IN THE MATTER OF

WARREN W. BURGESS ET AL. DOING BUSINESS AS THE KNOX COMPANY

Docket 5509. Complaint, Aug. 19, 1947—Decision, Sept. 15, 1954

Dismissal, for variance between the allegations and the proof, of complaint charging false advertising as to the therapeutic properties of a drug product "Cystex" recommended for kidney and bladder troubles.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. R. P. Bellinger for the Commission.

Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., and *Sampson & Dryden*, of Los Angeles, Calif., for respondents.

DECISION OF THE COMMISSION RULING ON APPEALS AND DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter came before the Commission upon the appeals separately filed by counsel supporting the complaint and counsel for respondents from the initial decision of the hearing examiner dismissing the complaint without prejudice.

For the reasons stated in its accompanying opinion, the Commission is of the view that the exceptions urged in support of the appeals filed by counsel for the respondents and by counsel supporting the complaint should be sustained to the extent there noted but in all other respects denied, and that the provision for dismissal of the complaint without prejudice as contained in the initial decision is appropriate.

It is ordered therefore that the respective appeals of counsel supporting the complaint and counsel for the respondents be granted in part and denied in part as noted in the accompanying opinion.

It is further ordered that the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to reopen this proceeding or to take such further or other action in the future as may be warranted by the then existing circumstances.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Initial decision by Everett F. Haycraft, Hearing Examiner.

This proceeding came on to be considered by the above-named Hearing Examiner, theretofore duly designated by the Commission, upon the complaint of the Commission, the answer of the respondents, testimony and other evidence introduced in support of and in oppo-

sition to the allegations of the complaint, proposed findings and conclusions presented by counsel, oral argument by counsel.

The complaint in the present proceeding was issued in August 1947 against the individuals named in the caption hereof as co-partners doing business as The Knox Company. It was alleged in the complaint that the respondents manufactured and sold in interstate commerce a drug preparation known as "Cystex" which they advertised in newspapers and over the radio as a cure or remedy or a competent or effective treatment for certain symptoms or conditions such as "'getting up nights,' backache, nervousness, leg pains, dizziness, swollen ankles, rheumatic pains, bladder weakness, painful passages, 'feeling old and rundown', 'feel below par', 'circles under your eyes,' and muscular pains due to non-organic and non-systemic kidney and bladder troubles", and also that the taking of Cystex as directed will remove or eliminate excess acids or poisons from the blood stream, and that the taking of Cystex will cause the one taking it to have new energy, increased vitality and better sleep.

It was further alleged that said advertisements were misleading in material respects and were "false advertisements" as that term is defined in the Federal Trade Commission Act; and that the taking of Cystex as set forth in the formula in the complaint, as directed or otherwise, will not constitute a remedy or cure or a competent or effective treatment for the conditions or symptoms set forth in the complaint which are symptoms caused by diseases or disorders of the bladder or kidneys, organic and systemic in nature; nor will it remove acids or poisons from the blood stream, nor will it constitute a cure, remedy or competent or effective treatment for any diseases or disorders of the bladder or kidneys or any symptoms or conditions that may result therefrom, nor will it improve the functioning of the bladder or kidneys.

The answer of the respondents admitted some of the allegations, including the formula of "Cystex" and the nature and contents of the advertisements, but denied that they had represented that the symptoms or conditions listed in the complaint are caused by non-organic or non-systemic disease of the bladder or kidneys. It was admitted however, that they had represented that such symptoms *may be* caused by non-organic or non-systemic disorders or troubles of the bladder or kidneys. The answer further denied that respondents had represented that Cystex is a cure or remedy for the symptoms set forth in the complaint, or that Cystex constituted a competent or effective treatment therefore in excess of generally furnishing palliative relief from the pain and distress caused by such symptoms and con-

ditions, by stimulating kidney action and thereby helping the kidney dispose of excess acid and waste materials which may have caused the onset or prolongation of such symptoms or conditions. Respondents denied that Cystex did not constitute a remedy or cure or a competent or effective treatment for any disorder of the bladder or kidneys, whether organic or non-organic, whether systemic or non-systemic, in origin. Respondents specifically denied the allegation that the taking of "Cystex" will not cause the one taking it to have new energy, increased vitality and better sleep. They further denied the allegation that "Cystex" would not constitute a remedy or cure or a competent or effective treatment for any disorder of the bladder or kidneys or any condition or symptom which may result therefrom, and that "Cystex" will not improve the functioning of the bladder or kidneys when functioning improperly, and averred to the contrary that "Cystex" is an urinary antiseptic and a diuretic which possesses value in the treatment of the symptoms and conditions, specifically named in the complaint, as well as other symptoms or conditions, which such symptoms are due to disorders of the bladder or kidneys, and also averred that "Cystex," because of its antiseptic and diuretic properties, will improve the functioning of the bladder or kidneys when those organs are functioning improperly and that the improvement of such function, in turn, enables those organs to dispose of excess acids, waste materials and poisons which often are the cause of such symptoms and conditions.

By way of special defense respondents alleged that the Federal Trade Commission issued a complaint against The Knox Company, a corporation, in September 1938, Docket No. 3597; that said complaint alleged misrepresentations as to the therapeutic value of the same product "Cystex" in the treatment of various ailments, disorders, and diseased conditions of the human kidneys and bladder; that the findings as to the facts and an order to cease and desist were issued by the Federal Trade Commission in such case on August 1, 1939, which recognized that "Cystex" possessed certain therapeutic values in the treatment of ailments, disorders, and diseased conditions of the human kidneys and bladder, and that thereafter The Knox Company filed its report of compliance therewith which was received and filed by the Commission on November 2, 1939.

It was further alleged affirmatively, by way of special defense, that on or about February 1, 1945, The Knox Company, a corporation, was dissolved and the business theretofore conducted by it has since been carried on by the respondents herein who were the sole stockholders in said corporation and its only successors in interest and that at all

times subsequent to the issuance of the said order to cease and desist, both the corporation and its successor partnership composed of the individual respondents herein, believing that said order was binding upon them have faithfully complied with the terms and requirements of said order and such compliance had not been questioned by the Federal Trade Commission; that the formula for the tablets now known and sold under the name "Cystex" is substantially the same as the formula used in 1938 and 1939; that the issues of fact and law in the former proceeding and in the instant proceeding are identical, and that the previous proceeding resulting in the outstanding order is a complete bar to the trial of the present case.

No action was taken by the Commission as to the special defense and the case was assigned to the undersigned Hearing Examiner to take testimony and receive evidence which was begun by him in July 1949 in Los Angeles, California, and continued from time to time until June 1952.

At the first hearing in this matter testimony was received indicating that the dosage set forth in the complaint, two tablets *three* times a day with a full glass of water, had been changed to two tables *four* times a day. However, the testimony received in support of the allegations of the complaint with respect to the therapeutic value of respondents' product "Cystex" in the Commission's case in chief related exclusively to said formula when taken by the patient according to the directions set forth in the allegations of the complaint, namely, two tablets *three* times a day. When counsel for the respondents presented testimony in opposition to the allegations of the complaint this testimony related to the therapeutic effect of respondents' product "Cystex" when taken in accordance with the new dosage, namely, two tablets *four* times a day. At the conclusion of the receiving of testimony in opposition to the allegations of the complaint, the attorney in support of the complaint was given an opportunity to rebut the testimony thus presented by testimony of other experts which testimony related to the therapeutic effect of respondents' product "Cystex" when taken according to the new dosage.

Reference to the Commission's complaint against The Knox Company in September 1938, Docket No. 3597, discloses that the allegations of that complaint are substantially the same as those of the present complaint, and challenged the therapeutic efficacy of respondents' product Cystex. For instance, it is alleged in the former complaint:

If functional disorders of the kidneys or bladder make you suffer from getting up nights, nervousness, leg pains, circles under eyes, dizziness, backache, swollen

joints, excess acidity or burning passages, don't rely on ordinary medicines, fight trouble with the doctors prescription Cystex.

It further appears that in the former case a stipulation of facts was entered into which served as a basis for the findings as to the facts in that proceeding. In the findings in that case the Commission found *inter alia* that—

Ailments, disorders and diseased conditions of the human kidneys or bladder often arise from, or are due to, or persist because of a systemic or organic derangement of some character. In such cases, while urinary antiseptic and diuretics frequently are used for temporary relief, "Cystex" does not constitute a cure or remedy for such ailments and disorders nor is it an adequate or competent treatment therefor. Such ailments, disorders and diseased conditions may also arise from other causes requiring various types of treatment, depending upon the particular cause of the condition in such case. "Cystex" does not constitute a cure or remedy for, or an adequate or competent treatment for, all non-organic or non-systemic cases due to such conditions, irrespective of the cause.

The various symptoms mentioned in respondents' advertising matter as being indicative of kidney or bladder derangement also may be symptoms of conditions dissociated from the kidney and bladder, and the presence of such symptoms does not positively indicate kidney or bladder derangement. Swollen joints, leg pains and so-called rheumatic pains may be and sometimes are symptoms of organic kidney and bladder disturbances. These symptoms, when present in cases of kidney or bladder troubles, may be and generally are of a systemic or organic origin. Backache, nervousness, dizziness, burning of the urinary passage, and "getting up nights" may be and sometimes are symptoms of kidney or bladder ailments that are systemic or organic in character. Functional disorders of the kidneys and bladder may, and sometimes do, arise from organic disturbances. For such functional disorders, while urinary antiseptics and diuretics frequently are used for temporary relief, "Cystex" is not a cure or remedy, nor is it an adequate treatment therefor.

The Commission in the former case against The Knox Company, Docket No. 3597, entered an order to cease and desist against the respondent The Knox Company "*and its officers, representatives, agents and employees directly or through any corporate or other device*" prohibiting them from representing that Cystex—

is an adequate remedy or cure or competent treatment for ailments, disorders, diseased conditions of the human kidneys and bladder, unless such representations are restricted to those cases of such disorders as are non-organic and non-systemic in character; or that said preparation is a cure or remedy for, or an effective treatment for, all ailments and disorders of the human kidneys and bladder which are non-systemic and non-organic; or that the presence of any of the following symptoms—swollen joints, leg and rheumatic pains, backache, nervousness, dizziness, burning of the urinary passage, "getting up nights", circles under the eyes, excess acidity or loss of energy—is necessarily indicative of ailments or diseased conditions which can be successfully treated by use of said preparation.

The foregoing findings as to the facts and order to cease and desist issued by the Commission against The Knox Company, Docket No. 3597, were duly served upon the respondent corporation therein and on November 2, 1939, the Commission advised said corporation that their report of compliance with the order to cease and desist in such proceeding had been received and filed. No appeal was prosecuted to any U. S. Circuit Court of Appeals with respect to the findings as to the facts and order to cease and desist and they became final within the meaning of subsection (1) of subsection (g) of Section 5 of the Federal Trade Commission Act on October 15, 1939, by operation of law.

From September 1938 until September 1947, the formulae for the two tablets comprising the drug product known as "Cystex" and the directions for its use were identical except for one minor ingredient which was eliminated. As hereinbefore indicated the directions for use were changed on September 1, 1947, so as to provide for the administration of the same dosage of two tablets *four* times per day instead of *three* times per day.

At the time of dissolution of The Knox Company, respondent in Docket No. 3597, in February 1945, its principal stockholders were Warren W. Burgess, Linn D. Johnson, and Richard T. Aldworth, respondents herein. Respondents Burgess and Johnson each owned a 45 percent interest in the corporation and respondent Aldworth owned a 10 percent interest in the corporation. From September 1938 up to and including the dissolution of the corporation on February 1, 1945, respondents Warren W. Burgess, Linn D. Johnson, and Richard T. Aldworth, were the sole officers of said corporation, respondent Burgess being president, Johnson, vice-president and treasurer, and Aldworth, vice-president and secretary. When the corporation was dissolved the assets thereof were distributed in kind to a co-partnership composed of respondents Burgess, Johnson and Aldworth, with their respective interest in the co-partnership remaining the same from the date of the distribution to the present as their prior respective interests in the corporation.

The issues raised by the complaint against The Knox Company, a corporation, Docket No. 3597, and the issues raised by the complaint against the respondents Burgess, Johnson and Aldworth, co-partners doing business as The Knox Company, Docket No. 5509, the present proceeding, are substantially identical since both complaints attack the efficacy and therapeutic value of the same product in the treatment of identical symptoms which may be indicative of ailments, disorders and diseased conditions of human kidneys and bladder, since both

complaints charge that said product has no therapeutic value in the treatment of such symptoms of ailments, disorders and diseased conditions.

In view of the foregoing and since the individual respondents, both in their capacities as the sole officers and representatives of The Knox Company, the corporate respondent in the preceding case, and as the joint successors in interest thereto upon its dissolution, would have been subject to the civil penalties provided for in subsection (1) of Section 5 of the Federal Trade Commission Act if any such proceeding had been instituted, it follows that they are entitled to all of the defenses in the present proceeding including the one of *res judicata*, to which the corporation would have been entitled. The principle of *res judicata* applies with respect to the orders to cease and desist issued by the Federal Trade Commission except to such extent as such principle may have been modified by the provision of subsection (b) of Section 5 of the Federal Trade Commission Act. Since the Commission has not elected to proceed by way of reopening the proceeding in Docket No. 3597, the principle of *res judicata* is fully applicable to bar the institution and maintenance of the present proceeding. Under such circumstances, the complaint in this proceeding should be dismissed in the light of the principle of law laid down in the case of *United States* vs. *Piuma*, 40 F. Supp. 119, which decision was confirmed by the U. S. Circuit Court of Appeals for the Ninth Circuit, 126 F. 2d 601. Certiorari was denied. Other decisions to the same effect are: *Lee* vs. *Federal Trade Commission*, 113 F. 2d 583; *U. S.* vs. *Willard Tablet Co.*, 141 F. 2d 141.

According to the formulae of respondents' product "Cystex," one of its principal ingredients and the one relied upon for its therapeutic value, is methenamine known by several names including urotropine. From 1894 until the advent of sulfa drugs and antibiotic agents ranging from about 1937 to 1942, methenamine was recognized as one of the outstanding urinary antiseptics available and it is still recognized and used by the medical profession for such purpose although to a much more limited extent, because the medical profession now has the sulfa drugs and the so-called antibiotic agents which have proven to be more efficient in that they are more often germicidal while methenamine merely inhibits bacterial growth and activity.

In the dosage involved in this proceeding the amount of methenamine taken by the patient varies from 15 grains per day (when two tablets are taken three times a day) to 20 grains a day (when two tablets are taken four times a day). The purpose of administering methenamine is to release it in an acid urine and thereby cause the

release of formaldehyde, which is a well-recognized germicidal and in the urinary tract will inhibit the growth of many kinds of bacteria including colon bacillus. The action of formaldehyde on bacteria in the pelvis of the kidneys is the same as it is on those in the bladder except that a greater concentration occurs in the bladder because the urine usually remains there longer.

Another important ingredient of respondents' product Cystex is benzoic acid which is recognized and used as an acidifying agent in the urine tract although it is not as satisfactory for that purpose as some other acidifiers. The quantity of benzoic acid in respondents' product consists of four grains per day when two tablets are taken four times a day, and it is considered sufficient to affect the pH of urine and make it more acid then it would be otherwise and to a point where formaldehyde can be released from methenamine. In order for the formaldehyde to be released from methenamine the pH of the urine must be reduced to a pH of 6.5 or lower, and if the pH of 5.5 to 6 is attained, formaldehyde is liberated sufficiently to have an action which inhibits germicidal growth activity although it might not be liberated in sufficient concentration to kill the germs.

There was a difference of opinion on the part of the urologists and other experts called in support of the allegations of the complaint and in opposition thereto with respect to the efficacy and therapeutic value of respondents' product Cystex when taken as directed since September 1947, two tablets four times per day, and containing 20 grains of methenamine per twenty-four hour day, to bring about bacteriostatic (inhibiting) action in urinary tract infections. Tests were made on patients by urologists called to support the contention of respondents and the results of these tests were placed in the record and the urologists making them were cross examined thoroughly. While some of these tests were not conducted in such a manner as to set forth accurate results with respect to the efficacy of respondents' product, it is believed that there is sufficient, reliable and probative evidence in the record to support the following conclusions with respect to respondents' product Cystex and its therapeutic value in relieving the symptoms and conditions outlined in the Commission's complaint.

Cystitis is recognized generally in the medical profession as an inflammatory condition of the lining of the bladder and the most common and usual symptoms of cystitis are frequency of urination, nocturia, or "getting up nights," urgency of urination, and painful or burning passage of urine. These symptoms are sometimes described by laymen as "bladder weakness" or "bladder trouble."

When a patient comes to a doctor with a history of urgency and frequency, getting up nights, and the doctor makes a general physical examination and then examines the urine according to techniques which are generally recognized for males and females and finds bacteria in the bladder urine, it is reasonable for such doctor to make a diagnosis that the patient has cystitis or inflammation of the upper urinary passages, although this technique would not provide positive evidence that the patient actually had cystitis.

Inflammations in the urinary tract are caused by infecting bacteria in the tissues thereof. Before the sulfa and antibiotic drugs were developed, the only thing that could be done was attack the bacteria in the urine and on the surface of the urinary tract tissues because the urinary antiseptics then in use could not penetrate into the tissues. Practitioners still have reason to attack the bacteria in the urine because those which infect the tissues first appear in the urine and also because inhibiting the bacteria in the urine helps prevent reinfection.

The bacteria which is the most common cause of cystitis and pyelitis is the colon bacillus, sometimes called b. coli and escherichia coli.

If sufficient methenamine is placed in an acid urine to cause the release of formaldehyde in the urinary tract, it might be very helpful for certain infections, including cystitis.

If the bacteria in the urine and on the surface of the bladder tissues are inhibited by a bacteriostatic agent such as formaldehyde, the natural recuperative processes of the body then may overcome the inflammation in the tissues.

Insofar as respondents' advertisements refer to such symptoms as frequency of urination, nocturia or "getting up nights," urgency of urination and painful or burning passage of urine, or "bladder weakness" being due to kidney and bladder troubles, such advertisements are not misleading in material respects and do not constitute "false advertisements" within the meaning of the Federal Trade Commission Act, since such symptoms are commonly and predominantly symptoms of cystitis and pyelitis, which are disorders of the bladder and kidneys, respectively.

Insofar as respondents' advertisements refer to such symptoms as backache, pain in the area of the back, pain or tenderness over the bladder, rheumatic or muscular pains and neuritic pains as being due to kidney and bladder troubles, such advertisements are misleading in material respects and constitute "false advertisements" within the meaning of the Federal Trade Commission Act, since such symptoms

also indicate organic and systemic troubles which are disorders of the organs mentioned and are not eliminated by respondents' product.

Insofar as respondents' advertisements refer to such symptoms as nervousness, upset condition, headache, and a feeling of being older than one's years and run down or below par being due to kidney and bladder disorders, such advertisements are not misleading in material respects and do not constitute "false advertisements" within the meaning of the Federal Trade Commission Act, since such symptoms are often secondary or resulting symptoms arising from the primary symptoms accompanying such disorders and are improved or eliminated when the infection in the urinary tract is improved or cleared up.

Respondents' advertisements do not all claim the product Cystex to be a cure or remedy for the diseases and disorders of the urinary tract which may cause some of the various symptoms listed in respondents' advertisements. Some of the advertisements specifically and affirmatively point out that Cystex merely assists in the recuperative processes but none claim that Cystex is a cure or remedy for such diseases. For example, one advertisement contains, in part, the following language:

1. The first dose starts right to work *helping nature* clean out excess acids and wastes which often aggravate many aches and pains.
2. *In acid urine it helps nature* combat certain harmful germs.
3. *By relieving* irritated tissues it *helps reduce* frequent or smarting passages both day and night.

(all italic supplied)

Another advertisement contains, in part, the statement:

The very first dose of Cystex (a physician's prescription) *usually* goes right to work *helping* the kidneys * * *.

(italic supplied)

Subsequent to September 1, 1947, respondents have contemplated that the dosage of "Cystex" would administer 20 grains of methenamine per day to the user and since it has been found that the administration of such dosage of methenamine affords some therapeutic benefit in connection with the treatment for many uncomplicated cases of acute and subacute cystitis and for the most common and usual symptoms thereof, which are often described by laymen and by respondents in their advertising as "bladder weakness" or "bladder trouble" and which symptoms include frequency of urination, nocturia or "getting up nights," urgency of urination and painful and burning passage of urination, and for such secondary symptoms as may occur in conjunction with the aforesaid common and usual symptoms, and since the extent of the effectiveness of such product

and the conditions wherein it may reasonably be expected to have some beneficial therapeutic effect are included in respondents' advertising relating to such product, it would not be in the public interest to include such representations in an order to cease and desist herein if the complaint had not been dismissed for another reason (*res judicata*).

However, as to the advertising claims that respondents' product Cystex will have any beneficial effect upon such symptoms as backache or pain in the area of the back, pain or tenderness over the bladder, rheumatic pains and neuritic pains, leg pains, dizziness, swollen ankles or muscular aches and pains, which symptoms indicate organic or systemic troubles which are not substantially alleviated or helped by the administration of respondents' product Cystex, it is observed that such representations are prohibited in the outstanding Order to Cease and Desist in The Knox Company case, No. 3597, but in that case the dosage was less than respondents are now recommending and for that reason, the Commission should not be estopped from amending its present complaint or issuing another complaint containing charges with respect to respondents' product as it has been since September 1947.

From the foregoing it will be seen that there is a variance between the allegations of the complaint and the proof with respect to the dosage of the product Cystex—whereas the complaint describes a dosage which would give the patient *15* grains of methenamine in a twenty-four hour day to be released in the acid urine, the proof shows that the respondents for a number of years have been recommending, and their customers are using, a dosage which would give them *20* grains of methenamine in a twenty-four hour day, which larger amount of methenamine releases more formaldehyde in the urine and is thus more efficacious in destroying or inhibiting bacteria or germs in the urine. Although the attorney in support of the complaint did not move to amend the complaint to conform to the proof, it is not too late for him to do so. (Paragraph (b) of Rule 15 of the Federal Rules of Civil Procedure)

In accordance with the foregoing statement of fact and law,

It is ordered that the complaint be, and the same hereby is, dismissed without prejudice.

OPINION OF THE COMMISSION

By Mason, Commissioner:

The complaint in this proceeding alleges that through advertisements disseminated by means of newspapers and radio broadcasts in promoting sales of their product, Cystex, the respondents have repre-

sented, among other things, that various symptoms or conditions there referred to including, among others, "getting up nights," painful passages, backaches, nervousness, leg pains, dizziness and "feeling below par," may be caused by non-organic or non-systemic disorders of the kidneys or bladder and that, when so stemming, respondents' preparation is a cure or remedy or constitutes an effective treatment for them. These advertisements are misleading in material respects and hence "false advertisements" within the meaning of the Federal Trade Commission Act, the complaint charges, and it additionally alleges in that connection, among other things, that irrespective of the manner taken, Cystex will not constitute a remedy or cure or effective treatment for any of the symptoms or conditions designated in the advertising or for any disease or disorder of the kidneys or bladder and that it will not improve the functioning of the kidneys or bladder.

At the conclusion of the hearings at which testimony and other evidence in support of and in opposition to the allegations of the complaint were presented, the hearing examiner filed his initial decision providing for dismissal of the complaint without prejudice. This matter is before the Commission now upon the appeals filed by counsel supporting the complaint and counsel for respondents from that decision.

Under his appeal, counsel supporting the complaint takes exception to the hearing examiner's failure to find that Cystex is worthless as a treatment for any bladder or kidney disorder or for any symptoms or conditions so resulting. He contends additionally that the hearing examiner erred in concluding that, when used four times daily, respondents' preparation affords some therapeutic benefit for many uncomplicated cases of acute and subacute cystitis and in concluding also that the statements in respondents' advertisements are not misleading which have offered the product for use in conditions such as frequency of urination, "getting up nights," urgency and painful passages and certain others deemed by the hearing examiner to be commonly associated with infections of the urinary tract either as primary or secondary symptoms.

Cystitis is a term used to designated an inflammatory condition of the mucous membranes or lining of the bladder. A frequent cause of inflammations in the urinary tract in instances when they do not result from such organic or systemic causes as prostate trouble and kidney stones is bacteria, one type of which is the colon bacillus, sometimes referred to as b. coli. An inflammatory condition can occur in the kidneys also and this is referred to as pyelitis.

The administration of drugs which will be effective in killing invading bacteria which are causing infection is an approved therapeutic procedure for relieving urinary infection and its primary and any secondary symptoms, which primary symptoms may include painful or burning passages of the urine and frequency of urination. For this purpose, urologists frequently administer the sulpha drugs and others developed in the course of recent years. Prior to their development, however, menthenamine was used by many members of the medical profession in treating urinary infections, and portions of the testimony received into the record suggest that some of its members still may use menthenamine for that purpose.

One of the two kinds of tablets provided in the respondent's treatment contains menthenamine. When the complaint issued, respondents' directions called for usage three times daily, as correctly referred to in the complaint, but such directions were then changed to four times daily and the approximate amounts of menthenamine ingested under respondents' former and present directions have been 15 and 20 grains, respectively. Cystex manifestly has no diuretic effect and such therapeutic effect as the preparation may have must be attributed solely to the menthenamine, which can effect the release of formaldehyde during periods when a favorable level of acidity is present in the urine. Whether any formaldehyde actually released and excreted through the urine may be sufficient to act as a germicide in killing bacteria or serve to inhibit their growth through a marked bacterio static action or may have instead only negligible effect on the colon bacilli present in the kidneys or bladder, depends on its period of contact with the infecting organisms, its affect not being instantaneous, and upon its concentration; concentration varies with dosage, the degree of urinary acidity and the amount of urine secreted.

The physicians who were called as witnesses in this proceeding by counsel supporting the complaint in general expressed opinions that respondents' product has no therapeutic value in the treatment of bladder or kidney disorders or their symptoms unless taken in far greater amounts than those directed by respondents and unless taken under conditions wherein a sufficiently high degree of urinary acidity will be maintained through diet or acid-forming drugs. In their opinion, the acidifying agent contained in the preparation is wholly inadequate to significantly increase urinary acid levels. The witnesses who testified in support of the complaint appear well qualified to express opinions on these matters and their opinions are entitled to great weight. On the other hand, the scientific witnesses

who were called by respondents testified in effect that a level of acidity favorable to the release of formaldehyde will be afforded upon use of Cystex and that the higher daily dosage presently recommended by respondents provides sufficient menthenamine effectively to reduce and inhibit bacteria and thereby relieve inflammation. Their views are based in part on clinical uses of Cystex on selected numbers of patients which use was undertaken pursuant to requests by respondents. In the opinion of the medical witnesses called by respondents, the preparation is an effective treatment for uncomplicated cystitis due to bacterial infection and its symptoms and for similar uncomplicated inflammations of the kidneys and symptoms resulting therefrom.

In these circumstances, we are of the view that the hearing examiner did not err when he failed to decide that the use of respondents' preparation, as currently directed, is worthless and has no therapeutic value as a treatment for uncomplicated cystitis and its symptoms and it further appears that the greater weight of the evidence does not support conclusions that respondents' product may not afford therapeutic benefit in the treatment of many uncomplicated cases of acute and subacute cystitis and their symptoms. The exceptions urged in support of this aspect of his appeal by counsel supporting the complaint accordingly are not being granted.

The complaint charges also that respondents' advertising has been misleading in material respects for the additional reason that certain of the symptoms or conditions for which representations of product value are made are never due to kidney or bladder troubles and because when any of the remaining symptoms result from kidney or bladder troubles, they are organic or systemic in nature rather than non-organic or non-systematic troubles as stated in the advertising. The expressions "non-systemic" and "non-organic" appear in the Commission's prior decision in Docket No. 3597, which will be referred to again. These terms have no exact scientific meaning and when used to refer to disorders of the kidneys or bladder or any other body organ they are in one sense contradictory. Uncomplicated cases of cystitis when in their acute and subacute stages do result however from the presence of bacteria in and on tissues rather than from other structural changes of the organ.

Reverting to the matters presented under the first part of these allegations, the hearing examiner found that painful or burning passages, frequency of urination and urgency may be primary symptoms of cystitis and pyelitis, and that other symptoms and conditions such as nervousness, headache, and "feeling of old and rundown" may be

associated with them as secondary symptoms. Pertinent to the allegation that some of the symptoms are never due to kidney or bladder disorders are certain of respondents' exceptions to the hearing examiner's rulings declining to adopt various proposed findings and conclusions. In this category is respondents' conclusion 2 (d) which requested him to find that backache, pain in the area of the back, pain or tenderness over the bladder, rheumatic or muscular pains, and neuritic pains, often occur in cases of cystitis and pyelitis and that these conditions will be improved or eliminated when infection in the urinary tract is improved or cleared up. Opinions were expressed by certain of the witnesses to the effect that these symptoms sometimes may be caused by pyelitis and that backache may be associated with cystitis and other evidence was received to the effect that, irrespective of the conditions causing these symptoms, Cystex would be of no value therefor. It seems proper to conclude here that these types of pain sometimes may be associated with kidney inflammations but that, on the other hand, gravest doubt should be entertained if these symptoms and conditions ever stem solely from acute or subacute cystitis, uncomplicated by other conditions. The testimony relied upon as indicative that Cystex will significantly influence these pains when associated with kidney disease or infection is not convincing. Although we have decided that the record does not support conclusions that respondents' advertising has been misleading in material respects for the reasons alleged in the foregoing charges, the evidence received appears to us likewise inadequate to support an informed determination that the matters contained in respondents' relevant proposed findings and conclusions are, in fact, correct. Respondents' exceptions to the hearing examiner's rulings rejecting them are deemed therefore to be without merit and are not being sustained.

Another of the charges of the complaint relates to statements contained in respondents' advertising in reference to excess acids and poisons. In this connection, it alleges that the advertising statements have constituted representations that the symptoms and conditions referred to in the advertising are or may be caused by excess acids and poisons in the blood stream and that the use of respondents' preparation as directed will eliminate excess acids and poisons from the blood stream and relieve or cure the symptoms enumerated. The complaint alleges that these representations are untrue for the reasons that excess acids and poisons in the blood stream do not cause such symptoms and conditions and that the use of respondents' product will not effectively treat them or remove acids or poisons from the blood stream.

Kidney impairments unquestionably may interfere with the elimination of wastes and acids and it is equally plain from the record that the preparation itself has no significant diuretic effect. Such value as may in instances be afforded for urinary tract infections and their symptoms by respondents' product under the subsequently recommended dosage would not appear to justify representations that the product is effective in removing and eliminating excess acids from the blood stream. On the other hand, to the extent that burning or painful passages in instances may be relieved by Cystex, some assistance to removal of body wastes from the urinary tract would be afforded, and doubt additionally may be entertained if there is adequate showing here that it is specifically the blood stream's content of acids and poisons which is represented in respondents' advertising to be causative of the symptoms and conditions mentioned. In the light of these considerations, and the evidence received in reference to the companion charges of the complaint and their disposition here, it does not appear that the public interest requires further consideration of the issues as they relate to excess acids and poisons. Similar conclusions are reached respecting charges relating to the references made in respondents' advertising to increased energy, vitality and better sleep.

The initial decision sustains respondents' contention that the Commission's decision of August 1, 1939, in Docket No. 3597, is *res judicata* as to the issues here presented and accordingly constitutes a bar to proceedings herein and counsel supporting the complaint has filed exceptions to that ruling. Solely named as respondent in the complaint in the earlier proceeding and served with process was the Knox Company, a corporation, and it was charged there that that respondent had engaged in false advertising in promoting sales in commerce of the product Cystex. Disposition of that proceeding was made pursuant to a stipulation as to the facts entered into between counsel in lieu of testimony and other evidence, and the order to cease and desist as there entered and issued, together with the Commission's findings as to the facts, was directed to respondent Knox Company, a corporation, and its officers, representatives, agents and employees.

On January 8, 1947, counsel on the Commission's staff filed request that such proceeding be reopened for the purpose of taking evidence as to whether changed conditions of fact or the public interest required that these findings and the order be reopened and altered or modified, and answer was filed in the name of the respondent corporation requesting that such motion be denied. Thereafter, staff

counsel moved to withdraw his motion for the reason that the corporation has been dissolved on February 1, 1945, and in response thereto counsel appearing in opposition to the previous motion expressed willingness to enter into a stipulation substituting in the place of the dissolved corporation the respondents here, who formerly were officers of the dissolved corporation and owners of substantially all of its capital stock and who subsequent to February 1, 1945, engaged in the distribution of Cystex as copartners under the name of the Knox Company. Upon consideration of the motion to withdraw and the answer thereto, the Commission granted such motion, holding that in view of the dissolution of the corporation no purpose would be served by further consideration of the motion to reopen.

A statement appears in the initial decision to the effect that the differences between the dosage earlier recommended by respondents as referred to in the complaint and the more frequent use subsequently recommended by respondents represent a variation between the pleadings and the proof respecting which no motion to amend has been made. Counsel for respondents in excepting to this statement contend that respondents' testimony relating to product efficacy under the more frequent usage was properly received into the record by the hearing examiner over the objection of counsel supporting the complaint. The complaint challenges the therapeutic value of respondents' product when taken as directed "or otherwise." The evidence in question obviously was relevant and material thereto and we believe that the ruling under which it was received was a correct ruling. No essential variance between pleadings and proof, therefore, appears, and respondents' exception is accordingly sustained.

The exceptions to other rulings below, as additionally urged by counsel for respondents and counsel supporting the complaint in support of their respective appeals, have been considered. Their discussion here in detail is not warranted, but we have concluded that no prejudicial error appears in connection with the challenged rulings and these exceptions accordingly are not being sustained. In these circumstances, therefore, the appeals filed by counsel for the respondents and by counsel supporting the complaint should be deemed granted to the extent hereinbefore noted but otherwise denied.

As noted previously, a conclusion that respondents' product may not in instances have therapeutic value when used four times daily is not supported by the greater weight of the evidence. Probative evidence relevant to the charges has been received into the record,

however, indicating that respondents' product would not afford the benefits represented in their advertising or any benefit at all when taken three times daily in the manner formerly directed. The physicians presented by counsel for respondents, who testified that Cystex has therapeutic value, based their views on the more frequent use later recommended and such directions appear to have been in use since 1947. In the circumstances, we are of the view that no further consideration of these issues of the proceeding is required at this time in the public interest. The provision in the initial decision for dismissal of the complaint without prejudice, therefore, appears appropriate and our order of dismissal separately issuing here likewise provides for this form of disposition.

In view of our conclusion in this branch of the case, we find it unnecessary to consider the defense of *res judicata* interposed by respondent.

IN THE MATTER OF

THE C. H. MUSSELMAN COMPANY ET AL.

ORDER REMANDING PROCEEDING

Docket 6041. Order and opinion, September 15, 1954

Order granting appeal from initial decision dismissing complaint on the ground that a prima facie case of concerted price fixing had not been established, and remanding the matter to hearing examiner for further proceedings.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Leslie S. Miller, *Mr. William J. Boyd, Jr.*, *Mr. Floyd O. Collins* and *Mr. Wilmer L. Tinley* for the Commission.

Mr. Daniel R. Forbes, of Washington, D. C., for National Fruit Product Co., Inc., and along with—

Keith, Bigham & Markley, of Gettysburg, Pa., for The C. H. Musselman Co., and

Mr. J. P. Arthur, of Winchester, Va., for Shenandoah Valley Apple Cider & Vinegar Corp., et al.

Mr. David Putney, of Harrisburg, Pa., for Knouse Foods Cooperative, Inc.

Wharton, Aldhizer & Weaver, of Harrisonburg, Va., for Bowman Apple Products Co., Inc.

Mr. Lyman S. Hulbert, of Washington, D. C. for Appalachian Apple Service, Inc. et al.

ORDER GRANTING APPEAL FROM INITIAL DECISION DISMISSING COMPLAINT, AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter is before the Commission upon an appeal of counsel supporting the complaint from an initial decision of the hearing examiner dismissing the complaint for failure of proof at the close of the presentation of the case in support of the complaint. Briefs in support of and in opposition to the complaint have been filed and oral argument of counsel heard.

The Commission has fully considered the entire record herein and for the reasons set out in the written opinion of the Commission, which is being issued simultaneously herewith, believes that a prima facie case has been made out and that the complaint was erroneously dismissed.

It is ordered, therefore, that the appeal of counsel supporting the complaint from the initial decision is hereby granted.

It is further ordered that the initial decision dismissing the complaint is hereby set aside.

It is further ordered that this matter is hereby remanded to the hearing examiner for further appropriate proceedings in due course.

Commissioner Howrey not participating for the reason that he did not hear oral argument.

OPINION OF THE COMMISSION

This proceeding involves charges that the Appalachian Apple Service Inc., an association of apple growers, and five processors of apple food products have engaged in an illegal combination to fix the price of apples in the Appalachian area. It is before the Commission on an appeal from the decision of the hearing examiner dismissing the complaint. This dismissal was granted prior to the time for the presentation of respondents' defense on the ground that the allegations of the complaint have not been proven, prima facie, by counsel supporting the complaint.

The record shows that the apple growers' association, in addition to many other activities, has named a twelve-man Joint Grower-Processor Committee to help both the growers and the processors in the field get a clear understanding of each others problems, policies and intent. Six of the members of this committee are growers and six are processors of apples. Each of the five respondent processors had a representative on this committee. This committee has served as a forum in which the growers' representatives have presented their reasons for requiring higher prices and the processors' representatives have explained why lower prices are necessary. The crux of this case is whether this record, prima facie, supports the contention that respondents, through this committee, fixed the price of apples by agreement.

The record shows the gradual development of the pricing activities of respondents through the Joint Grower-Processor Committee particularly from 1947 through 1951. The clearest picture is presented for 1950.

Respondents' representatives, who were there, testified that a meeting of the Joint Grower-Processor Committee was held on August 26, 1950, to discuss the price to be paid for that year's crop of apples. The growers apparently were trying to get $3.50 cwt. for the top grade of apples while the processors were urging $3.00 a cwt. Their testimony as to the details of what happened at the meeting, in the words of the hearing examiner, is "a mass of contradictions and confusion." The testimony of the respondent association's secretary was rejected in its entirety by the hearing examiner for evasiveness, exaggeration, lack of frankness and general lack of credibility.

One of the witnesses on whom the hearing examiner placed reliance was Mr. Stockdale of Zero Pack, a processor, and the only man at the meeting who was not connected with one of the respondents. In answer to the examiner's question "What did this meeting accomplish?" he answer:

"Nothing, to my viewpoint, except that it had been pretty clearly—I felt, pretty clearly that the growers represented there were telling us that they believed $3.50 was the price; I felt pretty clearly that the ones that stipulated prices of the processors, which mainly was Mr. Hunt, was $3.00, and I left there and when I reported to my office in Cincinnati I told them then, they asked me how I thought the thing would wind up, and I said, 'It looks to me like a $3.25 price'; but as to the actual meeting that was evolved in my own mind out of the various discussions that I heard at the meeting, but to say the meeting, itself, accomplished anything other than to bring forth these points in discussion, I couldn't name any reason for it."

In fact, the record shows that identical price announcements, at $3.25 a cwt. for top-grade applies, were made by each of the respondent processors very shortly after this meeting. The announced prices were identical in all respects for each of the sixteen classes and grades of apples sold. Such uniformity of price announcement among competitors after a meeting at which they admit they discussed prices implies that they agreed on the prices to be announced. This is not weakened by the fact that Mr. Stockdale was able to report to his office as a result of the meeting that it looked like a $3.25 price to him.

The hearing examiner was greatly persuaded by the fact that each of the representatives of the respondent processors at the meeting denied that there was any agreement as to price. He stated that because of the interest of those involved in this proceeding, their testimony "is not entitled to much weight." And he recognized that their testimony as to the details of what happened at the meeting, other than that there was no agreement, is "a mass of contradiction and confusion." Still he permits this testimony to outweigh what appears to us to be the most credible type of evidence, namely, the report of the secretary to the president of the association, written at the time.

This and other reports written by the association's secretary clearly state that the respondents, through the Joint Growers-Processor Committee, fixed by negotiation the price of apples. This evidence was given little weight by the hearing examiner because he did not believe the author when he testified under oath. In this testimony he was attempting to explain away these documents.

In our opinion, an attempt by a witness to explain away documents containing statements injurious to his cause, which testimony is rejected as not being credible by the hearing examiner, in no way affects the force of the written statements. These statements in reports written shortly after the time of the meeting in question should be given great weight. Under similar circumstances, the Supreme Court of the United States in the *Gypsum* case rejected testimony of the defendants that they had not acted in concert, stating that "When such testimony is in conflict with contemporaneous documents, we can give it little weight, * * *" (*U. S.* v. *Gypsum Co.*, 333 U. S. 364, 396 (1948)). This rule is particularly applicable under the facts in this case where it is undisputed that representatives of all of these respondents were at a meeting discussing what the price for apples should be immediately before the respondent processors all made identical price announcements. The proof of these joint activities connects these respondents sufficiently to make the written reports of their activities by any of them proper evidence as to them all.

Respondents contend that their activities at this meeting and otherwise have not fixed the actual price at which apples are sold. They contend that the uniform announced prices were not followed and that there was no price uniformity in the apple market. They point to testimony of their representatives that the respondents followed different practices as to the payment of bonuses at the end of the year, granting allowances for freight, free hauling, crating, storage, special deals, and payment for culls. There is testimony of diversity of practices as to these fringe pricing elements. However, their importance and extent is contested by counsel supporting the complaint. They point to the purchase tickets and stipulations pertaining to other purchase tickets all of which show that all of respondent processors paid uniform scale prices for apples in the 1950 season. Some of these tickets show that two of the respondents paid for culls in certain instances. However, the documentary evidence indicates that the uniform announced prices were followed in a substantial number and volume of sales by the processor respondents.

Upon this record we conclude that a prima facie case of price fixing has been established. Uniform prices were announced shortly after a meeting at which respondents admit they discussed what the prices should be and concerning which meeting the association secretary reported the price had been pushed up to $3.25. The evidence establishing a prima facie case of illegal price fixing has not been rebutted.

We also believe that a prima facie case has been established as to agreement on a formula or scale for fixing the relationship between

the prices to be paid for the different grades and classes of apples, and as to diversion of apples to other processors by agreement to maintain prices.

It is noted in connection with the former that the secretary of the association reporting on the August 26, 1950, meeting stated that, in addition to reaching the $3.25 price for the top grade of apples, the scale had been pushed up accordingly as a result of respondent's pricing discussions. Thus, although the exact amount to be paid for each class and grade of apples was not discussed as such, common understanding of the scale enabled each respondent to announce identical prices for each of the sixteen different classes and grades shortly after this meeting.

The hearing examiner placed too much reliance on the fact that the scale was not the same percentagewise as the one worked out under O. P. A. Documents in the record show a continuing need for change in the scale from year to year and that the price relationship between the different grades did change. Also, it is shown that certain changes in the scale were proposed for discussion but were not agreed on at the August 1950 meetings. That these proposed changes involved the proper price differentials between the different grades is expressly stated by the vice president of respondent National Fruit Product Company, Incorporated, in a letter transmitting his proposed changes to the secretary of respondent association for comment.

As to the alleged agreement to divert shipments of apples to another area to avert a break in the price in Virginia, the record shows that a meeting of the Joint Grower-Processor Committee was held on October 23, 1950, to discuss a plan of Mr. Hunt, vice president of respondent National Fruit Company, Incorporated, to reduce the price of apples in the Virginia area to around $3.00. At that time there was an oversupply in the Virginia area and a less than anticipated crop in Pennsylvania. No price reduction occurred. National Fruit Company, Incorporated, borrowed money and handled a larger pack than anticipated, on which it lost money. Some fruit was diverted to the respondent processors in the Pennsylvania area, taking pressure from the respondent Virginia processors. The extent of the diversion is not shown.

This does not appear to be usual competitive behavior. Normally, a buyer faced with oversupply lowers his price. He does not call a meeting of his competitors and the sellers' association, discuss the situation, encourage diversion of the oversupply from his area, and end up by maintaining the same price although that meant he had to borrow money, overbuy and lose money on the deal. These actions,

however, do fit into a pattern of price fixing and can be explained by a desire to maintain the agreed on price structure. That this is the situation is made clear by the report of the secretary of the association to its president that the Joint Grower-Processor Committee meeting of October 23, 1950, stopped a canner price break.

Special consideration has been given to the contention of respondent Knouse Foods Cooperative, Inc., that it did not purchase apples and that it was unable to agree on a price. This respondent is a cooperative. It acts as a marketing agent of its grower members. It operates under an obligation to pay ratably to the growers the net amount received for its processed products after making certain deductions to cover operating expense and other items enumerated in its agreement. Its method of payment was to make an initial advance of 50% of the announced market price to the grower on delivery, advance 20% more when the processed apples were sold in sufficient quantities to warrant it, and pay the remainder, which may make the total more or less than the announced market price, after the processed products have been sold. Respondent contends that its announced price is only a goal, required to secure loans and to enable it to calculate the initial 50% advance. It is not the actual net price finally paid. Counsel supporting the complaint contends that the announced prices of this company are prices regardless of the actual amount of the net payment.

In our opinion, a cooperative which pays its growers on the basis of its net income is unable to fix its purchase price in advance. However, it is capable of participating in discussions with its competitors and assisting them in fixing their prices. By agreeing to announce its opening price or goal at the same figures as its competitors, it is able to help to establish and maintain those figures as the agreed on price at which growers will sell to its competitors. Its announcement of a higher price or goal could well act to weaken the announced prices of its competitors. Cooperatives are capable of violating the law by participating in illegal agreements in restraint of trade, whether their announced opening prices are technically prices or anticipated goals. In our opinion, this record establishes, prima facie, that this cooperative did participate illegally in this combination to fix and maintain the price of apples in the Appalachian area.

We, therefore, hold that the decision of the hearing examiner that a prima facie case has not been establishd as to the respondents herein is erroneous and that this matter should be returned for further proceedings in due course.

Commissioner Howrey did not participate for the reason that he did not hear oral argument.

ORDER GRANTING MOTIONS TO DISMISS

Initial Decision by Frank Hier, Hearing Examiner.

The complaint charges in substance that Appalachian Apple Service, Inc., an incorporated association of apple growers in Virginia, West Virginia, Maryland and Pennsylvania, hereinafter referred to as AAS, entered into "an understanding, agreement and combination" with the other corporate respondents,[1] all of whom buy raw apples from growers for processing, to

1. fix, stabilize and maintain prices to be paid for apples;

2. fix, devise and establish a mathematical percentage pricing formula for the different grades of apples;

3. divert shipment of raw apples from one or more processors to others in order to maintain prices and price scales.

Respondents move to dismiss for insufficiency and lack of substantiality of the evidence to make out a *prima facie* case at the conclusion of the proof-taking in support of the complaint. Sixteen hearings have yielded 2,020 pages of transcript from 29 witnesses and 392 exhibits, totaling another thousand or so pages. As informally stated to all counsel, the Hearing Examiner rejects the testimony appearing at pages 95B to 121, inclusive, of the transcript, because of faulty memory due to advanced age. The testimony appearing at pages 35 through 94, 122 through 180, 243 through 369 is likewise rejected for evasiveness, exaggeration, lack of frankness and general lack of credibility.[2] Excellent briefs totaling 159 pages have been filed in support of the motions to dismiss, and a brief of 130 pages has been filed in opposition thereto, all of which have been studied and carefully considered.

The *ratio decidendi* of this ruling must be whether there is sufficient substantial evidence, at this stage, firmly to support the order requested, since respondents may elect to offer no defense evidence.

At the outset two questions on which counsel supporting the complaint place great stress—whether processors were and are members of AAS, and whether there was a Joint Grower Processor Committee

[1] Hereinafter C. H. Musselman Company will be referred to as Musselman; National Fruit Product Company, Inc. as National; Knouse Foods Coop., Inc. as Knouse; Bowman Apple Products Company, Inc. as Bowman; Shenandoah Apple Cider & Vinegar Corporation as Shenandoah.

[2] Exhibits routinely identified by this witness, however, are unaffected by this rejection, since they are regularly-kept records of AAS and their authenticity admitted by counsel.

of AAS, six members of which were processor representatives—may be disposed of.

As to the first, the Constitution and Bylaws of AAS are broad enough to include processors if desired, but the two membership lists of AAS in the record— CX 48 for 1950–1951 and CX 372–3–4–5 for 1951—do not show any processor respondent herein, except Musselman, which is also a grower. Individual officers of the processor respondents are listed as members, but each of them is, as an individual, a grower. There is abundant evidence in the record of the receipt of contributions by AAS from "Allied Industries"—$250.00 out of total income of $22,767.10 for the fiscal year ending June 1937 (CX 257d, 258a, 259e, 261ab); $863.00 out of total income of $47,306.59 for the fiscal year ending June 30, 1938 (CX 248), although this is entered simply as "Contributions"; no receipts whatever from this source for the fiscal years ending June 30, 1942 and 1943 (CX 219c, 221a, 222); $2,217.08 out of $42,232.72 for the fiscal year ending June 30, 1945 (CX 203, 197, 200, 210); $2,794.42 out of total income of $35,333.11 for the fiscal year ending June 30, 1946 (CX 194 and 304); "Assessments on Allied Industries" of $2,764.40 out of total income of $50,875.07 for the fiscal year ending June 30, 1947 (CX 179b and 182); receipts from Allied Industries of $425.00 out of total income of $48,759.43 for the fiscal year ending June 30, 1948 (CX 173); $50.00 out of total income of $71,744.02 for the fiscal year ending June 30, 1949 (CX 157). The Examiner has been unable to find any receipts from this source since then in the record. "Allied Industries" apparently means cold storages, canners, dealers, package people, spray material manufacturers, basket manufacturers, etc. (CX 256f, 257b, 258a, 259bc). None of these amounts are itemized; it is impossible to ascertain how much, if any, came from processors only, or from the processor respondents herein.

In addition to this, AAS membership records show receipt of payments of several hundred dollars a year from respondent Musselman from 1936 through 1949 (CX 338, 339); from Bowman for 1942 through 1949 (CX 346); from the Knouse Corp. (not involved herein) 1936–1950 (CX 343, 344, 345); from National of $500.00 in 1944, $2,500.00 in 1943, $1,000.00 in 1945 (CX 354, 356, 357); but transmittal letters make it clear these payments were contributions only and not membership dues, fees or assessments (CX 329, 348, 350).

In addition, the 1943 membership lists of AAS (CX324a–f, 325ab, 326, 327a–e) show Bowman and nine storage firms as Virginia members, two storage firms such as Maryland and West Virginia members,

four storages, Musselman and the Knouse Corporation (not involved herein) as members.

Sporadic lump sum payments, varying in amount, to an organization, most of whose efforts and budget were devoted to increasing apple popularity and consumption, do not indisputably connote membership—it would seem a natural thing to assist financially efforts whose success would mean greater sales. That the Constitution and Bylaws of AAS permit non-grower membership is no proof that such exists. The membership lists themselves are the evidence of most weight. It is concluded that some non-growers were members in 1943, Bowman being the only processor respondent (Musselman being a grower also), and that in 1951 there were no processor members (Musselman being a grower and Knouse Foods Corp., Inc., being owned by growers). Somewhere in the intervening years Bowman ceased to be a member.

It is apparent to the Examiner from the record as a whole, that AAS is a grower organization, amorphous and loosely knit, supported in major part by assessments collected by State Apple Commissions under the authority of State law and from growers directly, and that its aims and activities are primarily in the interests of growers. All of its bulletins and activities so indicate.

On the second question of whether there was a joint grower-processor committee, the greater weight of the evidence sustains the contention. The Examiner is unable, however, to understand the contention that processor representatives could not serve on AAS committees, unless their corporations were members thereof, particularly in view of the fact that these same representatives, as individuals and as growers, were members of AAS as growers. However, it seems immaterial to the Examiner—if processor representatives agreed with growers to do the things charged, it matters not whether they did so formally or informally, as strangers, friends, partners, or co-members. Their status as alleged conspirators is not altered by membership or non-membership. Much time, energy and transcript were spent haggling and quibbling over this question.

Coming now to the first charge—price fixation and maintenance—counsel in support of the complaint lay great insistence on the well-established rule of law that the character and effect of an alleged price-fixing combination cannot be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. However, the complexities, contradictions, and confusion in the record, as well as the serious questions of weight and credibility which it raises, justify

critical, detailed analysis, as well as the broad generalizations and panoramic views insisted upon.

Furthermore, apples being a seasonal crop, purchasing for processing generally ends in the spring, and a new crop in the late summer brings a new market and a new price for every year (Tr. 673).

Lastly, the Hearing Examiner was never able to secure from counsel in support of the complaint any limitation on the specific years to which charges were applicable. Counsel's statement, at the time they rested, appears to confine the charges to 1946 and subsequent years, but a careful examination of that statement (Tr. 2012–13) indicates that there is in fact no limitation, so it is necessary to examine the evidence as to each year since AAS was organized in 1936 as to the charges of price fixation and maintenance by agreement. The evidence on the other two charges is disparate and confined to more narrow ranges of time and will be discussed separately.

Coming down to an analysis of the documentary evidence on which counsel so heavily relies, and a review of the years involved, there is no substantial evidence to support the charges in the complaint as to 1936 (CX 1, 9, 77, 206, 263abc, 339, 345); 1937 (CX 255a–f, 256a–g, 257a–h, 258a–b, 261ab, 339, 345); 1938 (CX 241a–d, 243, 247a–d, 248, 250, 251, 252a–d, 253a–j, 254ab, 339, 345); 1939 CX 235ab, 236a–c, 239a–e, 210a–d, 339, 345); 1940 (CX 339, 345); 1941 (CX 225ab, 229ab, 339, 345).

All of these exhibits in these years are negative as to any agreement on prices, some of them show receipts, or hopes thereof, by the AAS of contributions from "Allied Industries" (discussed above), some of them show direct contributions of several hundred dollars by various processors, one of which is no longer extant, another shows AAS protest at U. S. D. A. crop estimates, increase in membership in the Association and promotion of State laws levying a per bushel contribution from each grower. There is no testimony of any significance on the issues as to these years.

During the war years 1942–1946, O. P. A. in effect fixed prices with the consultation and advice, but without the consent of growers or processors. Since price agreements, or any "tampering with the price structure" by agreement, were then ineffective, it follows that evidence of activities in those years is worthless in this proceeding, even to show the "thinking" of those directly affected (CX 17a–d, 78, 137, 190, 192a–b, 193ab, 194, 196ab, 197, 200, 203, 205, 207, 208, 210, 214a–d, 217ab, 219ab, 220, 221a–c, 222, 223a–c, 303a–f, 304, 324a–f, 325ab, 326, 327a–e, 328, 329, 338, 344, 345, 346, 347, 350, 352, 353, 354, 356, 357, 358). Inconclusive "thinking" is no violation.

If there is a *prima facie* case of substantial evidence to support the recommended order, it must rest on evidence from 1947 to date.

In 1947, the significant documentary evidence shows that at an AAS meeting on July 22, 1947, crop estimates, growers' increased costs, processors' increased costs, size of packs, carry-over from previous season, and the proposition that in spite of increased costs for both, selling prices to consumer should not be increased and who is to absorb the loss were discussed by the "12 Man Grower-Processor Committee." The only agreement reflected is that it was too early to forecast sales trends and that they would meet again, which they did on August 27, 1947 (CX 16ab). At this meeting the same factors were discussed and it was reported "until the price levels paid by New York processors are known, and the answers clearer to several other questions processors here find themselves unable to decide each on his own scale he will pay growers for apples" also "Last season, processors here largely made and maintained the general apple price level, by setting satisfactory price scales and accepting practically everything offered. This year it looks like the fresh fruit (packed) must set the pace and price level." It also appears that prices for the previous year were discussed and there was a real effort by processors to find the maximum they could pay growers which would bring apples to the plants in sufficient volume and still protect the processors' cost of production as against New York processors' prices. Finally, it was concluded that a price range fair to grower and processor alike cannot be determined right now because of unknowns, and the committee would reassemble when these uncertainties have been resolved, probably within ten days (CX 15ab). Although there was another meeting on September 12, 1947 (CX 181abc), no mention of either prices or processors appears in the minutes thereof.

There also appears Musselman's price announcement of September 17, 1947 (CX 116ab) and National's price announcement of September 16, 1947 (CX 118), which is the same as Musselman's except that it gives prices on Class B varieties, which Musselman's does not. There also appears Musselman's letter to grower Hopkins of September 11, 1947, advising that apple prices would be announced the following week, suggesting that, in the meantime, he ship apples, and agreeing to pay 30¢ a cwt. additional to the price as trucking allowance (CX 115). The other exhibits referring to 1947 in the record (CX 78, 114, 117, 137, 179abc, 181abc, 182, 296a–k, 338, 344, 346, 347, 351) are insignificant or have already been hereinbefore discussed. There is no significant testimonial evidence as to 1947.

The above is neither substantial or sufficient to support the charges. The most it can be said to show by inference is a strong desire to do what is charged. Price uniformity is at the most shown as to only two processors, on only four varieties, and only one sale by one grower, on which a separate deal was made at variance to the price announcement.

In 1948, there appears in the report of the AAS secretary under the heading "the following major jobs were done in 1948–49 season" the notation: "3. Work with processors on prices paid growers; meeting; organization of growers here and in N. Y.—NE areas" (CX 166), and in the minutes of executive committee AAS, July 6, 1948, under optional proposed disbursements for the budget the notation "Joint Grower-Processor Promotion—$20,000.00" (CX 170d). However, it is obvious from the whole document (CX 170a–e) and another (CX 175) and other references in the record generally, that this referred to a proposed joint advertising compaign to increase consumption of processed apple products. It would hardly cost $20,000 for growers and processors in the area to meet and agree to do the things charged. In the minutes of a joint meeting between the directors of AAS and the State Apple Commissions of Maryland, Virginia, West Virginia and Pennsylvania there appears a proposal by the secretary of AAS of a program "to equalize by grower education and agreement, prices at which growers in the various areas offer their apples to processors." It is obvious that this and the resulting resolution refer to "grower to grower cooperation" between instead of within areas (CX 178b). On September 9, 1948, Musselman announced prices for all grades of apples desired (CX 93, 110), which are identical with the prices announced by National on August 30, 1948 (CX 108). On September 9, 1948, AAS Bulletin 209 stated "The following '*day-to-day*' price to growers for apples delivered to the canning plant has been posted by one of the larger canners of the Appalachian Belt. As usual, other canners of the Belt, will probably set up pay scales based on this" (CX 295a). This Bulletin bitterly points out that these prices are only 52% of the previous years', details the processors' reasons for the lowering, and the growers' angry reactions thereto. On October 11, 1948, National issued an announcement increasing its prices on Yorks only, effective that day (CX 111, 112), and the next day Musselman issued an identical price increase announcement with one significant difference—Musselman's price was retroactive to the beginning of the season (CX 113). On October 12, 1948, AAS reported these increase announcements, pointing out their difference (CX 290). From this

report, apparently other processors did not follow suit. The record contains no evidence of price announcements, price increases, or prices paid by the other respondent processors.

There are also in the record thirty delivery tickets of Musselman showing apples purchased on fifteen in accord with its first price announcement (CX 93, 110) and fifteen showing apple purchases presumably at the prices shown on its price increase announcement (CX 113) with two exceptions: one, #1128, shows Yorks paid for at the increased price on September 27, 1948, before the increase had been announced; another, #1895, showing the same for a purchase on October 7, 1948 (CX 360). Other documents in the record for 1948 (CX 78, 79, 91, 92, 109, 171abc, 173, 176, 177, 291, 292ab, 293ab, 297ab, 338 and 344) are without significance on the issues.

The only evidence of any substance in the above is price uniformity by two processors for about a month, similar but not identical increase in the price of one variety by the same two processors, and sales records of one of them showing prices paid in accordance with such announcements in 93% of 30 sales. Against this, there is no evidence of any meeting between growers and processors, the fact that one processor did not announce until 10 days after the other, no evidence of the prices announced or paid by the other three alleged conspirators, the fact that the initial prices are "day-to-day" and minimum, and that the increase by one canner was retroactive, the other not. A reading of the AAS Bulletin 209 (CX 295ab) does not leave one with the impression of any agreement on prices.

The documentary evidence for 1949 consists mainly of price announcement lists. Musselman's, issued August 29, 1949 (CX 391), includes in top tree run bracket Yorks, Staymans, Grimes and Golden Delicious as does Knouse's "advance" basis (CX 85). They are identical and thirty sales tickets of Musselman's (CX 361) show it paid these prices. National's price list has only Yorks and Golden Delicious in the top tree run bracket, but pays substantially less as Class B, Stayman and Grimes varieties (CX 67), and there is one sale at those prices (CX 69). Shenandoah's price list, on the other hand, is substantially lower in the six upper brackets than any of the foregoing (CX 95b), in view of the testimony of both growers and processors that 5¢ a cwt. will switch business (Tr. 195–6; 396–7; 1691–2; 843–4). There are no other sales records in evidence except five of Bowman (CX 63) which show prices paid in accordance with price announcements and "advance announcements" of Musselman and Knouse. Of the five respondent processors, two are uniform

in announcements, one other agrees in sales, but the remaining two are markedly and substantially different.

The sales records and opening price announcements, however, were not the end of the story. Shenandoah paid a bonus of 30¢ a cwt. on everything they bought (Tr. 1263). National paid an additional 20¢ a cwt. on Yorks 2½ inches up, 15¢ a cwt. on 2½ inch other varieties, 10¢ a cwt. on 2¼ to 2½ inches varieties other than Yorks (CX 121). Bowman paid an additional price or bonus of substantially the same amounts but on all apples, including culls (CX 122, 123). Musselman paid a bonus on 1949 apples, but the amount per cwt. and on what grades and varieties is not known (Tr. 1712).

There is no evidence in the record, except as hereinbelow noted, of any price discussion meeting prior to the 1949 price announcements. The latter are neither synchronous, nor uniform. Sales records are too sparse to evidence a pattern, or its continuance. The final price received varied markedly and substantially between processors. The Examiner is accordingly of the opinion that no reasonable inference of either price fixation or price maintenance from the above can be drawn.

However, in addition to the above there appears in the annual report of AAS for the 1949–50 season (CX 2) on page 2 the following:

> Our processors put a pretty firm floor under our price-level by accepting practically all offerings at the price scale, and then, most important maintained that floor thruout the season. They maintained it steadfastly after their competition in N. Y. State and the Midwest had thrown price scales overboard and were getting raw material at one-half what our processors were paying. And our processors accepted record quantities under these conditions. That was unthinkable a few years back. It requires a high order of business vision and courage; statesmanship in short. The dog-eat-dog policy has been replaced with something much pleasanter:—and from processing sales to date, more profitable. Perhaps we haven't seen the end of the age-old battle between the jungle law of the tooth and the fang and the law of live and let live, but decency certainly won this last round. Can we, by mutual consideration and assistance, keep it thus?

And on page 3, as one helpful factor in setting and maintaining the Belt's favorable price level, it is noted:

> the early season mark of our Joint Grower-Processor 12 man Committee in establishing price levels for processor apples.

And on page 9:

> The value of our grower-organization in dealing with the processors is like many other jobs we do;—hard to put a yard-stick on. But the results are large. The Association, thru the 6-grower half of The Joint Grower-Processor Committee, gets a rather clear understanding of the processors' problems, policies and intent and the processors get the same picture of the growers' side, in the

pre-season series of meetings of the Joint Committee. Both sides understand each other, at the start.

In part because of these conferences and this mutual understanding, the processors of this Belt did an outstanding job. They held to their announced price-scales when their competition, in New York and elsewhere, cut their opening price-scales drastically. The short crop in the southern half of this Belt aided in price-maintenance; but without the mutual understanding between our processors and our growers, largely thru Appalachian's work in past years, this price-maintenance could hardly have happened. Maintenance of processing price-scales was a main support for prices on our apples sold into fresh-fruit channels—and this Belt has averaged from $1 to a half-dollar above all other apple belts this season.

Our work with the processors began about 1941. Compare grower-processor days: of 45-cent apples and 14¢ ciders. An active grower-organization is beneficial to both growers and processors, it is clear.

And on page 15:

1. Co-operation was the principal factor in adding between 25¢ and 50¢ per bushel to returns to growers of this Belt, over other Belts, this season:—real, organized co-operation between growers, handlers, processors and retailers. With The Belt's crop 22½ million bushels, this put an added minimum of 5 million dollars in our growers' pockets * * * This co-operation was possible only thru Organization—in which Appalachian Apple Service was one main part * * * To build this co-operation stronger is both sound business and necessary to the solvency of our Industry.

The inference from these quoted excerpts of price fixation, maintenance and uniformity is negatived by the substantially variant respondent processors' prices themselves, discussed above. The only conclusion the Hearing Examiner can draw is that the above excerpts represent another instance of the writer's exaggeration, promotional extravasation, and liberty with the basic facts, noticeable in, and one of the causes for, the Hearing Examiner's rejection of his sworn testimony *in toto*.

The other documentary evidence applying to 1949 lends but small support to the charges. There was suggested, discussed and disseminated a joint grower-processor program for consumer advertising of processed apple products, the cost to fall equally on the two groups by equal deductions of 1¢ per bushel sold and used (CX 27abc, 376abc, 379abc, 33ab, 155abc), but apparently the proposal was still-born if not miscarried during gestation (CX 153). Commission's Exhibit 14 indicates the obvious—that processor prices for raw apples depend on prices for processed products. There is also evidence that AAS directors favored a committee of growers to take up with the processors their desire to receive uniform prices for the run and table pack out fruit (CX 156ab), but the record shows this too "came a cropper" (CX 155b). Otherwise the documentary evidence (CX 26, 28, 29, 78, 79, 137, 157, 158ab, 159, 160a–e, 161, 162, 163ab, 167ab, 309a–d, 365, 370,

371, 382ab) is negative, has been discussed, or is chiefly applicable on subsidiary issues.

1950 is claimed by counsel supporting the complaint to be the year in which the alleged conspiracy "reached its zenith" in full flower and the bulk of the evidence refers to that year. Three meetings on August 15, August 23, and August 26, 1950, are alleged to have been the occasions on which price agreement between processors and growers took place. There is no significant documentary or testimonial evidence prior to July 1950 (CX 25, 72ab, 78, 80, 97, 98, 99, 100ab, 94a–d, 147a–d, 150abc).

On August 15, 1950, there was a meeting of the Joint Grower-Processor Committee at which was discussed the coming crop, its size, regionally and nationally, its condition, competitive crops, growers' cost of production, the available market for both fresh and canned apples, processors' cost of production, packaging and probable markets for fresh fruit, exports, imports, special outlets, and prices. That no agreement on the latter was arrived at is obvious from the brief itself of counsel in support of the complaint. The testimony fully supports this conclusion as well as the fact that two additional meetings were held at which prices were also discussed. Obviously, if agreement had been reached at the first meeting, further discussion would have been useless.

On August 23, 1950, one of the Association's marketing clinics was held. These clinics apparently discuss the entire apple situation, including prices, and are attended by a large number of grower and processor representatives. So far as the one subject of price is discussed, apparently the growers make as good a sales argument as possible as to what their fruit is worth and what a hard time they are having making their cost of production, but it was quite apparent to those who attended this particular meeting that it was all resultless discussion (Tr. 744–5, 389–90, 829–31, 684–88, 1066–67).

On the same day the 6 man grower half of The Joint Grower-Processor Committee unanimously adopted the following resolution:

> After further study of all available information it is the judgment of the 6 man growers half of The Joint Grower-Processor Committee of this Appalachian Belt that it will take a starting price scale based on not less than $3.50 per hundredweight for Class A, US 1 Canners, 2½ inches up to channel sufficient apples to processing from the present crop; assuming that Class B and lower sizes and grades carry the same dollars-and-cents differentials as last season (CX 13, 144).[3]

[3] Parenthetically, the Association is one which, in the Examiner's opinion comes within the Capper-Volstead Act, 7 U. S. C. A. 291, and by reason of the provisions of that Act, may take concerted action to fix the price at which their products will be marketed as long as they do not combine or conspire with other persons (non-growers) to do so.

The third and final meeting at which prices were discussed took place on August 26, 1950. Ten men were present, including the Secretary of AAS. Five of them were executives of processor respondents in this case.[4] Another was an executive of a processor not joined as a respondent in this case.[5] Four of them were growers.[6] All of them are members of the Joint Grower-Processor Committee, two grower members thereof, Griest and Henry Miller, not being in attendance.

There must be in the record some 800 pages of questioning as to what took place at this meeting from each of those present. From that plathora of testimony there is unanimity on only four facts: (1) that the meeting was held on August 26, 1950, at Martinsburg, West Virginia; (2) that prices of the crop about to be harvested were discussed between the growers and the processor representatives present; (3) that no agreement as to the price which the processors would pay the growers was reached; (4) that no one left the meeting knowing what the price would be except the Musselman representative, who had already determined what he would pay and who had mimeographed his price announcements on that basis.

The details of the meeting are a mass of contradictions and confusion.

Thus, the witness Arthur remembers Knouse suggesting a price of $3.25 (Tr. 1306), but neither McDonald (Tr. 1477, 1484), Young (Tr. 1161), Caspar (Tr. 988), Moore (Tr. 765), or Bowman (Tr. 510) remember any such suggestion. Hauser was not asked. Knouse thinks he did not (Tr. 1789). Stockdale (Tr. 853) of Zero Pack (not a respondent herein) remembers Knouse suggesting a price, but does not remember what it was. Hunt of National recollects that Knouse could pay $3.00 or $3.15 (Tr. 576). Stockdale recalls a heated discussion between Hunt and Knouse on this and every other meeting (Tr. 862), but no one else who was asked remembers any such argument (Tr. 510, 767, 582, 798–99, 1789–9). On the question of whether or not Secretary Manager Miller was instructed to call the absentee grower members, Henry Miller and Griest, and return with a report of such telephone conversation, Hunt remembers Miller leaving the room but does not remember him phoning any one and he is sure he relayed back no message (Tr. 644–45). Bowman does not remember anything of the occurrence (Tr. 511–12). Casper testifies as does Young, that the growers instructed Miller to call these two gentlemen and that Miller reported back that Henry Miller would

[4] Hauser for Musselman, Hunt for National, Bowman for Bowman, Knouse for Knouse, Arthur for Shenandoah.

[5] Layton Stockdale of Zero Pack.

[6] John Caspar, Blackburn Moore, Wm. F. Young, Richard McDonald.

leave it up to the Committee (Tr. 987–88). Griest remembers no telephone call (Tr. 1441). Neither does McDonald (Tr. 1483, 1495–6); nor Hauser (Tr. 1685). Knouse was not asked; neither was Arthur; but Stockdale testifies that Miller did leave the meeting and that when he returned he stated that he had a conversation with Henry Miller, who was of the opinion that $3.50 should be the price, but Stockdale does not remember the Secretary saying anything about talking to Griest (Tr. 859–60).

Bowman and Hunt do not remember the Secretary being invited out of the room (Tr. 512, 572). Stockdale insists that he was not invited to leave (Tr. 858) the room. The remainder present were not asked.

Knouse states that the growers' resolution for a $3.50 top price was presented to the meeting (Tr. 1786). Bowman does not remember (Tr. 503). Hunt recalls it but thinks Caspar may have done it (Tr. 571). Caspar does not know whether he did it or not (Tr. 976). Arthur recollects that Moore presented it (Tr. 1304). Stockdale does not recall Caspar reading it but remembers him mentioning it (Tr. 847). The others were not asked about this point.

On the question of whether or not the growers left the meeting and convened by themselves, Bowman remembers it (Tr. 505), as does Hunt who goes on to say that the processors then discussed the situation among themselves (Tr. 575). Young and Caspar were not asked. Hauser remembers nothing of it (Tr. 1686). Knouse says the growers left and came back (T. 1801). Arthur remembers the growers leaving but remembers nothing else about it, and recalls no discussion among the processors while the growers were away (Tr. 1308). Stockdale says that the growers wanted to talk things over and that the processors left the room and hung around the lobby (Tr. 854–5).

On the more important question of specific prices being mentioned, Hauser does not recall any specific price (Tr. 1668–76, 1684). Knouse says that no consideration was given any specific price, but $3.50 was mentioned in the resolution. However, the growers could not agree among themselves in spite thereof (Tr. 1786). Bowman does not recall anyone mentioning a specific price, though the processors probably did discuss the price (Tr. 504–08).

Hunt, on the other hand, recalls $3.50, $3.75 and $4.00 having been mentioned (Tr. 571), states that Knouse suggested $3.00 and $3.75 (Tr. 576), that Bowman may have suggested $3.15 but does not recall exactly (Tr. 577). Moore, the grower, testifies that he advocated $4.00 for Yorks, that $3.00 was mentioned by somebody else but he

does not remember what other growers were advocating; but it seems to him that Hunt said something about $3.00 but just what, he does not remember, and that he does not recall $3.15 or $3.25 being mentioned by Knouse or anyone else (Tr. 763–65). Stockdale remembers $3.00 being mentioned by the processors and Moore advocating $4.00. He does not recall Hunt or Arthur mentioning any price but remembers Knouse suggesting a price (Tr. 851–53). He also recalls $3.15 being mentioned but does not remember by whom (Tr. 857).

Caspar testified that $3.00, $3.50 and $4.00 were all "kicked around" (Tr. 978). He stated that processors claimed that $3.50 was too high, that they might pay $3.00 (Tr. 987–88). He heard $3.15 and $3.25 discussed but cannot say who or how many favored either (Tr. 994–95). He further testified that Hauser said he (Hauser) was coming out with his price Monday regardless of what took place at the meeting, but he would not say what it would be (Tr. 1003). Young does not remember any definite price being discussed (Tr. 1161).

Arthur has no recollection of a $3.00 price being discussed or any prices being discussed or favored by any processor except to the best of his recollection $3.25 price in some discussion between him and Hunt (Tr. 1305–06).

The only prices which McDonald could recall were the prices for the processors' finished products (Tr. 1481). Nothing was said about $3.25 (Tr. 1484). He suggested no price (Tr. 1487). Thinks Bowman might have suggested $2.75 (Tr. 1488).

Knouse states that $3.50 was mentioned in the growers' resolution and that $4.00 was discussed (Tr. 1786–7). He further stated that sparring from $2.75, $3.00, $3.15 and $3.25 took place. There may have been a $3.25 price, but he does not know of a single processor who expressed his own opinion (Tr. 1790).

This, despite the persistent, repetitious and very adroit questioning by counsel for the complainant.

The latter, being unable to rationalize this confusion and these contradictions, sweep it all aside, blandly asserting that the testimony was coached, was an afterthought, and came from witnesses interested in hiding the facts. Each of these witnesses was examined at considerable length as to whether or not they had not told the investigators contrary stories or if they had not given statements of occurrences to the investigators which they could not now remember. The answers to these questions were practically uniform, that the witnesses did not recall doing so or that they did not do so. It is most significant to the Examiner that these investigators, although

available, were not called as witnesses in this proceeding. The Examiner cannot, as urged, cast aside testimony impeached solely by innuendo or insinuation, and where the insinuation is met by flat denial, and no direct impeachment made though available, the witness' credibility is enhanced by such failure.

As to what had been accomplished when the meeting was adjourned, practically everyone who was asked was emphatic that there had been no agreement and that they had left without any idea as to what the price would be. Bowman so stated (Tr. 513), as did Moore (Tr. 778) and Arthur (Tr. 1307–13). When Knouse left the meeting he knew nothing more than he knew before (Tr. 1803). McDonald testified that there was no consensus of opinion among those at the meeting (Tr. 1485), that nothing definite had happened; and that the growers were convinced that they were not going to get $3.00 but did not know what they were going to get (Tr. 1484–90).

Hunt stated that he had no authority to approve or agree upon prices, and in any event, would not have done so without checking with superiors (Tr. 652). Caspar stated that when the meeting was over the growers did not know whether they had accomplished anything or not and that when he left the meeting he had no idea what price would be announced (Tr. 999–1000). Stockdale stated that the meeting broke up pretty late, when people got to the point that "what in heck is the use, we might just as well go home," he personally left the meeting and thought that $3.25 would eventually be the price, but the meeting did not accomplish anything more than discussion (Tr. 862, 865–66).

Hauser determined several weeks before upon the price he was going to pay, and had already mimeographed his price lists, and the discussion at the meeting had convinced him that he had hit the nail on the head (Tr. 1673–83).

Counsel, however, brush all this aside as coached, imaginative, or afterthought testimony, selecting from the mass thereof only sentences or phrases which they claim "filtered thru in unguarded moments," insisting that these bits and pieces reflect the truth whereas all the rest is to be disregarded as fiction. The only reason apparent for this is that these "chips and whetstones" fit in with counsel's theory. The Examiner is unable thus to pick and choose according to an *a priori* thesis.

True, representatives of respondent processors herein are interested witnesses and as such, not entitled to the weight to be given a wholly disinterested witness. One of the latter, however, was present—Stockdale of Zero Pack—a processor, but operating in entirely dif-

ferent fashion, and not involved in this proceeding as a respondent. In response to the Examiner's direct question "What did this meeting accomplish?" he answered, "Nothing, to my viewpoint, except that it had been pretty clearly—I felt, pretty clearly that the growers represented there were telling us that they believed $3.50 was the price; I felt pretty clearly that the ones that stipulated prices of the processors, which mainly was Mr. Hunt, was $3.00, and I left there and when I reported to my office in Cincinnati I told them then, they asked me how I thought the thing would wind up, and I said, 'It looks to me like a $3.25 price'; but as to the actual meeting, that was evolved in my own mind out of the various discussions that I heard at the meeting, but to say the meeting, itself, accomplished anything other than to bring forth these points in discussion, I couldn't name any reason for it."

In addition to this, is the testimony of Hauser, an interested witness but nevertheless partially corroborated. Musselman each year makes an orchard crop survey in the area (Tr. 1701–02), and in 1950 did so also before the fateful meeting (Tr. 1675). This is confirmed by two growers (Tr. 1371, 1440). This survey indicated $3.00 would be too low, $3.50 would be a little high and "they (growers) were happy with $3.25." As a result of these extensive contacts, Hauser determined on a $3.25 top price weeks before the meeting and had his price announcement already mimeographed (Tr. 1678–79), intending to issue it regardless of the meeting, but waiting to see, if, from the discussions, he could learn anything new and whether from those discussions his previous determination had pretty well "hit the nail on the head" (Tr. 1673–74). This is corroborated by another witness (Tr. 983, 986). Although Hauser stated he was coming out with his price on Monday regardless (the meeting was on Saturday), he did not state at the meeting what prices he was going to pay.

This testimony is branded as a "high point of imaginativeness and afterthought" and not to be given any credence whatsoever (Commission brief, pages 31, 32). Since it was apparent from the beginning that weight and credibility were to be major considerations in this proceeding, the Examiner watched and listened to all witnesses with this in mind, and as the transcript will show, often intervened for clarification or supplementation. The witness Hauser impressed the Examiner as frank and credible, non-evasive and direct, in marked contrast to some others.

Counsel in support of the complaint cite two bits of testimony out of all of it to support their charge. That at page 1534 and 1535 of

the transcript refers back to the witness' pre-lunch evidence, an examination of which puts an entirely different light on the statement standing alone. The other at page 1072 to the effect that a grower had been told by Hauser that the latter would only buy f. o. b. cannery because all canners had so agreed, is directly refuted by the abundant evidence in the record of buying f. o. b. orchard.

Counsel then stress that documentary evidence of this August 26, 1950 meeting is of greater weight than testimonial evidence because *ante motam litem* and because made contemporaneous with the meeting. In a letter to the Association president September 2, 1950, the Secretary wrote:

> You have the results of last Saturday's Joint Committee session. In general, growers seem satisfied with the scale, so far as I've heard. It was all that seemed justified at the time—and the door was left open for action later if warranted.
>
> The processors were much more co-operative than ever before. We really negotiated with them, for the first time. It is conservative to say that grower organization pushed the price up from $2.75 to $3.25 "top" and pushed the scale up proportionately. If the deal goes well, as it should, by another year we can probably make some headway on these other questions:—the differentials etc. (CX 50)

And in an article published in the February 1951 issue of the Mountaineer Grower (CX 10) at page 43, the same writer says of the previous season:

> Thru inter-change of information, and then active follow-up of this with the growers by the organization staffs, these two principal apple-canning belts of the nation moved thru the season on a fairly uniform and satisfactory price-level. For the first time in history (except for very short-crop seasons) one of the processors' biggest stumbling blocks was removed;—the fear that "the competition" would get raw materials cheaper and could under-sell and still make a profit. Removal of that threat stabilized the nation's apple processing deal hugely in a season that has produced the world's record pack;—2 million cases (22%) above last season's 9 million cases of sauce, for instance. The close harmony between Appalachian and Western New York growers, thru their associations, was we think the biggest single factor in maintaining that price-stability, both as to growers' returns and for the processors' finished products.

On the other hand, the AAS bulletin of August 29, 1950 (CX 5) makes no mention whatever of the meeting, but sets forth the general opening price range, already published by Musselman and National and the AAS Bulletin 253 of September 15, 1950, is likewise silent as to this important conclave, as is the AAS annual report for the 1950–51 season (CX 48), although there is in this latter the following on page 5:

The pre-harvest marketing clinic, August 23 at Martinsburg, with nearly 100 representative apple grower-salesmen, handlers, processors and specialists from over the 4 state Belt, present by special invitation (to preserve workable size in the gathering) developed much market information from this and the other apple belts, and passed it along to the "grass roots";—a helpful step toward unity and stability in marketing over the Belt.

Another of the facts on which counsel in support of the complaint strongly relies is price identify among the respondent processors, which is, of course, well settled to be competent and persuasive evidence of agreement between them. On August 28, 1950, National, Musselman and Bowman (CX 60, 61, 62), on August 31, 1950, Knouse (CX 82), and on September 5, 1950, Shenandoah (CX 83ab) all issued opening price announcements, identical in price, for each grade and class of apples, of which there were 16, and all f.o.b. cannery, no payment for culls. There are a number of delivery and purchase receipts from these various processors in evidence in the Fall of 1950, which show purchases at these identical prices without substantial deviation (CX 56, 359, 386, 366, 68, 88, 57). This standing alone would be persuasive evidence of the fixation and maintenance charges. However, the record clearly and abundantly shows that these prices referred to were not the final prices paid. There is substantial evidence in the record that growers received throughout the season different prices because of the inclusion of the cost or allowances in excess of cost for hauling, storage, payment for culls and crates, the expenses of all of which items, according to the price announcements, must be borne by the grower. In addition to this, several of the processors paid season-end bonuses per bushel or per cwt. of apples, and many growers sold at special and different prices.[7] The testimony is clear and uncontradicted that these extra amounts are regarded by the growers as an extra price for the apples (Tr. 209–10, 472–4, 804, 1935); that price to the grower is his orchard net; and that, furthermore, these extra price payments were not uniform, but varied substantially among the processors. Thus, one grower testified that only 25 to 40% of his apples were sold at the scale price mentioned in the price announcement (Tr. 1944), another that he got special considerations pricewise and made special deals with various processors (Tr. 404–5), another that he received from 25¢ to 35¢ per cwt. additional but not uniformly between processors (Tr. 1230), another that the hauling allowances were quite substantial (Tr. 208–09), another that some processors allowed for hauling and others did not (Tr. 1035, 1048,

[7] Hauling allowances (Tr. 208–10; 472, 1048, 1202, 1387, 1420–8, 1935). Storage allowances (Tr. 404–5; 1202; 1034–5; 1935). Bonuses (Tr. 1712; 205). Special prices (Tr. 404–5; 539, 781–2, 398, 402, 1230–1, 1237, 1703–6).

1202, 1387), and another that he was paid freight but not for culls from one processor but, on the other hand, received payment for culls from a different processor but could not get hauling charges (Tr. 1420–3). It also appears that Musselman paid bonuses on a per cwt. basis between $75,000 and $80,000 for the year 1950 (Tr. 1712), paid special inducements to some growers such as storage, made crate allowances to others (Tr. 1705–6), made individual deals with growers (Tr. 1706), does not pay for culls (Tr. 1713), pays hauling allowances depending how badly it needs the apples, which means to some growers and not to others (Tr. 1731, 1736–7). These transportation, storage and crate allowances cannot be dismissed as payments for special services unconnected with the price of the apples, for the simple reason that they are part of the price to the seller. Furthermore, the alleged agreement (price announcements) provides uniformly for all processors, that the price quoted shall be f. o. b. cannery. Payment by canners of these allowances in various amounts negatives the inference of uniform fixation as well as maintenance.

In view of this, it seems important to the hearing examiner to examine the substantiality of the sales which the record reflects to have been made at the identical prices in the price announcements since, in view of this evidence, they can hardly be regarded as typical samples. It is evident that these sales are but a fraction of the processors' purchases for the season. Thus, Musselman buying 3½ million bushels during the 1950 season (Tr. 1644) is shown to have purchased at the opening price which it announced on August 28, 1950, 351,779 pounds net weight (CX 56, 59, 359 and 386), or approximately 7,000 bushels. The record does not show Knouse's 1950 consumption, but advances on the basis of the opening prices are shown to be 325,717 pounds net weight (CX 56, 366),[8] or approximately 6,500 bushels. Bowman processed about 700,000 or 800,000 bushels in the 1950 season (Tr. 498), but is shown by purchase tickets to have paid the opening announced prices on but 89,380 net pounds, or about 1,700 bushels (CX 58, 63). National purchased 3,800,000 bushels in the 1950 season (CX 76), whereas the record shows purchases by it at its opening announced price, but 29,570 pounds less than 600 bushels (CX 57, 68, 86). Similarly, Shenandoah purchased in excess of $800,000 worth of apples in the 1950 season (Tr. 1255), but is shown by documentary evidence to have paid these identical opening prices on but 295,350 net pounds, which reduces to about 5,800 bushels.[9]

[8] 20% of the "price" has not been paid as yet, and it is not known whether it will be (Tr. 187, 218).

[9] The Examiner, being unfamiliar with conversion mathematics of this industry, does not guarantee the accuracy of the above, and relies on its approximation only. Absolute accuracy at present is wholly coincidental.

Approaching it from another angle, out of the 13½ million bushels purchased by processors in the Appalachian area in the 1950–51 season (CX 35b, 48), identical prices are shown specifically by documentary evidence on but 21,600 bushels approximately.

If bonuses, allowances for freight, hauling, crates, storage, payments for culls and special "deals" are all disregarded, the testimony is abundant and uniform that apples were bought by all processors at identical prices for the same size and grade (Tr. 1043, 1046, 1082–83, 1247, 1292–93, 1357–64, 1403, 1411–12, 1438, 1461, 1534, 1185–87, 1197). The uncontradicted and credible testimony is that the grower regards his orchard net as what he received for his apples (Tr. 1935, 804, 209–10), and that even 5¢ a cwt. has enough economic significance to switch business (Tr. 1514, 843–44, 195–96, 1691–92, 534–35, 594–95). The testimony is that the announced price is "just something the grower goes behind and makes his deal each time" (Tr. 1507–08), and is a base price, but not the price secured (Tr. 1216–38). There was competition in buying and in selling.

As to culls, the uniform and identical price or "advance" announcements (CX 60, 61, 62, 82, 83b) all specify no payment will be made for culls. Nevertheless, Bowman and National paid 65¢ a cwt. for these, Musselman did not, and the record is silent as to the other two processors (Tr. 1358–63). Sales or delivery tickets show that these culls ran from none to as high as 20% of sales. This cannot be regarded as insignificant or unsubstantial. If the price fixation and maintenance were as claimed, this could not have occurred.

A further factor, militating against the price fixation and maintenance charged, is the voluntary increase in the price by way of bonus by Musselman in 1950 and Bowman and National in 1949, out of the season's profits at season's end. It would seem to the Examiner that if Musselman negotiated with growers and other processors to fix a price as low as possible, from which operation it derived a profit, it would not voluntarily and alone subsequently share that profit with those from whom it had been obtained, and that if it did, there would naturally be economic reprisals by the other processors to the alleged agreement, for breach. The payment of such bonuses, even by all processors, if not in the same amount, should have the same effect, and derogates strongly from the inference of binding agreement.

A last complicating factor is the Knouse Cooperative. Regardless of whether it buys or acts as processing agent, the fact is that by law or regulation pursuant to law, it may borrow, secured by mortgage, from the Baltimore Bank of Cooperatives subject to the approval of the Central Bank of Cooperatives in Washington, funds with which

to advance to growers 50% of the "going or market price" in the community of apples. The growers who send their apples to Knouse then become *pro rata* partners in that year's pool, receiving 50% of the going price after delivery, 20% more after the processed apples have been sold to the consumer outlets in sufficient quantity to warrant it, and, if the pool pays out, the balance when it does (Tr. 1541–42, 1750, 1840–1, 199–200, 197, 1848–52). Apparently, as the Examiner understands it, if the pool loses money, the grower receives less than the price announced for "advance" purposes; if the pool makes money, he receives that price, and may or may not receive a higher net price by way of patronage dividend or other disbursement (Tr. 197, 1741–1871, 1541–42, 215–16, 1535). Under this mode of operation, as of the date of hearings in 1952, some growers had only received 80% of the 1950 announced prices;—subsequently "debentures" were issued for an additional amount (Tr. 187, 197, 437, 796–8). From all of this the Examiner distills the conclusions that the "prices" in Knouse's announcement (CX 82) were a goal rather than an agreement, that as a practical matter it was impossible for Knouse to agree with either grower or processor, with any ultimate or binding effect, upon any price, and the grower who consigned or sold to Knouse could not then know whether or when he would get the announced "price," and that what he eventually did get, might or might not be that price. It is just a basis for making advances (Tr. 197–200).

A final fact, which would seem to belie to some extent the inference of conspiracy, is that the Department of Agriculture purchased apples in 1950 in the Appalachian area in an effort to hold up the price (Tr. 718), since the growers did not receive parity (Tr. 715–16).

Hence, as the Examiner sees it, 1950 presents the undisputed facts of meetings between respondents, the discussion thereat of prices, the almost simultaneous announcement of price scales immediately thereafter, identical as to prices and terms of sale, such as refusal to pay for culls or delivery, plus the subsequent written characterizations thereof by the AAS secretary-manager, from all of which, standing alone, price fixation and maintenance can be and should be inferred. Against this there is the unanimous testimony of all those present, that no conclusion or agreement was reached, testimony which, because of the interest of those involved in this proceeding, is not entitled to much weight, but that weight increased by the testimony of one without defined interest in this proceeding, and increased to some extent by its very unanimity and the failure to impeach by a showing of prior contradictory statements, though the opportunity was available. Against this also, the uncontradicted fact that all sorts of prices were

in fact paid by respondent processors, and the announced terms of sale widely disregarded, not uniformly but independently, the voluntary distribution of an additional payment by at least one processor, without economic reprisal or matching by others, and inability of one processor to agree at all on any price. To the Examiner, the preponderance is clearly in the negative, the inference that there was no binding or effective agreement not only the more reasonable, but, in his opinion, the uncontradicted evidence as to purchases during the season destroys the basis of the contrary inference.[10]

Coming to 1951, much of the documentary evidence (CX 7, 8, 32, 49abc, 64, 74ab, 75, 76, 78, 80, 105, 106, 107abc, 129abc, 130, 131, 132, 343, 372, 373, 374, 375, 387, 388, 389, 390) is insignificant on the two issues under discussion. From what the Examiner can find, there apparently was no price-discussing market clinics or Joint Grower-Processor Committee meetings, or if there were, there is nothing to indicate what transpired thereat. In fact, the only indications are that there was no common thinking as to price. Thus Knouse, according to the AAS secretary on August 23, 1951, saw no reason why processors could not announce the same opening prices as for 1950, in spite of the fact that those prices broke badly at the end of that season, and in spite of a large carry-over of processed fruit and a smaller pack in sight (CX 287abc). In a review of the "canning apple deal" and outlets, crop size, etc. AAS secretary recommended September 4, 1951, that growers would have to sell more fruit in the fresh market to stay solvent (CX 286a–e), and on October 3, 1951, he stated (CX 285a–d), "As of Tuesday Oct. 2, no processor of this Belt has announced prices. Practically all plants are running after a late start." He then quotes N. Y. area processor prices of $1.00 a bushel tops. Apparently it was October 3 before National and October 4 before Musselman announced their opening prices, which "range about the same" (CX 284a–d). This Bulletin complains rather bitterly that at these prices, growers make only a fraction of their cost of production. There is no indication in the record of what prices other processors announced or paid—nor is there a price list of any processor in the record.

Apparently these opening prices were increased because on October 24, 1951, the AAS secretary reports:

> The mid October increase in processors' prices is welcome—as a 25% increase would be to a man losing money appallingly. Allowing fully for all the factors that governed the processors in setting (then upping) their prices this season:—

[10] Of interest is the recent decision of the Commission on the matter of *Vitrified China Ass'n. et al., Docket 5719,* in which the facts seem to the Examiner to be far stronger than in this proceeding.

the surplus of, and slashed wind-up prices on, sauce and slices, government ceilings, uncertainties between the Belts and such—allowing for all these, the grower must still consider his return against his cost of production,

which, from another report of cost studies made by an AAS cost accountant, is determined at $2.53 a cwt. (CX 283abc)—much higher than the first announced prices. The record does not reveal what the increase in price amounted to, whether it came from all processors or was identical in amount from all. The above does not suggest price agreement between growers and processors, nor between processors alone.

Finally, in an undated speech but apparently made in 1952, in New York (Tr. 1905–06), the AAS secretary states:

That's the essence of my talk here. The apple growers and the processors in Appalachia—and in Western New York—are in the same family. We're brothers: partners; close partners, in business. Together we supply 85% of the nations apple sauce and canned slices. So far, we've been going it alone, practically speaking: each section battling its own problems; and in each section, growers and canners battling too often. And we've all gotten pretty thoroughly trounced,

and speaking of the 1951 season, stated:

Our 6-man Grower's Committee was active during late August, without tangible results: except that one processor, M. E. Knouse of the Knouse Foods Co-operative gave a prophetic price formula:—that processing the coming season should continue on the same prices-to-growers as last season ($3.25 etc) provided processors limited their pack to adjust for the carry-over. (As we know now, that adjustment occurred. The national pack to Dec. 1 was 7 million cases of sauce: maybe 2 million after Dec. 1: against 13½ million total pack from the '50 crop. And the price is again up to about $1.20 and, with the short supply, will go higher. But that is somewhat of an aside.)

All during August and September, there was no indication of processor prices in Appalachia except this:—on Sept. 6 one of the big independents mailed a letter to all of the hundreds of growers from whom it had bought in the past saying: "On the basis of today's market, we would have to pay growers $1 less than last year's prices". That was:—$1 less than the $3.25 scale, or $2.25 per hundred. That of course became the expected price-range for growers. That was Sept. 6.

Meanwhile the processors generally told their growers they would buy only a fraction as much as last season:—30% or 40% or 50–60%. Growers' morale was beaten down. The processors were working on half of the Knouse formula: they reduced their intentions-to-pack to fit the surplus.

On Sept. 6 and Sept. 8 the two big plants—the 2 use slightly more than half our Belt's processing apples—these 2 plants opened, and moved quickly into full operation. Growers delivered apples to them in huge volume, without any price beyond that "$1 less than last year" statement.

Growers delivered apples without price for almost a full month. On Oct. 3 and 4, respectively, the 2 big plants issued their price scales: both based generally on $1.75 for 2¾" Yorks and $1.40 for the biggest of all other varieties. In a

season of general drouth, they penalized all but the biggest apples: and drastically narrowed the A-varieties list to Yorks only.

Early loads on this scale returned the grower 29¢ per bushel for all but Yorks, which ranged higher.

The growers were stunned. Twenty-nine cents a bushel! They mostly did one of three things:—walked out of their orchards: or sold to truckers for anything above that 29¢ per bushel: or turned to packing for fresh channels. But growers couldn't do anything about the huge volume of delivered apples. Truckers, finding they could get apples for 35¢ or 40¢ or 50¢, flocked into The Belt. We've never moved such a volume by trucks. Any time truckers can get 40- to 50-cent apples, they'll come a-running: something to remember and develop. Growers soon upped this trucker price and on the whole we did fairly well with this big volume of fruit:—$1 and $1.25 a bushel later.

The net result was that the canners were soon hunting apples. The diversion was that effective, and the price that much too low. So * * * on Oct. 15 or thereabout, the leading processors jumped their scales 20- to 30-percent—to $2.10 for big Yorks and $1.80 for others in big sizes—2¾. That was a sufficient increase to bring them the apples they wanted, generally speaking. It came 6 weeks after growers began delivering. One big lesson for us stands out: Don't deliver without a price! * * * That is the chronological sequence of events in Appalachia for the first half of the season.

Now—how did all this affect you? The evident effect was huge, and costly—to the growers, principally. Growers paid for nearly all of this.

(CX 281a-d)

The above is hardly suggestive of agreement on prices.

Also of interest is the Secretary's reaction to the investigation which preceded the instant proceeding, reported in AAS Bulletin 270 dated June 12, 1951 (CX 35abc), reading in part:

Fear of Federal Government persecution may cause processors of this Belt to abandon their custom of holding to their prices, once announced, thru the season. For the past 15 years, processors in this Belt, once each announced his general price-scale, has not lowered that, no matter what the volume of apples offered. The only change has been to increase, as in 1948, when short supplies indicated their prices were not high enough: that the Apples were being diverted to fresh fruit markets.

In contrast, in New York State processors tie their prices directly to their supplies. Heavy supplies at the offered prices indicate to them that they could get apples cheaper—so they "withdraw and adjust" their prices. A result is to keep growers continually fearful: an advantageous situation for the buyers (processors) of course.

A second possible result among our processors of this fear of Government prosecution would be to drive them to a return to the "lone wolf" days, when each processor tried to out-smart the growers and his competing processors by quietly "signing up" as much fruit as he needed, at his own price: the price necessarily low enough that his competing processors could not get it any lower. That would tend to put this Belt right back in the old days of 45-cent canners and 15-cent ciders. That moves inevitably to price-slashing among the canners on their processed product—such as led in 1937 to retail sales of apple sauce at 5¢ per

can:—with losses to everyone concerned, of course; the growers and the processors and the retailers. That is the way to bankruptcy.

Processors in this Belt, generally speaking, must pay growers approximately equal prices for apples, to get their share of the "raw materials." Plants the size of these cannot afford to remain closed; nor to lose their customers because of short pack. So they must offer growers about the same return as the other fellow. That is a first law of Business. If that law is repealed by threat of Federal prosecution, it is replaced by the Law of the Tooth and the Fang;—and 45¢ per cwt. for apples.

The inconsistency between the implications of the above and other statements by the Secretary previously quoted is apparent from a mere reading.

There is no significant testimony in reference to the year 1951 only.

About all that the documentary evidence dated in 1952 reveals is a post-complaint, marked change in the Secretary's reports. Thus the minutes of the meeting of the directors, AAS, April 23, 1952, states that "Pres. McCue will ask the major processors of the Belt if they will sit down with a growers' committee from time to time to discuss over mutual problems, first meeting not later than end of June" (CX 127ab). No report of that meeting is in the record.

The minutes of the annual meeting, directors AAS, July 23, 1952 (CX 125a–d), after discussing elections, budget and treasurer's report, shows that processors would be invited to attend a meeting of the Grower's Committee (named) August 12, 1952, to confer on problems other than price, and in Bulletin 298, dated August 18, 1952, the Secretary reports (CX 276abc):

The Appalachian Growers' Committee on Processing met Tuesday Aug. 12 at Hagerstown with major processors of 4 state belt. In a 3 hour session the Growers' Committee presented 3 recommendations to the Processors:—

1. Announcement of price to be paid before delivery of apples to the processor.
2. Restoration of the 1950-and-before Classes:—

A Class: Yorks, and at least Grimes, Stayman & Golden Delicious instead of Yorks only;

B Class: All others acceptable.

3. Restoration of the 1950-and-before size base of 2½ inches, instead of the 2¾-inch base used last season.

The Processors took the requests under consideration.

All processor respondents were represented, plus Stockdale for Zero Pack and representatives from Renehan, Duff-Matt and Comstock.

The record does not reveal what happened to these requests nor what prices were paid in 1952.

The other documentary evidence dated in 1952 (CX 124ab, 128, 322) is insignificant and there is no significant testimony particularly applicable to 1952 on the issues.

Considering the record now as a whole instead of piecemeal on the charges of price fixation and maintenance, the Examiner is of the opinion that there is insufficient reliable, probative and substantial evidence to sustain the charges and support the order requested. This turns on the difficult allocations of weight and credibility. If these are determined as urged by counsel in support of the complaint, then there is here not only a reasonable, but a strong inference of the conspiracy charged. But the Examiner, from his observation, is unable so to do, and he has hereinabove, in an effort to make clear to counsel and the public, discussed what he has relied upon and what he has rejected and why, to what he has given weight, and in what degree, which has extended this opinion to what would be otherwise unjustified length.

In observance of the principle that a contemporaneous writing before litigation more accurately depicts the facts than post-litigation testimony based on recollection and influenced by a desire to tone down or dispel implications, the Examiner has given full weight and credit to such writings except where they, on their face, indicate the same exaggeration which festooned the writer's rejected testimony, or where they were in contradiction to some independent and uncontradicted fact, evidenced either by an unquestioned document or unanimity of testimony by credible witnesses, which, in each instance, has hereinabove been noted. Some documents had this in spite of the impression that much was the extra factual effluvia of an over-ambitious promoter, and that it seems anomalous to believe writings not under oath when the writer is disbelieved under oath. There is no doubt from that the AAS secretary wanted to fix, stabilize and maintain prices, urged it and may have thought he achieved it—but stubborn and unquestioned facts belie it, in the Examiner's opinion. Assessing weight and credibility as the Examiner has, the factual picture is not one from which one of two equally reasonable but opposite inferences may be drawn. Rather it presents a picture, suspicious of the conspiracy charged, indicating repeated but abortive attempts to agree and a contrary strong and reasonable inference of independent pricing.

Turning now to the charge of using by agreement a mathematical pricing formula, whereby prices were fixed and established on grades and classes of apples, we find the evidence and its implications conflicting and confusing. Proponent counsel claim its genesis in the minutes of a meeting of the apple industry committee for the Appalachian area held in the Hotel Raleigh, Washington, D. C., on July 28, 1943, attended by growers, processor representatives and apparently officials of O. P. A.—and the War Food Administration (CX 17abcd). M. E. Knouse, apparently a consultant to one or both,

reported that a pricing formula had been agreed upon as follows: Using 2¼ inch US #1 Canner grade as a base, #2 Canners to be 75% of that price; juice, butter and chop apples to be 62½% thereof; ciders 50% thereof. All soft varieties to be priced 15% less than hard varieties.

This same Knouse, writing to the Federal Trade Commission investigator on June 22, 1951 (CX 275), says:

> In reply to your letter of June 8, I would say that first, we use the actual yield on a basis of size, quality, grade and variety. Then, second, the cost of labor for preparation of the end product is something that changes and affects the differentials. Third, the end use of the product whether the product of manufacture is in short or long supply and is wanted. Also, all of these factors in setting the differentials in the A and B class were factors considered by the OPA, Department of Agriculture, the grower and processor committees that worked jointly in developing proper price structures and differentials during World War II and ever since this study, the industry has continued at that time by these joint committees. These differentials and these patterns should be adjusted slightly from year to year due to all of the factors mentioned above.

If this "mathematical pricing formula" was continued from 1943 down to the present, the prices announced should show it, but they do not. The 1949 price announcements (CX 67, 85, 95b) in the first place do not agree as to what varieties are Class A (hard apples). Secondly, the percentage formula was obviously not used. Thus, #1 Canners 2¼ inches up (the base used in the 1943 formula) are $1.65 cwt. 75% of this should yield a price for #2 Canners, of $1.2375; however, the price was 70¢ cwt. Similarly "soft" varieties (Class B) are not in any instance 15% less than Class A or "hard" varieties. Again ciders @ 50¢ cwt. are not 50% of U. S. #1 Canners, 2¼ inches up at $1.65 cwt. Analysis of the 1950 price announcements (CX 60, 261, 62, 82, 83b) produces similarly negative results. Furthermore, the numerous and substantial variations from the announced prices, particular "bonuses" paid on one grade or variety and not on others in the same grade, annihilate any mathematical percentage formula, or even relationship, which may exist between grades and varieties in the announcements. In fact, without regard to the 1943 formula, the Examiner is unable to find any mathematical relationship in the various price announcements, of either constancy or pattern. The contrary inference of non-continuance and non-user of this war-born formula is supported by the testimony of the witness, Stockdale, that the formula died with the extinction of O. P. A. (Tr. 879, 916–17).

Faced with this, counsel for the complainant insists that the "principle" nevertheless survived, or was revived in different form, and agreed upon and utilized. The brief does not make clear what the

"principle" is, but the Examiner assumes this to be that respondents agreed upon grades and classes for which different prices would be paid. The complaint, however, does not so charge—it is quite specific that the respondents "have entered into an understanding, agreement, and combination" * * * "to fix, devise and establish" * * * "*A mathematical percentage pricing formula for calculating* (a) the price scale or prices for the various grades and classifications of apples *from the price set by respondents* for apples referred to by respondents as 'Tops' and (b) fixing, determining and establishing price differentials between the several grades and classifications of apples." As the Examiner understands this, pleadings (a) and (b) depend solely on the "*mathematical percentage pricing formula*" preceding them, and this is confined by its terms to fixing by agreement *prices* for grades and classifications already extant. Furthermore, it may be observed as to (a) that the 1943 formula was based on #1 U. S. Canners 2¼ inches and up, whereas the "Tops" grade on which the record contains prices is #1 U. S. Canners 2½ inches and up.

The evidence cited by counsel of statements and letters of the witness Hunt obviously refers to suggested or desired changes in grades, rather than prices therefor, or any formula for calculating those prices (CX 36, 39), which suggestion or desire came to nothing incidentally. The Examiner is of the opinion that no *prima facie* case has been shown to support the second charge.

The evidence on the last charge—diversion by agreement among respondents of apples from some processors to others for the purpose of maintaining price—is confined to 1950 and centers around a meeting of respondents on October 23rd. In this year the apple crop in Virginia was abnormally heavy, in Pennsylvania it was light. Processor respondents apparently buy from regular grower customers each year, and attempt to "take care" of these regular customers' fruit first as a matter of good will. Growers will not sell to a processor in lean years if the processor does not take care of them in abundant years. In October it became apparent to Hunt of National that his plants were swamped with apples for which he was paying on the basis of a certain size pack (Tr. 646–49). To continue to buy apples at the rate they were being shipped to him, he would have to take the financial risk of borrowing funds to finance a substantially larger pack and the commercial risk of being able to dispose of it (Tr. 611–13). Also, a processor does not like to refuse a grower's apples in an abundant year and send him elsewhere, as the grower may stay elsewhere in subsequent years when the processor needs those apples.

Accordingly, he requested the AAS secretary to call a meeting of grower representatives to discuss a market situation (Tr. 614), but instead the Joint Grower-Processor Committee was summoned, met, was told by Hunt of his problem and discussed it (Tr. 518, 868, 1008, 1167–68, 1328, 1492). None of them knew in advance the purpose of the meeting (Tr. 406, 868, 1009).

One of those present testified that Hunt stated that a lower price was more realistic (Tr. 868), but no one else so stated. Hunt's testimony is that National would pay 50% of its announced price upon delivery with the understanding that if the processed apple products market held in price, the remainder would be paid later, but if it broke, the grower would get proportionately less than the announced price—in effect, a proposal that the grower selling to National, from then on, become a risk partner in a pool similar to the Knouse Co-operative operation. He characterized it as a trial balloon for the reaction of the growers, but he said "we laid an egg" (Tr. 622–23, 786, 1493–94). Apparently, the reaction of the growers was negative (Tr. 1493–94). Suggestion was made—some witnesses say by Knouse and Musselman—others by growers, that apples be shipped to these two Pennsylvania processors (Tr. 520, 790, 869–70, 1010, 1447). Others did not remember such suggestion (Tr. 786–90, 1170–71, 1328).

Three of those present and asked were positive that no solution was arrived at or agreed upon (Tr. 411–13, 519, 623, 1450–53). One said the problem was ultimately settled and solved, he believed, by diversion (Tr. 1010), four others were significantly not asked (Tr. 786–90, 868–71, 1161–74, 1494–95); two others were not interested in the problem at all (Tr. 1328, 1174).

Reporting on this meeting, the AAS secretary in Bulletin 256, October 24, 1950, stated:

> In 1949, the apple crop was in Pennsylvania. This year, the apples are in The Virginias. The crop in The Virginias has been notably increased by the ample late rains; and percentage of packed fruit has been reduced by russeting. A result of this is that several Virginia processors in the heart of the Virginia production have received apples beyond early-season expectations, and are approaching the limits of what they feel they can accept, hold either in storage or otherwise, and process and sell. When this limit is reached, they expect to shut off acceptance of apples, except those previously contracted for.
>
> Larger Pennsylvania processors, in the midst of Pennsylvania's short crop (which seems, as short crops do, to be getting smaller) are not facing this situation: will need a considerable volume of apples from south of The Potomac. This is the reverse of 1949, when Virginia processors, in the middle of a short Virginia crop, took considerable fruit from Pennsylvania's large crop.

The above is the result of a conference of The Joint Grower-Processor Committee for Appalachia, held Monday at Hagerstown. Several Virginia processors noted that their pack-out so far was larger than ever before at the same period; that their cold-stored apples, for later use, were far above any previous holdings: that they are approaching the volume of pack, in both sauce and slices, that they feel can be well sold; and when that point is reached, they must stop acceptance of any fruit not previously contracted for.

Pennsylvania processors, in the middle of a light-crop area, have no such inventory of stored fruit nor of their finished product; and indications are that, by and large, they will be in the market for sufficient apples to take up the slack of Virginia's processable fruit. (CX 34)

and, in a letter to the President of AAS dated November 7, 1950, stated, "Yes, we had a Joint Grower-Processor Committee meeting Oct. 23—at the request of the processors. The Committee—Appalachian, that is—stopped a canner price break we believe" (CX 51). How is not stated. Two other statements in the record tending to show agreement were Bowman's testimony that the problem was alleviated (Tr. 520) and Hunt's reference to the suggestion that the Pennsylvania processors buy up the slack that "we were no party to that agreement—we could not agree to it" (Tr. 623).

However, there is no satisfactory or sufficient evidence of diversion. Caspar did not know definitely whether Virginia and West Virginia apples went to Pennsylvania canneries (Tr. 1010–12). Miller "understood" that the latter purchased Virginia apples after that (Tr. 413). Bowman did not know of any diversion, said he did not divert (Tr. 519) and that his problem was not lessened; Moore continued to ship substantial quantities to National (Tr. 788) which did not refuse any shipment (Tr. 790); Stockdale had no knowledge of it (Tr. 871); Young from the Staunton area had no trouble disposing of his fruit (Tr. 1174); Arthur was not asked; Griest from Pennsylvania did not know (Tr. 1450), stating that there was no shortage of apples in Pennsylvania, as did McDonald (Tr. 1495), who testified that the apples sought their own channels (Tr. 1499); Hunt knew of no Virginia apples going to Pennsylvania except by hearsay (Tr. 637).

The most reliable information on this point was obviously the purchase records of Knouse and Musselman. These were not put into the record. Representatives of both were witnesses, but neither was asked anything about the meeting which they both attended, although both had attributed to them statements made at the meeting. What is still more significant, when respondents' counsel inquired on this point, counsel in support of the complaint objected as being beyond the scope of the direct (Tr. 1707), from all of which the Hearing Examiner can only conclude, that they would have testified there was no diversion nor any picking up of the surplus by them.

Another uncontroverted fact negativing the inference of agreement is that after the meeting National borrowed $2,000,000—continued buying fruit and put up a much bigger pack (Tr. 635–7, 788). This hardly bespeaks an effective agreement to divert—apparently the glut was still there, in major part at least.

In sum, the evidence is at least conflicting, contradictory and far from clear as to any agreement to divert, the evidence is preponderant that there was no substantial diversion, and the conclusion is that the evidence as a whole is insufficient to sustain the third charge of the complaint.

It follows, therefore, that the motions to dismiss the complaint for insufficient substantial evidence to sustain it are each sustained; and, accordingly, it is

Ordered that the complaint herein be, and the same hereby is, dismissed.

IN THE MATTER OF

REVLON PRODUCTS CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT AS AMENDED

Docket 5685. Complaint, Aug. 1, 1949—Decision, Sept. 23, 1954

Order requiring a New York manufacturer of some 200 cosmetic preparations, dominant in the quality nail enamel field and the leading seller of lipsticks, to cease violating Sec. 3 of the Clayton Act by selling its products to beauty supply jobbers on the condition that the purchaser not deal in or sell cosmetic products supplied by its competitors.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. William C. Kern and *Andrew C. Goodhope* for the Commission.

Blumberg, Singer, Heppen & Blumenthal, of New York City, and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., for respondent.

DECISION OF THE COMMISSION

Order denying respondent's appeal from initial decision except to the extent of modifications and additions, decision of the Commission, and order to file report of compliance, Docket 5685, September 23, 1954, follow:

This matter came before the Commission upon an appeal by the respondent, Revlon Products Corporation, from an initial decision of the hearing examiner holding that it has violated section 3 of the Clayton Act. Briefs have been filed in support of and in opposition to this appeal and oral argument has been heard. Respondent also has filed a motion requesting reargument, which motion is opposed by counsel supporting the complaint.

The Commission has reviewed the rulings made by the hearing examiner at the hearings and finds that no prejudicial error was committed. It has considered the initial decision, respondent's exceptions thereto, the briefs and oral argument and the entire record in the case and, for the reasons set out in the written opinion of the Commission issued simultaneously herewith, is of the opinion that the initial decision should be adopted as the decision of the Commission with the following additions and modifications:

1. Respondent excepts to the finding that it is a dominant factor in the nail enamel and lipstick fields. As to lipstick, the record shows that respondent is one of the leading sellers of lipstick. However, it

does not support a finding that it dominates the field. As to nail enamel, respondent's officials testified that it is by far the leader in the more expensive nail enamel field. Testimony of competitors shows that Revlon has eighty percent of the nail enamel and adjunct line in the beauty parlor field and is dominant in the sale of these products in that field. Other companies sell large quantities of inexpensive nail enamel, principally to drug and ten-cent stores, but respondent clearly dominates in the quality enamel field. Therefore, this finding is modified so as to hold that respondent is dominant in the quality nail enamel field and is a leading seller of lipsticks.

2. The last sentence in Paragraph Six of the hearing examiner's finding is hereby modified by striking from it the phrase "Based upon the testimony of beauty supply jobbers with reference to the various competitive items handled by them." The remainder of the sentence is retained as respondent admits in its exceptions that many manufacturers voluntarily do not sell to beauty supply jobbers.

3. Paragraph Eighteen of the initial decision is modified to clearly state that many of respondent's franchised jobbers sold products, other than nail enamel, which are competitive with respondent's products in violation of their franchise agreements. The hearing examiner so held, in general effect, in ruling on respondent's requested finding number 20, but did not so state in his findings.

4. Paragraph Nineteen of the initial decision is modified by striking the following sentence:

> "Representatives of 19 of these beauty supply jobbers appeared as witnesses, but, while they denied certain conversations with Breslauer as to their reasons for limiting their business to Revlon nail enamel, it is quite clear that these jobbers did not handle nail enamel competitive with that supplied by respondent."

and by substituting therefor:

> "Representatives of 19 of these beauty supply jobbers appeared as witnesses; of these, 12 testified that they sold Revlon nail enamel exclusively. The others did not testify on this point. Certain of these denied having told Breaslauer they wouldn't handle competing nail enamels because of their exclusive dealing agreements with respondent. One, H. L. Reid and Sibell, testified that he got rid of a competitive nail enamel shortly after becoming a Revlon jobber upon being directed to do so by a Revlon representative who had checked his stock and found the competitive product."

The Commission has considered all of the exceptions to the initial decision and arguments set out in respondent's brief. They are rejected except to the extent the initial decision is hereinabove modified.

Respondent has moved for reargument before the Commission for the reason that two of the present five Commissioners were not members and did not hear the oral argument of counsel, and for the further reason that principles of law bearing on this decision have been announced by the Commission since oral argument herein. The Commission is of the opinion that the able briefs and oral argument and its familiarity with its own recent decisions are sufficient to fully apprise it of all of the issues herein. For that reason, it is of the further opinion that reargument would serve no useful purpose.

It is ordered, therefore, that respondent's motion for reargument is hereby denied.

It is further ordered that respondent's appeal from the initial decision of the hearing examiner is hereby denied except to the extent hereinabove set out.

It is further ordered that the initial decision, with the modifications and additions hereinabove set out, is hereby adopted as the decision of the Commission.

It is further ordered that respondent Revlon Products Corporation shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist set out in the initial decision, a copy of which is attached hereto.

Commissioners Howrey and Gwynne not participating for the reason oral argument was heard prior to their appointment to the Commission.

Said initial decision as modified by the above Decision of the Commission, and adopted by the Commission as its decision, follows:

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914, commonly known as the Clayton Act, the Federal Trade Commission on August 1, 1949, issued and subsequently served its complaint in this proceeding upon the respondent Revlon Products Corporation, a corporation, charging it with the violation of the provisions of section 3 of said Act. After the filing of answer to the complaint, hearings were held at which testimony and other evidence in support of, and in opposition to, the allegations of the complaint were intro-

duced before the above-named Hearing Examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, answers thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel; and said Hearing Examiner, having duly considered the record herein, makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Revlon Products Corporation 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 745 Fifth Avenue, New York, New York, and its factory located at 137th Street and Third Avenue, New York, New York.

PAR. 2. Respondent is now and for many years last past has been engaged in the manufacture, sale and distribution of various cosmetic products, including nail enamels and polishes, lipsticks, facial creams and manicure implements. Respondent sells a substantial portion of its cosmetic products to distributors or jobbers, who will hereinafter be referred to as beauty supply jobbers, who in turn resell respondent's cosmetic products to beauty shops and beauty salons. Respondent also sells its cosmetic products directly to department stores and retail drugstores, but these sales are not involved in this proceeding.

PAR. 3. Respondent causes its cosmetic products, when sold, to be transported from its factory in the city of New York and State of New York to purchasers thereof, including beauty supply jobbers, who are located in the various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said cosmetic products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business, the respondent is now, and, during the times mentioned herein, has been, in substantial competition in interstate commerce with persons, firms, partnerships and other corporations in the sale and distribution of its cosmetic products.

PAR. 5. Respondent was incorporated under the laws of the State of New York in 1933 and originally sold a line of manicure preparations for use on the nails and hands. Later respondent added mani-

cure implement and various cosmetic preparations, including lipsticks, which latter item has become a principal factor in the line of cosmetic preparations sold and distributed by it. Giving consideration to all of the cosmetic preparations now sold by respondent and the many different shades and colors in which such preparations are sold, respondent presently sells approximately 200 different cosmetic preparations. Respondent's preparations are nationally advertised by magazines, radio, television, newspapers and displays and respondent's manicure preparations and lipsticks constitute prestige and demand items in the trade. While starting as a small company with a very limited capital, respondent has become a dominant factor in the nail polish and enamel and the lipstick field.

PAR. 6. According to the testimony, there are 14 companies which manufacture manicure instruments. It was also stipulated in the record that there are 39 companies which make liquid nail enamel; 65 companies which make massage cream; 95 companies which make hand cream; 142 companies which make hand lotion; 145 companies which make lipstick; and 153 companies which make cleansing creams. The record does not disclose the duplication of companies in the above figures, but there can be no doubt from the record generally that a substantial number of the above companies manufacture more than one cosmetic product and would subsequently appear in more than one of the above categories. The record is also silent as to the number of these companies who sell their products to beauty supply jobbers. Based upon the testimony of beauty supply jobbers with reference to the various competitive items handled by them, it appears that a substantial number of the above companies do not sell to beauty supply jobbers, but instead confine their sales to department stores, drugstores, five and ten cent stores, and other channels of distribution.

PAR. 7. Beauty supply jobbers are a very important method of getting distribution of any cosmetic manufacturer's products to the beauty salons located throughout the United States. There are approximately 120,000 beauty salons located throughout the United States and any attempt to deal direct with such a large number of beauty salons would entail prohibitive expense, as well as financial difficulties on credit risks, and consequently the use of beauty supply jobbers is the only practical method of distribution to such beauty salons and is relied upon by respondent as well as competing manufacturers. Beauty supply jobbers are recognized in the trade as being important channels of distribution for the additional reason that they are not considered merely order takers but are expected to and do promote the cosmetic products which they sell and perform, therefore,

an important selling function in gaining distribution to such beauty salons. Recognition is given such fact by the cosmetic manufacturers as beauty jobbers receive larger discounts than in comparable fields of distribution. In fact cosmetic manufacturers generally try to induce beauty supply jobbers to concentrate on purchasing and pushing such manufacturers' products.

PAR. 8. The public acceptance or demand for a cosmetic product has a bearing upon products purchased by the beauty salon. However, the acceptance or demand is influenced by the sales effort put forth on a particular product and the professional use of a cosmetic product in a beauty salon constitutes a professional endorsement and has a decided influence on public acceptance of a particular cosmetic product. It is, therefore, important to the cosmetic manufacturer to reach the beauty salons with his preparations and to have the wholesale avenue of distribution to such beauty salons unimpeded and unrestricted. Beauty salons can and do purchase from more than one jobber and carry more than one line of nail enamel and other cosmetic products.

PAR. 9. There are approximately 1,500 established beauty supply jobbers who supply the needs of the beauty salons, of which approximately 1,100 might be classified as good credit risks. Respondent uses considerable care in the selection of beauty supply jobbers to handle its products. Among the qualifications required by respondent are (1) efficient sales organization; (2) ability to give full coverage of all the beauty shops in the area covered by such jobbers; (3) financial integrity, good credit rating and both the ability and disposition to pay indebtedness promptly; and (4) ability to sell and promote respondent's products. While the beauty supply jobbers so selected by the respondent to sell and promote its products are a small percentage of the total number of beauty supply jobbers they constitute the leading jobbers in their respective areas of distribution and are sufficient in number to give the respondent full coverage of all beauty salons located in the recognized trade areas of the United States.

PAR. 10. Beauty supply jobbers, generally, including the jobbers selling and distributing respondent's products, are independently owned and operated. Respondent does not contribute to the administrative or operating cost of the beauty supply jobbers handling its products, and such jobbers are not either agents or employees of respondent, but are independent enterprises purchasing respondent's products and reselling the same generally to beauty shops located throughout the United States and ordinarily do not sell to drugstores, department stores or other retail outlets.

PAR. 11. When respondent first began doing business it limited its products to nail enamel preparations and sold direct to beauty shops, but in 1934 began selling through beauty shop supply jobbers and by 1935 had adopted as a general policy the granting of exclusive territory to its beauty supply jobber customers on the condition, agreement and understanding that such jobbers would sell only cream nail enamel manufactured and sold by the respondent. At the beginning of this practice the agreements were both oral and written.

PAR. 12. As early as 1934 the respondent entered into a letter contract with one of its beauty supply jobbers for the distribution of its cream nail enamel. This letter agreement contained the following provisions:

From May, 1934 forward, exclusive sales of Revlon Cream Nail Enamel is offered to you in Northern California, that is north of Bakersfield, and also in Nevada.

This agreement can be broken only upon a thirty day written notice by either you or us. This protection is further based on your selling only one cream nail enamel, that is Revlon Cream Enamel, as declared in your letter of March 6th. (CX 38)

PAR. 13. About 1938 or 1939 the respondent began the manufacture of hand creams and lipsticks. In 1938 or 1939 it acquired the Farel Destin line of cosmetics which was operated as a separate or affiliated company until finally absorbed by respondent in 1947. Manicure implements were added to respondent's line in 1939. As its products were increased in number, later agreements were not limited to nail enamel but granted certain designated sales territory on condition that the beauty supply jobbers carry Revlon products only. In most instances the sales territory was granted to the particular beauty supply jobber exclusively, but codistributorships were granted in territories comprising the larger cities where more than one jobber was necessary to obtain satisfactory coverage of beauty salons.

PAR. 14. During the years 1942, 1943 and 1944, respondent entered into written letter agreements with 19 of its beauty supply jobbers. One of the letter agreements, which is typical of those used in 1942, contained, among other things, the following provisions:

As agreed, in granting you the co-distributorship for San Francisco and the immediately adjacent vicinities, you will carry Revlon manicure preparations only. It is also agreed that you will clear your stock of other polishes and manicure preparations and effective immediately you will not reorder on these items.

In accordance with our co-distributorship plan, both parties reserve the right, at all times, to terminate this relationship with or without cause and without any liability of any kind or nature to either party by reason of such termination and in the event of such termination you will ship to our factory within

fifteen days after you receive notice of such termination, all Revlon merchandise and display material you have on hand at the time said business relationship is terminated. On receipt of this merchandise, we will issue credit to you in accordance with our Return Goods Schedule, plus the cost of shipping this merchandise to our factory. However, we cannot guarantee to issue credit if this merchandise is not shipped within the stipulated time.

Please acknowledge receipt of this letter and signify that you are in full understanding and agreement with its provisions by affixing your signature to attached white copy and return it to us. (CX 19)

Another letter agreement typical of those used in 1944 contained, among other things, the following provisions:

It is understood that in consideration for granting you the distributorship for Albuquerque, you will, of course, carry Revlon preparations only and accordingly promptly dispose of any stock you may have on hand of other preparations.

It is also understood that in accepting the distributorship, you agree to sell Revlon merchandise to beauty salons only. Under no consideration may you supply any other outlets such as department stores, drug stores, post exchanges or ship stores.

An indispensable companion to the intrinsic excellence of Revlon products is the constant maintenance of wholesale and sound merchandising standards. Together they have given Revlon its eminent place in the beauty world. A prime contributing factor in achieving these standards is our plan of reciprocal exclusive distributorship, the success of which rests, as must be obvious to you, upon the utmost cooperation and mutual good will.

Experience has shown that the enviable position enjoyed by our products can best be maintained if we reserve the right to resolve any questions that may arise concerning merchandising policies or practices in order to check those which may tend toward an adverse effect upon that position. This control, to be effective, must necessarily carry with it the right to terminate any distributorship if for any reason, in our sole judgment, that should become unavoidable.

It must, therefore, be clearly understood at the outset that if we should ever have occasion to exercise this right in your case that there will be no liability whatsoever to you on our part. In such circumstances, we will, of course, expect you to return, within fifteen days from receipt of written notice to that effect, all Revlon merchandise and display material which you may then have on hand. Upon receipt thereof, we will issue credit to you in accordance with our return goods schedule. However, we cannot guarantee that we will accept such merchandise for return after this stipulated period.

We shall appreciate it very much if you will signify your full accord with the above agreement in its entirety by affixing your signature to the attached white copy and returning to us. (CX 1)

PAR. 15. In 1948 the respondent, for the purpose of formalizing already established policies, which included the exclusive dealing features, issued and caused to be executed by its beauty supply jobber customers a formal contract known as Distributors Franchise Agreement. This is clearly indicated by the form letter which accompanied such contracts, which read in part as follows:

Up to the present the Franchise Agreement between you and Revlon has been on a loose gentleman's agreement basis. We accepted you because we felt you can give our products the type of distribution and representation they required, and you chose to undertake this representation of Revlon because the line offers certain definite advantages over other available lines of the same class of products.

There is no question that Revlon has lived up to everything expected of it. Today it leads the world in the sales and promotion of its type of products. You are one of a limited number of selected Distributors, with all the advantages which accrue.

Our distribution has now reached a stage where it would be better for all concerned to have a formal Franchise Agreement which specifically lists those points on which absolute agreement must be reached if we are to take the fullest advantage of potential sales of Revlon Products. A definite understanding of the minimum policy requirements will save a great amount of time and effort now consumed by you and ourselves to maintain uniform adherence to our sales policy.

The Franchise Agreement we are sending you herewith has been carefully formulated over a period of several years. It contains very little that is new or that has not already been discussed many times between you and Revlon representatives or executives. It formalizes already established policies and terms of sale, and it clarifies Revlon's obligations to you. * * * (CX 39).

When the contract was executed by the jobber customer and forwarded to respondent, it in turn executed such contract and returned a copy to the customer with an accompanying letter containing statements of which the following is typical:

Enclosed herewith is your copy of the Revlon Distributors Franchise Agreement, properly executed.

Now that we have formalized our agreements by this contract, there will be no guesswork in our relationship. We both know what we are expected to do.

Revlon will scrupulously carry out its obligations under this agreement, and we are certain that you will do likewise.

We believe this is one more landmark on the road to bigger sales volume through fullest cooperation between Revlon and its Distributors. (CX 17)

PAR. 16. During the years 1948 and 1949 the respondent sent such Distributors Franchise Agreements to all its beauty supply jobbers throughout the United States with the exception of those located in the State of Texas. These contracts were executed by 157 of respondent's 176 beauty supply jobbers.[1] Among other things, these contracts all contained the following provisions:

3. (a) The Distributor will purchase exclusively from Revlon all of its requirements of the products mentioned in "Schedule B," subdivisions (I), (II) and (III) except such products set forth in subdivision (2) which are a part of or are a complete make-up and treatment line. With respect to the products men-

[1] These figures include approximately 23 branch offices located in separate and distinct territories and which were handled by the respondent as separate and distinct entities to the extent of separate contracts being executed with them.

tioned in subdivision (3) the Distributor may handle similar products made especially for it and may distribute the same under its own brand or trade name.

5. The Distributor will not, directly or indirectly, manufacture, sell or offer for sale at wholesale any products identical with, similar to or which are sold in competition with any Revlon products set forth in "Schedule B" except as provided for in paragraph "3" hereof.

11. In the event of a breach of any of the terms, covenants or conditions of this agreement on the part of the Distributor, Revlon may terminate this agreement and said termination, unless otherwise specifically provided for in this agreement, shall be by notice effective five (5) days from the date of mailing thereof. (CX 3)

Schedule "B" was a part of this form contract and provided as follows:

SCHEDULE "B"

Subdivision I

Nail Enamel
Nail Enamel Base Coats
Nail Enamel Top Coats
Nail Enamel Fast Drying Agent
Nail Enamel Solvent or Thinner
Nail Enamel Top and Base Coat
Lactol (Hot Oil Manicure Treatment)
Nail Cream
Cuticle Remover
Cuticle Oil
All other manicure and pedicure preparations
Manicure Implements

Subdivision II

Lipsticks
Face Powder
Cheekstick (Cream Rouge)
Cake Rouge
Hand Cream
Hand Lotion
Foundation Make-Up
Hand Massage Cream
Night Hand Cream
Hand Cologne

Subdivision III

Nail Enamel Remover

PAR. 17. The letter agreements and franchise agreements and methods of sale adopted by the respondent as hereinbefore described constitute sales or contracts for sale of respondent's cosmetic products on the condition, agreement or understanding that the purchasers thereof shall not deal in cosmetic products sold and distributed by competitors of the respondent. The aggregate dollar volume of cosmetic products annually sold by respondent to its beauty supply jobber customers

under restrictive conditions, understandings and agreements as set out in its letter agreements and Distributors Franchise Agreement was substantial. In 1949 the sales to beauty supply jobbers of cosmetic products falling within Subdivisions I, II and III of Schedule B of the Distributors Franchise Agreement, hereinbefore described, amounted to $1,512,939.54.

PAR. 18. It was contended by the respondent that its franchise agreement, although executed by many of its beauty supply jobber customers has not been followed by such jobbers to any substantial extent nor has respondent made any substantial attempt to enforce its terms, and that whatever contractual validity these agreements may have had originally, has been lost in inconsistent action upon the part of the beauty supply jobbers and acquiescence therein by respondent. The fact that the respondent may have acquiesced in the sale of certain cosmetic products by its beauty supply jobbers, which were in fact competitive with products sold by the respondent, constitutes no defense to this proceeding as the power to enforce the exclusive dealing clause in its contract is ever present. Furthermore, the exclusive dealing clause of respondent's contract, when considered in conjunction with the right of cancellation by respondent, is a sufficient deterrent to require compliance with the contract, particularly in view of the fact that respondent's cosmetic products are prestige items which are in demand by beauty salons.

PAR. 19. Testimony in support of the above contention dealt with cosmetic products other than the nail enamel line. The franchise agreements, hereinbefore described, while permitting the purchase of certain competitive items when part of a complete make-up and treatment line, required the nail enamel line to be purchased only from the respondent. Insofar as nail enamel is concerned, the respondent has required compliance with, and its beauty supply jobber customers have strictly adhered to, the exclusive dealing requirements of the several contracts and agreements. Representatives of 54 beauty supply jobber customers of the respondent testified in this proceeding. Not one of these testified to the handling of any nail enamel other than that supplied by the respondent and only 2 were handling a competitive nail polish. Benjamin Breslauer of A. Breslauer Company, manufacturer and distributor of The Contoure line of cosmetics, testified that nail enamel was introduced into their line in 1938. He named 34 beauty supply jobbers who handled his line and who were also jobbers for respondent but who did not handle Contoure nail enamel. Representatives of 19 of these beauty supply jobbers appeared as witnesses, but, while they denied certain conversations with Breslauer as to their

reasons for limiting their business to Revlon nail enamel, it is quite clear that these jobbers did not handle nail enamel competitive with that supplied by respondent. Many of these jobbers gave the lack of demand for competitive nail enamels as the reason why they did not carry competitive nail enamels. However, there is substantial evidence to the effect that beauty salons carry more than one brand of nail enamel, indicating that a demand for competitive nail enamels did in fact exist.

PAR. 20. There is a preference on the part of beauty supply jobbers to sell respondent's cosmetic products because of the advertising done on these products and the assistance given by respondent in promotional work, all of which operates to make the sale of respondent's products less difficult than other products. Evidence was introduced to this effect through a large number of beauty supply jobbers and also to the effect, that, from an economic standpoint, it is more satisfactory for a beauty supply jobber to confine his efforts to one line of cosmetics or nail preparations because it reduces inventory outlay and permits concentration on fewer items and avoids accumulation of obsolete inventory. There has been established in this record that while respondent's cosmetic products are prestige items, there is in fact a demand by beauty salons for cosmetic products produced by other manufacturers. Whether or not he should meet the demand of the beauty salon for various lines of cosmetic products or confine himself to respondent's line should be left to the decision of the beauty supply jobber free of any obligations placed upon him by a contractual requirement to deal in only one line of cosmetics. No matter how compelling this advantage might be or how great the assistance furnished by the respondent by sales promotions and advertising, it does not justify the evasion or violation of the statutory provisions dealing with exclusive dealing contracts. While a beauty supply jobber, who is engaged in an entirely private business has the right freely to exercise his own independent discretion as to parties with whom he will deal or stop dealing for reasons sufficient to himself, this should be left to the decision of the beauty supply jobber free of any contractual requirement to deal in only one line of cosmetics.

PAR. 21. The testimony with reference to preference and economic advantage was also introduced by the respondent for the purpose of showing that no injury had been sustained by its competitors by reason of the exclusive dealing feature of its contracts. As a matter of fact, however, there is substantial evidence that beauty supply jobbers, did, in fact, consider themselves bound by the restrictive

provisions in respondent's contracts, and as a result either temporarily or permanently discontinued the purchase of cosmetic products sold and distributed by competitors of respondent. For example:

(1) On May 1, 1945, Carl Zolov, Manager of the Maine Beauty and Barber Supply Company, wrote Northam Warren Corporation, manufacturers and distributors of "Peggy Sage" cosmetics:

> We have recently been appointed a Revlon distributor for our territory. No doubt you are familiar with the fact that Revlon distributors are not permitted to carry any other kind of nail polish.
>
> Will you therefore please give us permission to return to you our stock of Peggy Sage Nail Polish. If you would like to have this sent to any other distributor, please advise us and we will act accordingly. (CX 21).

On June 13, 1945, Zolov again wrote Northam Warren Corporation stating that he had previously written that he had taken on the Revlon line, and that he wanted to return all Peggy Sage merchandise for credit. These letters were written at about the time he became a Revlon jobber, and coincide with the existing arrangement between respondent and its beauty supply jobber customers. Five years later, on the witness stand, while still a Revlon jobber and testifying for Revlon, Zolov attempted to explain this correspondence by saying that the statements made were a subterfuge to enable him to return the merchandise for credit, and that no representative of respondent had told him to confine his sales to Revlon nail polish. The admission by the witness that he did not tell the truth in the first instance tends to destroy his reputation for veracity as a witness, and the written statement, made at the time the witness became a Revlon jobber, should be accepted as the facts.

(2) On September 26, 1941, at or about the time he became a Revlon jobber, Edward Kaeser of the Nashville Beauty and Barber Supply Co. wrote Northam Warren Corporation in part as follows:

> We wish to advise that we have secured a line of nail polish on exclusive basis, and this will necessitate our discontinuing other polishes. We would like to know if you would prefer taking this off our hands, or our selling this at a cut price. (CX 20).

Nine years later, while still a Revlon jobber, Kaeser attempted to explain his use of the word "necessitate" as applying to the fact that they had an investment in a line of merchandise which was not selling and which they felt necessary to discontinue, and that it had no reference to the fact that he had become a Revlon jobber. This explanation is an afterthought, and a more reasonable and consistent construction of this letter is that the exclusive agreement necessitated the discontinuance. This is in accord with the existing policy of Revlon.

(3) Herbert Smullian of the Duchess Beauty and Barber Supply Co., immediately upon becoming a Revlon jobber on July 2, 1947, wrote the Quality Cosmetics Corporation, distributors of a complete facial line of cosmetics, informing them that he had been appointed the exclusive Revlon distributor for that area, and requested that he be permitted to return shipment of cosmetics just received except shampoo, as he would not be able to use same.

(4) On September 7, 1948, Felton Beauty Supply Co., Inc., wrote Radnai, Inc., manufacturers of a competitive hand cream, in part, as follows:

> However, because of circumstances, we now find ourselves in a position where we will not be able to handle your line.
>
> We have recently signed an agreement with Revlon Products Corporation, which prevents us from handling certain items which might compete with items in their own line. Sadly enough, your Hand Cream is one of them. (CX 35).

(5) Reid of Reid & Sibell, Inc., testified that Sager, a representative of respondent, told him to get rid of LaCross instruments. He notified Eberhard, the LaCross salesman, that he could not handle that line and stock was turned over to Sommer & Co. Norman B. Steven, salesman for Eberhard, confirmed this and testified that in the first part of 1939 Reid had told him he had signed a Revlon contract and had agreed to discontinue competitive lines and could no longer purchase Naylon and LaCross implements.

(6) In 1943 A. J. Houle, a Revlon jobber in Manchester, New Hampshire, was told by the Revlon representative that he should discontinue purchasing and selling Brit-tex, which is a cuticle remover. In consequence of this, he discontinued Brit-tex.

(7) Thomas M. Murphy, of the Royal Supply Co., on March 13, 1946, wrote Thomas Products, Inc.:

> Please do not ship our order of 3/13/46. Since we handle Revlon, they do not want us to handle competitive items. Do you sell other Revlon jobbers Britex? (CX 63).

Murphy, when called as a witness for the respondent, attempted to explain this letter by stating that while he did not want to handle Brit-tex because of lack of merit, he did not want to give Thomas this reason, but wanted to let him down easy. This explanation is inconsistent with the fact that Murphy resumed purchases in 1947 of this product on which he claimed order was canceled for lack of demand.

(8) Kirby, the manager of Wahl in Baltimore, in 1949 informed Shipman of the House of Lowell, manufacturers and distributors of Mary Lowell Hand Cream, that he could not purchase their products

because of Revlon contracts, and has not purchased any other products since.

(9) On January 8, 1949, Standard Barber & Beauty Supply, Inc., of Omaha, Nebraska, wrote the House of Lowell, saying in part as follows:

We are still going around in circles as far as Revlon and your company is concerned. After a lot of thought I finally decided to sign that contract of theirs, and sent it to them about December 15th.

However, I asked them at the same time if they would give us authority to continue to handle your line. So far, we have had no answer. They haven't returned the contract to us, O. K.'d or otherwise, so that is as far as we have gotten with them. (CX 50–A)

Subsequent to writing this letter, Standard discontinued purchasing from the House of Lowell, and has not purchased since. In a prior letter dated October 30, 1948, Standard stated, in part, as follows:

Now, getting down to your line—since the rumor is going around that all Revlon dealers won't be able to handle your line, it has made quite a nick in the sale of your merchandise. Our boys are quite upset about the whole thing—to the extent that definitely did not do the business they should have on your line.

* * * * * * *

Of course, if this isn't possible, we will work off your stock some way, but I am just very much afraid that after we unload this stock, we won't be able to re-order.

As yet, we haven't signed the Revlon contract. We had two of their people working the show with us, but neither of them mentioned it. However, it looks like eventually we will have to come to it or possibly give up the Revlon line, and I don't think we want to do that.

Frankly speaking, we are in a position now so we don't know which way to turn. I know this much—all this conversation has hurt Mary Lowell as far as our sales force is concerned.

What are your other jobbers doing on the Revlon situation? How is the matter being taken over the country as a whole?

If the situation does come to a point where we will shall be forced to discontinue handling your line, it is going to make us very unhappy, Mr. Shipman. We couldn't ask for better cooperation from a manufacturer than you have given us through the years, and your merchandise is the best, and so for that reason we have a very difficult decision to make. (CX 49–A)

(10) As recently as August 12, 1950, the House of Lowell received a letter from Doris R. Schmidt of Schmidt Beauty Supplies, reading in part as follows:

About the most difficult task we have had for a long long time is to have to give you the news that we recently became Revlon Dealers. In order to get the complete Revlon line we agreed with them to not handle any competitive merchandise. Your line is the only one we really are going to miss and we can assure you that we still think Mary Lowell is one of the top lines in the busi-

ness. You realize we have put forth a lot of sales effort in getting your line into the shops and it took a lot of forethought on our part to be sure the move we made was correct. (CX 82–A).

Schmidt Beauty Supplies made no purchases from the House of Lowell until February 26, 1951, and has continued to purchase since that time.

PAR. 21. It was further contended by the respondent that no competitor had been effectively foreclosed access to any market area. This, however, does not constitute a defense to this proceeding, particularly when it appears that such competitor has in fact temporarily or permanently lost the business of certain beauty supply jobbers who were the leading jobbers in the particular trade area and were forced to seek secondary outlets. While there were many instances where other jobbers were available in the same trade area, these were not of the same standing in many cases and competitive manufacturers were deprived of the full coverage of the beauty salon business in the trade area involved, by reason of the respondent's exclusive dealing contracts. Furthermore, these practices had the tendency and capacity to create a monopoly in the respondent or in the respondent and a limited number of its competitors, for example, there are 800 or 900 beauty salons in the city of New Orleans. There are only 4 beauty supply jobbers in the city of New Orleans and 2 of these are Revlon jobbers. Should one other manufacturer, following the respondent's example, tie up the 2 remaining jobbers by exclusive dealing contracts, it would create a monopoly or result in the exclusion of all other cosmetic manufacturers from this territory.

CONCLUSION

The acts and practices as herein found constitute a violation of the provisions of section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (the Clayton Act).

ORDER

It is ordered that the respondent Revlon Products Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of cosmetic products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of respondent's cosmetic products on the condition, agreement or understanding that the pur-

chaser thereof shall not use or deal in or sell cosmetic products supplied by any competitor or competitors of respondent;

2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract of sale, which condition, agreement or understanding is to the effect that the purchaser of respondent's cosmetic products will deal in and sell only cosmetic products supplied by respondent.

OPINION OF THE COMMISSION

By Mason, Commissioner:

This case is before the Commission upon the appeal of the respondent, Revlon Products Corporation, from an initial decision by the hearing examiner holding that it has violated section 3 of the Clayton Act. The question for decision is whether respondent's agreements with its franchised beauty supply jobbers are illegal. The record in this case is not limited to a showing that a substantial amount of sales were made under exclusive dealing contracts. It contains testimony of competitors and other evidence showing the effect of these agreements on competition. The Commission has considered all of this evidence, much of which is specifically set out in the initial decision.

Revlon is a cosmetic manufacturer, well known for its lipsticks and cosmetic nail products. This company was organized in 1933, at which time its principal line was manicure preparations. It was the developer of nail enamel as it is known today, originating the concept of broad color ranges in which this product is now sold.

In about 1939, respondent broadened its line of products. It began the manufacture of lipsticks, hand creams and manicure implements. It purchased the Farel Destin line of cosmetic products, which it sold separately until 1947, when it absorbed those products into the Revlon line. Respondent presently sells around 200 different cosmetic items, of which its largest selling products are lipsticks, nail enamels and allied manicure products. It specializes in the more expensive nail enamels and polishes, in which field it is the leader and is dominant. Large quantities of these nail products are sold by others, principally in the ten-cent store field, but in the quality field, the class of these products sold to beauty shops, respondent is by far the largest seller. It is also a leading seller of lipsticks, which comprises its largest volume of business.

Respondent originally sold its products to beauty shops only. At first it sold to these accounts directly but soon started its present method of selling them through beauty supply jobbers. Later it began to sell its products to the retail trade generally, both through regular jobbers and directly. These sales to the trade generally, in

time, became the principal part of its business, accounting for over 80 percent of its total sales.

Respondent's sales to beauty supply jobbers are those which are made under the complained of restrictive agreements. There are well over one hundred thousand beauty shops in the United States. They are served by approximately 1,500 beauty supply jobbers which specialize in products purchased by these shops. Of these about 1,100 are rated as being good credit risks. These jobbers are recognized as providing the best means of selling cosmetic products to beauty shops. Of these jobbers respondent sells to 176. These are recognized by competitors as being the very best jobbers in the field.

Almost from the first, respondent entered into informal agreements which required its beauty supply jobbers to deal in its cream nail enamels exclusively. As its line of cosmetic products broadened, it recognized that only its nail products had sufficient prestige to enable it to require exclusive dealing. Its beauty supply jobbers were not willing to give up handling other products of the large well-established cosmetic houses. It, therefore, entered into various restrictive informal agreements which required exclusive dealing as to manicure products but which permitted its jobbers to sell other products of its well-established competitors. These agreements prohibited the jobbers from buying from smaller competitors which don't sell a complete cosmetic line. These informal agreements finally culminated in its formal written franchise agreement entered into with 157 of its beauty supply jobber accounts in 1948. These agreements are still in effect.

Respondent's franchise agreement with its beauty supply jobbers divides its cosmetic products into three subdivisions. The first subdivision consists of nail enamel and related manicure products. As to this class of products the agreement requires the jobbers to deal in respondent's products exclusively. The second subdivision includes lipsticks, face powder, rouge, various types of creams, lotions and other make-up cosmetic products. As to these products the agreement requires the jobbers to deal exclusively in respondent's products except that they are permitted to deal in any of this class of products which are part of a competitor's complete make-up and treatment line. The third subdivision consists of nail enamel remover. The agreement requires exclusive dealing as to this product except that the jobbers are allowed to sell competitors' nail enamel remover under the jobber's own brand or trade name.

Respondent's sales through its beauty supply jobbers, in 1949, totaled approximately one and a half million dollars. Of these sales,

over six hundred thousand dollars were of nail enamel and the other related products listed in subdivision I of the franchise agreements, over eight hundred thousand dollars were of lipstick and the other cosmetic products listed under subdivision II of the agreements, and the remainder consisted of sales of about sixty thousand dollars worth of nail enamel remover, the product listed in subdivision III.

The record shows that these agreements, although they have not been fully complied with by respondent's jobbers, have resulted in certain of them stopping the purchase of certain competitive products. Many of the jobbers have purchased some competing products of the type listed in subdivision II of the agreement which are not a part of a complete line, in violation of their agreement. However, respondent's franchised jobbers do not purchase competitive nail enamels. Insofar as nail enamel is concerned, respondent has required and has secured strict compliance with its exclusive dealing requirement.

On this record the hearing examiner concluded that these agreements and respondent's methods of sale constitute sales or contracts for sale of respondent's cosmetic products on the condition that its franchise beauty supply jobber purchasers thereof shall not deal in cosmetic products of competitors of respondent in violation of section 3 of the Clayton Act.

Respondent contends that this is error as its exclusive dealing agreements have not had, nor is there any likelihood of their having, any substantial adverse effect on competition. It contends that the sales made under these agreements are not substantial, that the agreements have not affected the jobbers' buying practices at all and that competitors have free access to all markets through other jobbers.

In support of its contention that the sales made under its restrictive agreements are not substantial, respondent compares the total volume of cosmetic sales in the United States with its volume of sales to beauty supply jobbers of nail enamel and the other manicure products listed in subdivision I of the franchise agreements. It contends that the sale of cosmetic products generally is the line of commerce involved in this proceeding, and that only the sales to beauty jobbers of its manicure products listed in subdivision I, on which its exclusive dealing requirement is absolute, are made under the form of agreements covered by section 3 of the Clayton Act.

The purpose of considering the substantiality of respondent's sales which were made subject to the restrictive agreements is to assist in the determination of whether or not the agreements have a substantial likelihood of adversely affecting competition. Here there can be little question of respondent's power to substantially restrict competition.

It is the largest seller of quality nail enamel, the type handled by beauty shops, and dominates that field. It is one of the leading sellers of lipstick. It has formal franchise agreements with 157 jobbers, and it sells 176, out of 1,100 first-class beauty supply jobbers. Under the terms of its franchise agreements, cosmetic companies which do not market a full line of cosmetics are completely barred from selling these jobber accounts any competitive products.

Beauty supply jobbers provide the best method for selling cosmetic products to the well over one hundred thousand beauty shops throughout the country. Selling direct requires a large sales force and is impractical especially for the smaller cosmetic houses. Thus, these smaller houses are largely dependent on these jobbers to give them access to the beauty shop market. Beauty shops are a particularly important cosmetic market not only because of the volume of their purchases but because many women consider the use of a cosmetic by a beauty shop as a professional endorsement. This adds prestige to the product and, thereby, increases demand for it generally.

Respondent does not have a monopoly of the beauty supply jobbers in any trade area, the largest percentage being in New Orleans where it has franchised 2 out of 4 of the beauty supply jobbers serving the from 800 to 900 beauty shops in the area. Competitors shut off from respondent's jobbers by its agreements presumably can sell through the other jobbers in the area. However, respondent's jobbers are recognized as being among the best in the country. And the record shows that in some cases the only other outlets available to such competitors were of lesser quality, and that they were deprived of full coverage in the area involved as a result of respondent's agreements. Further, if these contracts are found to be legal, there is a very great likelihood that similar contracts will be put into use by respondent's competitors, further restricting the number of beauty supply jobbers available to the small cosmetic houses. The cumulative effect of such agreements could as effectively close the market to competitors as if one company monopolized all of the jobbers.

Respondent has attempted to show that no actual injury has been sustained by respondent's competitors as a result of these agreements. It presented evidence to show the economic advantages of dealing in respondent's products only and contends that these advantages, not the agreement, resulted in cancellation of competitive accounts by franchised jobbers. It further presented evidence to show that a large number of respondent's dealers still buy cosmetic products which are not part of a complete line, in violation of their agreement.

However, as analyzed in the initial decision, the record contains letters and testimony showing that certain of respondent's jobbers discontinued purchases of competitors' products because of their agreements with respondent. The hearing examiner, who observed the demeanor of the witnesses and is thus quite able to judge their credibility, did not believe testimony of certain of these jobbers that they discontinued purchasing the competitive products for other reasons and just used their agreement with respondent as an excuse to the competitor. We believe he weighed this conflicting evidence correctly.

That these jobber accounts were closed to competitors' nail enamel by these agreements is especially clear. Respondent's franchises require absolute exclusive dealing as to these products. All of the franchise dealers who testified on the subject stated they sold only respondent's nail enamel. In fact, there is no contention that any of respondent's franchised dealers handle any competing product in this class. Letters in the record show that competing manufacturers of nail enamel and other allied manicure products were told by franchise jobbers that they were discontinuing purchases because of respondent's exclusive dealing requirements.

We believe that this record establishes that respondent's franchise agreements have a substantial probability of lessening competition. This is particularly true as to the provisions requiring absolute exclusive dealing in respondent's nail enamel. The greater weight of the evidence is that the jobbers who entered into this agreement restricted themselves to selling only respondent's nail enamel because of it. The evidence of actual effect of the remainder of the agreement on competition is not as great. Certain jobbers discontinued buying from certain smaller cosmetic houses which do not manufacture a complete make-up and treatment line because of the agreement. Many others did not comply fully with this part of their agreement. However, the fact remains that as long as this agreement continues in existence, there is a likelihood that respondent may enforce all of its provisions. Considering the importance of the beauty shop market, the value of beauty shop jobbers to cosmetic companies, particularly the smaller ones, in reaching that market, and the number and importance of the jobber accounts which respondent has tied up with its contracts, the conclusion clearly follows that there is a probability that these agreements will substantially lessen competition in the sale of these cosmetic products if they are permitted to continue in effect.

Respondent's contention that the provisions of its contracts, which prohibit purchases of competing cosmetic products which are not part

of a complete cosmetic and treatment line, are not in violation of section 3 of the Clayton Act is rejected. Section 3 prohibits the sale of goods on the agreement that the purchaser shall not deal in the goods of a competitor or competitors of the seller, where the agreement creates the requisite likelihood of adverse effect on competition. This section is not limited to exclusive dealing agreements but applies equally to agreements not to deal with a competitor or class of competitors. Here the provisions of respondent's franchise agreements which require exclusive dealing in the products listed in subdivision II except for those sold as part of a complete line of cosmetics, in effect, prohibit purchases from all cosmetic houses which do not sell a complete cosmetic line. These agreements are shown to have the requisite likelihood of adverse effect on competition and are in violation of section 3.

Respondent has taken a large number of exceptions to specific parts of the initial decision. Certain of these exceptions have been found to be valid and have been granted. However, the initial decision in all other respects, including its conclusion that respondent has violated section 3 of the Clayton Act, is held to be correct.

We, therefore, are of the opinion that respondent's appeal from the initial decision should be denied.

Commissioners Howrey and Gwynne did not participate for the reason oral argument was heard prior to their appointment to the Commission.

IN THE MATTER OF

SYLVANIA ELECTRIC PRODUCTS, INC., ET AL.

Docket 5728. Complaint, Dec. 21, 1949—Decision, Sept. 23, 1954

Dismissal, upon appeal of respondent from the hearing examiner's decision—not opposed by counsel supporting the complaint—on the ground that respondents had established a cost justification defense, of complaint charging the manufacturer of 25 per cent of the domestic production of radio receiving tubes with granting discriminations in prices in violation of sec. 2 (a) of the Clayton Act, as amended, in the sale of such tubes to the largest domestic manufacturer of radio receiving sets, and charging the latter with violation of sec. 2 (f) of that Act through knowingly inducing and receiving such discriminatory prices.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. James I. Rooney, *Mr. James S. Kelaher*, *Mr. Philip R. Layton* and *Mr. Francis C. Mayer* for the Commission.

Ropes, *Gray*, *Best*, *Coolidge & Rugg*, of Boston, Mass., and *Covington & Burling*, of Washington, D. C., for Sylvania Electric Products, Inc.

Weaver & Glassie, of Washington, D. C., and *Ballard*, *Spahr*, *Andrews & Ingersoll*, of Philadelphia, Pa., for Philco Corp.

ORDER GRANTING APPEAL FROM INITIAL DECISION AND DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon the appeal of respondent Sylvania Electric Products, Inc., from the hearing examiner's initial decision, which appeal is not opposed by counsel supporting the complaint; and

The Commission having duly considered said appeal and the entire record herein and being of the opinion, for the reasons stated in the accompanying opinion of the Commission, that the appeal is well taken:

It is ordered that the appeal of respondent Sylvania Electric Products, Inc., from the hearing examiner's initial decision be, and it hereby is, granted.

It is further ordered that the complaint in this proceeding be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By Carretta, Commissioner:

This matter is before us upon an appeal by respondent Sylvania Electric Products, Inc., from the hearing examiner's initial decision.

Counsel supporting the complaint do not oppose the appeal and state that they do not believe the public interest requires an order in this proceeding.

The complaint charges respondent Sylvania Electric Products, Inc., with granting discriminations in prices in violation of Section 2 (a) of the Clayton Act, as amended, and respondent Philco Corporation with knowingly inducing and receiving discriminatory prices in violation of Section 2 (f) of that Act, all in connection with the sale by Sylvania, and the purchase by Philco, of radio receiving tubes. After taking testimony and other evidence in support of and in opposition to the allegations of the complaint, and after considering the entire record, including proposed findings and conclusions submitted by respective counsel, motion to dismiss filed by respondent Philco, and oral orgument of counsel, the hearing examiner made and filed his initial decision in which he found that the charge in the complaint with respect to respondent Sylvania is sustained by the evidence in the record and ordered Sylvania to cease and desist from discriminating in prices between competing customers. The hearing examiner further found that the allegations of the complaint and proof are insufficient to constitute a violation of Section 2 (f) and dismissed the complaint as to respondent Philco without prejudice. Counsel supporting the complaint noted an intention to appeal from the initial decision but the appeal was not perfected.

Respondent Sylvania in its appeal contends that the price differences shown by the record are not unlawful because of the presence of cost justification and because the evidence fails to establish the requisite competitive injury. Specific exceptions are taken to substantially all of the hearing examiner's findings and conclusions which are adverse to respondent Sylvania's contentions as well as to his order and to certain rulings excluding evidence offered by respondent Sylvania and admitting evidence offered by counsel supporting the complaint. Counsel supporting the complaint, although contending before the hearing examiner that the allegations of the complaint with respect to both respondents are sustained and that respondent Sylvania had failed to establish its defense of cost justification, now state that they will not argue the issues presented by respondent Sylvania's appeal because they have determined that they cannot ask the Commission to sustain the hearing examiner who concurred in their previous view that an order should issue covering those tube types which are not fully cost justified. They further state that the record is clear that the discriminations which are not

fully cost justified are largely with respect to a limited number of tube types which are not sold in substantial volume.

We thus have the novel situation of counsel supporting the complaint asking the hearing examiner to find a violation of the law by both the respondents, getting half of what they asked for—a finding of a violation by one of the respondents—and now advising us that no violation which would warrant an order has been proven.

The facts of record show that respondent Sylvania sells replacement tubes to Sylvania distributors at prices higher than those charged respondent Philco and that many Sylvania distributors paying the higher prices are competitively engaged with Philco Distributors, Inc., a wholly owned subsidiary of Philco, and other Philco distributors in the sale and resale of such tubes. There are approximately 600 types of tubes sold by Sylvania for replacement purposes. Each type is sold in different quantities. Many types are obsolete and are in limited demand. The price differentials between Sylvania distributors and respondent Philco vary as between the different types of tubes.

Respondent Sylvania has offered the defense of cost justification. In support of this defense a cost accounting study was presented. The record contains considerable testimony by experts concerning various aspects of this study. That the study was made in good faith and generally in accordance with sound accounting principles is clearly established. While there are certain items of distribution costs which counsel supporting the complaint originally contended were not proper to consider in computing costs, the basic question presented by the cost study is whether, under the circumstances of this case, it is proper to compare the aggregate price difference on the entire complement of tubes with the aggregate cost difference. In other words, is it proper to use a "weighted average" price in determining the amount of the differential to be cost justified, or should the price differential on each individual tube type be cost justified? Counsel supporting the complaint originally contended, and the hearing examiner held, that it was the price difference for each type of tube which must be cost justified. If a "weighted average" price is used, the price differential between Sylvania distributors and respondent Philco appear to be substantially cost justified. If the individual prices on the different types of tubes are used to determine the amounts of the price differentials, some of the price differences appear to be more than cost justified while others are not entirely cost justified.

There is no showing in the case that the lack of uniformity in the price spread has any competitive significance. There is no showing that the tubes which are in the greatest demand are the ones on which the price spread is greater, To the contrary, it appears that the types of tubes on which the price differentials are larger are in the least demand. Under all the circumstances of this case, we believe that it is proper to compare the aggregate price difference with the aggregate cost difference on the entire complement of tubes sold by respondent Sylvania. Such a comparison shows that respondent Sylvania's cost justification defense has been established. The complaint must, therefore, be dismissed as to both respondents in this proceeding. This determination makes it unnecessary for us to rule more specifically on each of the exceptions to the hearing examiner's initial decision made by respondent Sylvania in its appeal.

The appeal of respondent Sylvania from the hearing examiner's initial decision is, therefore, granted and it is directed that an order issue accordingly.

Commissioner Mead concurs in the result, but not in the reasons for the dismissal.

CHAIRMAN HOWREY, concurring:

The complaint in this case filed under section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act,[1] charged respondent Sylvania Electric Products, Inc. with discriminating in price by charging its distributors more for renewal radio tubes than it charged Philco Corporation.

Sylvania offered two defenses. It urged that the discrimination had no adverse effect on competition, and it offered a cost accounting justification for the difference in price. Only the latter issue was considered by the Commission on appeal.

It appears from the record that each radio tube serves a specific function. Each has its own specifications and construction. Each socket in a radio set, depending on the set's construction and manufacture, requires a special tube type and no other can be substituted. For these reasons it is necessary for distributors of replacement radio tubes to handle the entire line, that is, an entire complement of all types of tubes.

Thus we are confronted with a unique marketing situation—one where volume and demand are not affected by such normal competitive factors as price, consumer preference or profit margins.

[1] 15 U. S. C. sec. 13, 38 Stat. 730, 49 Stat. 1526.

Sylvania has approximately 380 distributors located throughout the country. These distributors sell to radio servicemen and retail dealers. The tubes bear the "Sylvania" brand. Sylvania also sells private brand tubes to Philco both for original equipment and for replacement purposes. The former, that is, the original equipment tubes, are not involved in this case. "Philco" and "Sylvania" brand tubes are of the same grade and quality.

In 1948, the year under study, Sylvania manufactured and sold about 600 different renewal tube types. They were sold in varying amounts controlled by the quantity of each type previously installed in radio sets as original equipment and the length of time they had been in use.

In determining the price differential to be cost justified, Sylvania first ascertained the average price per tube paid by its distributors. This was compared with the average price per tube which the distributors would have paid for the same tubes if accorded the Philco price. The distributors paid $4,251,466.16 for 7,635,790 tubes in 1948, or a weighted average of $.5568 per tube. If they had been granted the Philco price they would have paid $.4003 per tube, or $.1565 less per tube.[2] The cost differences claimed in the Sylvania study more than justified this $.1565 price difference.[3]

The hearing examiner held, however, that the use of a weighted average price in determining the price differential was not proper; that it was the price difference on each individual type of tube which must be cost justified. The hearing examiner also rejected certain accounting principles of respondent and certain minor cost allocations. Counsel supporting the complaint had contended, for example, that cash discounts should be cost justified in the same manner as quantity or method discounts;[4] that certain joint field selling expense should not be allocated between different products on the basis of gross profit margins; that the Philco price used for computation of royalty expense was a net price, whereas the Sylvania distributor price used

[2] The $.5568 amount was a *gross* delivered price, whereas the $.4003 amount is what the Sylvania distributors would have paid at the Philco *net* f. o. b. price. This was taken care of in the cost study when sales deduction and costs of distribution were determined.

[3] The Examiner stated that the cost study showed a cost difference of $.1574 per tube. Respondent claims that the cost difference was actually $.1612 per tube. However, both amounts are in excess of the price difference of $.1565.

[4] In 1948 Sylvania distributors earned cash discount on 77 percent of the dollar volume of the goods they purchased. On 23 percent of the dollar volume, they paid the extra 2 percent because of the deferred payment. The price accorded Philco was net of cash discount on 100 percent of its purchases. In its cost study Sylvania made a price comparison net of cash discount between Philco and Sylvania distributors. The study disregarded the 23 percent of the volume on which cash discount was not earned on the ground that the cash discount was uniform and available to all. The hearing examiner rejected this theory and held that gross prices before cash discount should be compared.

for royalty computation was a gross price; that certain joint sales management and research expense should be allocated between different classes of customers on the basis of time studies instead of being treated as an overhead item; and that certain joint expenses involved in the handling of paper work in connection with Philco's original equipment and renewal purchases should not be allocated on the basis of dollar volume of sales

All of these items taken together do not add up to much in dollars and cents. In fact the elimination of all of them would result in a lack of cost justification, on a weighted average basis, of only $.0087 per tube.[5] Without passing on the accounting issues involved in the challenged items, and accepting for the moment the correctness of the weighted average method, it seems to me that the amount of $.0087 per tube is *de minimis*. No cost justification study presented in good faith should be rejected because of such a minor cost deficiency. See *In the Matters of United States Rubber Co.*, 46 F.T.C. 998, 1012 (1950), *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 381–82 (1948), and *The B. F. Goodrich Co.*, Dkt. No. 5677 (1954).

Turning then to the major cost accounting issue, involving cost justification of the weighted average difference in price, the Commission should, I think, look to the economic and marketing factors which control the radio tube replacement market.

As we have seen, the replacement tube distributors and dealers perform a somewhat mechanical sales function. They cannot "push" one type as against another. The volume of some types is, of course, greater than others, but this is because existing radio sets (with burned-out tubes) contained as original equipment more of some types than others and also because many of the 600 types of tubes are becoming obsolete.

It is true that actual individual price differences varied rather widely from tube to tube. However, this fact, according to the record, had no economic or competitive significance; the non-uniformity arose out of historical factors, with new tube types being priced as they were developed and came on the market.

While the use of the weighted average price for the whole line seems reasonable in this case, it might, of course, be quite different where demand was primarily for individual items and the volume of sales depended on price differences and other similar competitive factors. In the tube industry, however, this was clearly not the case. Demand for tubes was inelastic. It was determined not by competitive factors

[5] The Examiner erroneously said that the elimination of these items resulted in a lack of justification of $.0174 per tube. The maximum claim of lack of cost justification on a weighted average basis made by counsel in support of the complaint was this amount of $.0087 per tube.

but by the structure of the radio set sought to be kept running. For such a market only the weighted average price would appear to have competitive significance.

Because of this Sylvania contemporaneously made available to the trade figures as to the weighted average price charged by it to distributors, the weighted average suggested list price, and weighted gross profit on the sale of the entire complement of tubes at the various discounts from the suggested list price.

Thus it seems to me that the accounting method employed by Sylvania in this case—the comparison between the aggregate price difference on the entire complement of tubes and the aggregate cost difference—was responsive to the economic realities of electronic tube distribution.

The question remains as to whether the statute recognizes the realities of the market place or whether it requires cost justification of individual tube types willy nilly.

Section 2 (a) of the Act requires cost justification only where price differentials may result in adverse competitive effects. It would seem appropriate, therefore, to offer a cost defense that deals with the particular price differential which may have caused the injury. Here it seems clear that any injury would have to stem from the average price difference on the entire line, and not from the differentials which prevailed on individual tube types.

In determining whether the cost proviso of section 2 (a) should receive a reasonable interpretation or a rigid mechanical one, it is appropriate, I think, to refer to its origin and history. Section 2 of the Clayton Act prior to the Robinson-Patman Act amendment permitted price differentials based on differences in quantity. The precise words of the old quantity proviso were that "nothing contained herein shall prevent discrimination in price between purchasers of commodities on account of differences in the * * * quantity of the commodity sold."

In the leading case under the old law, the Federal Trade Commission charged The Goodyear Tire & Rubber Company with violation of section 2 by selling tires to Sears Roebuck at discriminatory prices.[6] Respondent contended that its contracts with Sears, which involved lower net prices than those charged independent dealers, were made because of the great difference in the volume purchased by Sears as compared with that of the largest independent dealer.

After some 25,000 pages of testimony the Commission ruled that it did "not consider a difference in price to be on account of quantity

[6] *In the Matter of The Goodyear Tire & Rubber Co.*, 22 F. T .C. 232 (1936), rev. 101 F. 2d 620 (1939).

unless it is based on a difference in cost, and where based on a difference in cost, such difference in price is reasonably related to, and approximately no more than, [such] difference * * *" [7] It concluded that since the price differential in favor of Sears was not justified by differences in cost of transportation or selling, the lower prices were not made "on account of" quantity.

To support this ruling the Commission relied on the views of various economists who had written or commented on the subject of quantity discounts. These economists had said that insofar as the purchasing habits of the customer contribute to savings, it is sound to carry the discount to the point where the customer receives the benefit of the savings he created, that the proper basis for quantity discounts is to make them commensurate with the economies that are effected in handling and shipping the respective quantities of merchandise. Such discounts are equitable, they said, in that the buyer who purchases in large quantities is compensated for the carrying or handling charges he assumes when he buys in large lots. Based on this reasoning it was concluded that quantity discounts which exceeded such savings were a device for catering to large buyers and amounted to price cutting.

The respondent tire company, in refutation, pointed to the language of the statute and asserted that it permitted a discrimination that would measure the economic advantage of quantity sales beyond mere savings in costs. It pointed to such economic benefits as the value of Sears' volume in removing manufacturing hazards, the avoidance of profit fluctuation, the assumption by the buyer of certain risks and drops in raw material prices.[8]

While the Commission remained unconvinced the court, on appeal, agreed with respondent. "It seems clear," the court said, "that [old] Section 2 of the Clayton Act permits discrimination in price on account of quantity without relation to savings in cost." [9] In the meantime—in fact while the matter was pending before the Court of Appeals—Congress was asked to clarify the situation. The result was the present cost proviso of the Robinson-Patman Act which reads:

"* * * nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." [10]

[7] Id. 329.
[8] *The Goodyear Tire & Rubber Co.* v. *F. T. C.*, 101 F. 2d 620, 622.
[9] Id. 624.
[10] 15 U. S. C. sec. 13 (a), 49 Stat. 1526.

It was believed at the time that the new proviso was little more than a legislative restatement of the Commission's interpretation of the old proviso, namely, that price differentials should be "reasonably related" to cost differences. The new proviso was designed to preserve for the consumer and the public the benefits of more efficient marketing methods, while at the same time protecting small buyers from "unearned" discounts which were not related to savings in cost in serving the large buyer.[11]

However, within a few years after the passage of the Robinson-Patman Act the Commission abandoned this rule of reason approach and put respondents to strict cost accounting proof. While there were some lingering protestations that mathematical precision would not be required, the cost proviso was applied so as to require detailed showings of individual distribution costs—sometimes to the point of measuring separate items of expense by variances in mileage, time spent in travel, or the number of typed lines per invoice.

This technical approach was sought to be justified on the ground that the distribution activities of practically every company differ from those of every other company and what is suitable for one company in the way of distribution cost analysis may not fit the situation of another company. This, of course, is true. But instead of justifying rigid and mechanical approaches it merely emphasizes the need for elasticity and development of overall techniques by which to measure price differentials based on cost differences.

Cost accounting is by no means an exact science. Methods of allocation and proration of distribution costs are in the evolutionary stage. Several equally acceptable techniques will no doubt be developed as has been the case in the more traditional field of manufacturing cost analysis.

In any event the fact remains that the cost defense has proved largely illusory. In only three formal cases, one of which is the instant case, has the cost justification been entirely successful.[12] In two more cases cost studies were accepted in part as justifying some portion of the price differential.[13] In all the remaining cases of public record the cost studies were rejected as inadequate.[14]

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[11] House Rep. No. 2287, 74th Cong. 2d Sess., pp. 9 and 10.

[12] *In the Matter of Bird & Son, Inc.*, 25 F. T. C. 548 (1937); *In the Matter of B. F. Goodrich Co.*, Dkt. 5677 (1954); *In the Matter of Sylvania Electric Products, Inc.*, Dkt. 5728 (1954).

[13] *In the Matter of Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948); *In the Matter of U. S. Rubber Co.*, 46 F. T. C. 998 (1950).

[14] *In the Matter of Standard Brands, Inc.*, 29 F. T. C. 121 (1939); *In the Matter of E. B. Muller Co., et al.*, 33 F. T. C. 24 (1941); *In the Matter of Morton Salt Co.*, 39 F. T. C. 35 (1944); *In the Matter of Standard Oil Co.*, 41 F. T. C. 263 (1945); *In the*

There have been, of course, a large number of cases in which the cost defense was explored on an informal basis. Such cases include some in which the proposed respondent was able to convince the Commission's staff that the cost defense would be successful, and so the formal complaint was not issued. They also include cases in which respondents became convinced that the cost defense would not be successful or that it was too complex and expensive to be undertaken.

In none of the cases, with the possible exception of the instant case, has the Commission established adequate guiding principles or precedents for cost analysis. The fact that there are no rules of the game is illustrated by the present case where there was not even an agreement between the parties as to the treatment of cash discounts, that is, whether to compare prices before or after the deduction of cash discounts.

There is a still smaller body of precedents in the courts with respect to the cost justification proviso. Two Federal district courts and one court of appeals have dealt with the cost justification defense in treble damage actions brought under the Robinson-Patman Act. One district court rejected the cost defense because of its failure to separate the seller's cost in dealing with each individual buyer.[15] Another district court rejected cost studies for similar reasons, that is, because they were not based on individual transactions with individual customers.[16] This, however, was reversed on appeal where the court said:

"It seems to us that the applicable statute discloses no Congressional intent to authorize a District Court, in an action such as this, to reject a seller's attempted justification of its quantity discount system unless the justification meets all of the requirements which the District Court in this case evidently considered essential. If a manufacturer granting quantity discounts is required to establish and to continuously maintain a cost accounting system which will record the expenses incurred in selling every individual customer and all of the data which the plaintiff deems essential, the burden, expense and assumption of risk involved would seem to preclude the granting of quantity discounts, at least until the approval of the plan by the Federal Trade Commission had been secured.

"We cannot say that the District Court was compelled to accept the defendant's justification of the quantity discounts which were granted.

Matter of Curtiss Candy Co., 44 F. T. C. 237 (1947); *In the Matter of International Salt Co.*, Dkt. No. 4307 (1952); *In the Matter of Champion Spark Plug Co.*, Dkt. No. 3977 (1953).

[15] *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985, aff. 187 F. 2d 919 (C. A. 5, 1951).

[16] *Russellville Canning Co.* v. *American Can Co.*, 87 F. Supp. 484 (1949), rev. 191 F. 2d 38 (C. A. 9, 1951).

If, however, the system was adopted in good faith and the cost study during the test period of more than four years was honestly maintained, and reflected with substantial accuracy the differences in selling costs as between the customers in Class C and those in Classes A and B, we think the court's conclusion that the justification was inadequate because it was not continued beyond the test period, did not reflect cost differences as between individual customers, and failed to take into consideration conjectural geographical differences in selling costs and other matters which might be thought to have some speculative bearing on such cost differences, was not justified.

* * * * * * *

". . . We think the District Court in the instant case, in determining the sufficiency of the defendant's attempted justification, applied too rigid a standard." [17]

The sole comment of the Supreme Court on this subject occurred in the *Automatic Canteen* case where the Commission contended that the buyer had the burden of proving his sellers' costs. In rejecting this contention Mr. Justice Frankfurter said:

"We have been invited to consider in this connection some of the intracacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding. The elusiveness of cost data, which apparently cannot be obtained from ordinary business records, is reflected in proceedings against sellers. Such proceedings make us aware of how difficult these problems are, but this record happily does not require us to examine cost problems in detail. It is sufficient to note that, whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices and bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business." [18]

These Commission and court decisions demonstrate the necessity for a reexamination of the problem of cost analysis under the Robinson-Patman Act.

If the cost justification proviso is ever to be administered successfully, the Commission must, in my opinion, go back to first principles and approach the problem with a desire to give full credence to the intent of Congress. This intent, as I interpret it, was to make a fair adjustment between the protection of small buyers and the welfare of the consumer—to preserve for the consumer the benefits of mass pro-

[17] *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 59 (C. A. 8, 1951).
[18] *Automatic Canteen Co. of America* v. *F. T. C.*, 346 U. S. 61, 68 (1952).

duction and low cost distribution while prohibiting price favors to large buyers that were unrelated and not reasonably attributable to savings created by more economical methods of manufacture, sale or delivery.

In the light of the foregoing, it seems entirely proper, under the facts and circumstances of this case, to compare the aggregate price difference on the entire complement of radio tubes with the aggregate cost difference. Any other holding would, it seems to me, nullify the proviso insofar as this respondent is concerned.

IN THE MATTER OF

CALVINE COTTON MILLS, INC.

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

Docket 6119. Complaint, Aug. 19, 1953—Decision, Sept. 23, 1954

Order requiring a corporate manufacturer to cease use of a sales promotion plan under which each of its tobacco seed bed covers had a numbered label or coupon attached and prizes of farm implements or kitchen utensils were awarded to purchasers who happened to hold coupons selected at a "LUCKY NUMBER" drawing.

Before *Mr. Everett F. Haycraft*, hearing examiner.
Mr. J. W. Brookfield, Jr. for the Commission.
Mr. Maurice A. Weinstein, of Charlotte, N. C., for respondent.

ORDERS AND DECISION OF THE COMMISSION

Order adopting initial decision as Commission decision and order to file report of compliance, Docket 6119, September 23, 1954, follow:

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission having issued a tentative order modifying said initial decision in certain respects and having afforded respondent and counsel supporting the complaint opportunity to present any objections they may have to the proposed modification, and counsel supporting the complaint having filed his objections to the proposed modification; and

The Commission having further considered the entire record herein and now being of the opinion that the hearing examiner's initial decision is adequate and appropriate to dispose of this proceeding:

It is ordered that the attached initial decision of the hearing examiner shall, on September 23, 1954, become the decision of the Commission.

It is further ordered that respondent, Calvine Cotton Mills, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY EVERETT F. HAYCRAFT HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 19, 1953, issued and subsequently served its complaint in this proceeding upon respondent Calvine Cotton Mills, Inc., a corporation, charging it with the use of unfair acts and practices in commerce in violation of the provisions of the said Act. After the issuance of said complaint and the filing of an answer denying the material allegations of the complaint, a hearing was held in Washington, D. C., November 6, 1953, at which time a stipulation was entered into whereby it was stipulated and agreed that a Statement of Facts signed and executed by J. W. Brookfield, Jr., counsel supporting the complaint for the Federal Trade Commission and Maurice A. Weinstein, counsel for respondent, which was read into the record, may be taken as the facts in this proceeding and in lieu of evidence in support of the charges stated in the complaint or in opposition thereto; that the said Hearing Examiner may proceed upon said Statement of Facts to make his Initial Decision stating his Findings as to the Facts, including inferences which he may draw from the said stipulation of facts and his Conclusions based thereon. Both counsel reserved the right to submit proposed findings and conclusions, including memorandum on the law and requested oral argument on the proposed findings. On said date, oral argument was had on the proposed findings which had been submitted by counsel as stipulated. In addition four exhibits were received in evidence. Thereafter, this proceeding regularly came on for final consideration by said Hearing Examiner upon the complaint, answer, stipulation, and exhibits received in evidence, said stipulation having been approved by the Hearing Examiner who, after duly considering the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Calvine Cotton Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina with its office and principal place of business located at 5620 Bergenline Avenue, in the City of West New York, New Jersey.

PAR. 2. Respondent for more than six months last past has been engaged in the manufacture and sale of cotton fabric products and during the last few months of 1952 and in January and February of 1953 has been engaged in the manufacture and sale of tobacco seed bed

covers in commerce between and among the various States of the United States and when sold, said products are caused to be shipped from respondent's place of business in the State of North Carolina to purchasers thereof located in other States of the United States. Respondent at all times mentioned herein maintained a substantial course of trade in said tobacco seed bed covers in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its said business and for the purpose of promoting the sale and distribution of its said products, respondent has distributed through the United States mail and otherwise to dealers located in the various States of the United States certain literature setting out therein a sales promotion plan for selling its products. Said sales promotion plan is described in said literature as follows: A circular letter, distributed to wholesale dealers in respondent's product, states:

In order to enable you to get a larger share of the market, at no extra cost, to you, we are conducting a "LUCKY NUMBER" drawing, in which everybody has a chance to win a valuable prize, whether they purchase 1 or 100 seed bed covers.

Rules

The beauty of this contest is its simplicity. Every cover has a numbered label attached, as per the enclosed. No entries are called for and no skills are demanded. All the customer has to do is save his labels. In March, 1953, the end of the season, there will be a drawing of 100 lucky numbers in Charlotte, N. C., which numbers will be publicized. All any one has to do who holds the lucky numbers, is to fill in his name and address, mail it to us in Charlotte, and we will forward to them, their lucky prize.

Advertising

Every bale contains a large window poster and window streamer for the retailer to post in his window. The covers are also packed in an attractive carton so that it will serve as an advertising piece while it is on the retailers' floor.

Posters furnished respondent's dealers for display to the purchasing public in connection with the aforesaid plan state:

Buy Calvine Seed Bed Covers Here!

SAVE your lucky numbers

CALVINE LUCKY NUMBERS ARE GOOD FOR

FREE FARM IMPLEMENTS

Over 100 Useful Implements And Appliances
Given Away—Winners In Every Area!

No entries to send in, no slogans to write—here's the world's easiest contest! Just save the lucky number labels on your Calvine seed bed covers. Next March a public lucky-number drawing in Charlotte will pick more than 100

winners to fine farm implements and kitchen appliances. Lucky numbers will be announced locally. Then mail in your lucky number to Calvine and your prize will be shipped to your door.

FREE—You don't have to buy anything to be a winner. Just save your Calvine Labels or write Calvine Cotton Mills, Charlotte, North Carolina, for free label with lucky number!

Save this coupon
and win a valuable prize Free
THIS MAY BE YOUR LUCKY
Number!

Watch for
date & Location
of drawing

to CALVINE
tobacco seed bed cover

Calvine Cotton Mills
Charlotte, N. C.

And the paper wrappers in which the tobacco seed bed covers are packed contain the following legend:

Save this coupon and Win a Valuable Prize FREE!

THIS MAY BE YOUR LUCKY
Number!

CALVINE

World's Finest

tobacco seed bed cover

Calvine Cotton Mills
Charlotte, N. C.

Prizes are awarded to purchasers of respondent's products in accordance with the above-described plan and prizes were also awarded to those who wrote for and received without cost a label number from the company without purchasing any of respondent's merchandise.

In accordance with the sales promotion plan above-described, a drawing was held on March 30, 1953, at Charlotte, North Carolina. One hundred two winning numbers were drawn and merchandise distributed to the holders of the winning numbers in accordance with the terms of the advertising as set out above. The members forwarded or mailed to those who requested them without making a purchase were included with the numbers or labels of those who had made purchases for the purpose of the drawing.

CONCLUSION

The awarding of prizes, consisting of articles of merchandise, by means of a drawing as hereinbefore set forth constitutes a game of chance, lottery or gift enterprise. Many persons are attracted by

respondent's sales promotion plan and the element of chance involved therein and are thereby induced to buy and sell respondent's merchandise.

The use by respondent of a sales promotion plan involving a game of chance, lottery or gift enterprise as herein set forth in promoting the sale of or in selling respondent's products is contrary to the public interest and is contrary to an established public policy of the Government of the United States. The Federal Trade Commission Act condemns any method of competition in interstate commerce which is contrary to public policy, *Ostler Candy Co.* vs. *F. T. C.*, 106 F. 2d 962, 965. The use of a sales method which involves an element of chance is contrary to public policy, *F. T. C.* vs. *R. F. Keppel & Bro.*, 291 U. S. 304, 313; *Chicago Silk Co.* vs. *F. T. C.*, 90 F. 2d 689; *Wolf* vs. *F. T. C.*, 135 F. 2d 564, 566–7.

In the light of the foregoing, the aforesaid acts and practices of the respondent as set out in Paragraphs One through Three are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered that the respondent Calvine Cotton Mills, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of tobacco seed bed covers or any other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or using any sales promotion plan or scheme whereby purchasers of its said products are entitled to participate in a drawing for prizes, the award of which is or will be dependent on lot or chance.

2. Selling or otherwise disposing of any merchandise through the use of, or by means of, a game of chance, gift enterprise or lottery scheme.

SPECIAL CONCURRING OPINION OF COMMISSIONER CARRETTA

I agree with my colleagues on the Commission that respondent's sales promotion plan, which involves an element of chance, is contrary to the public interest and to an established public policy of the Government of the United States and constitutes an unfair practice which should be prohibited. I also believe that the order to cease and desist which is being issued herein is adequate and appropriate to prohibit

a continuation of the practice. *However, I think it should be made clear that, in my opinion, respondent's practice is not being condemned because it is a technical lottery, but because it is a method of merchandising which constitutes an unfair trade practice.* I believe the Commission should not be concerned with whether the three essential elements of a lottery, namely, prize, consideration, and chance are all present in respondent's sales promotion plan or whether the plan contravenes any of the criminal statutes with respect to lotteries. Rather, it should be concerned only with the unfair trade practice of distributing merchandise by means which are contrary to public policy. It is clear that respondent's sales promotion plan was intended to appeal to the gambling instincts of purchasers and prospective purchasers and was therefore contrary to public policy.

The Commission and the courts have heretofore considered numerous sales promotion plans similar in essential respects to the respondent's plan. Concerning one such plan the Supreme Court said: "It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the States, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." (*FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 313 (1934).) In *Modernistic Candies, Inc.*, v. *FTC*, 145 F. 2d 454, 455 (1944), the Circuit Court of Appeals, Seventh Circuit; had before it a plan of merchandising which did not in and of itself constitute a technical lottery but which did aid and encourage merchandising by gambling. Of this plan the court said: "It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling it must police those who designedly and deliberately aid and abet this practice. We think the Commission has such power." (*See also: Chicago Silk Co.* v. *FTC*, 90 F. 2d 689 (1937); *Kritzik* v. *FTC*

125 F. 2d 351 (1942); *Koolish* v. *FTC*, 129 F. 2d 64 (1942); *Wolfe* v. *FTC*, 135 F. 2d 564 (1943); *Jaffe* v. *FTC*, 139 F. 2d 112 (1943); *Chas. A. Brewer & Sons* v. *FTC*, 158 F. 2d 74 (1946).)

The fact that under respondent's sales promotion plan it was possible for persons to obtain label numbers and to participate in the "lucky number" drawing without purchasing any of respondent's merchandise cannot be properly considered separate and apart from the other facts. It is the use of the plan as a whole which constitutes an unfair practice. There is no necessity to determine whether any particular part of the plan, if used alone, would or would not constitute an unfair practice.

IN THE MATTER OF

HARRY A. BURCH TRADING UNDER THE NAMES OF WASHINGTON INSTITUTE OF PRACTICAL NURSING AND NATIONAL TRAINING SERVICE

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

Docket 6170. Complaint, Feb. 11, 1954—Decision, Sept. 23, 1954

Consent order requiring the operator of a correspondence school in Seattle, Wash., to cease misrepresenting the nature of his school and the opportunities for employment in the field of practical nursing, among other things.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Charles S. Cox for the Commission.
Mr. R. Wayne Cyphers, of Seattle, Wash., 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 Harry A. Burch, trading as Washington Institute of Practical Nursing and National Training Service, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Harry A. Burch, is an individual trading under the firm names of Washington Institute of Practical Nursing and National Training Service, with his principal office and place of business located at Suite 203, Paramount Theater Building, 907 Pine Street, in the city of Seattle and State of Washington.

PAR. 2. Respondent is now, and has been for more than two years last past, engaged in the sale and distribution in commerce between and among the various States of the United States of courses of instruction, including among others a course in practical nursing, which said courses are pursued through the medium of the United States mail. Respondent causes said courses of instruction to be transported from his said place of business in the State of Washington to the purchasers thereof located in the various States of the United States other than the State of Washington.

PAR. 3. There is now, and has been at all times hereinafter mentioned, a substantial course of trade in said courses of instruction so sold and distributed by respondent in commerce between the various States of the United States.

PAR. 4. In the course and conduct of his business, as aforesaid, respondent makes use of advertisements in newspapers, circulars and return postal cards addressed to boxholders generally, bearing the return address National Training Service and inviting inquiries with respect to the several training courses enumerated in Paragraph 2 hereof. Respondent also employs sales agents who call upon prospects for the purpose of soliciting orders for the purchase of said courses of instructions. Specifically in connection with the sale of said course in practical nursing, respondent, by any one or more of the foregoing means and oral statements made by said sales agents, represents and implies:

1. That there is an acute national shortage of nurses who are needed for hospitals, sanitoriums, doctor's offices and home nursing, and that persons completing respondent's course of instruction will aid in alleviating such shortage.

2. That women from 17 to 60 years of age are urgently needed to prepare for practical nursing at home and that the opportunities in said field are unlimited.

3. That a high school education is not required or necessary to study respondent's course of instruction or to become a licensed or graduate practical nurse.

4. That said course is "a practical theoretical course" which may be mastered easily through home study.

5. That respondent operates a training school and maintains a competent teaching staff.

6. That completion of said course of instruction enables students—

(a) to obtain employment as nurses or graduate practical nurses in hospitals, sanitoriums or doctors' offices;

(b) to qualify for State examinations for registered or licensed practical nurses;

(c) to qualify for general nursing and perform all duties except attendance in surgery.

7. That respondent's school is recognized or accredited in the medical and nursing professions.

8. That the diploma issued by respondent gives the holder thereof accredited standing or is equal to a practical nurse's license.

9. That students may cancel their contracts of purchase at any time without obligation to pay any balance due on the purchase price.

PAR. 5. The foregoing representations and implications are false, deceptive and misleading. In truth and in fact:

1. Regardless of any acute national shortage of nurses which may exist, persons who complete respondent's course of study will not alleviate such shortage, nor are they qualified to take advantage of the opportunities for employment which may exist in the field of nursing.

2. Generally, women are not urgently needed to train as practical nurses and respondent's course does not train them adequately for said vocation, and the opportunities in the field of practical nursing for respondent's students are not unlimited.

3. Although respondent may not require his students to possess a high school education, such qualification is nevertheless necessary and required for persons desiring to become graduate or licensed practical nurses.

4. Respondent's said course may not be mastered easily through home study for the reason that it includes a number of subjects which require demonstration and practice on patients.

5. Neither respondent nor his employees are qualified by training or experience to teach practical nursing, and no teaching staff is maintained.

6. Completion of said course does not qualify persons to obtain employment as nurses or graduate practical nurses in any institution devoted to the care of the sick. Such persons could find employment in hospitals only as nurses' aides, and in that capacity would be hired regardless of whether they had any previous training; said course does not enable any person to qualify as a registered or licensed practical nurse or be eligible for the taking of any State examinations therefor; nor does said course qualify such person to perform all nursing duties.

7. Respondent operates no training school and said course of instruction is not recognized or accredited in the field of practical nurse education. To obtain such recognition and accreditation, minimum standards must be complied with, which include several months of resident study of theoretical subjects and at least six months of practical training on live patients under the supervision of registered nurses in a hospital approved and accredited for that purpose.

8. The so-called diploma issued by respondent to persons having completed said course is of no effect or validity whatever, and gives neither an accredited standing nor constitutes the equivalent of a license to engage in practical nursing.

9. Purchasers of said course cannot cancel their contract of enrollment and discontinue the payments due thereon; on the contrary, respondent demands payment of the full purchase price regardless of any cancellation.

PAR. 6. The use of the word "institute" in respondent's trade name implies the existence and operation of a resident institution of higher learning with a staff of competent, experienced and qualified educators offering instruction in the arts, sciences and other subjects of higher learning.

In truth and in fact, respondent's business is not an institute within the generally accepted meaning of said term. Respondent offers no training in a resident school in any subject of higher education, his business consisting only of selling courses of instruction in vocational subjects by correspondence.

PAR. 7. The statements and representations made by respondent, as aforesaid, have the tendency and capacity to mislead and deceive members of the purchasing public into the belief that said statements and representations are true and to induce a substantial number thereof to subscribe to and purchase respondent's said course of instruction on account thereof.

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

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated September 23, 1954, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding charges the respondent with unfair and deceptive acts and practices in the offering for sale, sale and distribution of correspondence courses in practical nursing, in violation of the Federal Trade Commission Act. Subsequent to the submission of respondent's answer to said complaint, respondent and counsel supporting the complaint entered into, and thereafter submitted to the Hearing Examiner, a Stipulation For Consent Order.

In this stipulation, respondent Harry A. Burch is identified as an

individual trading under the names of Washington Institute of Practical Nursing and National Training Service, with his office and principal place of business located at 203 Paramount Theater Building, 907 Pine Street, in the City of Seattle, State of Washington.

Respondent admits all the jurisdictional allegations set forth in the complaint and stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondent requests that his answer, heretofore submitted herein, be withdrawn, and expressly waives the filing of an answer to the complaint and further proceedings before the Hearing Examiner and the Commission. Respondent agrees that the order contained in said stipulation shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and expressly waives all right, power and privilege to contest the validity of said order.

Said stipulation provides that the complaint may be used in construing the terms of the order contained in the stipulation, and that said order may be altered, modified, or set aside in the manner prescribed by statute for orders of the Commission.

Respondent further agrees that said stipulation for consent order together with the complaint herein, shall constitute the entire record in this proceeding, and that the order contained in said stipulation may be entered without further notice upon the record, in disposition of this proceeding.

In view of the provisions of the Stipulation For Consent Order as outlined above, and the fact that the order embodied in the stipulation does not differ materially from the order accompanying the complaint, it appears that the respondent's request that his answer to the complaint herein be withdrawn should be granted; that the Stipulation For Consent Order should be accepted; and that such action, together with the issuance of the order contained in the stipulation, will resolve all the issues arising by reason of the complaint in this proceeding and respondent's answer thereto, and will safeguard the public interest to the same extent as could be accomplished by a full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, the Hearing Examiner, in consonance with the terms of said agreement, accepts the Stipulation For Consent Order submitted, grants respondent's request that his answer to the complaint herein be withdrawn, and issues the following order:

It is ordered that respondent, Harry Burch, trading under the name Washington Institute of Practical Nursing or National Training Service, or trading under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in

connection with offering for sale, sale and distribution of any course of instruction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That the opportunities for employment in the field of endeavor in which a course of instruction is offered are greater than they are in fact;

2. That a correspondence school course is capable of (a) qualifying persons for positions as nurses or licensed practical nurses in hospitals, sanitariums or other medical institutions or in a doctor's office, (b) qualifying persons for State examinations for registered or licensed practical nurse;

3. That respondent's business is other than the operation of a correspondence school;

4. That respondent has a staff of instructors in the subject covered by the course unless such is the fact;

5. That a high-school education is not necessary to become a licensed practical nurse;

6. That a high-school education is not necessary to become a graduate practical nurse unless limited to persons completing respondent's course of instruction;

7. That any course of instruction or diploma issued to persons completing any such course is approved, accredited or recognized by any organization, institution, group or person unless it is a fact;

8. That a contract of enrollment may be cancelled without obligation for any unpaid balance due on the purchase price of any such course, unless it is a fact.

B. Using the word "Institute" in his trade name or otherwise representing that his business is other than a commercial enterprise operated for profit.

It is further ordered that the answer to the complaint herein filed by respondent on March 15, 1954, be, and the same hereby is, withdrawn from the record.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that respondent Harry A. Burch, an individual, trading under the names of Washington Institute of Practical Nursing and National Training Service, shall, within (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of September 23, 1954].