to competitors of respondents; have a tendency to hinder, suppress and injure competition in the sale and distribution of such paper cups as are used in the operation of Griff's Burger Bars; and have a tendency to hinder, suppress and injure competition between Griff's Burger Bars, and independently owned hamburger stands, including those units operated under a franchise from Griff's.

Such acts and practices constitute unfair methods of competition in commerce, or unfair or deceptive acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having, pursuant to the Commission's 1963 Rules of Practice, executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, has accepted said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Griff's of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 700 Tower Petroleum Building, Dallas, Texas.

Respondent Brice Wholesalers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 14 West Davis Street, Iola, Kansas.

Respondent Robert L. Fellers is an individual, formerly president of Griff's of America, Inc., with his office and principal place of business located at 901 Kentucky Street, Lawrence, Kansas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Griff's of America, Inc., and Brice Wholesalers, Inc., each a corporation, and their officers, agents, representatives and employees, and respondent Robert L. Fellers, an individual, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase or sale of any commodity in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, combination, conspiracy or planned common course of action, between or among any of said respondents or between any of said respondents and others not parties hereto to do or perform any of the following acts or things:

(1) Induce any seller of any commodity to pay or allow a brokerage fee, commission or discount, to an agent or representative of any buyer;

(2) Negotiate with any seller for the purchase of any commodity on condition that the buyer's entire requirements be supplied by such seller, provided such seller pay a brokerage fee to an intermediary specified by respondents and/or that said seller recognize an intermediary specified by said respondents to act as a wholesaler when said wholesaler is, in fact, an agent of or subject to the control of, said respondents or any of them.

(3) Fixing or establishing prices for resale of any commodity by any means to any retailer.

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

IN THE MATTER OF

AMERICAN CYANAMID COMPANY ET AL.

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

Docket 7211. Complaint, July 28, 1958—Decision, Sept. 29, 1967

Order modifying an earlier Commission order dated Dec. 17, 1963, 63 F.T.C. 1747, after a rehearing on remand from the U.S. Court of Appeals for the Sixth Circuit, 363 F. 2d 757(8 S.&D. 248), by requiring two manu-

facturing chemical firms to grant to any domestic applicant nonexclusive licenses to make and sell two of their patented antibiotics and furnish such licensees certain technical information.

Mr. Ernest G. Barnes, Mr. Herbert Karzen, and Mr. Daniel H. Hanscom supporting the complaint.

Donovan, Leisure, Newton and Irvine, New York, N.Y., by Mr. Richard Y. Holcomb and Mr. Kenneth Hart for respondent American Cyanamid Company.

Winthrop, Stimson, Putnam and Roberts, New York, N.Y., by Mr. Merrell E. Clark, and Mr. Henry J. Zafian for respondents Bristol-Myers Company and Bristol Laboratories, Inc.

Dewey, Ballantine, Bushby, Palmer and Wood, New York, N.Y., by Mr. John E. F. Wood and Connolly, Bove & Lodge, Wilmington, Del., by Mr. Arthur G. Connolly for respondent Chas. Pfizer & Co., Inc.

Cravath, Swaine and Moore, New York, N.Y., by Mr. Allen F. Maulsby and Mr. John F. Bradley for respondent Olin Mathieson Chemical Corporation.

Covington & Burling, Washington, D.C., by Mr. Nestor S. Foley and Mr. Gerhard A. Gesell for respondent The Upjohn Company.

INITIAL DECISION ON REMAND BY ABNER E. LIPSCOMB, HEARING EXAMINER

NOVEMBER 9, 1966

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I. HISTORY FROM COMPLAINT TO HEARING ON REMAND

A. *The Complaint*

The complaint in this proceeding, issued on July 28, 1958, charges the respondents named therein with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in the sale of *tetracycline*, an antibiotic, in violation of the provisions of Section 5 of the Federal Trade Commission Act.

In addition to various other factual charges, the complaint specifically charges all respondents with fixing and maintaining an arbitrary and rigid price for tetracycline through conspiracy and combination.

The complaint describes the antibiotic industry as one of dynamic growth with sales exceeding \$330 million per year and with tetracycline enjoying the largest sale by dollar volume, aggregating more than \$100 million in 1957.

The major factual charge of the complaint, however, and the only major charge with which we are concerned in this initial

decision or remand, is the charge that Chas. Pfizer & Co., Inc. (hereinafter referred to as Pfizer) and American Cyanamid Company (hereinafter referred to as Cyanamid) made false, misleading, and incorrect statements to, and withheld material information from, the United States Patent Office with the purpose and effect of inducing or causing the issuance of a patent on the antibiotic tetracycline to Pfizer.

B. Hearings and the Initial Decision

After extended hearings, which resulted in over 11,000 pages of transcript and numerous exhibits, Robert L. Piper, the hearing examiner in this original proceeding, filed his initial decision on October 31, 1961, in which he held that the charges of the complaint had not been sustained by the evidence. Accordingly, he ordered that the complaint be dismissed.

C. The Commission's Decision of August 8, 1963

On August 8, 1963, the Commission, after considering the appeal of counsel supporting the complaint from Mr. Piper's initial decision and the entire record of this proceeding, vacated and set aside that initial decision, made its own findings as to the facts and conclusions drawn therefrom, and issued its own order, requiring the respondents to cease and desist from those acts and practices that the Commission found to be illegal, including a prohibition concerning the major charge of wrongfully inducing the United States Patent Office to issue a patent for tetracycline to Pfizer.

D. The Remand to the Commission by the United States Court of Appeals for the Sixth Circuit

Respondents appealed to the United States Court of Appeals for the Sixth Circuit from the Commission's decision of August 8, 1963, and its Final Order thereon, dated December 17, 1963 [63 F.T.C. 1747]. On June 16, 1966 [8 S.&D. 248], the Court vacated that order and remanded this entire case to the Commission for the purpose of "a *de novo* hearing on all issues without the participation of Chairman Dixon." The Court of Appeals held that Chairman Dixon was disqualified to participate in the Commission's decision because of his previous service as Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary of the United States Senate. This Committee had investigated many of the same facts involved in the present proceeding. The Court further ruled that the Commission's findings that material misrepresentations had been

made to the United States Patent Office and that material information had been withheld from it by Cyanamid and Pfizer, was not supported by substantial evidence. The Court suggested that additional evidence should be secured from Patent Examiner Herbert J. Lidoff, who had not testified during the original hearings, in order to determine if he, the patent examiner who approved the granting of a patent for tetracycline, had been misled or deceived by Pfizer and Cyanamid. The Court also suggested that any other witnesses who had testified relevant to the procuring of the patent should be allowed to testify to the facts relating thereto. In addition, the Court suggested a number of very pertinent questions that Mr. Lidoff should be asked if he were called to testify herein. (*American Cyanamid Co. et al. v. F.T.C.*, 363 F. 2d 757 (6th Cir. 1966).)

E. *The Remand to the "Chief Hearing Examiner"*

After the Court remanded this proceeding to the Commission, the Commission, by order dated August 1, 1966 [70 F.T.C. 1763], reopened this proceeding and remanded it to the "Chief Hearing Examiner for assignment to an examiner to begin expeditious hearings." Since Robert L. Piper, the hearing examiner who originally heard this case and wrote the initial decision herein, was no longer in the employ of the Commission, the remanded proceeding was assigned to the present presiding hearing examiner for the limited purpose stated in the Commission's order.

II. THE ISSUES ON REMAND

The Commission in its remand order specified that a hearing was to be held for:

the sole and limited purpose of receiving the testimony of Patent Examiner H. J. Lidoff, and of any other witnesses who have heretofore testified, with respect to "the issue as to whether Pfizer and Cyanamid made misrepresentations to the Patent Office and withheld essential information, thereby deceiving Lidoff into granting a patent which otherwise never would have been approved."

The Commission's order further specified that the hearing examiner should submit an initial decision "confined to the issue hereinabove specified."

III. THE HEARING ON REMAND

In compliance with the Commission's order of remand, a hearing was held in Washington, D.C., on September 12 and 13, 1966, at which Patent Examiner Herbert J. Lidoff was presented as a

witness by counsel supporting the complaint, and Werner Hutz, an attorney, and Dr. Francis X. Murphy, a scientist, were presented as witnesses by Pfizer.

IV. FACTS IN THE ORIGINAL RECORD NECESSARY TO THE ISSUES ON REMAND

Before evaluating the testimony of the witnesses who testified on the remand of this case and before making factual findings based on their testimony and on such additional evidence from the original record as relates thereto, it seems necessary to a coordinated presentation of the issues on remand to present first, a summarization of the antibiotic industry; second, a brief explanation of antibiotics; and third, the proceeding before the United States Patent Office that led to the issuance of the patent for tetracycline.

A. *The Antibiotics Industry*

(The following discussion is quoted from the opinion of the United States Court of Appeals for the Sixth Circuit in *American Cyanamid Co., et al. v. F.T.C.*, *supra*, pp. 760-61 [8 S.&D. 248, 252-253].)

Tetracycline, a broad-spectrum antibiotic, is sold and distributed under various trade names by all five petitioners: Chas. Pfizer & Co., Inc. ("Pfizer"), American Cyanamid Company ("Cyanamid"), Bristol-Myers Company and Bristol Laboratories ("Bristol"), Olin Mathieson Chemical Corporation through its E. R. Squibb & Sons Division ("Squibb") and the Upjohn Company ("Upjohn"). Pfizer owns the patent on tetracycline and produces it in addition to selling and distributing.

Under licenses granted by Pfizer, Cyanamid and Bristol also produce this antibiotic as well as selling and distributing it. Squibb and Upjohn sell and distribute by authority of licenses granted by Pfizer.

Also involved are two older antibiotics: (1) chlortetracycline, which is produced and sold by Cyanamid, owner of its patents, as aureomycin; and (2) oxtetracycline, which is produced and sold by Pfizer, owner of its patent, as terramycin.

Antibiotics are chemical substances produced by certain microorganisms. They have the capacity to counteract and cure a broad variety of diseases. At the end of World War II, penicillin was the principal antibiotic. It was a "narrow-spectrum" drug with more limited effectiveness than the "broad-spectrum" antibiotics. Penicillin was not patented. Its production and sale proved to be fiercely competitive and profits were marginal.

The antibiotics involved in this case were described by the Commission as follows:

"The earlier antibiotics such as penicillin and streptomycin are known as narrow spectrum antibiotics because they are normally effective against either

gram-positive or gram-negative bacteria but not both. The antibiotics with which this case is concerned are known, beginning with the discovery of Aureomycin, as broad spectrum antibiotics because they are effective against a far wider range of bacteria, including both gram-positive and gram-negative bacteria. Because of their wide-range of efficacy against practically all infectious diseases, the broad spectrum antibiotics have become known popularly as 'wonder drugs'. Their use results in a marked decrease in the cost of treating those diseases, and they presently are prescribed in substantially all instances in which they are effective. Antibiotics are also employed to prevent infection or disease as, for example, prior to surgery, and to prevent recurrences of infection and disease. Antibiotics are, therefore, of vital and unique importance to the health and welfare of the general public.

"Antibiotics, including tetracycline, Aureomycin and Terramycin, as all ethical drugs, are products which can be obtained by the ultimate consumer or patient only under the authority of a doctor's prescription. Each is customarily prescribed by the physician under the respective brand name of the manufacturer, rather than its generic or chemical name. It is the physician's prescription which determines the amount and brand of drug which the pharmacist will sell. Consequently, respondents direct a major portion of their sales and promotional efforts at physicians, emphasizing their respective trade names. By law and custom, pharmacists are prohibited from substituting one brand of an ethical drug for another without permission of the physician."

B. *Proceedings Before Patent Office*

(The following discussion is quoted from the opinion of the United States Court of Appeals for the Sixth Circuit in *American Cyanamid Co., et al. v. F.T.C., supra*, pp. 761, 773-75 [8 S.&D. 248, 253-254, 269-272].)

When Cyanamid obtained a patent on aureomycin in 1949, the molecular structure of that drug was not known. The patent application described it in terms of certain secondary chemical properties. In 1952 the molecular structure was discovered, and a Pfizer scientist speculated that an antibiotic of at least equal strength could be produced by altering only slightly the structure of aureomycin. The result was a vastly improved antibiotic, tetracycline, which first was produced by Pfizer scientists in 1952.

Within six months of the discovery of tetracycline, both Pfizer and Cyanamid filed applications for patents. (Pfizer's application is described in the record as the "Conover application" and Cyanamid's as the "Boothe-Morton application.") The Patent Office declared an interference, which was settled as a result of a private cross-licensing agreement between Pfizer and Cyanamid to the effect that the party found to have priority would license the other. Thereafter Cyanamid conceded priority to Pfizer and withdrew its application.

Bristol then filed a patent application. A second interference was declared. The patent examiner filed an opinion which concluded that tetracycline was unpatentable. Pfizer thereupon submitted affidavits to the effect that tetracycline could not be recovered from broths representative of those described in the Cyanamid patent application on aureomycin. Shortly afterwards a product patent was issued to Pfizer.

* * * * *

