Failure on the part of the sub-agent or "Distributor" to purchase minimum quantities of radios as fixed by respondents, works as forfeiture of the sales agency and of its "exclusive" franchise territory.

Respondent Sydney Gold acts as general agent for respondent with full authority to grant exclusive territorial franchises to distributors, usually on a minimum sales basis, and with full authority to make sale of and to distribute in commerce respondents' said coin-operated radios. Prospective purchasers, upon making inquiry of corporate respondents, are referred by it to respondent Sydney Gold. The latter, acting for respondents, makes contact with said prospective purchasers or distributors who wish to purchase respondents' radios and to obtain territorial franchises in which to resell or operate them. Respondent Sydney Gold in effecting the sale of radios and acting with full authority from Coradio, Inc., distributes advertising material among purchasers and prospective purchasers of said radios, allots territorial franchises, makes written contracts covering the sale of radios and the allotment of said territorial franchises, and, in addition, makes various verbal representations on behalf of his principal, Coradio, Inc., in effecting the sale of the said coin-operated radios.

PAR. 4. In the course and conduct of their said business and for the purpose of inducing the purchase of their said coin-operated radios, respondents have circulated among their prospective purchasers, including prospective sales agents, throughout the United States, by advertisements inserted in trade journals, by advertising media of general circulation, many statements and representations concerning their said coin-operated radios. Among and typical of such statements and representations, disseminated as aforesaid, but not all-inclusive, are the following:

THIS IS THE BUSINESS YOU DREAM ABOUT

Quick Steady Profits

CORADIO

The coin operated Radio

It's the new fast-growing depression-proof business.

PICTURE OF RADIO

placed in hotels, tourist courts, clubs, hospitals, etc., on a commission basis—play 1 or 2 hours for 25¢ and produce immediate profits.

The best coin operated radio is CORADIO

ACT NOW

Start your own lifetime business, full or part time

Send for Free Catalog and

WRITE TODAY DEPT P. M.

CORADIO

COIN OPERATED RADIO

108 W. 31st St., N. Y. 1, N. Y.

* * * * * * *

Coradios can be fully insured against fire, theft or damage at a surprisingly low rate in any section of the country. * * * This insurance is available through your local broker. The advantage of your local broker is obvious. In case of theft or damage you can file immediate claims and receive prompt attention.

* * * * * * *

For those who prefer it, Coradios can be fully insured against fire, theft or damage at a surprisingly low rate in most sections of the country. This insurance is available through local brokers.

* * * * * * *

Manufactured by CORADIO

108 West 31st Street, New York 1, N. Y.

* * * * * * *

BUILT IN CORADIO-NATIONAL SLUG REJECTOR UNIT

* * * * * * *

COIN TROUBLE IS OUT WITH THE NEW CORADIO. Coradio will not pass bad coins—neither will it permit the coin received to be jammed. * * * While we were building this revolutionary new unit into the set we decided to incorporate other improvements and new features to make the new Coradio 100% better.

* * * * * * *

GUARANTEE—Entire set is unconditionally guaranteed for 1 year. Tubes guaranteed for 90 days.

* * * * * * *

Respondents further, through their sales agents, have represented orally and otherwise to prospective salesmen, distributors, or agents in various States of the United States:

That they will be allotted exclusive sales territories.

That they will be furnished with an ample supply of advertising folders, order blanks, and lease blanks, and with general sales assistance.

That they will be furnished with a list of prospective buyers who are anxious for someone to call on them and take their orders.

PAR. 5. Through the use of the statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, respondents represent and have represented, directly and by implication:

That anyone investing money in their said coin-operated radio can fully protect such property against loss by fire, theft, or damage, by being able to obtain readily in most, if not all, sections of the country, insurance to indemnify himself fully against losses due to fire, theft, or other damage, at a low rate.

That each distributor or sales agent purchasing the requisite number of coin-operated radios from respondents will be protected from competition in selling or operating said radios by having exclusive sales territory allotted to him.

That the sales agent or distributor will receive the assistance and cooperation of respondents in selling or operating the radios purchased by him by being furnished by respondents with all customary and needful advertising material, such as sales leads, lease blanks, advertising folders, and order blanks, and similar material to be used to induce and effect the sale of respondents' said coin-operated radios.

That with a view to further cooperating with agents in selling or operating respondents' said radios, respondents will furnish said agents with lists of proposed buyers ready and willing to buy.

That the respondents own, operate, and control a plant or factory where they manufacture the said Coradio coin-operated radios and component parts thereof, including the "Coradio National Slug-Rejector Unit."

That respondents unconditionally guarantee the entire radio set, including all parts thereof, for 1 year, and guarantee tubes thereof unconditionally for 90 days.

PAR. 6. The foregoing claims, statements, and representations are grossly exaggerated, false, and misleading.

In truth and in fact it is not easy or even possible to obtain fire, theft, or damage insurance on coin-operated radios in most, if not all, sections of the country at low rates, or otherwise. There is no standardization of rates on this type of policy and even when such character of business is written, a high rate of premium is invariably charged.

Distributors and sales agents are not allotted exclusive sales territory as promised and represented by respondents, but, on the contrary, respondents have made it a practice to allot the same territory or parts thereof to more than one agent at the same time, such overlapping territory system resulting in confusion and loss of business.

Distributors and sales agents in connection with the sales efforts to be made by them on behalf of respondents are not, in many instances, furnished with an ample supply of advertising folders, order blanks, and lease blanks, as promised by respondents and respondents have not furnished them with a list or lists of prospective buyers.

Respondents do not own, operate, or control any plant or factory where they manufacture the said coin-operated radios or any component parts thereof. On the contrary, the said coin-operated radios sold by respondents are bought by respondents, fully assembled, from the Hotel Radio Corporation, a separate and distinct corporate entity, doing business in quarters adjacent to those of respondents. The slug-rejector mechanism used in respondents' coin-operated radios and advertised by respondents as "Coradio-National Slug Rejector Unit" is patented and manufactured by National Rejector, Inc., St. Louis, Mo.

There is a preference on the part of dealers and of a substantial portion of the purchasing public for dealing directly with and buying directly from manufacturers, by virtue of the belief that through such purchases they obtain advantages in price and in other respects.

Respondents do not unconditionally guarantee their radio sets for 1 year. In a printed statement attached to the radios themselves respondents limit their guarantee to repairing or replacing defective parts transmitted to them, charges prepaid and returned likewise at the expense of the purchaser. Respondents in said separate printed material further undertake to limit and qualify the terms of their guarantee by stipulating that their guarantee does not apply to any instrument which has been altered or repaired in a way that "in the opinion of Coradio, Inc." affects the reliability of or detracts from the performance of the instrument, and that their said guarantee does not apply to any instrument which, in the further opinion of respondents, has been subjected to misuse through negligence, or otherwise. These terms are not made known to the purchasers until the sets are bought and paid for.

PAR. 7. The use by respondents of the foregong false and misleading advertisements and representations, employed and disseminated as aforesaid, has a tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such advertisements and representations are true, and by reason of such belief, so engendered, a substantial number of the public is thereby induced to purchase substantial quantities of respondents' said coin-operated radios.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the injury and prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Report, Findings as to the Facts, and Order

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 5, 1949, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint, a trial examiner of the Commission was designated by it to take testimony and receive evidence in support of and in opposition to the allegations of the complaint and on April 10, 1950, a hearing was convened in New York, N. Y., for this purpose. At this hearing respondents Coradio, Inc., and Louis Brown submitted an answer which was received and ordered filed by the trial examiner, in which answer said respondents admitted all the material allegations of fact as to themselves and waived the taking of testimony and other procedure. It was also averred in such answer that respondent Lew N. Lewis had sold his interest in and severed all connection with respondent corporation prior to the issuance of the complaint. Subsequently, on May 17, 1950, respondent Sydney Gold moved that he be permitted to file an answer admitting all the material allegations of fact as to himself and waiving the taking of testimony and other procedure. Said motion was granted by the trial examiner and said answer was accepted and filed.

Thereafter this proceeding regularly came on for final hearing before the Commission upon the complaint, answers thereto, and the record herein; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

Paragraph 1. Respondent Coradio, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 212 Broadway, New York, N. Y. Respondent Coradio, Inc., was formerly located and did business at the respective addresses, 60 East Forty-Second Street, New York, N. Y., and 108 West Thirty-First Street, New York, N. Y.

Individual respondent Louis Brown, residing at 420 East Forty-second Street, New York, N. Y., is president of corporate respondent

Coradio, Inc., and acting in such capacity formulates, directs, and controls the practices and policies of corporate respondent, including the advertising and other representations used and business practices employed by corporate respondent, as hereinafter related. Respondent Louis Brown owns the entire capital stock of corporate respondent Coradio, Inc.

Individual respondent Sydney Gold is, and acts as, general agent and company representative for corporate respondent Coradio, Inc., with full authority to contract and to act for and in the name of said corporate respondent.

Individual respondent Lew N. Lewis sold his interest in respondent Coradio, Inc., prior to the issuance of the complaint herein and has had no connection with it or its activities since such sale. The trial examiner dismissed the complaint as to said individual respondent without prejudice to the right of the Commission to institute proceedings should future facts warrant. As hereinafter used, the term "respondents" does not include individual respondent Lew N. Lewis.

PAR. 2. Respondents are now and for more than 2 years last past have been engaged in the sale and distribution of coin-operated radios designated by them as "Coradio," for use in hotels, tourist cabins, motor courts, hospitals, boarding houses, and similar places.

Respondents cause their said coin-operated radios, when sold by them, to be transported from their aforesaid place of business in the State of New York to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their said coin-operated radios in commerce between and among the various States of the United States.

PAR. 3. Respondents' general plan of operation in effecting the sale of their said coin-operated radios was and is as follows:

In magazines or other advertising media of general circulation, respondents advertise to attract and contact persons who may wish to purchase their said coin-operated radios with a view to reselling them or operating them in hotels, tourist cabins, motor courts, hospitals, boarding houses, and similar places. The purchaser, designated as "Distributor," contracts to pay for the radio units or sets received by him from respondents, designated as "Suppliers," on presentation of sight draft with railroad or other bill of lading attached or cash on delivery by express or motor transport to be selected by the "Supplier." Each so-called "Distributor" is allotted a particular territory by respondents which is described in detail, and the "Distributor" must confine his sales activities to the precise territory allotted to him. The so-called "Distributor" when selected and appointed has the right to resell the instrument purchased by him at a price fixed and defined by respondents, or he may operate the radios himself, as above described.

Failure on the part of the sub-agent or "Distributor" to purchase minimum quantities of radios as fixed by respondents, works as forfeiture of the sales agency and of its "exclusive" franchise territory.

Respondent Sydney Gold acts as general agent for respondents with full authority to grant exclusive territorial franchises to distributors, usually on a minimum sales basis, and with full authority to make sale of and to distribute in commerce respondents' said coin-operated radios. Prospective purchasers, upon making inquiry of corporate respondent, are referred by it to respondent Sydney Gold. The latter, acting for respondents, makes contact with said prospective purchasers or distributors who wish to purchase respondents' radios and to obtain territorial franchises in which to resell or operate them. Respondent Sydney Gold in effecting the sale of radios and acting with full authority from Coradio, Inc., distributes advertising material among purchasers and prospective purchasers of said radios, allots territorial franchises, makes written contracts covering the sale of radios, and the allotment of said territorial franchises, and, in addition, makes various verbal representations on behalf of his principal, Coradio, Inc., in effecting the sale of the said coin-operated radios.

PAR. 4. In the course and conduct of their said business and for the purpose of inducing the purchase of their said coin-operated radios, respondents have circulated among their prospective purchasers, including prospective sales agents, throughout the United States, by advertisements inserted in trade journals, by advertising media of general circulation, many statements and representations concerning their said coin-operated radios. Among and typical of such statements and representations, disseminated as aforesaid, but not all-inclusive, are the following:

THIS IS THE BUSINESS YOU DREAM ABOUT

Quick Steady Profits

CORADIO

The coin operated Radio

It's the new fast-growing, depression-proof business.

PICTURE
OF
RADIO

placed in hotels, tourist courts, clubs, hospitals, etc., on a commission basis—play 1 or 2 hours for 25¢ and produce immediate profits.

The best coin operated
radio is CORADIO

ACT NOW

Start your own lifetime
business, full or part time

Send for Free Catalog and

WRITE TODAY DEPT P. M.

C O R A D I O

COIN OPERATED RADIO

108 W. 31st St., N. Y., 1, N. Y.

*   *   *   *   *   *   *

Coradios can be fully insured against fire, theft or damage at a surprising low rate in any section of the country. * * * This insurance is available through your local broker. The advantage of your local broker is obvious. In case of theft or damage you can file immediate claims and receive prompt attention.

*   *   *   *   *   *   *

For those who prefer it, Coradios can be fully insured against fire, theft or damage at a surprisingly low rate in most sections of the country. This insurance is available through local brokers.

*   *   *   *   *   *   *

Manufactured by CORADIO
108 West 31st Street, New York 1, N. Y.

*   *   *   *   *   *   *

BUILT IN CORADIO-NATIONAL SLUG REJECTOR UNIT

*   *   *   *   *   *   *

COIN TROUBLE IS OUT WITH THE NEW CORADIO. Coradio will not pass bad coins—neither will it permit the coin received to be jammed. * * * While we were building this revolutionary new unit into the set we decided to incorporate other improvements and new feautres to make the new Cardio 100% better.

*   *   *   *   *   *   *

GUARANTEE—Entire set is unconditionally guaranteed for one year. Tubes guaranteed for 90 days.

*   *   *   *   *   *   *

Respondents further, through their sales agents, have represented orally and otherwise to prospective salesmen, distributors, or agents in various States of the United States:

That they will be allotted exclusive sales territories.

That they will be furnished with an ample supply of advertising folders, order blanks, and lease blanks, and with general sales assistance.

That they will be furnished with a list of prospective buyers who are anxious for someone to call on them and take their orders.

PAR. 5. Through the use of the statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, respondents represent and have represented, directly and by implication:

That anyone investing money in their said coin-operated radio can fully protect such property against loss by fire, theft, or damage, by being able to obtain readily in most, if not all, sections of the country, insurance to indemnify himself fully against losses due to fire, theft, or other damage, at a low rate.

That each distributor or sales agent purchasing the requisite number of coin-operated radios from the respondents will be protected from competition in selling or operating said radios by having exclusive sales territory allotted to him.

That the sales agent or distributor will receive the assistance and cooperation of respondents in selling or operating the radios purchased by him by being furnished by respondents with all customary and needful advertising material, such as sales leads, lease blanks, advertising folders, and order blanks, and similar material to be used to induce and effect the sale of respondents' said coin-operated radios.

That with a view to further cooperating with agents in selling or operating respondents' said radios, respondents will furnish said agents with lists of proposed buyers ready and willing to buy.

That the respondents own, operate, and control a plant or factory where they manufacture the said Coradio coin-operated radios and component parts thereof, including the "Coradio National Slug-Rejector Unit."

That respondents unconditionally guarantee the entire radio set, including all parts thereof, for 1 year, and guarantee tubes thereof unconditionally for 90 days.

PAR. 6. The foregoing claims, statements, and representations are grossly exaggerated, false, and misleading.

In truth and in fact it is not easy or even possible to obtain fire, theft, or damage insurance on coin-operated radios in most, if not all, sections of the country at low rates, or otherwise. There is no standardization of rates on this type of policy and even when such character of business is written, a high rate of premium is invariably charged.

Distributors and sales agents are not allotted exclusive sales territory as promised and represented by respondents, but, on the contrary, respondents have made it a practice to allot the same territory or parts thereof to more than one agent at the same time, such overlapping territory system resulting in confusion and loss of business.

Distributors and sales agents in connection with the sales efforts to be made by them on behalf of respondents are not, in many instances, furnished with an ample supply of advertising folders, order blanks, and lease blanks, as promised by respondents and respondents have not furnished them with a list or lists of prospective buyers.

Respondents do not own, operate or control any plant or factory where they manufacture the said coin-operated radios or any component parts thereof. On the contrary, the said coin-operated radios sold by respondents are bought by respondents, fully assembled, from the Hotel Radio Corp., a separate and distinct corporate entity, doing business in quarters adjacent to those of respondents. The slug-rejector mechanism used in respondents' coin-operated radios and advertised by respondents as "Coradio-National Slug Rejector Unit" is patented and manufactured by National Rejector, Inc., St. Louis, Mo.

There is a preference on the part of dealers and of a substantial portion of the purchasing public for dealing directly with and buying directly from manufacturers, by virtue of the belief that through such purchases they obtain advantages in price and in other respects.

Respondents do not unconditionally guarantee their radio sets for 1 year. In a printed statement attached to the radios themselves respondents limit their guarantee to repairing or replacing defective parts transmitted to them, charges prepaid and returned likewise at the expense of the purchaser. Respondents in said separate printed material further undertake to limit and qualify the terms of their guarantee by stipulating that their guarantee does not apply to any instrument which has been altered or repaired in a way that "in the opinion of Coradio, Inc.," affects the reliability of or detracts from the performance of the instrument, and that their said guarantee does not apply to any instrument which, in the further opinion of respondents, has been subjected to misuse through negligence, or otherwise. These terms are not made known to the purchasers until the sets are bought and paid for.

PAR. 7. The use by respondents of the foregoing false and misleading advertisements and representations, employed and disseminated as aforesaid, has a tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such advertisements and representations are true, and by reason of such belief, so engendered, a substantial number of the public is thereby induced to purchase substantial quantities of respondents' said coin-operated radios.

CONCLUSION

The aforesaid acts and practices of respondents as herein found are all to the injury and prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answers of the respondents, except individual respondent Lew N. Lewis, the complaint having been dismissed as to him without prejudice, in which answers the respondents admitted all the material allegations of fact set forth in said complaint and waived the taking of testimony and other procedure; and the Commission having made its findings as to the facts and its conclusion that respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondents, Coradio, Inc., a corporation, and its officers, Louis Brown, individually and as an officer of respondent corporation, and Sydney Gold, individually and as general agent for respondent corporation, and respondents' agents, represetatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of coin-operated radios or any component part thereof in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(1) That insurance on coin-operated radios against loss by fire, theft, or damage is readily obtainable generally or that the rates on such insurance are low;

(2) That exclusive sales territories are allotted to distributors, sales agents, or others purchasing their radios, when such is not a fact;

(3) That they will assist distributors, sales agents, or others in selling or operating the radios purchased by furnishing advertising

material, lists of prospective buyers, lease and order blanks, and similar material, or otherwise, unless such assistance will in fact be furnished;

(4) Through the use of the words "manufactured by," or any other word or words of similar import or meaning, that they are the manufacturers of said coin-operated radios, or any component part thereof, unless and until such products are actually manufactured in a plant or factory owned and operated, or directly and absolutely controlled, by them;

(5) That their radio sets, or the tubes thereof, are "guaranteed," unless and until the nature and extent of the "garantee" and manner in which the guarantor will perform are clearly and conspicuously disclosed.

It is further ordered, That the respondents shall, within 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

REID H. RAY FILM INDUSTRIES (DESIGNATED IN THE COMPLAINT AS RAY BELL FILMS, INC.)

COMPLAINT, FINDINGS, ORDER, AND SUPPORTING AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5495. Complaint, May 26, 1947—Decision, Oct. 17, 1950

Maintenance of free and open competition is in the public interest, and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly; and the fact that certain exclusive dealing agreements, challenged as restrictive and in unreasonable restraint of trade, might be beneficial to respondent as instrumental in building up its business, or might be preferred by motion picture theaters concerned, is not controlling where the effects of such agreements have been and are to unduly hinder, lessen and injure competition.

Where a corporation which was engaged in the production, and in the competitive interstate sale, leasing and distribution to or for advertisers, and to other distributors of commercial advertising films, including so-called library films of playlet type with name trailers identifying the advertisers; doing a business which embraced local advertising, manufacturer-dealer or cooperative advertising, and national advertising; and, in connection therewith, entering into agreements with such theaters as accepted film advertising, for the limited space available for such advertisements, and into contracts, usually for a year, but no longer, with advertisers for the display of commercial film advertising their businesses or commodities in the space thus made available; and constituting one of the four largest producers and distributors of advertising films in the United States, which together entered into such exclusive arrangements as below described with about three-fourths of the theaters in the United States displaying advertising films for compensation—

Entered into agreements with motion picture theaters or exhibitors for a maximum term of 2 years through contracts, a substantial number of which contained the provision that the exhibitor display no other paid local advertising films during the term of the agreement, and had such exclusive contracts, as of August 1, 1947, with 458 theaters out of the 1,450 with which it had screening agreements, with 37 percent thereof for 2 years, and the remainder for less;

With the result that it was thereby materially assisted in holding for its own use the screens of the theaters with which such contracts were made; competitors were prevented from showing their films in such theaters, thereby eliminating their outlets in a limited field and, in some instances, forcing them out of business; and the injurious effect of such agreements upon competition, together with the tendency to monopoly inherent therein, was materially increased by the cumulative effects of similar agreements entered into by the three aforesaid other similarly engaged concerns:

Held, That the use of such contracts as extended for terms greater than 1 year, constituted an unreasonable restraint and restriction of competition; that prohibition of such use was required in the public interest; and that said acts and practices, under the circumstances set forth, constituted unfair methods of competition in commerce.

As respects respondent's contention in the aforesaid proceeding that it did in fact make screen space available to competitors in theaters in which it had exclusive agreements, if such films were of standard length, of the quality distributed by the respondent, satisfactory to the theater, and screening space was available: it appeared that respondent required the payment to it of the same rate it charged its advertising customers, less 15 percent commission, out of which the competitor had to pay the costs of the film, overhead, and sales expense, and thereby so limited the latter's profit as to make such arrangement unprofitable in local advertising.

With regard to respondent's contention that because of the beneficial value of the exclusive agreements to the distributor and theater, to wit, that such agreements are instrumental in building up the film advertising business; that they are of assistance in negotiating more satisfactory contracts with both theaters and advertisers; that in many instances theaters prefer them because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers; and that the advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract; the fact that the agreements in question might be beneficial to respondent or to theaters as above suggested, is not controlling where the effects of such agreements have been and are, as in the instant case, to unduly lessen and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, namely, that the capacity, tendency and effect thereof were to unduly restrain and injure competition in the interstate conduct of the business concerned, and to unduly hinder and prevent competitors from carrying on such business, as therein more particularly set out:

The Commission was of the opinion that the reasonableness of the restraints imposed was dependent upon the relationship between the terms of respondent's screening agreements with theaters and the terms of its contracts with the advertisers, and that an exclusive screening for a period of 1 year was not an undue restraint upon competition; it appearing in said connection that an advertising contract for 1 year has become standard practice in the trade, that it is the practice to first contact the theater in order that respondent's representatives may determine if space is available for such advertising, make arrangements with respect thereto, and thus be able to show prospective advertisers where space is available, and that it is not unreasonable for respondent—since film advertising space in theaters is limited to four, five, or six advertisements—to contract for all space available, particularly in territories canvassed by its salesmen at regular and frequent intervals.

With regard to the fact that under the practice herein concerned, the beginning of the performance of a contract with the advertiser will not coincide with the beginning of the screening agreement with the theater, so that very often distributors have unexpired contracts with advertisers when their contract with the theater expires, and respondent's contention that due to delays in starting advertising contracts after screening agreements are executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers:

The Commission rejected said contention, since by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements, even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and the theater.

In said proceeding, in which it appeared that the total number of long-term, exclusive agreements of the kind here involved, made by the respondent and the other three concerns hereinbefore referred to, aggregated about three-fourths of the theaters in the United States which screen film advertising for compensation, and the Commission agreed with the conclusion of the trial examiner that the reasonableness of the restraints imposed under respondent's exclusive screening agreements was dependent upon the relationship between the term of the screening agreement with the theater and the terms of the contracts with the advertisers, that respondent's long-term exclusive screening agreements constituted an unreasonable restraint and restriction of competition, but that such agreements as did not extend for more than a year did not unduly or unreasonably restrain trade:

The action of the Commission in such cases manifestly did not impinge on the right of respondent to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition, and the Commission's corrective action was directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods of advertising films of competitors from the screens of theaters.

In said proceeding, in which the Commission was of the view that under the circumstances of the case, including the nature of the business, which rendered it desirable that respondents have an outlet through which they could screen advertising film in order that prospective advertisers could be assured that screening space was available for such film advertising as they might like to purchase; the general practice, on the part of respondent's representatives, of contacting theaters in the first instance to determine if space was available for screen advertising, and make such arrangements as conditions warranted with respect thereto, and of thereafter, in normal course, proceeding with efforts to obtain the commitments of merchants with respect to display of respondents' advertising films; and the fact that it was the standard practice to make such contracts with advertisers for periods of 1 year:

The Commission, in concluding that such exclusive agreements as were limited to 1 year or less did not unreasonably restrain trade, was not unmindful of the decision in *United States* v. *American Can Co.*, Nov. 19, 1949, 87 F. Supp. 18, in which it was demonstrated that the period specified in a restrictive agreement might be important in determining the lawfulness of some types of exclusive provisions, in that the court, while condemning the longer terms agreements there involved as instruments by which competition was suppressed and eliminated and monopoly promoted, concluded, nevertheless, that agreements extending for 1 year should, under the circumstances of the case, be absolved of adverse competitive effects.

Before *Mr. Frank Hier* and *Mr. Earl J. Kolb*, trial examiners.

Mr. Floyd O. Collins and *Mr. Lewis F. Depro* for the Commission.

Oppenheimer, Hodgson, Brown, Baer & Wolff, of St. Paul, Minn., for respondent.

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 Ray-Bell Films, Inc., a corporation, hereinafter referred to as respondent, has 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 issued its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Minnesota, with its office and principal place of business located at 2267 Ford Parkway, St. Paul, Minn.

PAR. 2. Said respondent for more than 10 years last past has been, and is now, engaged in the business of producing, selling leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of advertising films. Said respondent furnishes display services to advertisers through the exhibiting of such films upon the screens of various motion picture theaters throughout the United States, with whom it has screening agreements.

Said respondent is one of the largest producers and distributors of commercial or advertising films in the United States and causes said films when produced, sold, leased or rented, to be transported from its place of business to motion picture theaters located throughout the several States of the United States, where said films are displayed on the screens of such theaters for a specified period of time, usually 1 week. Upon the conclusion of the display period such films are returned by the theater or exhibitor to said respondent.

There has been, and is now, a constant recurring course and flow of said commercial or advertising films in interstate commerce throughout the several States of the United States.

PAR. 3. Said respondent has been from time to time, and is now, in active and substantial competition with other film distributors in the sale, rental and distribution in said commerce of commercial or advertising films.

PAR. 4. In or about the year 1937, and from time to time thereafter, said respondent has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the theater or theaters owned or controlled by said exhibitors, and said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are referred to as "Theater Screening Agreements," in which there is included the following provision:

> The exhibitor agrees no other paid advertising slides or films will be displayed during the term of this agreement, except that contracts with advertisers made previous to the date of this agreement shall be continued only to the earliest expiration date of said contract, or contracts.

The foregoing provision has been enforced by respondent and adhered to by a substantial number of exhibitors located throughout the United States.

PAR. 5. The capacity, tendency and effect of the aforesaid agreements and the acts of said respondent in the performance thereof are and have been, to unduly restrain, lessen, suppress, and injure competition in the interstate sale, lease, rental and distribution of commercial or advertising films and to unduly hinder and prevent competing producers, sellers and distributors of commercial or advertising films from selling, leasing, renting, and distributing such films from the various States of the United States, where said producers, sellers, and distributors are located, to and into various other States where the exhibitors of said films are located, and to monopolize in said respondent the sale, lease, rental and distribution of commercial or advertising films in commerce as herein stated.

As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through said other film distributors, have been compelled, as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

PAR. 6. The acts and practices of respondent, as herein alleged, are all to the prejudice of competitors of respondent and of the public; have a dangerous tendency to hinder and prevent and have actually hindered and prevented competition in the sale, leasing, rental and distribution of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in certain areas of the United States in the sale, leasing, rental and distribution of such films, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 26, 1947, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the respondent filed its answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument, having been waived); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Reid H. Ray Film Industries, Inc., is a corporation organized under the laws of the State of Minnesota with its principal office and place of business located at 226 Ford Parkway, St. Paul, Minn. At the time the complaint issued in this proceeding, respondent was known as Ray-Bell Films, Inc., which name was changed to Reid H. Ray Film Industries, Inc., on July 1, 1947.

PAR. 2. Since 1936 the respondent has been engaged in the business of producing, selling, leasing and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theaters, motion picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various theater owners, both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theaters. These advertising films are returned to the respondent by such exhibitors at the end of the screening period.

In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theaters, respondent ships such advertising films from its place of business in the State of Minnesota to the various exhibitors located in other States of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Minnesota, either directly to such distributor or to the theaters designated by them, located in States other than the State of Minnesota. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Minnesota by such exhibitor or distributor.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said commercial or advertising films in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns, in the sale, leasing and distribution of commercial or advertising films in commerce among and between the various States of the United States.

PAR. 4. The motion picture advertising film business conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertising, and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length, with a 20-foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manfacturer. The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theater charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturer has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising where the manufacturer sells a large number of dealers on a nonexclusive basis.

PAR. 5. In the conduct of its business, the respondent enters into written screening agreements with exhibitors for the maximum period of 2 years. These agreements provide that the exhibitors shall properly display the advertising films, supplied by the respondent, on the screens of their theaters as designated, at each and every performance and at a time when the theater is dark and the audience is seated but not at the beginning or close of any performance or during intermissions. The respondent also agrees that it will solicit contracts for film advertising to be displayed on the exhibitor's screen and to pay the exhibitor each month for screening as designated in the contract.

PAR. 6. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with advertisers, usually for a period of 1 year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theaters weekly or every other week for a period of usually 1 year. The shortest term contract which the respondent will accept from an advertiser is 13 weeks, but this is very rare, and contracts for 1 year have become the standard practice. The films are changed so that there is a different playlet for each week that a film is shown.

PAR. 7. The usual practice, particularly in local advertising, is to make an agreement with the theater first so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theater. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theater expires.

It is the customary procedure in such cases for the theater to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theater and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

PAR. 8. A substantial number of the contracts executed by the respondent with exhibitors contain the provision that the exhibitor agrees that no other paid local advertising films will be displayed during the term of the agreement. These exclusive agreements run for a maximum period of 2 years. The percentage of exclusive agreements which are for the maximum period is 37 percent, the remainder of 63 percent being for less than the maximum term.

PAR. 9. As of August 1, 1947, there were approximately 20,306 theaters in the United States and of these about 12,676 exhibited film advertising. The respondent as of that date had screening agreements with 1,450 theaters of which 458 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. In six of the States where the bulk of the theaters having screening agreements with respondent are located, respondent, as of such date, held agreements containing the exclusive clause with approximately 20 percent of the total number of theaters exhibiting film advertising in such States.

Among others engaged in the sale and distribution of advertising films are Alexander Film Co., United Film Service, Inc., and Motion Picture Advertising Service Co., Inc., which companies are respondents in dockets 5496, 5497, and 5498, respectively. As of August 1947 Alexander Film Co. had agreements with exhibitors operating 8,498 theaters and of this number the agreements relating to 4,913 theaters contained the provision that no advertising or commercial films other than those furnished by Alexander Film Co. would be displayed for remuneration during the terms of such agreements. Many of such agreements were for a term of 3 years. United Film Service, Inc., had screening agreements containing an exclusive feature on its behalf, some for a maximum term of 5 years, with 1,562 theaters, and Motion Picture Advertising Service Co., Inc., had similar contracts with 2,493 theaters. The total number of exclusive arrangements held by the aforesaid three companies and the respondent in this proceeding approximated three-fourths of the total number of theaters in the United States which displayed advertising films for compensation.

PAR. 10. The available space for screening advertisements is limited and only approximately 60 percent of the theaters accept film advertising. In addition, theater patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theaters, the number varying from three to six advertisements or an overall of 2 to 4 minutes or 2 to 4 percent of the time consumed by each show.

PAR. 11. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

The injurious effects of the respondent's aforesaid agreements upon the competition of others engaged in the interstate sale, leasing, rental and distribution of advertising films, together with the tendency to monopoly which is inherent therein, have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by Alexander Film Co., United Film Service, Inc., and Motion Picture Advertising Service Co., Inc.

PAR. 12. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) That respondent does in fact make screen space available to competitors in theaters with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theater and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theater, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead and sales expense, which so limits his profit as to make such arrangements unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theaters and advertisers. Theaters in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract.

CONCLUSION

The Commission has given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long-term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but in essence denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distributor, exhibitor and advertiser, there is no unlawful restraint of competition and no public interest involved in this proceeding.

The maintenance of free and open competition is in the public interest and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly. The fact that the agreements in question may be beneficial or instrumental to respondent in building up its business, or that they may be preferred by theaters, is not controlling where the effects of such agreements have been and are, as in the circumstances here, to unduly hinder, lessen and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, the Commission is of the opinion that the reasonableness of the restraints imposed thereunder is dependent upon the relationship between the term of respondent's screening agreements with theaters and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of 1 year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respondent's representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five, or six advertisements, it is not unreasonable for respondent to contract for all space available for local advertising in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period of 1 year is not an undue restraint upon competition.

The Commission, however, rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theater.

It is concluded in the circumstances here that the use by respondent of its exclusive screening agreements which extend for terms greater than 1 year constitutes an unreasonable restraint and restriction of competition and that prohibition of respondent's use thereof is required in the public interest.

The aforesaid acts and practices of the respondent as herein found constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Reid H. Ray Film Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of 1 year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It is further ordered, That the respondent shall, within 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.

Commissioner Mason dissenting.

OPINION OF THE COMMISSION

MEAD, *Commissioner:*

The Commission issued complaints in the four different cases described in the heading of this opinion, charging that the respective respondents were engaged in unfair practices in violation of section

5 of the Federal Trade Commission Act. These cases involve similar questions of fact and law. The statements and conclusions in this opinion refer to the cases collectively and individually.

The respondents are the largest producers and distributors of advertising films in the United States. Respondents have entered into contracts with owners of various theaters located throughout the United States and have obtained the exclusive use of such theater screens for long periods of time. These periods vary in length from 1 year or less up to 5 years, during which time the exhibitors agree to display no advertising films for compensation other than those furnished by the respondent with whom the contract is made. Respondents' films may be prepared pursuant to agreements with merchants who are prospective advertisers, but there is a substantial volume of ready made or so-called library films of the playette type distributed by respondents. Such films are personalized by the addition of a name trailer identifying the advertiser with the line of business advertised by a particular playette. The agreements between the respondents and the merchants who are recipients of the advertising expire within a period of 1 year or less.

The principal question involved in these cases is whether or not the restrictive covenants contained in the various screening agreements between the respondent advertising film companies as distributors and certain theater operators or exhibitors constitute an unreasonable restraint upon commerce and are therefore in violation of section 5 of the Federal Trade Commission Act.

It appears that the use by the respondents of their exclusive screening agreements has been of material assistance in permitting each of the respondents to hold for his use the screens of the theaters with which such contracts have been made. Competing distributors have been deprived from showing their advertising film in such theaters thereby limiting the outlets for competitive films in a more or less limited field. In some instances, competitors have been forced to go out of the screen advertising business because of inability to obtain outlets for their film advertising. The injurious effects of the agreements of each of the respondents have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by each of the other respondents. Although competitors of respondents are sometimes permitted to show their films on screens under exclusive contracts to one of the respondents, the cost of the film, overhead and sales expense so limits the profit of such competitor as to make this arrangement unprofitable, especially in local advertising.

The respondents have waived the filing of exceptions to the recommended decision of the trial examiner and have waived also the filing of briefs and the presentation of oral argument before the Commission. The trial examiner in effect has found that respondents' long-term exclusive screening arrangements constitute an unreasonable restraint and restriction of competition. He has further concluded that such exclusive screening arrangements as extend for 1 year or less do not unduly or unreasonably restrain trade. In this connection, the trial examiner has given weight to the fact that contracts with advertisers normally run for a period of 1 year, although in some instances they are for a lesser term and he concludes that the reasonableness of the restraints imposed under respondents' exclusive screening arrangements are dependent upon the relationship between the term of such screening agreement with the theater and the terms of the contracts with the advertisers.

It is apparent that the nature of the business of these respondents renders it desirable that they have an outlet through which they can screen their advertising film in order that prospective advertisers can be assured that screening space is available for such film advertising as they may like to purchase. The general practice of respondents' representative is to contact theaters in the first instance to determine if space is available for screen advertising and to make such arrangements as conditions warrant with respect to such space. It is only then in normal course that respondents proceed with their efforts to obtain the commitments of merchants with respect to certain of respondents' advertising films.

In the opinion of the Commission, the conclusions of the trial examiner that such exclusive screening contracts are unduly restrictive of competition and hence unlawful when they extend for periods in excess of 1 year are supported by the greater weight of the evidence. The Commission moreover is of the view that in the circumstances here, such exclusive agreements as are limited to 1 year or less do not appear to unreasonably restrain trade.

That the period specified in a restrictive agreement may be important in determining the lawfulness of some types of exclusive provisions is demonstrated by the decision of the court in *United States* v. *American Can Company*, 87 F. Supp. 18 (November 19, 1949). Under consideration in that case were contracts requiring customers to purchase their total requirements of specified merchandise from a particular source for periods up to 5 years. Although the court concluded that the longer term agreements there involved constituted instruments by which competition was suppressed and eliminated and monopoly promoted, in applying the remedy therefor it was further concluded that agreements extending for 1 year should be absolved of adverse competitive effects in the circumstances of that case. The court in such connection stated:

> Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of 1 year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present in the 5-year requirements contracts, would be removed. Under a contract limited to 1 year, the user-consumer would be guaranteed an assured supply and protected by a definite obligation on the part of American to meet the totality of needs of the canner, while he, in turn, would have a fixed obligation to purchase his seasonal needs from American, thus making for mutuality of contract and obligation.
>
> To strike down the requirements contracts and to declare them totally void as violative of the Sherman Act, without at the same time affording to the user-consumer a supply over a limited period of time, would be destructive, illogical, unsound and not inconsonance with the acute and particular problems confronting the canning industry.

It is noted, however, that at the time this opinion is being written, the judgment of the trial court in that case has not yet become final since hearings pertaining to the type of relief to be granted are in progress.[1]

As of August 1947, the total number of exclusive agreements held by respondents in the aggregate approximated three-fourths of the total number of theaters in the United States which screen film advertising for compensation. Although the Commission has determined in these cases that the effects of the exclusive contracts for a period in excess of 1 year have been to unduly restrain competition, the action of the Commission in these cases manifestly does not impinge on the rights of respondents to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition. The corrective action of the Commission is directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films

[1] Judge Harris entered final decree in said matter at San Francisco on June 22, 1950, and thereafter, on November 24, 1950, entered "Order and Instructions," in which the court denied defendant's application for modification of paragraph 8 of section II of the judgment so as to permit defendant American Can, subject to certain conditions, to make certain payments for office space, to customers, as well as for storage or manufacturing, and to make payments for leases, easements and licenses obtained from railroads, States or cities; and, in response to the Government's request, entered the court's interpretation and construction with respect to certain matters having to do with section III of the decree relating to "Machines and Equipment," deferring the court's finding as to the "Compensatory Rentals," which defendant was to establish for each type and model of leased container closing machine, pending a factual report on the practical and accounting aspects of the question from the special master.

of competitiors of respondents from the screens of theaters. It is the view of the majority of the Commission that the orders to cease and desist which are issuing herewith are appropriate in the circumstances here.

Dissenting Opinion of Commissioner Lowell B. Mason

To understand the subject of this litigation one must know what trailer ads are because we are here concerned with the leasing of screen time in theaters for the exhibition of respondent's trailer ads.

When you look at a picture extolling the virtues of a specific commercial product, you are looking at a trailer ad.

People mostly go to the movies to forget their cares. In the words of the industry, "This is the privilege of motion pictures, that they bring great joy and relaxation to humankind."

Trailer ads do not bring audiences much of either. Generally, people believe any form of advertising in a place of amusement is a bore and ought to be done away with.

On the other hand, the small theater owner benefits from trailer ads. He is paid to show them.

Features, news reels and shorts cost him money. However, trailer ads actually reverse the flow of film money back into his own till. He pays for a film of somebody's love life, but he gets paid for showing the cold facts about somebody's breakfast food or shaving mugs.

The order in this case prohibits the trailer ad maker from leasing screen time from a theater owner for a greater period than 1 year. If we could do this, it might be a great favor to audiences. Unfortunately, the privilege of boring the public for pay is a theater owner's inalienable right, provided he doesn't carry the thing too far.

People know trailer ads help eke out an existence for the small exhibitor. It's sort of a subsidy to keep the marginal operator alive. This is why audiences in small towns and communities sit quietly every night whilst the community theater parades a variety of commercial plugs across the screen.

I do not believe we should prohibit a theater owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theater owner) may want to sell, namely a lease for more than 1 year.

It must be borne in mind that the gravamen of the charge is not aimed at the exclusiveness of the contract for as the Findings of Facts concede:

Since film advertising space in theaters is limited to four, five or six advertisements, it is not unreasonable for respondent to contract for all space available for local advertising in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

The prohibition runs to the length of the lease rather than its terms. The order says "yes" to 1 year but "no" to anything longer.

As I pointed out at the beginning, trailer ads are a source of income to small theaters. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For them, it may be that portion of income which represents the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a 1-year lease was legal but that the same lease for a longer period was an unfair act or practice in commerce.

Leaving for the moment the unsalutory but indirect effect of this order on small exhibitors let us consider the direct problems of respondent in this case.

I believe we should approach this not as a legal abstraction but realistically.

When a man sells something he does not have on his shelf he is a speculator. When the respondent (as here) is prohibited from assuring himself screen space for more than 1 year the time lag between the act of purchasing that space for 1 year and reselling it to advertisers for 1 year will always place him in the speculator's seat.

We are reassured the order won't hurt the respondent because, in the words of the trial examiner:

The theater completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theatre.

I like to think of all businessmen as generous but an order against a respondent which relies on the implied generosity of others to go easy on the hapless defendant stretches governmental optimism too far.

Perhaps the case is of scant moment. Certainly a decision one way or another will not greatly affect our economy, but I dissent rather than let the matter go by because it illustrates the inequality and error that creep in to the Procrustean fitting of the law enunciated in such ponderous cases as *U. S.* v. *American Can* (relied upon by the majority) when seeking to regulate the many and infinitesimal problems as are illustrated by Ray-Bell's alleged monopolistic practices here.

On the one hand, we have litigation against a can company doing a fifth of a billion dollars' worth of business a year (the biggest in the world), and controlling over 46 percent of the "competition" (if such it be) in the sale of cans.

On the other hand, we have a tiny enterprise whose share of the limited market for film trailer ads is represented by the figure of 458 leases out of a probable 12,676 and a possible 20,306 or less than 4 percent of the competition.[1]

To apply the reasoning of the court in the *American Can* case here is like killing butterflies with a pile driver.

Nor can I put much stock in the plea that this order is needed to nip monopoly in the bud. If we nipped every bud with 4 percent of a market the fields of American industry would look like Egypt's after the locusts. Ray-Bell has a long way to grow before its competitors need fear it will grow into a monopoly.

When the Federal Trade Commission gets into determining how long an ad taker's lease shall run, we open up an astonishing new field of activity for us and one that we might well wish ourselves out of before we hear the end of it.

I am against it.

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[1] The majority opinion written to apply to the four companies sued states:

"The total number of exclusive agreements held by *respondents in the aggregate* approximated 75 percent of total number."

To carry this reasoning a step further, if the F. T. C. had sued all the film and companies we could justify antimonopoly orders against a tyro with 2 dollars' worth of annual business on the grounds that *he with all the others approximated 100 percent of the total industry.*

IN THE MATTER OF

ALEXANDER FILM COMPANY

COMPLAINT, FINDINGS, ORDER, AND SUPPORTING AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5496. Complaint, May 26, 1947—Decision, Oct. 17, 1950

Maintenance of free and open competition is in the public interest, and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly; and the fact that certain exclusive dealing agreements, challenged as restrictive and in unreasonable restraint of trade, might be beneficial to respondent as instrumental in building up its business, or might be preferred by motion picture theaters concerned, is not controlling where the effects of such agreements have been and are to unduly hinder, lessen, and injure competition.

Where a corporation which was engaged in the production, and in the competitive interstate sale, leasing, and distribution to or for advertisers, and to other distributors, of commercial or advertising films, including so-called library films of the playlet type, with name trailers identifying the advertisers; doing a business which embraced local advertising, manufacturer-dealer or cooperative advertising, and national advertising; and in connection therewith, entering into agreements with such theaters as accepted film advertising, for the limited space available for such advertisements, and into contracts, usually for a year, but no longer, with advertisers for the display of commercial film advertising their businesses or commodities in the space thus made available; and constituting one of the four largest producers and distributors of advertising films in the United States, which together entered into such exclusive arrangements as below described with about three-fourths of the theaters in the United States displaying advertising films for compensation—

Entered into agreements with motion picture theaters or exhibitors for terms of 3 years, 2 years, or 1 year, through contracts, many of which provided that "the exhibitor agrees not to screen or display any advertising or commercial films other than those furnished by the distributors, excepting films or slides exhibited for charitable organizations or for present and future attractions", and, as of August 1, 1947, had such exclusive contracts with 4,913 of the 8,495 theaters with which it had screening agreements;

With the result that it was thereby materially assisted in holding for its own use the screens of the theaters with which such contracts were made; competitors were prevented from showing their films in such theaters, thereby eliminating their outlets in a limited field, and, in some instances, forcing them out of business; and the injurious effect of such agreements upon competition, together with the tendency to monopoly inherent therein, was materially increased by the cumulative effects of similar agreements entered into by the three aforesaid other similarly engaged concerns:

Held, That the use of such contracts, as extended for terms greater than 1 year, constituted an unreasonable restraint and restriction of competition; that prohibition of such use was required in the public interest; and that said acts and practices, under the circumstances set forth, constituted unfair methods of competition in commerce.

As respects respondent's contention in the aforesaid proceeding that it did in fact make screen space available to competitors in theaters in which it had exclusive agreements, if such films were of standard length, of the quality distributed by the respondent, satisfactory to the theater, and screening space was available: it appeared that respondent required the payment to it of the same rate it charged its advertising customers, less 15 percent commission, out of which the competitor had to pay the costs of the film, overhead, and sales expense, and thereby so limited the latter's profit as to make such arrangement unprofitable in local advertising.

With regard to respondent's contention that because of the beneficial value of the exclusive agreements to the distributor and theater, to-wit, that such agreements are instrumental in building up the film advertising business; that they are of assistance in negotiating more satisfactory contracts with both theaters and advertisers; that in many instances theaters prefer them because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers; and that the advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract: the fact that the agreements in question might be beneficial to respondent or to theaters as above suggested, is not controlling where the effects of such agreements have been and are, as in the instant case, to unduly lessen and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, namely, that the capacity, tendency, and effect thereof were to unduly restrain and injure competition in the interstate conduct of the business concerned, and to unduly hinder and prevent competitors from carrying on such business, as therein more particularly set out:

The Commission was of the opinion that the reasonableness of the restraints imposed was dependent upon the relationship between the terms of respondent's screening agreements with theaters and the terms of its contracts with the advertisers, and that an exclusive screening agreement for a period of one year was not an undue restraint upon competition; it appearing in said connection that an advertising contract for 1 year has become standard practice in the trade, that it is the practice to first contact the theater in order that respondent's representatives may determine if space is available for such adverising, make arrangements with respect thereto, and thus be able to show prospective advertisers where space is available, and that it is not unreasonable for respondent—since film advertising space in theaters is limited to four, five, or six advertisements—to contract for all space available, particularly in territories canvassed by its salesmen at regular and frequent intervals.

With regard to the fact that under the practice herein concerned, the beginning of the performance of a contract with the advertiser will not coincide with the beginning of the screening agreement with the theater, so that very often distributors have unexpired contracts with advertisers when their contract with the theater expires, and respondent's contention that due to delays in starting advertising contracts after screening agreements are executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers:

The Commission rejected said contention, since by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements, even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and the theater.

In said proceeding, in which it appeared that the total number of long-term, exclusive agreements of the kind here involved, made by the respondent and the other three concerns hereinbefore referred to, aggregated about three-fourths of the theaters in the United States which screen film advertising for compensation, and the Commission agreed with the conclusion of the trial examiner that the reasonableness of the restraints imposed under respondent's exclusive screening agreements was dependent upon the relationship between the term of the screening agreement with the theater and the terms of the contracts with the advertisers, that respondent's long-term exclusive screening agreements constituted an unreasonable restraint and restriction of competition, but that such agreements as did not extend for more than a year did not unduly or unreasonably restrain trade:

The action of the Commission in such cases manifestly did not impinge on the right of respondent to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition, and the Commission's corrective action was directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of competitors from the screens of theaters.

In said proceeding, in which the Commission was of the view that, under the circumstances of the case, including the nature of the business, which rendered it desirable that respondents have an outlet through which they could screen advertising film in order that prospective advertisers could be assured that screening space was available for such film advertising as they might like to purchase; the general practice, on the part of respondents' representatives, of contacting theaters in the first instance to determine if space was available for screen advertising, and make such arrangements as conditions warranted with respect thereto, and thereafter, in normal course, proceeding with efforts to obtain the commitments of merchants with respect to display of respondents' advertising films; and the fact that it was the standard practice to make such contracts with advertisers for a period of 1 year:

The Commission, in concluding that such exclusive agreements as were limited to 1 year or less did not unreasonably restrain trade, was not unmindful of the decision in *United States* v. *American Can Co.*, Nov. 19, 1949, 87 F. Supp. 18, in which it was demonstrated that the period specified in a restrictive agreement might be important in determining the lawfulness of some types of exclusive provisions, in that the court, while condemning the longer terms agreements there involved as instruments by which competition was suppressed and eliminated and monopoly promoted, concluded, nevertheless, that agreements extending for 1 year should, under the circumstances of the case, be absolved of adverse competitive effects.

Before *Mr. Frank Hier* and *Mr. Earl J. Kolb*, trial examiners.

Mr. Floyd O. Collins and *Mr. Lewis F. Depro* for the Commission.

Mr. Thomas M. Burgess, of Colorado Springs, Colo., for respondent.

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 Alexander Film Co., a corporation, hereinafter referred to as respondent, has 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 is a corporation organized under the laws of the State of Delaware, with its office and principal place of business located at Colorado Springs, Colo.

PAR. 2. Said respondent for more than 10 years last past has been, and is now, engaged in the business of producing, selling, leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of advertising films. Said respondent furnishes display services to advertisers through the exhibiting of such films upon the screens of various motion picture theaters throughout the United States, with whom it has screening agreements.

Said respondent is the largest producer and distributor of commercial or advertising films in the United States and causes said films when produced, sold, leased, or rented to be transported from its studios and place of business to motion-picture theaters located throughout the several States of the United States, and in the District of Columbia, where said films are displayed on the screens of such theaters for a specified period of time, usually 1 week. Upon the conclusion of the display period such films are returned by the theater or exhibitor to said respondent.

There has been, and now is, a constant recurring course and flow of said commercial or advertising films in interstate commerce, throughout the several States of the United States and in the District of Columbia.

PAR. 3. Said respondent has been from time to time, and is now, in active and substantial competition with other film distributors in the sale, rental, and distribution in said commerce of commercal or advertising films.

PAR. 4. In or about the year 1937, and from time to time thereafter, said respondent has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertsing films, produced or distributed by it, on the screens of the theater or theaters owned or controlled by said exhibitors, and said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are referred to as "Theater Screening Agreements," in which there is included the following provision:

> The Exhibitor agrees not to screen or display any advertising or commercial films other than those furnished by the Distributor, excepting films or slides exhibited for charitable organizations, or for present and future productions.

The foregoing provision has been enforced by respondent and adhered to by a substantial number of exhibitors located throughout the United States, and in the District of Columbia.

PAR. 5. The capacity, tendency, and effect of the aforesaid agreements and the acts of said respondent in the performance thereof are, and have been, to unduly restrain, lessen, injure, and suppress competition in the interstate sale, lease, rental, and distribution of commercial or advertising films and to unduly hinder and prevent competing producers, sellers, and distributors of commercial or advertising films from selling, leasing, renting, and distributing such films from the various States of the United States, where said producers, sellers, and distributors are located, to and into various other States where the exhibitors of said films are located, and to monopolize in said respondent the sale, lease, rental, and distribution of commercial or advertising films in commerce as herein set out.

As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through said other film distributors, have been compelled as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

PAR. 6. The acts and practices of respondent, as herein alleged, are all to the prejudice of competitors of respondent and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the sale, leasing, rental, and distribution of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in the sale, leasing, rental, and distribution of such films, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 26, 1947, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the respondent filed its answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Alexander Film Co. is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located near Colorado Springs in El Paso County, in the State of Colorado.

PAR. 2. Since 1919 the respondent has been engaged in the business of producing, selling, leasing, and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theaters, motion-picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various theater owners, both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent designated as Alexander Screen Advertising Service in their various theaters and to return all films promptly to the respondent at the end of the screening period.

In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theaters, respondent ships such advertising films from its place of business in the State of Colorado to the various exhibitors located in other States of the United States.

In most instances where agreements to display respondent's Screen Advertising Service are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Colorado, either directly to such distributors or to the theaters designated by them, located in States other than the State of Colorado. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Colorado by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals, and business concerns, in the sale, leasing, and distribution of commercial or advertising films in commerce among and between the various States of the United States.

PAR. 4. The motion picture advertising film business conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertising, and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20-foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer. The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theater charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturer has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising where the manufacturer sells to a large number of dealers on a nonexclusive basis.

PAR. 5. In the conduct of its business the respondent enters into written screening agreements with exhibitors for the maximum period of 3 years with many being written for 2-year and 1-year terms.

These agreements provide that the exhibitors shall properly display Alexander Screen Advertising Service on the screens of their theaters as designated, at each and every performance, and at a time when the theater is dark and the audience is seated. The respondent also agrees that it will solicit contracts for Alexander Service to be displayed on the exhibitors' screens and to pay the exhibitors each month for screening as designated in the contracts.

PAR. 6. In connection with the sale or distribution of respondent's Screen Advertising Service, the respondent enters into contracts with advertisers, usually for a period of 1 year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theaters weekly or every other week for a period of usually 1 year. The shortest term contract which the respondent will accept from an advertiser is 13 weeks, but this is very rare, and contracts for 1 year have become the standard practice in the trade. The films are changed so that there is a different playlet for each week that a film is shown.

PAR. 7. The usual practice, particularly in local advertising, is to make an agreement with the theater first so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theater. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contract with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theater expires.

It is the customary procedure in such cases for the theater to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theater and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

PAR. 8. The contracts entered into by the respondent with exhibitors, for screening of its advertising films, fall into four general types: the partial guarantee plan which is used in about 89 percent of the deals; the minimum guarantee plan which is used in about nine percent of the deals; the flat guarantee plan which is used in approximately 1 percent of the deals; and the theater collect plan which is used in less than 1 percent of the deals. All of these contracts contain the following clause:

> The Exhibitor agrees not to screen or display any advertising or commercial films other than those furnished by the distributor, excepting films or slides exhibited for charitable organizations or for present and future attractions.

In those instances where an exclusive is not given by the theater, this clause is either stricken or changed at the time of execution, in accordance with the agreement between the parties. The partial guarantee contract, which is the principal contract used by respondent, is not a guarantee that any number of spaces on the screen will be used or purchased, but only that respondent guarantees payment for any and all advertising space sold by it to advertisers.

PAR. 9. As of August 1, 1947, there were approximately 20,306 theaters in the United States and of these about 12,676 exhibited film advertising. The respondent as of that date had screening agreements with 8,498 theaters of which 4,913 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent.

Among others engaged in the sale and distribution of advertising films are Reid H. Ray Film Industries, Inc., United Film Service, Inc., and Motion Picture Advertising Service Co., Inc., which companies are respondent in dockets 5495, 5497, and 5498, respectively. As of August 1947 Reid H. Ray Film Industries, Inc., had agreements with exhibitors operating 1,450 theaters and of this number the agreements relating to 458 contained the provision that no local advertising other than commercial films furnished by Reid H. Ray Film Industries, Inc., would be displayed for remuneration during the terms of such agreements. Many of such agreements were for a term of 2 years. United Film Service, Inc., had screening agreements containing an exclusive feature on its behalf, some for a maximum term of 5 years, with 1,562 theaters, and Motion Picture Advertising Service Co., Inc., had similar contracts with 2,493 theaters. The total number of exclusive arrangements held by the aforesaid three companies and the respondent in this proceeding approximated three-fourths of the total number of theaters in the United States which displayed advertising films for compensation.

PAR. 10. The available space for screening advertisements is limited and only approximately 60 percent of the theaters accept film advertising. In addition, theater patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theaters, the number varying from three to six advertisements or an over-all of 2 to 4 minutes or 2 to 4 percent of the time consumed by each show.

PAR. 11. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulting in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

The injurious effects of the respondent's aforesaid agreements upon the competition of others engaged in the interstate sale, leasing, rental, and distribution of advertising films, together with the tendency to monopoly which is inherent therein, have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by Reid H. Ray Film Industries, Inc., United Film Service, Inc., and Motion Picture Advertising Service Co., Inc.

Exhibitors with whom exclusive agreements were made by respondent cooperated in carrying out such agreements by notifying distributors of the execution of such exclusive agreements and directing that they sell no more advertising for their screens and deal with the respondent in all details concerning pending contracts.

PAR. 12. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) That respondent does in fact make screen space available to competitors in theaters with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theater and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theater, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead, and sales expense which so limits his profit as to make such arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theaters and advertisers. Theaters in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract.

CONCLUSION

The Commission has given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but in essence denies that its screening agreement were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distributor, exhibitor, and advertiser, there is no unlawful restraint of competition and no public interest involved in this proceeding.

The maintenance of free and open competition is in the public interest and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly. The fact that the agreements in question may be beneficial or instrumental to respondent in building up its business, or that they may be preferred by theaters, is not controlling where the effects of such agreements have been and are, as in the circumstances here, to unduly hinder, lessen, and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, the Commission is of the opinion that the reasonableness of the restraints imposed thereunder is dependent upon the relationship between the term of respondent's screening agreements with theaters and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of 1 year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respondent's representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five, or six advertisements, it is not unreasonable for respondent to contract for all space available in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

It is therefore the conclusion of the Commission in the circumstances here than an exclusive screening agreement for a period of 1 year is not an undue restraint upon competition.

The Commission, however, rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theater.

It is concluded in the circumstances here that the use by respondent of exclusive screening agreements which extend for terms greater than 1 year constitutes an unreasonable restraint and restriction of competition and that prohibition of the respondent's use thereof is required in the public interest.

The aforesaid acts and practices of the respondent as herein found constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Alexander Film Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale, leasing, or distribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled, or operated by such exhibitors when the term of such contracts extends for a period in excess of 1 year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It is further ordered, That the respondent shall, within 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.

Commissioner Mason dissenting.

OPINION OF THE COMMISSION

MEAD, *Commissioner:*

The Commission issued complaints in the four different cases described in the heading of this opinion, charging that the respective respondents were engaged in unfair practices in violation of section 5 of the Federal Trade Commission Act. These cases involve similar questions of fact and law. The statements and conclusions in this opinion refer to the cases collectively and individually.

The respondents are the largest producers and distributors of advertising films in the United States. Respondents have entered into contracts with owners of various theaters located throughout the United States and have obtained the exclusive use of such theater screens for long periods of time. These periods vary in length from 1 year or less up to 5 years, during which time the exhibitors agree to display no advertising films for compensation other than those furnished by the respondent with whom the contract is made. Respondents' films may be prepared pursuant to agreements with merchants who are prospective advertisers, but there is a substantial volume of ready made or so-called library films of the playette type distributed by respondents. Such films are personalized by the addition of a name trailer identifying the advertiser with the line of business advertised by a particular playette. The agreements between the respondents and the merchants who are recipients of the advertising expire within a period of 1 year or less.

The principal question involved in these cases is whether or not the restrictive covenants contained in the various screening agreements between the respondent advertising film companies as distributors and certain theater operators or exhibitors constitute an unreasonable restraint upon commerce and are therefore in violation of section 5 of the Federal Trade Commission Act.

It appears that the use by the respondents of their exclusive screening agreements has been of material assistance in permitting each of the respondents to hold for his use the screens of the theaters with which such contracts have been made. Competing distributors have been deprived from showing their advertising film in such theatres thereby limiting the outlets for competitive films in a more or less limited field. In some instances, competitors have been forced to go out of the screen advertising business because of inability to obtain outlets for their film advertising. The injurious effects of the agreements of each of the respondents have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by each of the other respondents. Although competitors of respondents are sometimes permitted to show their films on screens under exclusive contracts to one of the respondents, the cost of the film, overhead and sales expense so limits the profit of such competitor as to make this arrangement unprofitable, especially in local advertising.

The respondents have waived the filing of exceptions to the recommended decision of the trial examiner and have waived also the filing of briefs and the presentation of oral argument before the Commission. The trial examiner in effect has found that respondents' long-term exclusive screening arrangements constitute an unreasonable restraint and restriction of competition. He has further concluded that such exclusive screening arrangements as extend for 1 year or less do not unduly or unreasonably restrain trade. In this connection, the trial examiner has given weight to the fact that contracts with advertisers normally run for a period of 1 year, although in some instances they are for a lesser term and he concludes that the reasonableness of the restraints imposed under respondents' exclusive screening arrangements are dependent upon the relationship between the term of such screening agreement with the theater and the terms of the contracts with the advertisers.

It is apparent that the nature of the business of these respondents renders it desirable that they have an outlet through which they can screen their advertising film in order that prospective advertisers can be assured that screening space is available for such film advertising as they may like to purchase. The general practice of respondents' representative is to contact theaters in the first instance to determine if space is available for screen advertising and to make such arrangements as conditions warrant with respect to such space. It is only then in normal course that respondents proceed with their efforts to obtain the commitments of merchants with respect to certain of respondents' advertising films.

In the opinion of the Commission, the conclusions of the trial examiner that such exclusive screening contracts are unduly restrictive of competition and hence unlawful when they extend for periods in excess of 1 year are supported by the greater weight of the evidence. The Commissioner moreover is of the view that in the circumstances here, such exclusive agreements as are limited to 1 year or less do not appear to unreasonably restrain trade.

That the period specified in a restrictive agreement may be important in determining the lawfulness of some types of exclusive provisions is demonstrated by the decision of the court in *United States* v. *American Can Company*, 87 F. Supp. 18 (Nov. 19, 1949). Under consideration in that case were contracts requiring customers to purchase their total requirements of specified merchandise from a particular source for periods up to 5 years. Although the court concluded that the longer term agreements there involved constituted instruments by which competition was suppressed and eliminated and monopoly promoted, in applying the remedy therefor it was further concluded that agreements extending for 1 year should be absolved of adverse competitive effects in the circumstances of that case. The court in such connection stated:

> Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of 1 year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present in the 5-year requirements contracts, would be removed. Under a contract limited to 1 year, the user-consumer would be guaranteed an assured supply and protected by a definite obligation on the part of American to meet the totality of needs of the canner, while he, in turn, would have a fixed obligation to purchase his seasonal needs from American, thus making for mutuality of contract and obligation.
>
> To strike down the requirements contracts and to declare them totally void as violative of the Sherman Act, without at the same time affording to the user-consumer a supply over a limited period of time, would be destructive, illogical, unsound, and not inconsonance with the acute and particular problems confronting the canning industry.

It is noted, however, that at the time this opinion is being written, the judgment of the trial court in that case has not yet become final since hearings pertaining to the type of relief to be granted are in progress.[1]

As of August 1947, the total number of exclusive agreements held by respondents in the aggregate approximated three-fourths of the total number of theaters in the United States which screen film advertising for compensation. Although the Commission has deter-

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[1] Judge Harris entered final decree in said matter at San Francisco on June 22, 1950, and thereafter, on Nov. 24, 1950, entered "Order and Instructions", in which the court denied defendant's application for modification of par. 8 of sec. II of the judgment so as to permit denfendant American Can, subject to certain conditions, to make certain payments for office space, to customers, as well as for storage or manufacturing, and to make payments for leases, easements, and licenses obtained from railroads, states or cities; and, in response to the Government's request entered the court's interpretation and construction with respect to certain matters having to do with sec. III of the decree relating to "Machines and Equipment", deferring the court's finding as to the "Compensatory Rentals", which defendant was to establish for each type and model of leased container closing machine, pending a factual report on the practical and accounting aspects of the question from the Special Master.

mined in these cases that the effects of the exclusive contracts for a period in excess of 1 year have been to unduly restrain competition, the action of the Commission in these cases manifestly does not impinge on the rights of respondents to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition. The corrective action of the Commission is directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of competitors of respondents from the screens of theaters. It is the view of the majority of the Commission that the orders to cease and desist which are issuing herewith are appropriate in the circumstances here.

Dissenting Opinion of Commissioner Lowell B. Mason

Commissioner Mason dissents to the order herein for the reasons he has set forth in Docket No. 5495, Ray-Bell Films, Inc.[2]

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[2] See ante, p. 342.

IN THE MATTER OF

UNITED FILM AD SERVICE, INC.

COMPLAINT, FINDINGS, ORDER, AND SUPPORTING AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5497. Complaint, May 26, 1947—Decision, Oct. 17, 1950

Maintenance of free and open competition is in the public interest, and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly; and the fact that certain exclusive dealing agreements, challenged as restrictive and in unreasonable restraint of trade, might be beneficial to respondent as instrumental in building up its business, or might be preferred by motion picture theaters concerned, is not controlling where the effects of such agreements have been and are to unduly hinder, lessen, and injure competition.

Where a corporation which was engaged in the production, and in the competitive interstate sale, leasing and distribution to or for advertisers, and to other distributors, of commercial or advertising films, including so-called library films of the playlet type, with name trailers identifying the advertisers; doing a business which embraced local advertising, manufacturer-dealer or cooperative advertising, and national advertising; and, in connection therewith, entering into agreements with such theaters as accepted film advertising, for the limited space available for such advertisements, and into contracts, usually for a year, but no longer, with advertisers for the display of commercial film advertising their businesses or commodities in the space thus made available; and constituting one of the four largest producers and distributors of advertising films in the United States, which together entered into such exclusive arrangements as below described with about three-fourths of the theaters in the United States displaying advertising films for compensation—

Entered into agreements with motion picture theaters or exhibitors for terms of 5, 2, or 3 years, through contracts, a substantial number of which contained the provision that the exhibitor would not screen or display any advertising other than that furnished by said corporation during the term of the agreement; and, as of August 1, 1947, had such exclusive agreements with 1,562 of the 3,886 threaters with which it had screening agreements;

With the result that it was thereby materially assisted in holding for its own use the screens of the theaters with which such contracts were made; competitors were prevented from showing their films in such theaters, thereby eliminating their outlets in a limited field and, in some instances, forcing them out of business; and the injurious effect of such agreements upon competition, together with the tendency to monopoly inherent therein, was materially increased by the cumulative effects of similar agreements entered into by the three aforesaid other similarly engaged concerns:

Held, That the use of such contracts as extended for terms greater than 1 year, constituted an unreasonable restraint and restriction of competition; that prohibition of such use was required in the public interest; and that said acts and practices, under the circumstances set forth, constituted unfair methods of competition in commerce.

As respects respondent's contention in the aforesaid proceeding that it did in fact make screen space available to competitors in theaters in which it had exclusive agreements, if such films were of standard length, of the quality distributed by the respondent, satisfactory to the theater, and screening space was available; it appeared that respondent required the payment to it of the same rate it charged its advertising customers, less 15 percent commission, out of which the competitor had to pay the costs of the film, overhead, and sales expense, and thereby so limited the latter's profit as to make such arrangements unprofitable in local advertising.

With regard to respondent's contention that because of the beneficial value of the exclusive agreements to the distributor and theater, to wit, that such agreements are instrumental in building up the film advertising business; that they are of assistance in negotiating more satisfactory contracts with both theaters and advertisers; that in many instances theaters prefer them because they give better control of the screen advertising, eliminate uncertainty and exra bookkeeping, and prevent misunderstandings with local advertisers; and that the advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract; the fact that the agreements in question might be beneficial to respondent or to theaters as above suggested, is not controlling where the effects of such agreements have been and are, as in the instant case, to unduly lessen and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, namely, that the capacity, tendency, and effect thereof were to unduly restrain and injure competition in the interstate conduct of the business concerned, and to unduly hinder and prevent competitors from carrying on such business, as therein more particularly set out—

The Commission was of the opinion that the reasonableness of the restraints imposed was dependent upon the relationship between the terms of respondent's screening agreements with theaters and the terms of its contracts with the advertisers, and that an exclusive screening agreement for a period of 1 year was not an undue restraint upon competition; it appearing in said connection that an advertising contract for 1 year has become standard practice in the trade, that it is the practice to first contact the theater in order that respondent's representatives may determine if space is available for such advertising, make arrangements with respect thereto, and thus be able to show prospective advertisers where space is available, and that it is not unreasonable for respondent—since film advertising space in theaters is limited to four, five, or six advertisements—to contract for all space available, particularly in territories canvassed by its salesmen at regular and frequent intervals.

With regard to the fact that under the practice herein concerned, the beginning of the performance of a contract with the advertiser will not coincide with the beginning of the screening agreement with the theater, so that very often distributors have unexpired contracts with advertisers when their contract with the theater expires, and respondent's contention that due to delays in starting advertising contracts after screening agreements are executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers—

The Commission rejected said contention, since by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements, even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and the theater.

In said proceeding, in which it appeared that the total number of long-term, exclusive agreements of the kind here involved, made by the respondent and the other three concerns hereinbefore referred to, aggregated about three-fourths of the theaters in the United States which screen film advertising for compensation, and the Commission agreed with the conclusion of the trial examiner that the reasonableness of the restraints imposed upon respondent's exclusive screening agreements was dependent upon the relationship between the term of the screening agreement with the theater and the terms of the contracts with the advertisers, that respondent's long-term exclusive screening agreements constituted an unreasonable restraint and restriction of competition, but that such agreements as did not extend for more than a year did not unduly or unreasonably restrain trade—

The action of the Commission in such cases manifestly did not impinge on the right of respondent to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition, and the Commission's corrective action was directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of competitors from the screens of theaters.

In said proceeding, in which the Commission was of the view that under the circumstances of the case, including the nature of the business, which rendered it desirable that respondents have an outlet through which they could screen advertising film in order that prospective advertisers could be assured that screening space was available for such film advertising as they might like to purchase; the general practice, on the part of respondent's representatives, of contacting theaters in the first instance to determine if space was available for screen advertising, and make such arrangements as conditions warranted with respect thereto, and of thereafter, in normal course, proceeding with efforts to obtain the commitments of merchants with respect to display of respondent's advertising films; and the fact that it was the standard practice to make such contracts with advertisers for periods of 1 year—

The Commission, in concluding that such exclusive agreements as were limited to 1 year or less did not unreasonably restrain trade, was not unmindful of the decision in *United States* v. *American Can Co.*, Nov. 19, 1949, 87 F. Supp. 18, in which it was demonstrated that the period specified in a restrictive agreement might be important in determining the lawfulness of some types of exclusive provisions, in that the court, while condemning the longer terms agreements there invloved as instruments by which competition was suppressed and eliminated and monopoly promoted, concluded, nevertheless, that agreements extending for 1 year should, under the circumstances of the case, be absolved of adverse competitive effects.

Before *Mr. Frank Hier* and *Mr. Earl J. Kolb*, trial examiners.

Mr. Floyd O. Collins and *Mr. Lewis F. Depro* for the Commission.

Morrison, Nugent, Berger, Hecker & Buck, of Kansas City, Mo., for respondent.

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 United Film Ad Service, Inc., a corporation, hereinafter referred to as respondent, has 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 is a corporation organized under the laws of the State of Missouri, with its office and principal place of business located at 2449 Charlotte Street, Kansas City, Mo.

PAR. 2. Said respondent for more than 10 years last past has been, and is now, engaged in the business of producing, selling, leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of such film. Said respondent furnishes display services to advertisers through the exhibiting of such films upon the screens of various motion picture theaters throughout the United States, with whom it has screening agreements.

Said respondent is one of the largest producers and distributors of commercial or advertising films in the United States and causes said films when produced, sold, leased or rented, to be transported from its place of business to motion picture theaters located throughout the several States of the United States, where said films are displayed on the screens of such theaters for a specified period of time, usually 1 week. Upon the conclusion of the display period such films are returned by the theaters or exhibitors to said respondent.

There has been, and is now, a constant recurring course and flow of said commercial or advertising films in interstate commerce, throughout the several States of the United States.

PAR. 3. Said respondent has been from time to time, and is now, in active and substantial competition with other film distributors in the sale, rental, and distribution in said commerce of commercial or advertising films.

PAR. 4. In or about the year 1937, and from time to time thereafter, said respondent has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the theater or theaters owned or controlled by said exhibitors, whereby said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are known and designated as "Theater Screening Agreements," in which there is included the following provision:

> The exhibitor agrees not to screen or display any advertising on the screens of the above theaters other than that furnished by the distributor, excepting films or slides exhibited for charitable or political organizations, or for the exhibitor's present or future film attractions.

The foregoing provision has been enforced by respondent and adhered to by a substantial number of exhibitors located throughout the United States.

PAR. 5. The capacity, tendency, and effect of the aforesaid agreements and the acts of said respondent in the performance thereof are, and have been, to unduly restrain, lessen, suppress, and injure competition in the interstate sale, lease, rental, and distribution of commercial or advertising films and to unduly hinder and prevent competing producers, sellers, and distributors of commercial or advertising films from selling, leasing, renting, and distributing such films from the various States of the United States, where said producers, sellers, and distributors are located, to and into various other States where the exhibitors of said films are located, and to monopolize in said respondent the sale, lease, rental, and distribution of commercial or advertising films in commerce as herein stated.

As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through said other film distributors, have been compelled as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

PAR. 6. The acts and practices of respondent, as herein alleged, are all to the prejudice of competitors of respondent and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the sale, leasing, rental, and distribution of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in certain sections of the United States in the sale, leasing, rental, and distribution of such films, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

Report, Findings as to the Facts, and Order

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 26, 1947, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the respondent filed its answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

Paragraph 1. The respondent, United Film Service, Inc. (erroneously named in the complaint as United Film Ad Service, Inc.) is a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business at 2449 Charlotte Street, Kansas City, Mo.

Par. 2. Since 1924 the respondent has been engaged in the business of producing, selling, leasing, and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theaters, motion picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various exhibitors or theater owners, both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theaters and to return all films promptly to the respondent at the end of the screening period.

In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theaters, respondent ships such advertising films from its place of business in the State of Missouri to the various theaters and exhibitors located in other States of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Missouri, either directly to such distributor or to the theaters designated by them, located in States other than the State of Missouri. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Missouri by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals, and business concerns, in the sale, leasing and distribution of commercial or advertising films in commerce among and between the various States of the United States.

PAR. 4. The motion picture advertising film business conducted by the respondent falls into three divisions: Local advertising, manufacture-dealer or cooperative advertising, and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20-foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer. The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theater charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturer has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising where the manufacturer sells to a large number of dealers on a nonexclusive basis.

PAR. 5. In the conduct of its business the respondent enters into written screening agreements with exhibitors for a miximum period of 5 years with the majority being written for 2 or 3 years.

These agreements provide that the exhibitors shall properly display advertising films furnished by the respondent on the screens of their theaters as designated, as part of the exhibitors' regular program, but not immediately opening or closing the program, and that the respondent will solicit contracts for film advertising to be displayed on the exhibitors' screens and to pay the exhibitors each month for screening as designated in the contract.

PAR. 6. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with advertisers, usually for a period of 1 year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theaters weekly or every other week for a period of usually 1 year. The shortest term contract which the respondent will accept from an advertiser is 13 weeks, but this is very rare, and contracts for 1 year have become the standard practice. The films are changed so that there is a different playlet for each week that a film is shown.

PAR. 7. The usual practice, particularly in local advertising, is to make an arrangement with the theater first, so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances, the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theater. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theater expires.

It is the customary procedure in such cases for the theater to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theater and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

PAR. 8. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees that it will not screen or display any advertising other than that furnished by the respondent during the term of the agreement.

PAR. 9. As of August 30, 1947, there were approximately 14,439 theaters in the 27 States in which respondent operates and of these about 8,722 exhibited film advertising. The respondent as of that date had screening agreements with 3,886 theaters of which 1,562 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent.

There were approximately 20,306 theaters in the United States as of August 1, 1947, and of these about 12,676 exhibited advertising films. Among others engaged in the sale and distribution of advertising films are Reid H. Ray Film Industries, Inc., Alexander Film Co., and Motion Picture Advertising Service Co., Inc., which companies are respondents in dockets 5495, 5496, and 5498, respectively. As of August 1947, Reid H. Ray Film Industries, Inc., had agreements with exhibitors operating 1,450 theaters and of this number the agreements relating to 458 contained the provision that no local advertising other than commercial films furnished by Reid H. Ray Industries, Inc., would be displayed for remuneration during the terms of such agreements. Many of such agreements were for a term of 2 years. Alexander Film Co. had screening agreements containing an exclusive feature on its behalf, some for a maximum term of 3 years, with 4,913 theaters, and Motion Picture Advertising Service Co., Inc., had similar contracts running up to 5 years with 2,493 theaters. The total number of exclusive arrangements held by the aforesaid three companies and the respondent in this proceeding approximated three-fourths of the total number of theaters in the United States which displayed advertising films for compensation.

PAR. 10. The available space for screening advertisements is limited and only approximately 60 percent of the theaters accept film advertising. In addition, theater patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theaters, the number varying from three to six advertisements or an over-all of 2 to 4 minutes or 2 to 4 percent of the time consumed by each show..

PAR. 11. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own use the screens of the theaters with whom such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising..

The injurious effects of the respondent's aforesaid agreements upon the competition of others engaged in the interstate sale, leasing, rental, and distribution of advertising films, together with the tendency to monopoly which is inherent therein, have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by Reid H. Ray Film Industries, Inc., Alexander Film Co., and Motion Picture Advertising Service Co., Inc.

PAR. 12. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) That respondent does in fact make screen space available to competitors in theaters with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theater and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theater, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead, and sales expense which so limits his profit as to make such arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theaters and advertisers. Theaters in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract.

CONCLUSION

The Commission has given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long-term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but in essence denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distributor, exhibitor, and advertiser, there is no unlawful restraint of competition and no public interest involved in this proceeding.

The maintenance of free and open competition is in the public interest and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly. The fact that the agreements in question may be beneficial or instrumental to respondent in building up its business, or that they may be preferred by theaters, is not controlling where the effects of such agreements have been and are, as in the circumstances here, to unduly hinder, lessen, and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, the Commission is of the opinion that the reasonableness of the restraints imposed thereunder is dependent upon the relationship between the term of respondent's screening agreements with theaters and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of 1 year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respendent's representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five, or six advertisements, it is not unreasonable for respondent to contract for all space available in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period of 1 year is not an undue restraint upon competition.

The Commission, however, rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theater.

It is concluded in the circumstances here that the use by respondent of exclusive screening agreements which extend for terms greater than 1 year constitutes an unreasonable restraint and restriction of competition and that prohibition of respondent's use thereof is required in the public interest.

The aforesaid acts and practices of the respondent as herein found constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony, and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, United Film Service, Inc., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale, leasing, or distribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled, or operated by such exhibitors when the term of such contracts extends for a period in excess of 1 year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It is further ordered, That the respondent shall, within 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.

Commissioner Mason dissenting.

Opinion of the Commission

Mead, *Commissioner:*

The Commission issued complaints in the four different cases described in the heading of this opinion, charging that the respective respondents were engaged in unfair practices in violation of section 5 of the Federal Trade Commission Act. These cases involve similar questions of fact and law. The statements and conclusions in this opinion refer to the cases collectively and individually.

The respondents are the largest producers and distributors of advertising films in the United States. Respondents have entered into contracts with owners of various theaters located throughout the United States and have obtained the exclusive use of such theater screens for long periods of time. These periods vary in length from 1 year or less up to 5 years, during which time the exhibitors agree to display no advertising films for compensation other than those furnished by the respondent with whom the contract is made. Respondents' films may be prepared pursuant to agreements with merchants who are prospective advertisers, but there is a substantial volume of ready-made or so-called library films of the playette type distributed by respondents. Such films are personalized by the addition of a name trailer identifying the advertiser with the line of business advertised by a particular playette. The agreements between the respondents and the merchants who are recipients of the advertising expire within a period of 1 year or less.

The principal question involved in these cases is whether or not the restrictive covenants contained in the various screening agreements between the respondent advertising film companies as distributors and certain theater operators or exhibitors constitute an unreasonable restraint upon commerce and are therefore in violation of section 5 of the Federal Trade Commission Act.

It appears that the use by the respondents of their exclusive screening agreements has been of material assistance in permitting each of the respondents to hold for his use the screens of the theaters with which such contracts have been made. Competing distributors have been deprived from showing their advertising film in such theaters thereby limiting the outlets for competitive films in a more or less limited field. In some instances, competitors have been forced to go out of the screen advertising business because of inability to obtain outlets for their film advertising. The injurious effects of the agreements of each of the respondents have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by each of the other respondents. Although competitors of respondents are sometimes permitted to show their films on screens under exclusive contracts to one of the respondents, the cost of the film, overhead, and sales expense so limits the profit of such competitor as to make this arrangement unprofitable, especially in local advertising.

The respondents have waived the filing of exceptions to the recommended decision of the trial examiner and have waived also the filing of briefs and the presentation of oral argument before the Commission. The trial examiner in effect has found that respondents' long-term exclusive screening arrangements constitute an unreasonable restraint and restriction of competition. He has further concluded that such exclusive screening arrangements as extend for 1 year or less do not unduly or unreasonably restrain trade. In this connection, the trial examiner has given weight to the fact that contracts with advertisers normally run for a period of 1 year, although in some instances they are for a lesser term and he concludes that the reasonableness of the restraints imposed under respondents' exclusive screening arrangements are dependent upon the relationship between the term of such screening agreement with the theater and the terms of the contracts with the advertisers.

It is apparent that the nature of the business of these respondents renders it desirable that they have an outlet through which they can screen their advertising film in order that prospective advertisers can be assured that screening space is available for such film advertising as they may like to purchase. The general practice of respondents' representative is to contact theaters in the first instance to determine if space is available for screen advertising and to make such arrangements as conditions warrant with respect to such space. It is only then in normal course that respondents proceed with their efforts to obtain the commitments of merchants with respect to certain of respondents' advertising films.

In the opinion of the Commission, the conclusions of the trial examiner that such exclusive screening contracts are unduly restrictive of competition and hence unlawful when they extend for periods in excess of 1 year are supported by the greater weight of the evidence. The Commission moreover is of the view that in the circumstances here, such exclusive agreements as are limited to 1 year or less do not appear to unreasonably restrain trade.

That the period specified in a restrictive agreement may be important in determining the lawfulness of some types of exclusive provisions is demonstrated by the decision of the court in *United States* v. *American Can Company*, 87 F. Supp. 18 (November 19, 1949). Under consideration in that case were contracts requiring customers to purchase their total requirements of specified merchandise from a particular source for periods up to 5 years. Although the court concluded that the longer term agreements there involved constituted instruments by which competition was suppressed and eliminated and monopoly promoted, in applying the remedy therefor it was further concluded that agreements extending for 1 year should be absolved of adverse competitive effects in the circumstances of that case. The court in such connection stated:

> Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of 1 year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present in the 5-year requirements con-

tracts, would be removed. Under a contract limited to 1 year, the user-consumer would be guaranteed an assured supply and protected by a definite obligation on the part of American to meet the totality of needs of the canner, while he, in turn, would have a fixed obligation to purchase his seasonal needs from American, thus making for mutuality of contract and obligation.

To strike down the requirements contracts and to declare them totally void as violative of the Sherman Act, without at the same time affording to the user-consumer a supply over a limited period of time, would be destructive, illogical, unsound, and not inconsonance with the acute and particular problems confronting the canning industry.

It is noted, however, that at the time this opinion is being written, the judgment of the trial court in that case has not yet become final since hearings pertaining to the type of relief to be granted are in progress.[1]

As of August 1947, the total number of exclusive agreements held by respondents in the aggregate approximated three-fourths of the total number of theaters in the United States which screen film advertising for compensation. Although the Commission has determined in these cases that the effects of the exclusive contracts for a period in excess of 1 year have been to unduly restrain competition, the action of the Commission in these cases manifestly does not impinge on the rights of respondents to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition. The corrective action of the Commission is directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of competitors of respondents from the screens of theaters. It is the view of the majority of the Commission that the orders to cease and desist which are issuing herewith are appropriate in the circumstances here.

Dissenting Opinion of Commissioner Lowell B. Mason

Commissioner Mason dissents to the order herein for the reasons he has set forth in docket No. 5495, Ray-Bell Films, Inc.[2]

[1] Judge Harris entered final decree in said matter at San Francisco on June 22, 1950, and thereafter, on November 24, 1950, entered "Order and Instructions," in which the court denied defendant's application for modification of par. 8 of sec. II of the judgment so as to permit defendant American Can, subject to certain conditions, to make certain payments for office space, to customers, as well as for storage or manufacturing, and to make payments for leases, easements and licenses obtained from railroads, States or cities; and, in response to the Government's request, entered the court's interpretation and construction with respect to certain matters having to do with sec. III of the decree relating to "Machines and Equipment," deferring the court's finding as to the "Compensatory Rentals," which defendant was to establish for each type and model of leased container closing machine, pending a factual report on the practical and accounting aspects of the question from the special master.

[2] See ante, p. 342.

IN THE MATTER OF

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

COMPLAINT, FINDINGS, ORDER, AND SUPPORTING AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5498. Complaint, May 26, 1947—Decision, Oct. 17, 1950

Maintenance of free and open competition is in the public interest, and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly; and the fact that certain exclusive dealing agreements, challenged as restrictive and in unreasonable restraint of trade, might be beneficial to respondent as instrumental in building up its business, or might be preferred by motion-picture theaters concerned, is not controlling where the effects of such agreements have been and are to unduly hinder, lessen and injure competition.

Where a corporation which was engaged in the production, and in the competitive interstate sale, leasing and distribution of commercial or advertising films, including so-called library films of the playlet type with a name trailer identifying the advertiser, to or for advertisers and to other distributors of such film; doing a business which embraced local advertising, manufacturer-dealer or cooperative advertising, and national advertising; and entering, into agreements with such theaters as accepted film advertising, for space for such advertisements, and into contracts, usually for a year, but no longer, with advertisers for the space thus made available; and constituting one of the four largest producers and distributors of advertising films in the United States, which, in the aggregate, made such exclusive agreements as below described, with about three-fourths of the theaters in the United States which displayed advertising film for compensation—

Entered into screening contracts with motion-picture theaters or exhibitors for terms ranging from 1 year to 2 years and 5 years, which provided in the case of a substantial number that the exhibitor would display only advertising films furnished by said corporation, excepting films or slides for charitable or governmental organizations or announcements of attractions of the theater; and, as of August 1, 1947 had such exclusive contracts with 2,493 of the 4,096 theaters with which it had screening agreements;

With the result that it was thereby materially assisted in holding for its own use the screens of the theaters with which such contracts were made; competitors were prevented from showing their films in such theaters, thereby eliminating their outlets in a limited field and, in some instances, forcing them out of business; and the injurious effect of such agreements upon competition together with the tendency to monopoly inherent therein, was materially increased by the cumulative effects of similar agreements entered into by the three aforesaid other similarly engaged concerns:

Held, That the use of such contracts as extended for terms greater than 1 year, constituted an unreasonable restraint and restriction of competition; that prohibition of such use was required in the public interest; and that said acts and practices, under the circumstances set forth, constituted unfair methods of competition in commerce.

As respects respondent's contention in the aforesaid proceeding that it did in fact make screen space available to competitors in theaters in which it had exclusive agreements, if such films were of standard length, of the quality distributed by the respondent, satisfactory to the theater, and screening space was available: it appeared that respondent required the payment to it of the same rate it charged its advertising customers, less 15 percent commission, out of which the competitor had to pay the costs of the film, overhead, and sales expense, and thereby so limited the latter's profit as to make such arrangement unprofitable in local advertising.

With regard to respondent's contention that because of the beneficial value of the exclusive agreements to the distributor and theater, to wit, that such agreements are instrumental in building up the film-advertising business; that they are of assistance in negotiating more satisfactory contracts with both theaters and advertisers; that in many instances theaters prefer them because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers; and that the advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract: the fact that the agreements in question might be beneficial to respondent or to theaters as above suggested, is not controlling where the effects of such agreements have been and are, as in the instant case, to unduly lessen and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, namely, that the capacity, tendency and effect thereof were to unduly restrain and injure competition in the interstate conduct of the business concerned, and to unduly hinder and prevent competitors from carrying on such business, as therein more particularly set out:

The Commission was of the opinion that the reasonableness of the restraints imposed was dependent upon the relationship between the terms of respondent's screening agreements with theaters and the terms of its contracts with the advertisers, and that an exclusive screening agreement for a period of 1 year was not an undue restraint upon competition; it appearing in said connection that an advertising contract for 1 year has become standard practice in the trade, that it is the practice to first contact the theater in order that respondent's representatives may determine if space is available for such advertising, make arrangements with respect thereto, and thus be able to show prospective advertisers where space is available, and that it is not unreasonable for respondent—since film advertising space in theaters is limited to four, five, or six advertisements—to contract for all space available, particularly in territories canvassed by its salesmen at regular and frequent intervals.

With regard to the fact that under the practice herein concerned, the beginning of the performance of a contract with the advertiser will not coincide with the beginning of the screening agreement with the theater, so that very often distributors have unexpired contracts with advertisers when their contract with the theater expires, and respondent's contention that due to delays in starting advertising contracts after screening agreements are executed, a contract for 2 years or for a period longer than 1 year, is necessary to the performance of its contracts with advertisers:

The Commission rejected said contention, since by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements, even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and the theater.

In said proceeding, in which it appeared that the total number of long-term, exclusive agreements of the kind here involved, made by the respondent, and the other three concerns hereinbefore referred to, aggregated about three-fourths of the theaters in the United States which screen film advertising for compensation, and the Commission agreed with the conclusion of the trial examiner that the reasonableness of the restraints imposed under respondent's exclusive screening agreements was dependent upon the relationship between the terms of the screening agreements with the theater and the terms of the contracts with the advertisers, and that respondent's long-term exclusive screening agreements constituted an unreasonable restraint and restriction of competition, but that such agreements as did not extend for more than a year did not unduly or unreasonably restrain trade:

The action of the Commission in such cases manifestly did not impinge on the right of respondent to contract for extended terms on a nonexclusive basis with theater owners, under circumstances which do not unduly hinder competition, and the Commission's corrective action was directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of competitors from the screens of theaters.

In said proceeding, in which the Commission was of the view that under the circumstances of the case, including the nature of the business, which rendered it desirable that respondents have an outlet through which they could screen advertising film in order that prospective advertisers could be assured that screening space was available for such film advertising as they might like to purchase; the general practice on the part of respondents' representatives of contacting theaters in the first instance to determine if space was available for screen advertising, and make such arrangements as conditions warranted with respect thereto, and of thereafter, in normal course, proceeding with efforts to obtain the commitments of merchants with respect to display of respondents' advertising films; and the fact that it was the standard practice to make such contracts with advertisers for periods of 1 year:

The Commission, in concluding that such exclusive agreements as were limited to 1 year or less did not unreasonably restrain trade, was not unmindful of the decision in *United States* v. *American Can Co.*, Nov. 19, 1949, 87 F. Supp. 18, in which it was demonstrated that the period specified in a restrictive agreement might be important in determining the lawfulness of some types of exclusive provisions, in that the court, while condemning the longer term agreements there involved as instruments by which competition was suppressed and eliminated and monopoly promoted, concluded, nevertheless, that agreements extending for 1 year should under the circumstances of the case be absolved of adverse competitive effects.

Before *Mr. Frank Hier* and *Mr. Earl J. Kolb*, trial examiners.

Mr. Floyd O. Collins and *Mr. Lewis F. Depro* for the Commission.

Rosen, Kammer, Wolff, Hopkins & Burke, of New Orleans, La., for respondent.

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 Motion Picture Advertising Service, Co., Inc., a corporation, hereinafter referred to as respondent, has 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 is a corporation organized under the laws of the State of Louisiana, with its office and principal place of business located at 1032 Carondelet Street, New Orleans, La.

Par. 2. Said respondent for more than 10 years last past has been, and is now, engaged in the business of producing, selling, leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of such films. Said respondent furnishes display services to advertisers through the exhibiting of such films upon the screens of motion-picture theaters throughout the United States, with whom respondent has screening agreements.

Said respondent is one of the largest producers and distributors of commercial or advertising films in the United States and causes said films when produced, sold, leased, or rented, to be transported from its place of business to motion-picture theaters located throughout the several States of the United States and in the District of Columbia, where said films are displayed on the screens of such theaters for a specified period of time, usually one week. Upon the conclusion of the display period such films are returned by the theater or exhibitor to said respondent.

There has been, and now is, a constant recurring course and flow of said films in interstate commerce, throughout the several States of the United States and in the District of Columbia.

PAR. 3. Said respondent has been from time to time, and is now, in active and substantial competition with other distributors of commercial or advertising films in the sale, rental, and distribution thereof in said commerce.

PAR. 4. In or about the year 1937, and from time to time thereafter, said respondent has entered into long-term screening agreements with various motion-picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the theater or theaters owned or controlled by said exhibitors, whereby said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are known and designated as "Theater Screening Agreements" and provide, in part, that said respondent is granted the exclusive privilege of exhibiting commercial or advertising film or slide advertising on the screen of the exhibitor and that the said exhibitor will not display commercial or advertising films, other than that furnished by said respondent, except announcements of exhibitor's coming attractions and charitable, civic and governmental announcements, for which no compensation is to be received by the exhibitor. The foregoing provision has been enforced by said respondent and adhered to by a substantial number of exhibitors located in various States of the United States, and the District of Columbia.

PAR. 5. The capacity, tendency and effect of the aforesaid agreements and of the acts of said respondent in the performance thereof are, and have been, to unduly restrain, lessen, suppress, and injure competition in the interstate sale, lease, rental, and distribution of commercial or advertising films, and to unduly hinder and prevent competing producers, sellers, and distributors of commercial or advertising films from selling, leasing, renting, and distributing such films from the various States of the United States, where said producers, sellers and distributors are located, to and into various other States where motion-picture exhibitors are located, and to monopolize in said respondent the sale, lease, rental, and distribution of commercial or advertising films in commerce as herein set out.

As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion-picture film advertising through said other film distributors, have been compelled, as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

PAR. 6. The acts and practices of respondent, as herein alleged, are all to the prejudice of competitors of said respondent and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the selling, leasing, renting, and distributing of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in certain areas of the United States in the selling, leasing, renting and distributing of such films, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 26, 1947, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the respondent filed its answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission or oral argument having been waived); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Motion Picture Advertising Service Company, Inc., is a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business located at 1032 Carondelet Street, New Orleans, in the State of Louisiana.

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PAR. 2. Since 1925 the respondent has been engaged in the business of producing, selling, leasing, and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theaters, motion-picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various exhibitors or theater owners, both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theaters and to return all films promptly to the respondent at the end of the screening period.

In performance of its contracts with advertisers to display motion-picture films advertising their businesses or commodities on the screens of various motion-picture theaters, respondent ships such advertising films from its place of business in the State of Louisiana to the various theaters and exhibitors located in other States of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Louisiana, either directly to such distributor or to the theaters designated by them, located in States other than the State of Louisiana. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Louisiana by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns, in the sale, leasing and distribution of commercial or advertising films in commerce among and between the various States of the United States.

PAR. 4. The motion-picture advertising film business conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertising, and national advertising.

The motion-picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20-foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacture-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer. The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theater charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturer has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising when the manufacturer sells to a large number of dealers on a nonexclusive basis.

PAR. 5. In the conduct of its business the respondent enters into written screening agreements with exhibitors and theaters for a maximum period of five years with the majority being written for 2-year and 1-year terms. It was estimated that about 25 percent of respondent's screening agreements were for a period of 5 years. These agreements provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of their theaters as designated, return such films to the respondent at the end of the screening period, and that the respondent will pay the exhibitor each month for screening as designated in the contract.

PAR. 6. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with advertisers usually for a period of 1 year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theaters weekly or every other week for a period of usually 1 year. The shortest term contract which the respondent will accept from an advertiser is 13 weeks, but this is very rare, and contracts for 1 year have become the standard practice. The films are changed so that there is a different playlet for each week that a film is shown.

PAR. 7. The usual practice, particularly in local advertising, is to make an arrangement with the theater first, so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances, the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theater. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theater expires.

It is the customary procedure in such cases for the theater to recognize the distributor's contract with the advertiser and permit performance after the expiration date of the screening agreement.

In practice, the period of time specified in the contracts between the theater and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

PAR. 8. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees that it will screen or display only advertising films furnished by the respondent, excepting films or slides for charitable or governmental organizations or announcements of attractions of the theaters.

PAR. 9. As of August 1, 1947, there were approximately 20,306 theaters in the United States and of these about 12,676 exhibited film advertising. In the District of Columbia and the 27 States where theaters having contracts with respondent were located, there were approximately 6,260 theaters regularly exhibiting screen advertising for compensation. The respondent as of this period had screening agreements with 4,096 theaters of which 2,493 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by respondent.

Among others engaged in the sale and distribution of advertising films are Reid H. Ray Film Industries, Inc., Alexander Film Co., and United Film Service, Inc., which companies are respondents in Dockets 5495, 5496, and 5497, respectively. As of August 1947, Reid H. Ray Film Industries, Inc., had agreements with exhibitors operating 1,450 theaters and of this number the agreements relating to 458 contained the provision that no local advertising other than commercial film advertising furnished by Reid H. Ray Film Industries, Inc., would be displayed for remuneration during the terms of such agreements. Many of such agreements were for a term of 2 years. Alexander Film Co., had screening agreements containing an exclusive feature on its behalf, some for a maximum term of 3 years, with 4,913 theaters, and United Film Service, Inc., had similar contracts with 1,562, many for a maximum term of 5 years. The total number of exclusive arrangements held by the aforesaid three companies and the respondent in this proceeding approximated three-fourths of the total number of theaters in the United States which displayed advertising films for compensation.

PAR. 10. The available space for screening advertisements is limited and only approximately 60 percent of the theaters accept film advertising. In addition, theater patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theaters, the number varying from three to six advertisements or an over-all of 2 to 4 minutes or 2 to 4 percent of the time consumed by each show.

PAR. 11. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

The injurious effects of the respondent's aforesaid agreements upon the competition of others engaged in the interstate sale, leasing, rental, and distribution of advertising films, together with the tendency to monopoly which is inherent therein, have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by Reid H. Ray Film Industries, Inc., Alexander Film Co., and United Film Service, Inc.

PAR. 12. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) That respondent does in fact make screen space available to competitors in theaters with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theater and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theater, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead and sales expense which so limits his profit as to make such arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theaters and advertisers. Theaters in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract.

CONCLUSION

The Commission has given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long-term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but in essence denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distributor, exhibitor, and advertiser, there is no unlawful restraint of competition and no public interest involved in this proceeding.

The maintenance of free and open competition is in the public interest and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly. The fact that the agreements in question may be beneficial or instrumental to respondent in building up its business, or that they may be preferred by theaters, is not controlling where the effects of such agreements have been and are, as in the circumstances here, to unduly hinder, lessen and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive provision in the light of the charges of the complaint, the Commission is of the opinion that the reasonableness of the restraints imposed thereunder is dependent upon the relationship between the term of respondent's screening agreements with theaters and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respondent's representative is able to show propsective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five, or six advertisements, it is not unreasonable for respondent to contract for all space available in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period of 1 year is not an undue restraint upon competition.

The Commission, however, rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed a contract for 2 years or for a period longer than 1 year is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theater completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theater.

It is concluded in the circumstances here that the use by respondent of exclusive screening agreements which extend for terms greater than one year constitutes an unreasonable restraint and restriction of competition and that prohibition of respondent's use thereof is required in the public interest.

The aforesaid acts and practices of the respondent as herein found constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Motion Picture Advertising Service Co., Inc., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion-picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of 1 year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It is further ordered, That the respondent shall, within 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.

Commissioner Mason dissenting.

OPINION OF THE COMMISSION

MEAD, *Commissioner:*

The Commission issued complaints in the four different cases described in the heading of this opinion, charging that the respective respondents were engaged in unfair practices in violation of section 5 of the Federal Trade Commission Act. These cases involve similar questions of fact and law. The statements and conclusions in this opinion refer to the cases collectively and individually.

The respondents are the largest producers and distributors of advertising films in the United States. Respondents have entered into contracts with owners of various theaters located throughout the United States and have obtained the exclusive use of such theater screens for long periods of time. These periods vary in length from 1 year or less up to 5 years, during which time the exhibitors agree to display no advertising films for compensation other than those furnished by the respondent with whom the contract is made. Respondents' films may be prepared pursuant to agreements with merchants who are prospective advertisers, but there is a substantial volume of ready made or so-called library films of the playette type distributed by respondents. Such films are personalized by the addition of a name trailer identifying the advertiser with the line of business advertised by a particular playette. The agreements between the respondents and the merchants who are recipients of the advertising expire within a period of 1 year or less.

The principal question involved in these cases is whether or not the restrictive covenants contained in the various screening agreements between the respondent advertising film companies as distributors and certain theater operators or exhibitors constitute an unreasonable restrain upon commerce and are therefore in violation of section 5 of the Federal Trade Commission Act.

It appears that the use by the respondents of their exclusive screening agreements has been of material assistance in permitting each of the respondents to hold for his use the screens of the theaters with which such contracts have been made. Competing distributors have been deprived from showing their advertising film in such theaters thereby limiting the outlets for competitive films in a more or less limited field. In some instances, competitors have been forced to go out of the screen-advertising business because of inability to obtain outlets for their film advertising. The injurious effects of the agreements of each of the respondents have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by each of the other respondents. Although competitors of respondents are sometimes permitted to show their films on screens under exclusive contracts to one of the respondents, the cost of the film, overhead and sales expense so limits the profit of such competitor as to make this arrangement unprofitable, especially in local advertising.

The respondents have waived the filing of exceptions to the recommended decision of the trial examiner and have waived also the filing of briefs and the presentation of oral argument before the Commission. The trial examiner in effect has found that respondents' long-term exclusive screening arrangements constitute an unreasonable restraint and restriction of competition. He has further concluded that such exclusive screening arrangements as extend for 1 year or less do not unduly or unreasonably restrain trade. In this connection, the trial examiner has given weight to the fact that contracts with advertisers normally run for a period of 1 year, although in some instances they are for a lesser term and he concludes that the reasonableness of the restraints imposed under respondents' exclusive screening arrangements are dependent upon the relationship between the term of such screening agreement with the theater and the terms of the contract with the advertisers.

It is apparent that the nature of the business of these respondents renders it desirable that they have an outlet through which they can screen their advertising film in order that prospective advertisers can be assured that screening space is available for such film advertising as they may like to purchase. The general practice of respondents' representative is to contact theaters in the first instance to determine if space is available for screen advertising and to make such arrangements as conditions warrant with respect to such space. It is only then in normal course that respondents proceed with their efforts to obtain the commitments of merchants with respect to certain of respondents' advertising films.

In the opinion of the Commission, the conclusions of the trial examiner that such exclusive screening contracts are unduly restrictive of competition and hence unlawful when they extend for periods in excess of one year are supported by the greater weight of the evidence. The Commission moreover is of the view that in the circumstances here, such exclusive agreements as are limited to 1 year or less do not appear to unreasonably restrain trade.

That the period specified in a restrictive agreement may be important in determining the lawfulness of some types of exclusive provisions is demonstrated by the decision of the court in *United States* v. *American Can Company*, 87 F. Supp. 18 (Nov. 19, 1949). Under consideration in that case were contracts requiring customers to purchase their total requirements of specified merchandise from a particular source for periods up to 5 years. Although the court concluded that the longer term agreements there involved constituted instruments by which competition was suppressed and eliminated and monoply promoted, in applying the remedy therefor it was further concluded that agreements extending for one year should be absolved of adverse competitive effects in the circumstances of that case. The court in such connection stated:

Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of 1 year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present in the 5-year requirements contracts, would be removed. Under a contract limited to 1 year, the user-consumer would be guaranteed an assured supply and protected by a definite obligation on the part of American to meet the totality of needs of the canner, while he, in turn, would have a fixed obligation to purchase his seasonal needs from American, thus making for mutuality of contract and obligation.

To strike down the requirements contracts and to declare them totally void as violative of the Sherman Act, without at the same time affording to the user-consumer a supply over a limited period of time, would be destructive, illogical, unsound and not inconsonance with the acute and particular problems confronting the canning industry.

It is noted, however, that at the time this opinion is being written, the judgment of the trial court in that case has not yet become final since hearings pertaining to the type of relief to be granted are in progress.[1]

As of August 1947, the total number of exclusive agreements held by respondents in the aggregate approximated three-fourths of the total number of theaters in the United States which screen-film advertising for compensation. Although the Commission has determined in these cases that the effects of the exclusive contracts for a period in excess of 1 year have been to unduly restrain competition, the action of the Commission in these cases manifestly does not impinge on the rights of respondents to contract for extended terms on a nonexclusive basis with theater owners under circumstances which do not unduly hinder competition. The corrective action of the Commission is directed only to such exclusive agreements as are designed to exclude unreasonably for prolonged periods the advertising films of competitors of respondents from the screens of theaters. It is the view of the majority of the

[1] Judge Harris entered final decree in said matter at San Francisco on June 22, 1950, and thereafter, on November 24, 1950, entered "Order and Instructions," in which the Court denied defendant's application for modification of par. 8 of section II of the judgment so as to permit defendant American Can, subject to certain conditions, to make certain payments for office space, to customers, as well as for storage or manufacturing, and to make payments for leases, easements and licenses obtained from railroads, States or cities; and, in response to the Government's request, entered the Court's interpretation and construction with respect to certain matters having to do with section III of the decree relating to "Machines and Equipment," deferring the Court's finding as to the "Compensatory Rentals," which defendant was to establish for each type and model of leased container closing machine, pending a factual report on the practical and accounting aspects of the question from the Special Master.

Commission that the orders to cease and desist which are issuing herewith are appropriate in the circumstances here.

Dissenting Opinion of Commissioner Lowell B. Mason

Commissioner Mason dissents to the order herein for the reasons he has set forth in Docket No. 5495, Ray-Bell Films, Inc.[2]

[2] See ante, p. 342.

Syllabus

IN THE MATTER OF

FIR DOOR INSTITUTE ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5528. Complaint, Aug. 8, 1949 [1]*—Decision, Oct. 20, 1950*

Where eight corporations (along with a certain association or institute, its manager, etc.), to wit:

I. Three corporate members of such nonprofit corporation or institute (organized, among other things, to advertise and promote the sale of Douglas fir doors, including the "CrawFIRdor" overhead garage door), and four member concerns, engaged in the manufacture and interstate sale and distribution of said products, in competition with other members of the industry, and, but for the acts and practices below set out, in competition with one another; and,

II. An eighth concern, which was engaged, among other things, in the manufacture and in the interstate sale and distribution of hardware used in the production of said "CrawFIRdors", and was the holder of certain patent applications and patents relating to said overhead garage door, under which it had entered into so-called license agreements with manufacturers of Douglas fir doors, including those above set out, purporting to grant them the right to make and sell the "CrawFIRdor", but without granting to them or any one the right to make and assemble the hardware used in connection therewith—

During a substantial part of the period between January 1, 1938, and November 29, 1941, engaged in an understanding and planned common course of action among themselves, and with and through their said institute and its officers and manager, to hinder and suppress competition in the interstate sale and distribution of Douglas fir doors, said overhead garage doors, and the "CrawFIRdor" hardware used for assembling the latter, to wholesale and retail dealers; and to create and maintain in aforesaid concerns a monopoly in the interstate sale and distribution of said doors and overhead garage doors; and, in pursuance of said understanding, etc., and acting in cooperation with each other—

(*a*) Fixed the prices, terms, and discounts at which they sold or offered said Douglas fir doors to jobber customers;

(*b*) Established and maintained a system of zone delivered price quotations for the sale of such doors throughout the United States, with fixed discounts for each zone which were arbitrarily shortened a certain number of points depending upon the freight rate from the mill to destination; and quoted prices only on a delivered basis which included freight charges computed from Tacoma, Wash., irrespective of the origin of shipment or the actual freight rate applicable;

(*c*) Agreed to and did establish commercial standards for the different grades of Douglas fir doors, and a system for the inspection, classification and grade marking of the doors in accordance therewith;

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[1] Amended.

(*d*) Exchanged among themselves and made available to each other through the medium of their institute, intimate details of each others' business, including statistics relating to production, sales, and shipments, and orders on hand, without disclosing such information to the buying public;

(*e*) Fixed and maintained the prices, terms, and discounts at which said overhead "CrawFIRdors" were sold, and dealers' resale prices;

(*f*) Entered into so-called license agreements between the aforesaid concerns and said licensor whereby the former agreed to sell only the "CrawFIRdor" overhead garage doors, to sell such doors for use only in connection with "CrawFIRdor" hardware, and to purchase their entire requirements of "CrawFIRdor" hardware from said licensor;

(*g*) Agreed that said concerns would pay a royalty to said licensor for each "CrawFIRdor" sold, and that said licensor would pay a royalty to said institute for each set of "CrawFIRdor" hardware sold, for the purpose of advertising and promoting the sale of "CrawFIRdors", and observed said agreements;

(*h*) Agreed that "CrawFIRdors" sold by said concerns should be made strictly in accordance with specifications established and approved by said institute and licensor; and

(*i*) Fixed and maintained prices at which member and nonmember concerns would sell "CrawFIRdors" to said licensor, and agreed that latter would enter into no further so-called license agreements relating to "CrawFIRdors" without the written consent of all existing licensees;

Capacity, tendency and results of which understanding, etc., and the acts and things done and performed thereunder and pursuant were to place in their hands the power to control and enhance prices, and to actually increase the prices of said doors; to concentrate in the hands of said institute the power to dominate and control the manufacture of Douglas fir doors and "CrawFIRdors"; and to create a monopoly in themselves in the said of sale products:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and their competitors; had a dangerous tendency to and did hinder and prevent competition among themselves in the sale of said products; unreasonably restrained commerce therein; and constituted unfair methods of competition in commerce.

While the amended complaint named as respondents two individuals in their individual capacities, as well as in their capacities of treasurer and vice president of respondent institute, it appeared that both of said individuals were still officers of the institute and that any order to cease and desist would run against said institute and all of its officers, agents, representatives and employees, and that so long as said individuals were officers of said institute, or even employees thereof, they would be bound by the terms of the order, even though not individually named therein, and, such being the case, the Commission was of the opinion that insofar as the amended complaint named them in their individual capacities, it might properly be dismissed.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. Everette MacIntyre and *Mr. Lewis F. Depro* for the Commission.

McMicken, Rupp & Schweppe, of Seattle, Wash., for Fir Door Institute, N. O. Cruver, Arthur C. Peterson, Harbor Plywood Corp., Robinson Plywood and Timber Co. and Wallace E. Difford.

Neal, Bonneville & Hughes, of Tacoma, Wash., also appeared for Arthur C. Peterson.

Mr. Don G. Abel, of Chehalis, Wash., for Acme Door Co.

Sabin & Malarkey, of Portland, Oreg., for M & M Wood Working Co.

Eisenhower, Hunter & Ramsdell, of Tacoma, Wash., for Monarch Door & Manufacturing Co. and Northwest Door Co.

Scott, Langhorns & McGavick, of Tacoma, Wash., for The Wheeler, Osgood Co.

Firm of Charles W. Hills, of Chicago, Ill., for Crawford Door Co.

Amended 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 Fir Door Institute, a corporation; N. O. Cruver, individually and as treasurer of Fir Door Institute; Arthur C. Peterson, individually and as vice president of Fir Door Institute; Acme Door Co., a corporation; M & M Wood Working Co., a corporation; Monarch Door & Manufacturing Co., a corporation; Northwest Door Co., a corporation, and The Wheeler, Osgood Co., a corporation, all individually and as members of and subscribers to Fir Door Institute; and Harbor Plywood Corp.; Robinson Plywood and Timber Co., a corporation; Crawford Door Co., a corporation; and Wallace E. Difford, an individual, all hereinafter referred to as respondents have violated 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 amended complaint, stating its charges in that respect as follows:

Paragraph 1. (1) Respondent, Fir Door Institute, hereinafter referred to as respondent Institute, is a nonprofit corporation organized under the laws of the State of Washington in the year 1938, with its principal office located in the Tacoma Building, Tacoma, Wash. The membership of said respondent Institute is composed of corporations all of which are engaged in the manufacture, sale and distribution, or in the sale and distribution, of Douglas fir doors, and are located principally in the States of Washington and Oregon. Said members of respondent Institute produce a substantial part of the annual volume of Douglas fir doors produced in the United States.

(2) Said respondent Institute was organized for the purpose, among others, of advertising and promoting the sale of Douglas fir doors; promoting the sale of an overhead garage door referred to as a "Craw-FIRdor"; and of developing a factory prefit door.

(3) The names and addresses of the present officers of said respondent Institute are: Herman Snider, president, care Acme Door Co., Hoquiam, Wash.; Arthur C. Peterson, vice president, care Buffelen Manufacturing Co., Tacoma 1, Wash.; Thomas B. Malarkey, secretary, care M & M Wood Working Co., 2301 North Columbia Road, Portland 3, Ore.; and N. O. Cruver, treasurer, care The Wheeler, Osgood Co., Tacoma, Wash. The said N. O. Cruver has been treasurer of respondent Institute since 1938 and is named as a respondent herein in his individual capacity and as treasurer of Fir Door Institute. Respondent Arthur C. Peterson, although neither an officer nor member of the management committe, regularly attended and participated in the meetings of the management committee during the years 1938 through 1941 and is currently vice president of respondent Institute. Said Arthur C. Peterson is named as a respondent herein in his individual capacity and as vice president of said Fir Door Institute.

PAR. 2. (1) Respondent Acme Door Company is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Hoquiam, Wash. Said respondent is now and has been since October 15, 1939, a member of and subscriber to said respondent Institute.

(2) Respondent M & M Wood Working Co. is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at 2301 North Columbia Road, Portland 3, Ore. Said respondent is now and has been since September 28, 1938, a member of and subscriber to said respondent Institute.

(3) Respondent Monarch Door & Manufacturing Co. is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in Tacoma, Wash. Said respondent is now and has been since September 28, 1938, a member of and subscriber to said respondent Institute.

(4) Respondent Northwest Door Co. is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at 1203 East D Street, Tacoma,

Wash. Said respondent is now and has been since September 28, 1938, a member of and subscriber to said respondent Institute.

(5) Respondent The Wheeler, Osgood Co. is a corporation incorporated on March 1, 1903, and existing under the laws of the State of Washington, with its principal office and place of business located at 1216 St. Paul Street, Tacoma, Wash.

On September 1, 1932, said respondent had a large outstanding indebtedness consisting of both bank loans and bonded indebtedness. Due to large operating losses beginning in the year 1930, The Wheeler, Osgood Co. defaulted in the payment of interest due on September 1, 1932, on its bonded indebtedness. As of December 1932 all sales offices of The Wheeler, Osgood Co. had been closed, the company had withdrawn from active solicitation of business, all major plant activities had ceased, and its affairs were being directed by a committee representing the bondholders and creditors of said company.

On September 8, 1933, respondent, The Wheeler, Osgood Co., caused to be incorporated under the laws of the State of Washington a new corporation under the name of Wheeler Osgood Sales Corp., which said corporation was, throughout its existence, a wholly owned subsidiary of respondent, The Wheeler, Osgood Co. The Wheeler, Osgood Co. subscribed to all of the capital stock of Wheeler Osgood Sales Corp. and paid for same by transferring and conveying to Wheeler Osgood Sales Corp. all of its inventory and other assets which were not covered by a deed of trust dated March 1, 1926. Wheeler Osgood Sales Corp. leased, on a month-to-month basis, from The Wheeler, Osgood Co., all of the plant and other property of The Wheeler, Osgood Co. covered by the deed of trust, the lease being dated September 15, 1933, and all net profits of Wheeler Osgood Sales Corp. were paid to The Wheeler, Osgood Co. as rent for the property so leased. On the same day Wheeler Osgood Sales Corp. employed N. O. Cruver, who had been with The Wheeler, Osgood Co. for many years, and E. J. Calloway and Ralph Brindley, both also employees of The Wheeler, Osgood Co., as its principal executive officers. Wheeler Osgood Sales Corp. operated the plant of The Wheeler, Osgood Co. and all of the business formerly operated by The Wheeler, Osgood Co. from September 15, 1933, until June 30, 1944.

Wheeler Osgood Sales Corp. became a member of and subscriber to respondent Institute on September 28, 1938, and during all of the time the business and plant of The Wheeler, Osgood Co. was operated and conducted by Wheeler Osgood Sales Corp., the Wheeler Osgood Sales Corp. remained a member of and subscriber to said respondent Institute. During the period of time from September 15, 1933, to June

30, 1944, respondent, The Wheeler, Osgood Co., remained dormant and inactive and was engaged in the conduct under its own name of no business operations.

In December 1937 a plan for the reorganization of respondent, The Wheeler, Osgood Co., under section 77-B of the Bankruptcy Act, was submitted, and said plan of reorganization was approved by the court in 1938. The business which had been conducted by its wholly owned subsidiary, Wheeler Osgood Sales Corp., from September 15, 1933, to June 30, 1944, was turned back to respondent, The Wheeler, Osgood Co., and the wholly owned subsidiary, Wheeler Osgood Sales Corp., was dissolved by resolution filed on July 8, 1944, in the office of the secretary of State of the State of Washington.

Since July 1, 1944, the said business which had been operated by Wheeler Osgood Sales Corp. since September 15, 1933, and which prior to that time had been conducted and operated by respondent, The Wheeler, Osgood Co., has been and now is operated by respondent, The Wheeler, Osgood Co., and said respondent during all of the time since July 1, 1944, has been and now is a member of and a subscriber to said respondent Institute.

(6) All of said respondents hereinabove named in paragraph 2 are engaged in, among other things, the manufacture, sale and distribution in interstate commerce, or the sale and distribution in interstate commerce, of Douglas fir doors and are now or have been members of said respondent Institute. The said respondents named in this paragraph are hereinafter called member respondents.

PAR. 3. (1) Respondent Harbor Plywood Corp. is a corporation organized under the laws of the State of Delaware with its principal office and place of business located at Hoquiam, Wash. Said respondent was formerly engaged in the manufacture, sale and distribution in interstate commerce of Douglas fir doors. It was an original member of the respondent Fir Door Institute having become a member thereof and a subscriber thereto on September 28, 1938. In the spring of 1939, Harbor Plywood Corp. sold its door factory to Acme Door Co. Said Harbor Plywood Corp. has a contract with Acme Door Co. for the purchase of 80 percent of the door output of Acme Door Co. Said respondent Harbor Plywood Corp. remained a member of respondent Institute until March 1940.

(2) Respondent Robinson Plywood and Timber Co., before change of its corporate name was known as Robinson Manufacturing Co., and was so designated in the original complaint issued herein February 26, 1948. It is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business

located at Everett, Wash. Said respondent under its former corporate name became a member of, and subscriber to respondent Fir Door Institute on September 28, 1938, and remained such member of and subscriber thereto until July 24, 1944, at which time it resigned its membership therein. Since said date it has continued to contribute payments to said respondent Institute. It has attended no meetings of said Institute.

(3) Said respondents named in this paragraph 3 are engaged in, among other things, the manufacture, sale and distribution in interstate commerce, or the sale and distribution in interstate commerce of Douglas fir doors and are hereinafter called nonmember respondents.

PAR. 4. Respondent Crawford Door Co. is a corporation organized and existing under the laws of the State of Michigan with its principal office and place of business located at 401 St. Jean Avenue, Detroit, Mich. Said respondent is engaged in, among other things, the manufacture, sale and distribution in interstate commerce of hardware used in connection with the production of an overhead garage door referred to and known as a "CrawFIRdor," and also in the sale and distribution in interstate commerce of Douglas fir doors.

Said respondent is the holder of certain patent applications and of certain United States letters patent relating to said overhead garage door. Said respondent has entered into so-called license agreements under the aforesaid patent applications and letters patent with various manufacturers of Douglas fir doors all of whom are included among the respondents named herein. By virtue of said license agreements, said respondent, Crawford Door Co., purports to grant to such manufacturers the right to make and to sell the "CrowFIRdor." Said respondent, Crawford Door Co., does not grant to said respondents or to anyone the right to manufacture and to assemble the hardware used in connection with the said "CrawFIRdor," which said hardware is known as and referred to as "CrawFIRdor" hardware.

PAR. 5. Respondent Wallace E. Difford is an individual who maintains his office in the Henry Building, Seattle, Wash. Said respondent was employed as manager of respondent Institute from the inception of the Institute in 1938 until June 30, 1946. Said respondent, in the course of his activities as manager of respondent Institute, endeavored to promote the sale and distribution of Douglas fir doors and overhead garage doors known as "CrawFIRdors" and through and by means of his assistance the respondents hereinabove named in paragraphs 2, 3 and 4 have cooperated in performing and doing the things and acts as hereinafter alleged. Said respondent, Difford, severed his employment with respondent Institute as of June 30, 1946, and is presently engaged in the distribution of lumber products under the name of W. E. Difford & Sons.

PAR. 6. (1) The member and nonmember respondents hereinbefore named in paragraphs 2 and 3 are engaged in the business of selling and distributing Douglas fir doors to dealers therein located in States other than the State in which said respective respondents are located, causing said products, when so sold, to be transported from their respective places of business to the purchasers thereof located at various points in the several States of the United States other than the State of origin of such shipments and in the District of Columbia. There has been, and now is, a course of interstate trade and commerce in said products between said respondents and dealers in said products located throughout the several States of the United States and in the District of Columbia. Said respondents are now, and have been during all the times mentioned herein, engaged in competition with other members of the industry in making and seeking to make sales of said Douglas fir doors in said commerce, and, but for the facts hereinafter alleged, would now be in free, active and substantial competition with each other.

(2) Respondent Crawford Door Co. is engaged in the business of selling and distributing hardware used in connection with the assembly of overhead garage doors referred to and known as "CrawFIRdors" to purchasers thereof located in States other than the State of origin of such shipments and in the District of Columbia. There has been, and now is, a course of interstate trade and commerce in said hardware and in said overhead garage doors between said respondent and purchasers of said products located throughout the several States of the United States and in the District of Columbia. Said respondent, Crawford Door Co., is now and has been during all the times mentioned herein, engaged in competition with other members of the industry in making and seeking to make sales of hardware for use in connection with overhead garage doors and of overhead garage doors in said commerce, and, except for the facts hereinafter alleged, would now be in free, active and substantial competition with the member and nonmember respondents herein and with other dealers in overhead garage doors.

PAR. 7. Said respondents hereinbefore named in paragraphs 2, 3, 4 and 5, acting in cooperation with each other, and through and in cooperation with said respondent Institute, and its officers, and each of them, during the period of time, to wit, since January 1938, have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves, and with and through said respondent Institute and its officers, to hinder and suppress competition and in the interstate sale and distribution of Douglas fir doors, overhead garage doors known as "CrawFIRdors" and hardware used for assembling said doors and known as "CrawFIRdor" hardware to wholesale and retail dealers therein; and to create and maintain a monopoly in the interstate sale and distribution of Douglas fir doors and of overhead garage doors referred to as "CrawFIRdors" in the said member and nonmember respondents and respondent Crawford Door Co.

PAR. 8. Pursuant to the understanding, agreement, combination, conspiracy, and planned common course of action above alleged, and in furtherance thereof, the respondents have acted in concert and in cooperation with each other to do, and in doing the following, among other acts and things:

(*a*) They have fixed the prices, terms and discounts at which respondents sell or offer for sale Douglas fir doors to jobber customers.

(*b*) They have established and maintained a system of zone delivered price quotations for the sale of Douglas fir doors throughout the United States, with fixed discounts for each zone, which said discounts are arbitrarily shortened a certain number of points depending upon the freight rate from the mill to the point of destination.

(*c*) They have quoted prices only on a delivered basis, which price quotations included freight charges computed from Tacoma, Wash., irrespective of the origin of shipment or actual freight rate applicable thereto.

(*d*) They have agreed to and did establish commercial standards for the different grades of Douglas fir doors.

(*e*) They have agreed to and did establish a system for the inspection, classification and grade marking in accordance with the established commercial standards of the different grades of Douglas fir doors.

(*f*) They have exchanged among themselves and made available to each other through the medium of respondent Institute intimate details of each other's business including statistics relating to production, sales, shipments by and orders on hand with the respondents, which information was not and is not disclosed to the buying public.

(*g*) They have fixed and maintained the prices, terms and discounts at which overhead garage doors known as "CrawFIRdors" were sold or are offered for sale to the purchasers thereof.

(*h*) They have fixed and maintained the prices at which overhead garage doors known as "CrawFIRdors" could be and were offered for resale by dealers therein.

(*i*) Member and nonmember respondents have entered into so-called license agreements with respondent Crawford Door Co. whereby said member and nonmember respondents agreed to sell only such overhead garage doors as are known as "CrawFIRdors," to sell "CrawFIRdor" doors to be used only in connection with "CrawFIRdor" hardware and to purchase their entire requirements of "CrawFIRdor" hardware from respondent Crawford Door Co.

(*j*) They have agreed that member and nonmember respondents would pay, and they have actually paid, a royalty to respondent Crawford Door Co. for each "CrawFIRdor" sold, and that respondent Crawford Door Co. would pay, and it has actually paid, a royalty to respondent Institute for each set of "CrawFIRdor" hardware sold, for the purpose of advertising and promoting the sale of "CrawFIRdors."

(*k*) They have agreed that "CrawFIRdor" doors sold by member and nonmember respondents should be made strictly in accordance with specifications established and approved by respondent Institute and by respondent Crawford Door Co.

(*l*) They have fixed and maintained prices at which member and nonmember respondents would sell "CrawFIRdor" doors to respondent Crawford Door Co.

(*m*) They have agreed that respondent Crawford Door Co. would enter into no further so-called license agreements relating to "CrawFIRdors" without the written consent of all existing licensees.

PAR. 9. The capacity, tendency and results of the aforesaid understandings, agreements, combinations, and conspiracies, and the acts and things done and performed thereunder and pursuant thereto by said respondents, have been and are now to place in the respondents the power to control and enhance prices and to actually increase the prices of Douglas fir doors, and to concentrate in the hands of respondent Institute the power to dominate and control the manufacture of Douglas fir doors and "CrawFIRdors" and to create a monopoly in said respondents in the sale of Douglas fir doors and "CrawFIRdors."

PAR. 10. The acts and practices of said respondents as herein alleged, are all to the prejudice and injury of the public; have a dangerous tendency to, and have actually hindered and prevented competition between and among said respondents in the sale of Douglas fir doors and "CrawFIRdors" in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act; and have unreasonably restrained such commerce in Douglas fir doors and "Craw-FIRdors" and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 8, 1949, issued and subsequently served upon the respondents named in the caption hereof its amended complaint in this proceeding, charging said respondents with the use of unfair methods of competition in commerce in violation of the provisions of that act. On August 23, 1949, each of the respondents filed its separate answer to said amended complaint, in which answers all of the respondents, except Monarch Door & Manufacturing Co. and Northwest Door Co., for the purposes of this proceeding, admitted all of the material allegations of fact set forth in the amended complaint and waived all intervening procedure and further hearing as to said facts, the admissions in the answers of Monarch Door & Manufacturing Co. and Northwest Door Co. being limited to certain portions of said allegations, but each of the answers providing that the admissions contained therein should be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial portion of the period of time between January 1, 1938, and November 29, 1941 (in the case of Acme Door Co., between October 15, 1939, and November 29, 1941; in the case of Harbor Plywood Corp., between January 1, 1938, and March 1940; and in the case of Wallace E. Difford, between March 20, 1938, and November 29, 1941). In said answers each of the respondents reserved the right to file a brief and present oral argument before the Commission as to what order, if any, should be issued upon the facts admitted. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the amended complaint, the aforesaid answers of the respondents, a memorandum proposing disposition of the case filed by counsel in support of the amended complaint as, for, and in lieu of a brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended to the Commission by counsel in support of the amended complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs filed on behalf of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (*a*) The respondent, Fir Door Institute, hereinafter sometimes referred to as "respondent institute," is a nonprofit corporation organized under the laws of the State of Washington in the year 1938, with its principal office located in the Tacoma Building, Tacoma, Wash. The membership of said respondent is composed of a number of corporations located principally in the States of Washington and Oregon, all of which are engaged in the manufacture, sale and distribution, or in the sale and distribution of Douglas fir doors. Said members of respondent institute produce a substantial part of the volume of Douglas fir doors produced annually in the United States.

(b) The respondent institute was organized for the purpose, among others, of advertising and promoting the sale of Douglas fir doors, promoting the sale of an overhead garage door referred to as a "Craw-FIRdor," and of developing a factory prefit door.

(*c*) The names and addresses of the principal officers of said respondent institute are Herman Snider, president, care Acme Door Co., Hoquiam, Wash.; Arthur C. Peterson, vice president, care Buffelen Manufacturing Co., Tacoma 1, Wash.; Thomas B. Malarkey, secretary, care M & M Wood Working Co., 2301 North Columbia Road, Portland 3, Oreg.; and N. O. Cruver, treasurer, care The Wheeler, Osgood Co., Tacoma, Wash.

PAR. 2. (*a*) The respondent, Acme Door Co., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Hoquiam, Wash. This respondent is now, and since October 15, 1939, it has been, a member of and a subscriber to the respondent institute.

(*b*) The respondent, M & M Wood Working Co., is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at 2301 North Columbia Road, Portland 3, Oreg. This respondent is now, and since September 28, 1938, it has been, a member of and a subscriber to the respondent institute.

(*c*) The respondent, The Wheeler, Osgood Co., is a corporation incorporated on May 1, 1903, and existing under the laws of the

State of Washington, with its principal office and place of business located at 1216 St. Paul Street, Tacoma, Wash.

On September 8, 1933, the respondent, The Wheeler, Osgood Co., caused to be incorporated under the laws of the State of Washington, a new corporation under the name of Wheeler Osgood Sales Corp., which said corporation was, throughout its existence, a wholly owned subsidiary of respondent, The Wheeler, Osgood Co. The Wheeler, Osgood Co. subscribed to all of the capital stock of Wheeler Osgood Sales Corp. and paid for same by transferring and conveying to Wheeler Osgood Sales Corp. all of its inventory and other assets which were not covered by a deed of trust dated March 1, 1926. Wheeler Osgood Sales Corp. leased, on a month-to-month basis, from The Wheeler, Osgood Co., all of the plant and other property of The Wheeler, Osgood Co. covered by the deed of trust, the lease being dated September 15, 1933, and all net profits of Wheeler Osgood Sales Corp. were paid to The Wheeler, Osgood Co. as rent for the property so leased. On the same day Wheeler Osgood Sales Corp. employed N. O. Cruver, who had been with The Wheeler, Osgood Co. for many years, and E. J. Calloway and Ralph Brindley, both also employees of The Wheeler, Osgood Co., as its principal executive officers. Wheeler Osgood Sales Corp. operated the plant of The Wheeler, Osgood Co. and all of the business formerly operated by The Wheeler, Osgood, Co. from September 15, 1933, until June 30, 1944.

Wheeler Osgood Sales Corp. became a member of and a subscriber to the respondent institute on September 28, 1938, and during all of the time the business and plant of The Wheeler, Osgood, Co. was operated and conducted by Wheeler Osgood Sales Corp., Wheeler Osgood Sales Corp., remained a member of and a subscriber to said respondent institute. During the period of time from September 15, 1933, to June 30, 1944, respondent, The Wheeler, Osgood Co. remained dormant and inactive and was engaged in the conduct under its own name of no business operations.

Since July 1, 1944, the business which had been operated by Wheeler Osgood Sales Corp. since September 15, 1933, and which prior to that time had been conducted and operated by the respondent, The Wheeler, Osgood Co., has been, and is now, operated by the respondent, The Wheeler, Osgood. During the period from July 30, 1946, until the latter part of 1947, said respondent has undergone certain financial reorganizations, and has increased its outstanding capital stock, but at all times mentioned herein it has been, and is now, a member of and a subscriber to the respondent institute.

(*d*) All of the respondents hereinbefore named in paragraph 2 are engaged in, among other things, the manufacture, sale and distribution in interstate commerce, or in the sale and distribution in interstate commerce, of Douglas fir doors, and are now, or have been, members of the respondent institute. Said respondents are hereinafter sometimes referred to as "member respondents."

PAR. 3. (*a*) The respondent, Monarch Door & Manufacturing Co., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Tacoma, Wash. This respondent, from September 28, 1938, until May 1946, was a member of and a subscriber to the respondent institute.

(*b*) The respondent, Northwest Door Co., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1203 East D Street, Tacoma, Wash. This respondent, for a number of years subsequent to September 28, 1938, was a member of and a subscriber to the respondent institute.

(*c*) The respondent, Harbor Plywood Corp., is a corporation organized under the laws of the State of Delaware, with its principal office and place of business located at Hoquiam, Wash. This respondent was formerly engaged in the manufacture, sale and distribution in interstate commerce of Douglas fir doors. It was an original member of the respondent, Fir Door Institute, having become a member thereof and a subscriber thereto on September 28, 1938. In the spring of 1939, Harbor Plywood Corp. sold its door factory to Acme Door Co. Said Harbor Plywood Corp. has a contract with Acme Door Co. for the purchase of 80 percent of the door output of Acme Door Co. Said respondent, Harbor Plywood Corp., remained a member of the respondent institute until March 1940.

(*d*) The respondent, Robinson Plywood and Timber Co., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Everett, Wash. This respondent was formerly known as Robinson Manufacturing Co., and said respondent, under such former corporate name, became a member of and a subscriber to the respondent, Fir Door Institute, on September 28, 1938, and remained such member of and subscriber to said institute until July 24, 1944, at which time it resigned its membership therein. Since said date of July 24, 1944, it has continued to contribute payments to said respondent institute, but has attended no meetings of said institute.

(*e*) The respondents named in this paragraph 3 are engaged in, among other things, the manufacture, sale and distribution in interstate commerce, or in the sale and distribution in interstate commerce, of Douglas fir doors, and are hereinafter sometimes referred to as "nonmember respondents."

PAR. 4. The respondent, Crawford Door Co., is a corporation organized and existing under the laws of the State of Michigan, with its principal office and place of business located at 401 St. Jean Avenue, Detroit, Mich. This respondent is engaged in, among other things, the manufacture, sale and distribution in interstate commerce of hardware used in connection with the production of overhead garage doors referred to and known as "CrawFIRdors," and also in the sale and distribution in interstate commerce of Douglas fir doors.

The respondent, Crawford Door Co., is the holder of certain patent applications and of certain United States letters patent relating to the aforesaid overhead garage door. Said respondent has entered into so-called license agreements under such patent applications and letters patent with various manufacturers of Douglas fir doors, all of whom are included among the respondents named herein. By virtue of such license agreements, the respondent, Crawford Door Co., purports to grant to such manufacturers the right to make and sell the "CrawFIRdor," but it does not grant to said other respondents, or to anyone, the right to manufacture and to assemble the hardware used in connection with the said "CrawFIRdor," which said hardware is known as and referred to as "CrawFIRdor" hardware.

PAR. 5. The respondent, Wallace E. Difford, is an individual who maintains his office in the Henry Building, Seattle, Wash. Said respondent, from the inception of the respondent institute in 1938 until June 30, 1946, was employed as manager of said respondent institute, and as such manager he endeavored to promote the sale and distribution of Douglas fir doors and overhead garage doors known as "CrawFIRdors." Through and by means of the assistance of this respondent, the respondents hereinabove named in paragraphs 2, 3, and 4 have cooperated in performing and doing the acts and things as hereinafter found. Said respondent Difford severed his employment with the respondent institute as of June 30, 1946, and is presently engaged in the distribution of lumber products under the name of W. E. Difford & Sons.

PAR. 6. (*a*) The member and nonmember respondents hereinbefore named in paragraphs 2 and 3 are all engaged in the business of selling and distributing Douglas fir doors to dealers in such products located in States other than the States in which said respondents are located, causing said products, when so sold, to be transported from their respective places of business to the purchasers thereof located at various points in the several States of the United States other than the States of origin of such shipments and in the District of Columbia. There has been, and is now, a course of interstate trade and commerce in said products between the aforesaid respondents and dealers in such products located throughout the several States of the United States and in the District of Columbia. Said respondents are now, and during all of the time mentioned herein they have been, engaged in competition with other members of the industry in making and seeking to make sales of their products in said commerce, and, but for the facts hereinafter found, they would now be in free, active and substantial competition with each other.

(*b*) The respondent, Crawford Door Co., named in paragraph 4, is engaged in the business of selling and distributing hardware used in connection with the assembly of overhead garage doors referred to and known as "CrawFIRdors" to purchasers thereof located in States other than the State in which said respondent is located and in the District of Columbia. There has been, and is now, a course of interstate trade and commerce in such hardware and in said overhead garage doors between this respondent and purchasers of these products located throughout the several States of the United States and in the District of Columbia. Said respondent, Crawford Door Co., is now, and during all of the time mentioned herein, it has been, engaged in competition with other members of the industry in making and seeking to make sales of hardware for use in connection with overhead garage doors, and of overhead garage doors, in said commerce, and, except for the facts hereinafter found, it would not in free, active and substantial competition with the member and nonmember respondents herein and with other dealers in overhead garage doors.

PAR. 7. Said respondents hereinbefore named in paragraphs 2, 3, 4 and 5, acting in cooperation with each other, and through and in cooperation with the respondent institute and its officers, and each of them, during a substantial part of the period of time between January 1, 1938, and November 29, 1941, did engage in an understanding, agreement, combination, conspiracy and planned common course of action among themselves, and with and through the respondent institute and its officers, to hinder and suppress competition in the interstate sale and distribution of Douglass fir doors, overhead garage doors known as "CrawFIRdors" and hardware used for assembling said doors and known as "CrawFIRdor" hardware to wholesale and retail dealers therein; and to create and maintain in the member and nonmember respondents and respondent Crawford Door Co. a monopoly in the interstate sale and distribution of Douglas fir doors and of overhead garage doors referred to as "CrawFIRdors."

PAR. 8. Pursuant to the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and in furtherance thereof, said respondents, during the period of time mentioned in paragraph 7, acted in concert and in cooperation with each other to do, and in doing, among others, the following acts and things:

1. Fixing the prices, terms and discounts at which the respondents sold or offered for sale Douglas fir doors to jobber customers.

2. Establishing and maintaining a system of zone delivered price quotations for the sale of Douglas fir doors throughout the United States, with fixed discounts for each zone, which said discounts were arbitrarily shortened a certain number of points depending upon the freight rate from the mill to the point of destination.

3. Quoting prices only on a delivered basis, which price quotations included freight charges computed from Tacoma, Wash., irrespective of the origin of shipment or the actual freight rate applicable thereto.

4. Agreeing to and establishing commercial standards for the different grades of Douglas fir doors.

5. Agreeing to and establishing a system for the inspection, classification and grade marking, in accordance with the established commercial standards, of the different grades of Douglas fir doors.

6. Exchanging among themselves and making available to each other, through the medium of the respondent institute, intimate details of each other's business, including statistics relating to production, sales, shipments by and orders on hand with the respondents, which information was not disclosed to the buying public.

7. Fixing and maintaining the prices, terms and discounts at which overhead garage doors known as "CrawFIRdors" were sold and offered for sale to the purchasers thereof.

8. Fixing and maintaining the prices at which overhead garage doors known as "CrawFIRdors" could be and were offered for resale by dealers therein.

9. Entering into so-called license agreements between the member and nonmember respondents and Crawford Door Co. whereby said member and nonmember respondents agreed to sell only such overhead garage doors as are known as "CrawFIRdors," to sell "CrawFIRdors" to be used only in connection with "CrawFIRdor" hardware, and to purchase their entire requirements of "CrawFIRdor" hardware from the respondent, Crawford Door Co.

10. Agreeing that member and nonmember respondents would pay, and they actually did pay, a royalty to the respondent, Crawford Door Co., for each "CrawFIRdor" sold, and that respondent Crawford Door Co. would pay, and it actually did pay, a royalty to the respondent institute for each set of "CrawFIRdor" hardware sold, for the purpose of advertising and promoting the sale of "CrawFIRdors."

11. Agreeing that "CrawFIRdor" doors sold by member and nonmember respondents should be made strictly in accordance with specifications established and approved by the respondent institute and by respondent Crawford Door Co.

12. Fixing and maintaining prices at which member and nonmember respondents would sell "CrawFIRdors" to respondent Crawford Door Co.

13. Agreeing that respondent Crawford Door Co. would enter into no further so-called license agreements relating to "CrawFIRdors" without the written consent of all existing licensees.

PAR. 9. The capacity, tendency and results of the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done and performed thereunder and pursuant thereto, by the respondents, have been and now are to place in the respondents the power to control and enhance prices and to actually increase the prices of Douglas fir doors, and to concentrate in the hands of the respondent institute the power to dominate and control the manufacture of Douglas fir doors and "CrawFIRdors," and to create a monopoly in said respondents in the sale of Douglas fir doors and "CrawFIRdors."

PAR. 10. The amended complaint in this proceeding named as respondents herein N. O. Cruver and Arthur C. Peterson in their individual capacities, as well as in their capacities of treasurer and vice president, respectively, of the respondent, Fir Door Institute. It appears, however, that both of these respondents are still officers of the respondent institute, and any order to cease and desist entered herein will run against the respondent institute and all of its officers, agents, representatives and employees. So long as the respondents, Cruver and Peterson, are officers of the institute, or even employees thereof, they will be bound by the terms of the order, even though not individually named therein, and in view of this fact the Commission is of the opinion that insofar as the amended complaint names them as respondents in their individual capacities it may properly be dismissed.

CONCLUSION

The acts and practices of the respondents, as herein found, were all to the prejudice and injury of the public and of competitors of said respondents; have had a dangerous tendency to and have actually hindered and prevented competition between and among the respondents in the sale of Douglas fir doors and "CrawFIRdors" in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in Douglas fir doors and "CrawFIRdors"; and have constituted unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers thereto filed on behalf of all of the respondents, a memorandum filed by counsel in support of the amended complaint as, for, and in lieu of an opening brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended by counsel in support of the complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs filed on behalf of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Fir Door Institute, a corporation, its officers, agents, representatives and employees, the corporate respondents, Acme Door Co., M & M Wood Working Co., and The Wheeler, Osgood Co., individually and as members of and subscribers to said respondent institute, and their respective officers, agents, representatives and employees, the corporate respondents, Monarch Door & Manufacturing Co., Northwest Door Co., Harbor Plywood Corp., Robinson Plywood and Timber Co., and Crawford Door Co., and their respective officers, agents, representatives and employees, and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the

Federal Trade Commission Act, of Douglas fir doors, under whatever name offered so sold, and overhead Douglas fir garage doors known as "CrawFIRdors," do forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of such doors for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing, or maintaining uniform prices, and in connection therewith uniform discounts, terms or conditions of sale for any kind or grade of Douglas fir doors, or for overhead Douglas fir garage doors known either as "CrawFIRdors" or by any other name, or in any manner fixing or establishing any prices and in connection therewith discounts, terms or conditions for sale of such doors.

2. Selling only on a delivered price basis, and in conjunction therewith, (*a*) establishing or maintaining delivered price zones or price differentials between such zones; (*b*) computing the rail freight rate from any point other than the point of origin of the shipment; (*c*) quoting or selling on a basis which systematically includes transportation charges greater than the actual cost of transportation from point of shipment to destination.

3. Preparing, adopting, or using any basic price list at which Douglas fir doors, under whatever name offered or sold, are to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list.

4. Compiling, exchanging or disseminating between or among respondents statistical information in respect to the production, sale, shipment and orders on hand of Douglas fir doors, or any one thereof, unless such statistical information as is made available to respondents is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and unless the information so compiled, exchanged and disseminated does not disclose or make it possible to determine the identity of the manufacturer, seller or purchaser, and does not have the capacity or tendency of aiding in securing compliance with announced present or future prices, terms or conditions of sale.

5. Formulating, adopting, using or enforcing any minimum resale price agreements covering "CrawFIRdors" or any other Douglas fir overhead garage door, pursuant to and under which wholesalers,

jobbers or dealers are required to maintain resale prices, terms or conditions.

6. Adopting or entering into uniform license agreements relating to the sale of overhead Douglas fir garage doors known as "CrawFIRdors," under which member and nonmember respondents refrain from the manufacture and sale of any overhead Douglas fir garage doors other than "CrawFIRdors."

7. Adopting or entering into uniform license agreements relating to the sale of "CrawFIRdors," whereby member and nonmember respondent offer to sell, or sell overhead Douglas fir garage doors for use in connection with hardware exclusively produced by or for respondent Crawford Door Co.

8. Establishing or fixing, between member and nonmember respondents as licensees and respondent Crawford Door Co. as licensor, the amount of royalty to be paid on the sale of "CrawFIRdors."

9. Adopting or entering into uniform license agreements relating to the sale of "CrawFIRdors" whereby respondent Crawford Door Co. as licensor refuses to issue any new licenses without the written consent of the member and nonmember respondents as existing licensees.

10. Formulating, devising, adopting, circulating, or exchanging information concerning the customer classification granted or to be granted to any specific purchaser, or determining any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

It is further ordered, That nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

It is further ordered, For reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondents, N. O. Cruver and Arthur C. Peterson, in their individual capacities, it being understood, however, that said amended complaint is not being dismissed as against the said N. O. Cruver and Arthur C. Peterson as officers of the respondent, Fir Door Institute.

It is further ordered, That the respondents shall, within 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.

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IN THE MATTER OF

DOUGLAS FIR PLYWOOD ASSOCIATION ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5529. Complaint, May 19, 1949[1]—Decision, Oct. 20, 1950

Where 12 corporations, subscribers to, and members of an association (which, formed in about 1933, served as the Code Authority for the plywood industry during NRA, and was thereafter organized as a nonprofit corporation for the declared purpose, among other things, of dealing with common industrial problems of management, etc.); a thirteenth concern, which subscribed to the association's "Subscription Contract—Cooperative Trade Promotion Campaign", but was not a member; and 2 other corporate nonmembers who cooperated as hereinafter indicated; engaged in the manufacture, and in the interstate sale and distribution of plywood products to dealers, in competition with others, and, but for the matters below set forth, in competition with one another;

Acting in cooperation with each other and said association, its officers and management committee, managing director and assistant secretary, and the Information Bureau of the member and subscriber concerns—

Engaged in a conspiracy and planned common course of action during a substantial part of the time between May 1935 and August 1941, to restrict, restrain, and suppress competition in the sale and distribution of plywood products to customers located throughout the United States, by agreeing to fix and maintain prices, terms, and discounts at which said products were to be sold, and to cooperate with each other in their enforcement and maintenance by exchanging information through said association and said bureau as to the prices, terms, and discounts at which said concerns had sold and were offering to sell plywood products; and

Where said concerns (other than N, and A, member concerns, and W, a nonaffiliate), during the aforesaid period, and pursuant to the aforesaid understanding, etc., and in furtherance thereof—

(*a*) Agreed to and did curtail the production of plywood;

(*b*) Compiled statistical information in respect to production, sales, shipments, and orders on hand which was made available among themselves but was denied to the purchasing trade;

(*c*) Adopted and used a uniform basic price list containing uniform net extras to be charged thereon and uniform discounts;

(*d*) Compiled and used lists of buyers entitled to receive a so-called jobber's discount of 5 percent;

(*e*) Adopted and used a so-called functional compensation plan of distribution, and as a part thereof, and incident thereto—

(1) Issued uniform net dealers' prices on different quantities and a uniform cash discount;

[1] Amended.

(2) Issued identically worded compensation schedules which embodied definitions of trade factors, and provided for the functional discounts under prescribed conditions;

(3) Adopted an unpublished agreement which interpreted the plan and provided that a buyer doing less than 40 percent of its business at wholesale would be considered a dealer thereunder; and

(4) Established an Information Bureau to develop information as to the trade status of buyers, which applied said secret requirement of 40 percent wholesale in determining the status of buyers and transmitted to members and subscribers conclusions and findings as to said status;

(*f*) Adopted arbitrarily rules providing that the Government and certain industrial buyers be required to pay dealers' prices, and that certain specified classes of industrial buyers receive a 5 percent discount from the dealers' prices;

(*g*) Acted to insure the success of the plan and to compel compliance therewith, and in said connection, and for said purpose—

(1) Held meetings with distributors to force or induce adherence to the price and discount provisions, and invited distributors to submit information in reference to suspected deviations from the plan by manufacturers or others;

(2) Acted through the association to conduct general investigations of members' files or to investigate specific instances of reported violations;

(3) Established the association as an intermediary to place business among the members;

(4) Used mill numbers to identify the source of manufacture in cases of reported deviation from the plan; and

(5) Provided in the agreement under which manufacturers were licensed to use the trade marks obtained by the association, that the same could be used on grades approved by the association;

(*h*) Threatened to, sought to, and did, cut off the supply of distributors who failed or refused to adhere to prices or classification provisions;

(*i*) Quoted only on a delivered price basis, and, in conjunction therewith, computed the rail freight from Tacoma, Wash., irrespective of the origin of shipment or the rate applicable thereto, and used a uniform schedule of estimated weights which were higher than actual weights, and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers; and

(*j*) Shipped by water to East Coast and Gulf points only on a C. I. F. basis, and applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market; and

Where said member N, acting in pursuance of said understanding, etc., and in furtherance thereof, and during the same period—

(*a*) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which, made available among themselves, was denied to the purchasing trade;

(*b*) Adopted and used a uniform basic price list which contained uniform net extras and uniform discounts;

(*c*) Adopted and used the above described "functional compensation plan of distribution" except for establishment of the Information Bureau; and acted to insure success of the plan through such measures as those described above:

(*d*) Quoted only on a delivered price basis, computing the rail freight from Tacoma, Wash. and using a uniform schedule of estimated weights, as employed by the others; and, like them

(*e*) Shipped by water to East Coast and Gulf points only on a C. I. F. basis, and applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market; and

Where said nonmember W, pursuant to said understanding, etc., and in furtherance thereof, and during the same period, likewise—

(*a*) Adopted and used a uniform basic price list containing uniform net extras and uniform discounts;

(*b*) Compiled and used lists of buyers entitled to receive a "jobbers' discount" of 5 percent;

(*c*) Adopted and used the "functional compensation plan of distribution" above described; and

(*d*) Shipped by water to East Coast and Gulf points only on a C. I. F. basis, and applied a uniform net addition to the ocean freight rate, and a uniform net addition on sales made in the primary market; and,

Where said member A, in pursuance and furtherance of the aforesaid understanding, etc.—

(*a*) Issued a dealer price list which contained the same prices, terms, and conditions as shown in the price lists issued by other members or subscribers to the association; and

(*b*) In said connection, and effective on the same date as said price list, issued the same "Wholesale functional service compensation schedule" issued and used by all other aforesaid members and subscribers, and, in connection therewith, made use of the services of the aforesaid Information Bureau;

Capacity, tendency, and results of which conspiracy and planned common course of action, and acts done pursuant thereto had been and were—

(1) To interfere with and curtail the production of plywood products and the sale thereof in interstate commerce to dealers, who, but for the existence of said understanding, etc., would be able to purchase their requirements of said product from the manufacturers;

(2) To force many dealers in said products to discontinue the sale thereof because of their inability to obtain them from manufacturers or to maintain a supply thereof at reasonable prices;

(3) To substantially increase the price of plywood products to wholesalers, retailers, and the consuming public;

(4) To substantially increase the price of said products to the Government and certain industrial buyers; and

(5) To concentrate in the hands of said participants in said understanding, etc., the power to dominate and control the business policies and practices of the manufacturers and distributors of plywood products, and to exclude from the industry those who do not conform to the rules, regulations, and requirements established by said participants, and thus to create a monopoly in the latter in the sale of said products:

Held, That said acts and practices, as above set forth, were all to the prejudice and injury of the public, and of their competitors; had a dangerous tendency to and actually did injure and prevent competition in the sale of said products in commerce; unreasonably restrained such commerce; and constituted unfair methods of competition in commerce.

As to the contention of said A that the complaint against it should be dismissed since it did not begin operations until November 2, 1939, which was only 12 days before it issued the price list above referred to; and, being a new company faced with the problem of setting up a price list, it merely and naturally followed that already being used by the members of the industry generally; and that the record showed nothing more than a simple voluntary act on its part, importing no illegal conduct of any kind;

It appearing further, however, that said price list contained the same prices, terms, and conditions of sale which had been agreed upon and fixed, and were used by the subscribers to and members of the association, and others, pursuant to and in furtherance of an unlawful conspiracy; that A adopted the same compensation schedule which likewise had been agreed upon by the others and was used as a means of stabilizing the prices of plywood products; and that A also availed itself of the use of the services of said Information Bureau which was created to provide the membership of the association with information necessary for the classification of buyers of plywood:

The Commission was of the opinion that, while it might be true, as respondent contended, that the mere act on the part of one manufacturer of following the prices of another manufacturer is not in and of itself a violation of law, in the instant case, said A, having become a member of the association and, presumably, having acquainted itself with the purpose and activities thereof, and of its members, could not, after obtaining for itself the benefits of such purpose and activities, thus disclaim joint responsibility therefor; and that under the circumstances and for the reasons stated, said A was a participant in said unlawful understanding, etc., and that its said acts, as above set forth, were all done pursuant thereto and in furtherance thereof.

In said proceeding in which the amended complaint named an individual as respondent in his individual capacity, as well as in his capacity as assistant secretary of respondent association, it appearing, however, that said individual was still an officer of said association, and that any order to cease and desist would run against the association and all of its officers, etc., so that said individual would be bound by the terms of the order as long as he was an officer or even an employee of the association, even though not individually named in the order; the Commission was of the opinion, in view of such facts, that insofar as the complaint named said individual as a respondent in his individual capacity it might properly be dismissed as to him.

In said proceeding in which it appeared that a certain respondent named in the amended complaint was not organized until February 19, 1948, and did not participate in any of the unlawful acts or practices therein described, the trial examiner thereafter entered his order dismissing said complaint as to said respondent.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. Everette MacIntyre and *Mr. Lewis F. Depro* for the Commission.