of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

UNITED FRUIT COMPANY, ET AL.*

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE CLAYTON ACT, SECS. 2(a), 2(f), AND 7

*Docket 8795. Complaint, July 28, 1969—Decision, Jan. 12, 1973.***

Order requiring the largest banana jobber in the United States, located in Long Beach, California, to sell its major competitor in the Los Angeles area which it acquired in 1968; to stop knowingly inducing discriminatory prices; and to not make any acquisition of any banana firm for the next ten years without prior Federal Trade Commission approval.

Order requiring the largest importer of bananas in the Los Angeles market, and its subsidiary, to stop discriminating in price among purchasers of their bananas.

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*During the course of this proceeding, United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

**Respondent Harbor Banana Distributors, Inc., filed a separate petition for review on March 20, 1973 in the Court of Appeals for the Fifth Circuit. On March 22, 1973, respondents United Brands Company and Chiquita Brands, Inc. also filed a petition for review in the same court.

COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Section 45) and the Clayton Act, as amended (15 U.S.C. Sections 13, 18 and 21), by virtue of the authority vested in it by said Acts, having reason to believe that United Fruit Company, United Fruit Sales Corporation, and Harbor Banana Distributors, Inc., all corporations, hereinafter more particularly described and referred to as respondents, and hereby made respondents, have violated and are now violating the provisions of Section 2 of the Clayton Act, as amended, as hereinafter more particularly described, and having reason to believe that the respondents United Fruit Company, United Fruit Sales Corporation, and Harbor Banana Distributors, Inc., have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act as hereinafter more particularly described, and having reason to believe that the respondent Harbor Banana Distributors, Inc., has violated the provision of Section 7 of the Clayton Act, as amended, as hereinafter more particularly described, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its charges in respect thereto as follows:

PARAGRAPH 1. Respondent United Fruit Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal business office located at Prudential Center, Boston, Massachusetts. Respondent United Fruit Company is now, and for many years past has been engaged in the business of growing, causing to be grown, acquiring, processing, shipping, distributing and selling a variety of tropical agricultural food products including bananas. United Fruit Company operates many branch offices, installations and port facilities throughout the world and the United States. In 1966 its sales of all products and services were approximately $440 million, and its sales of bananas in that year were approximately $287 million. United is the dominant importer and distributor of bananas in the United States and the Los Angeles, California area. In 1966 United imported and distributed more than fifty percent of all bananas sold in the United States and more than sixty-five percent of all bananas sold in the Los Angeles, California area.

Some of the bananas sold and distributed by respondent United are sold for use, consumption and resale within the United States.

PAR. 2. Respondent United Fruit Sales Corporation, is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal business office located at Prudential Center, Boston, Massachusetts. Respondent United Fruit Sales Corporation, is now and, at all times referred to herein, has been a wholly-owned subsidiary of respondent United Fruit Company, and serves as the sales agent in the United States of United Fruit Company. Respondent United Fruit Company and respondent United Fruit Sales Corporation, are hereinafter jointly referred to as "United."

PAR. 3. Respondent United, in the course and conduct of its business, ships, and for many years past has shipped, bananas from foreign nations to purchasers located in many States of the United States. At all times referred to herein respondent has maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 4. Respondent Harbor Banana Distributors, Inc., was incorporated under the laws of the State of California on December 18, 1964, and exists and conducts its business under the laws of said state with its principal business office located at 1420 Panorama Drive, Long Beach, California.

Upon its incorporation, respondent Harbor Banana Distributors, Inc., succeeded in interest, privity, control and purpose the business of a joint venture organized under the laws of the State of California on May 26, 1964 by Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., California corporations. Said joint venture operated under the fictitious firm name "Harbor Banana Distributors, Inc.," and succeeded in interest, privity, control and purpose the businesses of the said Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc.

Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., during the times referred to herein and for many years past were operated, controlled and substantially owned by Norf James Jebbia and Dominic Jebbia, individuals, and other individuals who are members of their mutual family, all of which individuals are sometimes hereinafter referred to as the "Jebbia Family." In addition to, and sometimes in connection with, Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., the Jebbia Family for many years past operated

their business, as hereinafter described, under a variety of firms and trading names including San Fernando Valley Distributors, Inc., Colton Banana Distributors, West Coast Banana Distributors, and Union Banana Distributors.

Respondent Harbor Banana Distributors, Inc., and the individuals and firms described above as its predecessors are jointly referred to herein as "Harbor." Harbor is now and for many years past has been engaged in the business of purchasing bananas from importers, processing bananas and selling and distributing bananas to retailers and wholesalers in the Los Angeles, California area. Respondent Harbor had sales of approximately $5.5 million in 1967.

The bananas purchased, processed, sold and distributed by respondent Harbor are sold for use, consumption, and resale within the United States.

At all times referred to herein respondent Harbor has competed with other corporations and with individuals and firms in the sale and distribution of bananas.

PAR. 5. Respondent Harbor, in the course and conduct of its business of purchasing and selling bananas, has purchased bananas from importers from foreign nations, causing bananas to be shipped from foreign nations to its place of business in the State of California and causes and has caused bananas to be shipped from the State of California to purchasers located in various other States of the United States. At all times referred to herein, respondent Harbor has maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

COUNT I

Alleging violation of Section 2(a) of the Clayton Act, as amended, by respondent United.

PAR. 6. The allegations of Paragraphs One through Five, are alleged in Count I the same as if fully written herein.

PAR. 7. In the course and conduct of its business in commerce, repondent United now discriminates and since July 1965 has discriminated, in price in the sale of bananas of like grade and quality in the Los Angeles, California area by selling bananas to respondent Harbor upon terms and conditions significantly more favorable than the terms and conditions respondent United sells

bananas of like grade and quality to other purchasers competing with the favored purchaser, Harbor.

For example, respondent United now maintains and for many years past has maintained a terminal facility at Wilmington, California located at the waterfront on San Pedro Bay. During the times referred to herein, respondent United has sent two ships each week loaded with bananas to its terminal facility at Wilmington, California where respondent United unloads bananas from its ships into trucks and railroad cars for its various purchasers, which purchasers then transport said bananas to their respective processing warehouses, at their own expense.

Beginning in July 1965 and once each week since that date, respondent United has sent its ship loaded with bananas directly to the processing warehouse of the favored purchaser, respondent Harbor, at Long Beach, California, located at the waterfront on San Pedro Bay, where respondent United unloads the bananas sold to respondent Harbor directly into Harbor's processing warehouse.

Since July 1965 respondent United has maintained and does maintain a tract of land and necessary equipment and facilities at Long Beach, California for the sole purpose of unloading bananas from its ships into respondent Harbor's processing warehouse and has employed such land, equipment and facilities for this purpose.

Many of the purchasers of bananas from respondent United who receive their bananas from said respondent at its Wilmington, California terminal compete with the favored purchaser, respondent Harbor, in the distribution and resale of bananas in the Los Angeles area. None of the nonfavored competing purchasers receive the delivery and warehouse loading service and favorable terms and conditions of sale afforded to respondent Harbor, with the result that they incur substantially higher transportation expenses than the favored purchaser, respondent Harbor, in connection with the purchase of bananas from respondent United.

Said difference in delivery and loading service has resulted in a substantial discrimination in the ultimate or net price for products sold to its favored and nonfavored purchasers by respondent United.

PAR. 8. The effect of respondent United's discrimination in net price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which its

favored purchaser is engaged, or to injure destroy or prevent competition between the favored and nonfavored purchasers or with customers of either of them.

PAR. 9. The aforesaid acts and practices of respondent United constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Alleging violation of Section 2(f) of the Clayton Act, as amended, by respondent Harbor.

PAR. 10. The allegations of Paragraphs One through Nine are alleged in Count II the same as if fully written herein.

PAR. 11. Prior to the beginning of the discriminatorily favorable delivery and loading service, terms and conditions of sale, and net prices afforded to respondent Harbor as alleged in Count I above, respondent Harbor, in the course and conduct of its business in commerce, induced respondent United to agree to afford it such discriminatory considerations, when respondent Harbor knew or should have known that such discriminatory benefits would not be granted to all of the other purchasers from respondent United competing in the distribution and resale of bananas with respondent Harbor.

From the commencement of the discriminatory delivery and loading service, terms and conditions of sale, and net prices as alleged in Count I above to the present, respondent Harbor in the course and conduct of its business in commerce, has induced, induced and received, and received such discriminatory considerations when it knew or should have known that such discriminatory considerations were not granted to all of the other purchasers of bananas of like grade and quality from United competing in the distribution and resale of such bananas with respondent Harbor.

PAR. 12. The aforesaid acts and practices of respondent Harbor constitute violations of subsection (f) of Section 2 of the Clayton Act, as amended.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act by respondents, Harbor and United.

PAR. 13. The allegations of Paragraphs One through Five and

Paragraphs Seven, Eleven and Eighteen through Twenty-Two are alleged in Count III the same as if fully written herein.

PAR. 14. In the course and conduct of its business in commerce, respondent Harbor has attempted and is attempting to monopolize the sale and distribution of bananas in the Los Angeles area by various acts and practices, including but not limited to the following:

A. Selling or offering to sell bananas at unreasonably low prices approaching or below the cost of purchasing, handling, processing and distribution.

B. Acquiring and developing the physical facilities and capacity to support a monopoly in the sales and distribution of bananas in said market. For example, in July 1965, respondent Harbor completed the construction of and began operating a banana processing warehouse on the waterfront of San Pedro Bay at Long Beach, California. Said warehouse is especially and uniquely designed and equipped for the handling and processing of bananas. Said processing warehouse has the capacity to handle, process and store, in anticipation of sale, enough bananas to satisfy the entire needs of the Los Angeles market area presently and in the foreseeable future, and exceeds the total capacity of Harbor's own prior capacity and all its competitors combined.

C. Inducing, inducing and receiving, and receiving the discriminatory terms and conditions of sale as alleged in Count II herein.

D. Acquiring the business and assets of its largest competitor as alleged in Count IV hereinafter.

PAR. 15. Each of the acts and practices of respondent Harbor alleged in this count separately and in combination with each, any, or all of the other acts and practices alleged in this count have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; have been conducted, engaged in, and adopted, for the purpose of creating monopoly in respondent Harbor; are all to the prejudice of the public and to competitors of respondent Harbor; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 16. In the course and conduct of its business in commerce, respondent United, by discriminating in the terms and conditions

of sale as alleged hereinbefore, has knowingly and materially aided and abetted, and is knowingly and materially aiding and abetting respondent Harbor in the acts and practices alleged in this count, and in Harbor's attempt to monopolize the sale and distribution of bananas in the Los Angeles area.

United's aiding and abetting of respondent Harbor together with any or all of the acts and practices of respondent Harbor as hereinbefore alleged have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; and are all to the prejudice of the public and to competitors of respondent Harbor. Said aiding and abetting by respondent United constitutes unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

COUNT IV

Alleging violations of Section 7 of the Clayton Act, as amended, by respondent Harbor in respect to the acquisition of the assets of Charles C. McCann Company, Inc., and Tradewinds Produce, Inc.

PAR. 17. The allegations of Paragraphs Four, Five, and Fourteen are alleged in Count IV the same as if fully written herein.

PAR. 18. The Charles C. McCann Company, Inc., was organized in 1957 and at all times pertinent hereto was a corporation, organized and existing under the laws of the State of California. Tradewinds Produce, Inc., was organized in 1962 and at all times pertinent hereto was a corporation, organized and existing under the laws of of the State of California, and traded under the name "W. W. Crenshaw Company." During the period of their mutual existence, the Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., shared common ownership, management, and facilities and had the same principal business offices at 780 Warehouse Street, Los Angeles, California. Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., were operated as a single business enterprise engaged in the wholesale distribution of bananas. They were collectively known in the trade as, and are sometimes referred to herein as, "McCann-Crenshaw."

PAR. 19. During 1966 and for at least several years prior thereto, McCann-Crenshaw was a growing and increasingly profit-

able business with substantial sales and profits. For example, in 1966, McCann-Crenshaw had sales of about $3.5 million with net profits exceeding $90 thousand. Prior to its acquisition by respondent Harbor, McCann-Crenshaw competed with respondent Harbor in the purchase, sale, and distribution of bananas in the Los Angeles, California area.

PAR. 20. The wholesale distribution of bananas in the Los Angeles, California area is a substantial business with sales of about $13.5 million in 1967. Concentration is high and is increasing. In 1967 the two leading wholesale banana distributors in the market accounted for about sixty-five percent of wholesale banana sales. Respondent Harbor ranked first with about forty percent and McCann-Crenshaw was second with about twenty-five percent of such sales. Following the combination of the businesses of respondent Harbor and McCann-Crenshaw, the two-firm concentration in that market increased to about 77 percent.

PAR. 21. In February 1968, respondent Harbor acquired the assets of McCann-Crenshaw as a going business, by execution of the terms of a sales agreement dated February 2, 1968, wherein the Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., collectively agreed to sell their tangible personal property and interest in leases to respondent Harbor.

PAR. 22. At the time of said acquisition and at all times relevant hereto, Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., separately and jointly have purchased bananas from importers from foreign nations, causing said bananas to be shipped from foreign nations to the State of California and have caused said bananas to be shipped from the State of California to various other States in the United States. At all times referred to herein Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., have maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Clayton Act.

PAR. 23. The effect of the acquisition of the McCann-Crenshaw business and assets by respondent Harbor as herein alleged, may be substantially to lessen competition or tend to create a monopoly in the wholesale distribution of bananas in the Los Angeles, California area, in violation of Section 7 of the Clayton Act (15 U.S.C. Section 18) as amended.

Mr. Ivan W. Smith and *Mr. David M. Malone* supporting the complaint.

Mr. Harry L. Shniderman, Mr. Michael J. Henke, and *Mr. Rodney E. Gould, Covington & Burling,* Washington, D.C., *Mr. Henry C. Thumann, Mr. George A. Manfredi, O'Melveny & Myers,* Los Angeles, California, for respondents United Fruit Company and United Fruit Sales Corp., *Mr. Eberhard P. Deutsch, Mr. Bernard Marcus,* and *Mr. Joseph H. Lawson, Deutsch, Kerrigan & Stiles,* New Orleans, Louisiana, for respondent Harbor Banana Distributors, Inc.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

NOVEMBER 18, 1971

CONTENTS

I

PRELIMINARY STATEMENT

This proceeding was commenced on August 1, 1969, by the service of the complaint of the Federal Trade Commission on respondents. Respondents are: United Fruit Company, the largest importer of bananas into the United States and its subsidiary, United Fruit Sales Corporation by whom its selling activity was conducted (both described as United) and; Harbor Banana Distributors, Inc. (Harbor) the largest banana jobber in the United States that carries on its operations in the Los Angeles-Long Beach, California area.[1]

A. The Pleadings

The complaint contains four counts and certain descriptive matter concerning the business (reiterated in each count). The

[1] During the course of this proceeding United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

first count charges that United discriminated in net price in favor of Harbor in violation of Section 2(a) [2] of the Clayton Act, as amended, Count II that Harbor induced the discrimination in violation of Section 2(f) [3] of the Clayton Act, as amended; Count III that Harbor had attempted to monopolize the sale and distribution of bananas in the Los Angeles area, aided and abetted by United in violation of Section 5 [4] of the Federal Trade Commission Act; and, Count IV that Harbor had purchased the assets of competitors, Charles C. McCann Company (McCann) and Tradewinds Produce, Inc. (Tradewinds) in violation of amended Section 7 of the Clayton Act.[5]

On August 14, 1969, respondent Harbor moved for a more definite statement. The motion was denied August 21, 1969, and a prehearing conference was scheduled for 3 days after the date fixed in the complaint for the initial hearing.

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[2] Section 2(a) as amended, reads in pertinent part as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (15 U.S.C.A., sec. 13, as amended)

[3] Section 2(f) of the Clayton Act, as amended, reads as follows:

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (15 U.S.C.A., sec. 13, as amended)

[4] Section 5(a)(1), as amended, of the Federal Trade Commission Act reads as follows:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." (15 U.S.C.A. sec. 45)

[5] Section 7 of the Clayton Act, as amended, reads in pertinent part as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C.A. sec. 18)

Respondents filed their answers September 2, 1969. Each respondent (United being treated as one) admitted its corporate status and admitted some of the allegations regarding its activity, but generally there was denial of knowledge of the activity of the other respondent.

Respondent United took the position in its answer that it was under no obligation to answer regarding Counts II and IV. It stated that it had maintained a tract of land and necessary equipment at Long Beach and had discharged bananas there once each week during the period July 1965 to March 4, 1969. It also stated that it had maintained a terminal facility at Wilmington, California, and had sent two ships there each week loaded with bananas.

As an affirmative defense to Counts I and III, United alleged that the counts failed to state a cause of action and that United's action in discharging at Long Beach was taken in good faith to meet an equally low price or equal the services of a competitor.[6]

Respondent Harbor first separately stated its affirmative defenses to Counts II, III and IV.

Its position was that the deliveries to Long Beach were nondiscriminatory; ceased prior to the issuance of the complaint; could have been made to others; were made to a disadvantageously located processing warehouse; and were made in good faith to meet competition.

Harbor's position as to Count III was that: (1) it was not engaged in interstate commerce; (2) no sales were made at unreasonably low prices; (3) it acquired no property unlawfully and its warehouse capacity did not exceed its needs; (4) it had not received or induced discriminatory terms; and (5) it had not unlawfully acquired any business.

Harbor's third defense relating to Count IV was that: (1) it acquired only the physical assets of a seller, no longer a competitive factor, that was unable to dispose of them elsewhere; (2) the seller retained other assets and its right to compete; and (3) the acquisition had no anticompetitive or monopolistic effect.

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[6] This defense and Harbor's similar defense were made pursuant to Section 2(b) of the Clayton Act, as amended, which reads in pertinent part as follows:

"* * * Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (15 U.S.C.A. 13(b))

Harbor's fourth defense was a paragraph by paragraph answer to each paragraph of the complaint.[7] Except for admissions regarding its corporate status [8] and that of United's, the unloading of bananas into its processing warehouse, the purchase of certain assets of Charles C. McCann Company and Tradewinds Produce, Inc., and their competition prior to 1966, the answer generally denied the remaining allegations of the complaint. We pass now to the prehearing procedures.

B. Prehearing Procedures

Closed prehearing conferences were held in Washington, D.C., on September 19, 1969, December 2, 1969, March 4, 1970 and February 8, 1971 (Ph. Tr. 1–457) in an effort to simplify the proof and to insure complete discovery. The effort was partially successful in that most documents had been agreed to as genuine and the mathematical accuracy of most charts was conceded. Names of witnesses were also disclosed. A considerable period of time was expended in the preparation and exchange of charts and tabulations. This was due, in part, to differences of opinion concerning the geographic market and the competition to be included. And, despite the length of the hearings, considerable time was conserved by the prehearing procedures and by later agreements made during trial, for which counsel for all parties are commended. There were a number of other procedural matters disposed of during prehearings.

During the course of the prehearing procedures, counsel for Harbor reached an agreement with counsel supporting the complaint to submit to the Commission a proposed consent decree.

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[7] The following abbreviations will sometimes be used:

Tr.—Transcript page
Ph. Tr.—Prehearing transcript page
CX—Commission's Exhibit
RHX—Respondent Harbor Exhibits
URX—Respondent United Exhibits
RU—Respondent United
RH—Respondent Harbor
C.—Complaint
A.—Answer
RUPF—Respondent United's Proposed Findings
RHPF—Respondent Harbor's Proposed Findings
CPF—Complaint Counsel's Proposed Findings

(It should be noted, parenthetically, that exhibit numbers do not run consecutively throughout because among other matters charts were separately numbered during prehearing and it was necessary to set up a special series of hundreds for them. In addition, complaint counsel keyed their exhibits to sections of their proof.)

[8] In its answer respondent Harbor admitted that it was a successor to the Jebbia interests (hereinafter described as Jebbias and Jebbia family). In its findings it takes a different position (RHPF p. 150, *et seq.*), although no motion to amend was made.

Counsel for United refused to join but separately moved to dismiss. The hearing examiner certified both motions to the Commission on April 22, 1970, and April 24, 1970, respectively, and on May 13, 1970, issued an order rescheduling the hearing until after the decision by the Commission on the certifications. After receiving comments from the Division of Mergers on June 22, 1970, the Commission granted to the parties an opportunity to comment on the views of that division on July 7, 1970. Respondent Harbor replied on July 15, 1970, and the Commission on November 13, 1970, denied the motions of both of respondents. A motion for reconsideration was certified to the Commission on December 1, 1970. Reconsideration was denied January 15, 1971. A final prehearing conference was held Feb. 8, 1971, at which the times and places for the hearings were agreed upon. On the same day, respondent Harbor made a motion for partial summary judgment. This was denied March 8, 1971. Permission to appeal was also denied April 1, 1971. In the meantime, subpoenas *duces tecum* were issued and motions to quash were denied. We now consider the hearings.

C. The Hearings

Hearings commenced April 12, 1971, at Washington, D.C. and continued there until April 27, 1971. There was then a brief recess, stipulated by all parties to be necessary and hearings reconvened on May 10, 1971, in Los Angeles, California, by consent. Hearings continued there until May 27, 1971. After another short recess, stipulated as necessary by the parties, hearings resumed in Washington, D.C. and continued until July 2, 1971, at which time the evidence was closed. Twenty four witnesses testified and more than two thousand exhibit pages were considered.

The Commission extended the time for filing this initial decision until December 1, 1971, after conclusion of the hearings.

A novel procedure was adopted during the presentation of the case for Harbor. Two experts, one an economist and the other an accountant, were called by Harbor. Each identified a printed report compiled by him and stated that he had prepared it for submission in this case. Over complaint counsel's objection, the hearing examiner, after insuring that an adequate opportunity was given to complaint counsel to examine the reports, received

the reports in evidence in the nature of economic and accounting briefs but with the reservations that such briefs would not be taken for the truth of any facts not otherwise in evidence. The hearing examiner regards this innovation appropriate provided there is ample opportunity for preparation for cross-examination and provided that the facts forming the basis for the expert opinions expressed are otherwise established. Some saving of time resulted. The reports cannot, of course, be considered apart from the direct and cross-examination of the witnesses as such examination substantially affected the weight to be given to the reports. With these reservations it was considered helpful to an understanding of the position of the parties to have the reports received. We turn now to the basis of this decision.

D. Basis of Decision

This decision is based on the evidence as a whole. Under the requirement of Rule 3.51(b) principal supporting items of evidence have been cited.[9] However, this does not mean that the impact of the record in its entirety has not been considered or that there are not additional references which might be cited. In deciding on the weight to be given the evidence, the hearing examiner has considered particularly the demeanor of the witnesses and the contemporaneous records maintained. Consideration has been given to the proposed findings and conclusions of the parties. Those not adopted in terms or in substance are rejected as erroneous, irrelevant, or immaterial. On these bases the following findings of fact, reasons for decision, conclusions, and order are made.

II

FINDINGS OF FACT

For convenience [10] findings of fact will be grouped under headings and subheadings listed in the table of contents. We consider first the respondents.

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[9] In citing references the hearing examiner has depended in large part on the voluminous and carefully prepared findings supplied by counsel. In citing the proposed findings reference is intended to be made to the citations there given.

[10] It is not intended or possible to insure, without undue repetition, that the material collected under each heading or subheading will include all data suggested by the title used. Accordingly, facts stated under one heading must be considered in connection with those stated under other headings.