IN THE MATTER OF

OUTBOARD, MARINE & MANUFACTURING COMPANY

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

Docket 5882. Complaint, May 23, 1951—Decision, June 27, 1956

Order requiring a manufacturer of outboard motors for boats and parts and accessories therefor, with factories and offices at Milwaukee, Wis., and Galesburg, and Waukegan, Ill., accounting for one-third to one-half of the total sales of outboard motors in the United States, to cease exacting assurances from its distributors and dealers that they would not deal in its competitors' outboard motors or parts.

Mr. Paul R. Dixon for the Commission.

Butzel, Levin, Winston & Quint, of Detroit, Mich., and *Cleary, Gottlieb, Friendly & Ball*, of Washington, D. C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE PROCEEDINGS

Complaint herein was issued May 23, 1951 and charged respondent with selling or contracting to sell its outboard motors or fixing the sales price thereof on the condition, agreement, or understanding that the purchasers thereof would not use or deal in the merchandise of competitors of respondent in violation of Section 3 of the Clayton Act (15 U.S.C.A. 14). After service and answer, seven hearings were held resulting in 578 pages of transcript, 79 Exhibits for proponent and 22 Exhibits for respondent. The proceeding was closed by the hearing examiner on December 16, 1952 and initial decision filed by him December 29, 1952. The case was tried and decided on the theory of, and the quantitative tests applied by, the court in the so-called Standard Stations case[1] and others of like import; namely, that the statutory requirement of "where the effect of such lease, sale or contract for sale of such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" is satisfied, if it be shown that respondent's sales accounted for a major or substantial share of the available market for the product involved. This showing was that, in 1949, respondent sold almost as many units as all its competitors combined and did more business dollarwise than the rest of the industry;

[1] *Standard Oil of California* v. *U. S.*, 337 U. S. 293 (1949). *International Salt Company* v. *U. S.*, 332 U. S. 392.

in other words, accounted for more than 50% of all outboard motor sales.

All evidence offered by respondent—tending to show: that respondent spent far more than its competitors on advertising, on service maintenance, on dealer service training, on the number of salesmen and outlets of each competitor, and the latter's individual sales volume; that dealers prefer to handle only one brand of outboard motor and that they handle other non-competitive products such as boats, as well as outboard motors; the experience and training of respondent's dealers prior to becoming such, and since; the number of motors sold by them, why some quit selling respondent's motors, what dealers in other motors than respondent's sell and how, and the importance of service in selling motors; the relationship between consumer price and exclusive dealing; the reasons why respondent discontinued merchandising through distributors and sold direct to dealers; the benefits to the industry and to the public of exclusive dealing, and opinion evidence that respondent's success and pre-eminent position in the market was due to other factors, such as excellence of product, rather than its exclusive dealing policy—was all rejected by the hearing examiner, or, if received, was subsequently stricken from the record by him as immaterial under the Standard Stations case ruling referred to. Similarly, evidence to show actual injury to competitors of respondent was likewise rejected.

Upon appeal by respondent to the Commission from the initial decision, the Commission set the latter aside stating that such rejected evidence was, in its opinion, material and necessary for it to decide the case and remanded the case on February 18, 1954, with instructions to reconsider such rulings.

Since that hearing examiner was then about to be mandatorily retired for age, the proceeding was transferred to the undersigned hearing examiner for completion in conformity to such order, and counsel for respondent having waived any objection to such transfer, the former rulings of rejection or striking were reversed and 13 additional hearings were held resulting in 1,114 additional pages of transcript, 3 additional exhibits for proponent and 17 additional exhibits for respondent. The proceeding was then again closed on July 11, 1955, and the undersigned hearing examiner, having considered the entire record, the proposed findings and conclusions and briefs submitted by all counsel, makes the following:

FINDINGS OF FACT

1. Respondent, Outboard Marine and Manufacturing Company, is a Delaware corporation, with its principal office and place of business

located at Waukegan, Illinois. It has factories and offices located at Milwaukee, Wisconsin, and Galesburg and Waukegan, Illinois, and since its incorporation on September 30, 1936, has manufactured and sold outboard motors for boats, parts of such motors and other products, through three divisions:

A. Johnson Motors Division (referred to hereinafter as "Johnson"), with office and factory at Waukegan, Illinois, which manufactures and sells "Johnson Sea Horse" outboard motors.

B. Evinrude Motors Division (referred to hereinafter as "Evinrude"), with office and factory at Milwaukee, Wisconsin, which manufactures and sells "Evinrude" outboard motors and which, until 1950, also manufactured and sold "Elto" outboard motors.

C. Gale Products Division (referred to hereinafter as "Gale"), with factory at Galesburg, Illinois, which manufactures outboard motors primarily for special order and specification customers. In addition, Gale manufactures the "Buccaneer" line of outboard motors for sale to hardware jobbers throughout the nation.

2. Respondent's fiscal year runs from October 1st to the succeeding September 30th and all figures and data in these findings, pertaining to a specified year unless otherwise stated, refer to the fiscal year ending on September 30th of the specified year. Thus, 1948 means the twelve month period beginning October 1, 1947, and ending September 30, 1948.

3. In the years 1937 through 1950, respondent's sales through its three divisions were as follows:

	Johnson Motors division		Evinrude Motors division		Gale Products division		Total	
	Number of motors	Total price	Number of motors	Total price	Number of motors	Total price	Number of motors	Total price
1937	29, 391	$2. 113, 912	38, 680	$2, 011, 256			68, 071	$4, 125. 168
1938	31, 075	2, 165, 086	37, 345	1, 973, 454			68, 420	4, 138, 540
1939	40, 802	2, 865, 493	48, 967	2, 407, 666			89, 769	5, 273, 159
1940	41, 929	3, 073, 374	46, 887	2, 741, 091			88, 816	5, 814, 465
1941	41, 964	3, 281, 504	51, 870	3. 141, 822	5, 392	$283, 041	99, 226	6, 706, 367
1942	14. 428	1, 427, 826	12, 957	1, 033, 645	936	56, 391	28, 321	2, 517, 862
1943	6, 252	1, 321, 365	6. 772	1, 926, 900			13, 024	3, 248, 265
1944	7, 366	1, 293. 033	6, 901	1, 762, 824			14, 267	3. 055. 857
1945	11, 578	1. 583, 462	11, 466	2. 018, 254	7. 683	526, 463	30. 727	4, 128. 179
1946	47, 557	4, 870, 784	41. 728	3, 808, 923	35, 775	2, 280, 220	125, 060	10, 959, 927
1947	78, 554	8, 866, 148	89. 830	8. 323, 540	93, 707	6. 498, 493	262, 091	23, 688. 181
1948	90, 627	10, 316, 614	76, 221	8. 018, 636	98, 865	7, 204, 131	265, 713	25, 539. 381
1949	80. 419	11, 332. 254	37, 086	4, 790, 342	49, 576	4, 112. 166	137. 081	20, 234, 762
1950	82, 230	10, 818, 766	56, 360	6, 846, 799	36, 659	2, 907, 490	175, 249	20, 573, 055

4. In the year 1949, the entire outboard motor industry sold 347,159 motors for a total selling price of $39,094,482, of which approximately $8,320,651 were private brand sales. In that year, respondent ranked first in dollar volume of sales of outboard motors, equal to the aggregate of the dollar volume of all other outboard motor manufacturers,

although respondent's unit production was not equal to the total unit production of all other outboard motor manufacturers, being 48.1% for all three divisions, or 33.9% counting only Johnson and Evinrude production. During 1949, the largest of respondent's competitors enjoyed less than one-half of the dollar and unit volume of business secured by respondent. Between 1946 and 1950 the annual dollar sales of Johnson and Evinrude alone, in relation to the total sales of substantially all of the industry, declined 11.9%, although in each year it was never less than twice and usually more than three times the market share of any other manufacturer.[2] Johnson and Evinrude sales alone since World War II have never been less than 32% and have exceeded 50% of the total market. The finding, accordingly, is that respondent's market share has at times been dominant, and never less than substantial.

5. As of the date of the complaint, and for many years prior thereto, respondent has sold its outboard motors and parts therefor to distributors and dealers located throughout the several States of the United States, the territories thereof, the District of Columbia and foreign countries, for resale in interstate and foreign commerce and regularly caused such products, when sold, to be shipped from their various places of manufacture throughout the nation and abroad in a constant current of trade in such commerce.

6. In the course and conduct of its business, respondent has been for many years last past and is now in substantial competition in the manufacture, sale and distribution of outboard motors in commerce between and among the various States of the United States, the Territories thereof, and in the District of Columbia, with other corporations, persons, firms and partnerships who are likewise so engaged.

In addition to respondent there were, in 1951, ten manufacturers making and selling at least fifteen brands of outboard motors. These are:

(1) Kiekhaefer Corporation and Kiekhaefer Aeromarine Motors, Inc., manufacturer of Mercury and Wizard brands.

(2) National Pressure Cooker Co., manufacturer of Martin brand.

(3) Hart-Carter Co., manufacturer of Lauson brand.

(4) West Bend Aluminum Company, manufacturer for Sears-Roebuck of the Elgin brand.

(5) Chris-Craft Outboard Motors Co., manufacturer of Chris-Craft brand.

(6) Scott-Atwater Mfg. Co., manufacturer of Scott-Atwater, Corsair, and Firestone brands.

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[2] Respondent's Exhibit 22-G, -H, -I and -K.

(7) Champion Motors Co., manufacturer of Champion, Majestic, and Voyager brands.

(8) H. B. Milburn Co., manufacturer of Milburn Cub brand.

(9) Metal Products Corp., manufacturer of Flambeau brand.

(10) Muncie Gear Works, manufacturer of Neptune brand.

7. At the time or organization of respondent in 1936, there was being manufactured, in addition to its motors, the following:

Name of motor:	*Name of manufacturer*
Champion	Champion Outboard Motors Company.
Neptune	Muncie Gear Works.
Thor	Cedarburg Manufacturing Co.
Bendix	Bendix Aviation Corporation.
Elgin-Waterwitch	(Sears, Roebuck)—Kissel Company.

As of May 23, 1951, the Neptune motors were still being manufactured and sold by Muncie and the Champion by Champion Motors Company, successor to the old Champion Company. Cedarburg Manufacturing Company was acquired by Kiekhaefer Corporation, and the name of its motor was changed from Thor to Mercury, and this company continued manufacturing and selling Mercury motors as well as private brand motors. Kissel Company sold its business to West Bend Aluminum Company, which continued to manufacture and sell Sears, Roebuck motors at the former Kissel plant. Bendix Aviation Corporation is the only manufacturer to withdraw from the industry in the fifteen years from 1936 to 1951.

After 1936, other manufacturers entered the outboard motor business, some before World War II, and some after the War. These include the following:

National Pressure Cooker Co.	Martin Motor.
Scott-Atwater Manufacturing Co.	Scott-Atwater Motor, Corsair Motor, and Firestone Motor.
Chris-Craft Outboard Motors Co.	Chris-Craft Motor.
Hart-Carter Co.	Lauson Motor.
Metal Products Corp.	Flambeau Motor.
H. B. Milburn Co.	Milburn Cub.

All of these manufacturers who entered the business since 1936 were actively engaged in the manufacture and sale of outboard motors on May 23, 1951.

Between 1936 and 1950 the outboard motor industry expanded saleswise from five million total to over forty million. Business boomed, particularly from 1946 to 1950—from fifteen million to forty million. Gross sales and percent of market enjoyed by respondent and its competitors for these years is as follows:[3]

[3] Unit sales total and unit sales percent of total for the same companies show relatively the same pattern.

Company	1946		1947		1948		1949		1950	
	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales	Company's percent of industry	Dollar sales
A (1)										
B	-----	----------	0.69	$360,813	0.41	$210,687	0.21	$79,949	0.24	$97,599
C										
D	1.58	$251,039	10.86	5,678,888	6.82	3,504,599	3.20	1,218,274	3.10	1,260,654
E	.72	114,398	1.20	627,502	.96	493,316	1.38	525,380	1.02	414,796
F	4.16	660,964	3.40	1,777,921	2.59	1,330,926	.59	224,619	.78	317,197
G	5.22	829,383	10.57	5,527,242	11.32	5,817,018	5.36	2,040,608	5.99	2,435,908
H (2) [1]	54.63	8,679,707	32.87	17,189,688	35.68	18,335,250	42.34	16,122,596	43.44	17,665,565
I	-----	----------	-----	----------	-----	----------	1.09	414,974	1.24	504,261
J	7.72	1,226,597	10.46	5,469,721	14.80	7,605,289	19.07	7,260,149	20.56	8,360,980
K	8.22	1,306,039	9.93	5,192,575	7.20	3,699,870	8.92	3,395,938	9.44	3,838,894
L	3.40	540,211	7.59	3,968,947	6.20	3,185,999	7.03	2,676,395	7.04	2,862,904
M (3) [2]	14.35	2,280,220	12.43	6,498,493	14.02	7,204,131	10.81	4,112,166	7.15	2,907,490
Industry total [3]	100.00	15,888,558	100.00	52,291,790	100.00	51,387,085	100.00	38,071,048	100.00	40,666,248

[1] H (2) is respondent, Johnson and Evinrude.
[2] M (3) is respondent, Gale Products.
[3] Respondent's Exhibit 32.

8. Respondent now sells, and for many years last past has been selling, outboard motors and parts therefor to distributors and dealers in such motors located throughout the several States of the United States, the Territories thereof, the District of Columbia and foreign countries, for resale within the United States, the Territories thereof, the District of Columbia and foreign countries. Both Johnson and Evinrude direct factory dealers are authorized by respondent to appoint associate dealers who are also sometimes referred to as subdealers. During the years 1937 through 1950, respondent's Johnson and Evinrude Divisions sold their products to direct factory dealers and to distributors. Such direct factory dealers sold to the public, and in some instances to associate dealers, and said distributors sold to distributors' dealers. A list showing the number of distributors and dealers of the various classes follows:

JOHNSON MOTORS DIVISION

	Distributors	Distributors' dealers	Direct factory dealers	Associate dealers		Distributors	Distributors' dealers	Direct factory dealers	Associate dealers
1937	6	488	1,369	60	1944	----------	----------	----------	----------
1938	5	629	1,627	207	1945	----------	----------	----------	----------
1939	4	491	2,008	218	1946	7	988	2,058	6
1940	4	487	2,018	289	1947	6	512	2,593	11
1941	4	523	1,771	97	1948	6	538	2,424	15
1942	----------	----------	----------	----------	1949	5	553	2,580	57
1943	----------	----------	----------	----------	1950	5	609	2,604	210

EVINRUDE MOTORS DIVISION

1937	19	2,300	805	(1)	1944	14			(1)
1938	19	1,926	1,075	(1)	1945	14			(1)
1939	18	2,469	1,236	(1)	1946	14	2,455	1,522	(1)
1940	13	3,105	1,494	(1)	1947	14	2,500	1,516	(1)
1941	14	2,351	1,365	(1)	1948	15	2,760	1,431	(1)
1942	14			(1)	1949	17	2,666	1,349	(1)
1943	14			(1)	1950	6	1,207	2,570	(1)

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[1] No information.

Evinrude no longer has record information showing the number of associate dealers of its direct factory dealers prior to the year 1950. Johnson does not sell Johnson motors to Evinrude distributors or direct factory dealers, nor does Evinrude sell Evinrude motors to Johnson distributors or direct factory dealers. Total Johnson and Evinrude dealers out of total number of outboard motor dealers known of or reported for postwar years was as follows:

1946	7,029 out of total of 15,098
1947	7,132 out of total of 18,963
1948	7,168 out of total of 19,397
1949	7,205 out of total of 19,484
1950	7,421 out of total of 20,268
As of May 15, 1951	6,789 out of total of 19,085

Based on these statistics which show that respondent never had less than one-third of the total dealers, the finding is that respondent's outlets accounted for more than a substantial segment of total outlets.

9. Respondent, through its Johnson Motors Division and its Evinrude Motors Division, enters into written contracts with its direct factory dealers and with its distributors. These contracts are one-year agreements, expiring on September 30. They are terminable by either party on thirty-day notice any time during the fiscal year.

Respondent furnishes, to its distributors, forms of written contracts for use by its distributors in entering into relationship with distributors' dealers. Respondent furnishes, to its direct factory dealers, forms of written contracts for use by its direct factory dealers in entering into relationship with associate dealers. No other form of written contracts for entering into such relationships is known to have been used by respondent's direct factory dealers and distributors. To the best of respondent's knowledge, it receives copies of all written agreements entered into between distributors and their dealers and between direct factory dealers and their associate dealers; respondent knows of no instances in which this has not been done.

10. Respondent has consistently followed the policy and practice of making it known to prospective dealers and distributors that it will not franchise dealers and distributors, nor will it sell motors to

them for resale, if they are offering for sale and selling outboard motors manufactured by a competitor.

As early as 1939 the respondent entered into written contracts with dealers to sell its products. Such contracts entered into for the year 1939 with direct factory dealers contained, as to the Evinrude Division, the following:

If the right to sell is on the Single Dealer basis and is specifically so designated above, then the Manufacturer agrees to establish no other Evinrude dealer in said territory while this agreement is in effect, provided the Dealer establishes prior to ....., 1939, and maintains, not less than ..... associate-dealers, in accordance with the policy of and upon forms provided by the Manufacturer for that purpose, and further provided the Dealer shall sell only Evinrule outboard motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

In the year 1939 the Johnson Motors Division's contracts with direct factory dealers contained the following:

If the right to sell is on a "single dealer basis," and specifically so designated above, then the Manufacturer agrees to establish no other Dealers on Sea Horse Motor products in said territory while this Agreement is in effect, providing the Dealer establishes prior to ....., 1939, and maintains, not less than ..... sub-dealers in accordance with the policy of, and upon forms provided by the Manufacturer for that purpose, and further providing that the Dealer shall sell only Johnson Sea Horse Outboard Motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

Respondent's Evinrude Motors Division's contracts with direct factory dealers for the years 1940, 1941, and 1942 contained a comparable provision. Respondent's Johnson Motors Division's contracts with direct factory dealers for the years 1940, 1941, and 1942 contained a comparable provision.

11. Respondent's Evinrude Division furnished written contract forms to its distributors for use in entering into contractual relationship with distributor dealers. The forms for the year 1939 contained the following provision:

If the right to sell is on the Single Dealer basis and is specifically so designated above, then the Distributor agrees to establish no other Evinrude dealer in said territory while this agreement is in effect, provided the Dealer establishes prior to ....., 1939, and maintains, not less than ..... associate-dealers, in accordance with the policy of and upon forms provided by the Distributor for that purpose, and further provided the Dealer shall sell only Evinrude outboard motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

Comparable contract forms were furnished Evinrude distributors for the years 1940, 1941, and 1942. Respondent's Johnson Division furnished written contract forms to its direct factory dealers for

use in entering into contractual relationship with associate dealers. The forms for the year 1942 contained the following provisions:

If the right to sell is on a "single" associate-dealer basis, and is so especially designated above, then the Dealer agrees that during the term of this Agreement it will establish no other Associate Dealer in Sea Horse Motor products in said territory on the express condition, however, that the Associate Dealer sells only Johnson Sea Horse Outboard Motors and no others (except used motors traded in on Sea Horse motors).

Respondent Johnson Division furnished contract forms to its distributors for use in entering into contractual relationship with distributor-dealers. The forms for the year 1939 contained the following provision:

If the right to sell is on a "single dealer basis" and specifically so designated above, then the Distributor agrees to establish no other Dealers on Sea Horse Motor products in said territory while this Agreement is in effect, providing the Dealer establishes prior to ....., 1939 and maintains, not less than ..... sub-dealers in accordance with the policy of, and upon forms provided by the Manufacturer for that purpose, and further providing that the Dealer shall sell only Johnson Sea Horse Outboard Motors and no others (except used motors); and the Dealer expressly agrees to perform and abide by these provisions.

Comparable contract forms were furnished Johnson distributors for the years 1940, 1941, and 1942.

12. In the years 1943 and 1944 respondent was engaged wholly in war production and sold no outboard motors to its distributors and dealers except a small quantity which, by government order, was directed for use by commercial fisheries. No new contracts were entered into with distributors and dealers during these years, but the then existing contracts were, in some cases, extended by memorandum letters. In the year 1945 the Evinrude Motors Division and Johnson Motors Division manufactured a small quantity of outboard motors for sale to distributors and dealers. The contracts covering the year 1945 were either extensions of, or similar to, those used in the year 1942.

13. In the years 1946 to 1951, inclusive, the written contracts with direct factory dealers and distributors and the written forms of contract furnished by the Evinrude Motors Division and Johnson Motors Division to distributors and direct factory dealers for use in entering into contractual relationship with distributors' dealers and associate dealers, respectively, contained no reference or agreement as to exclusively selling respondent's motors.

14. The Evinrude Motors Division and the Johnson Motors Division from time to time send, to their respective distributors and the dealers of said distributors and to their respective direct factory

dealers and the associate dealers of such direct factory dealers, form letters and publications which contain material and advice designed to assist all of such distributors and dealers in the sale of Johnson or Evinrude motors, as the case may be, in the servicing and repairing of such motors, in the advertising thereof, in arranging for appropriate financing of installment sales, and in other phases of merchandising. On occasion, in such form letters and publications, respondent has called to the attention of dealers the benefits which respondent believes such dealers derive from the practice of not selling more than one brand of outboard motors. For example:

And we shall continue to want only those loyal and enthusiastic dealers who believe with us that everybody is better off when the dealer handles ONLY ONE make of outboard motor. Further, any Johnson dealers who feel they don't wish to subscribe to that policy, we'd like to discuss the matter with them right now.

Respondent had a fixed policy since its incorporation of advising all dealers and respective dealers that it desired that its motors be handled exclusively, and that when a dealer was found violating this policy, he was told that he would either have to discontinue handling a motor manufactured by a competitor or his franchise agreement would be cancelled. If, however, the cancelled dealer ceased handling the competitive motor, respondent would refranchise him, provided other factors were satisfactory.[4]

15. Each of respondent's Johnson Motors and Evinrude Motors Division has traveling salesmen who are instructed to call on all direct factory dealers and associate dealers at least once a year, for the purpose of assisting such dealers in effectively advertising, selling, and servicing outboard motors. These salesmen have been instructed by such Divisions to report all cases in which they have found that Johnson or Evinrude dealers have been engaged in the business of selling new outboard motors manufactured by any competitor of respondent, or by the competing Division of respondent. The record shows an effective and vigilant policing of dealers, stocks, displays, advertising and general operations by respondent's salesmen to ascertain if any competitive outboard motor was on the dealer's premises, regular reports thereof to respondent and immediate threats of refusal to sell further if such report was admitted or substantiated.[5] For example, from one such salesman to the director of sales:

I suggest immediate concellation of the above dealer. I heard they were selling Scott-Atwaters so I called them on the phone from Duluth today. I didn't reveal my name and was offered immediate delivery on a Scott-Atwater. I'm not very well pleased with the outlet and don't believe we should try and straighten them

[4] Tr. 62–3, 73, 100.
[5] Tr. 66, 103.

out. On my last visit Feb. 4, 1948, I was told they handled only Johnson Motors. They were not displaying Scott-Atwaters at the time. They know our policy and have no excuse.[6]

16. The respondent has the policy of terminating by thirty-day notice its agreement with, and ceasing to sell its products to, a dealer who sells new outboard motors manufactured by a competitor or competitors of respondent. The Johnson Motors Division has terminated Dealer Agreements in pursuance of this policy as follows:

1948—9
1949—5
1950—5
1951—1 (nine months)

The Evinrude Motors Division has terminated Dealer Agreements in pursuance of this policy as follows:

1948—12
1949—10
1950—31
1957—17 (nine months)

The company also has the practice, in selecting new dealers, of refraining from selecting a dealer who, at the effective date of the agreement with respondent, is selling new outboard motors manufactured by a competitor or competitors of respondent.

17. The extent to which this policy has been carried and the rigidity of the practice is well illustrated by a letter of April 15, 1948, from Bloomingdales to Johnson as follows:

After discussing the motor situation with your Mr. Adler, I feel it will be necessary for a store of this size to have more motors than the Johnson Motor Company can supply us this year. We would like very much to have your motors here at Bloomingdale's and hope we will receive our allocation of motors for this year.

Due to the great demand for motors in this area and the scarcity of your production, we feel it will be necessary for us to open new channels in the hope of securing enough motors to satisfy our customers.[7]

To the same effect is a May 27, 1948 letter from the Kaufmann Department Store in Pittsburgh[8] but notwithstanding the prestige, sales potential and excellent volume of these accounts, their dealerships were cancelled. This was corroborated as of more recent date when Evinrude's Director of Sales told the hearing examiner no

[6] Commission's Exhibit 78 (104).
[7] Commission's Exhibit 78 (71).
[8] Commission's Exhibit 78 (131).

matter how good or profitable the account, it would be cut off if a competitive line were added.[9]

18. The record is replete with evidence showing that Johnson and Evinrude make it as clear as possible that they will not sell, nor continue to sell, if a competitive motor is also retailed; that dealerships will be cut off regardless of justification or excuse, and that both through their salesmen and other sources, maintain a policing surveillance to find out whether the condition of sale is being observed.

19. Counsel supporting the complaint calls this exclusive dealing or, more formally, selling or contracting to sell on the "condition, agreement or understanding that the purchaser thereof shall not use or deal in the goods, wares, or merchandise * * * of a competitor or competitors of the seller." Respondent counsel, on the other hand, has consistently called it "single dealing" and claims it to be a unilateral policy of customer selection, without agreement, understanding or condition of sale. In reliance on the somewhat threadbare[10] Colgate case,[11] the Adams Mitchell case[12] and the J. I. Case, case,[13] respondent says it merely selects as its customers those who single deal.

20. To so assert, on this record, is to semanticize. To so hold, on this record, is to effectively emasculate the law and to provide a plausible and easy evasion of both its aim and prohibition. The words "condition, agreement or understanding" were designedly employed by Congress to prevent evasions on technical arguments as to whether informal understandings rose to the dignity of formalized written commitments, particularly where, as here, the latter were succeeded by the former, without substantial change in practical operation.

21. Without detailed discussion of the cases relied on, suffice it to say that no agreement or understanding was found to exist in any of them; that in the J. I. Case matter the "single dealing" affected only part of defendant's customers, even there the court emphasized that Case could not directly or indirectly employ coercion, pressure or business policy to obtain any understanding or condition. There were such instances but the court there found them to be sporadic and de minimis.

22. The record here is far different. Respondent's policy is practically universal and unyielding. Respondent has proved that its Johnson and Evinrude motors are two of the oldest, if not the oldest, outboard motors made, the best known, the most widely advertised

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[9] Tr. 1668.

[10] Cf. *F. T. C.* v. *Beechnut Packing Co.*, 257 U. S. 441; *U. S.* v. *Schrader's Sons, Inc.*, 252 U. S. 85.

[11] 250 U. S. 300.

[12] 189 F. 2d 913.

[13] 101 F. Supp. 856.

and most widely accepted and wanted on the market. Cutting off or threatening to cut off dealers reselling such motors by mere letter of cancellation is "business pressure" if not "commercial coercion." A typical telegram from respondent's sales manager to a field salesman reads: "How come dealer Princes Wickenburg selling Martins. Wire action you are taking." [14] Another reads: "Geissler was warned last year about handling Scott-Atwater and I don't believe he deserves another chance. * * *." [15] There are also instances in the record showing stores writing respondent that its local dealer is handling other outboard motors and in the same letter asking to be substituted for the local dealer.

23. If, as claimed, it is purely unilateral selection, rather than conditional sale or mutual understanding, the emphasis would seem to be, on respondent's part, on past performance of the prospect; not, as here, on future practice.

24. Here respondent offers its motors clearly stating that, if bought, no other motor must be offered for resale by the purchaser. Purchase with that knowledge conclusively implies, without benefit of Williston, acceptance of and agreement to the condition of sale. The record shows that respondent's dealers so regarded it, as exemplified by a letter from a cancelled Johnson dealer in Chisholm, Minnesota to respondent on August 7, 1948:

> It certainly was a bomb from out of the skies this morning when I received your notification of the termination of the Johnson franchise.
>
> Well you are acting according to the original agreement without question. * * * If motors had been more plentiful, or my allotments a little larger, I would have accepted no other make of motor ever. * * *
>
> I hope you can see the picture my way and reinstate me as a Johnson dealer, and I will never again have another make of new motor in my place of business.[16]

Another letter from respondent to a dealer of May 6, 1948 states:

> We were under the impression that our policy in this regard was very thoroughly understood. It has been publicized from time to time and frankly we were of the opinion that your outboard motor activity was entirely devoted to the Johnson line. Apparently this has not been the case.[17]

A letter from the Evinrude salesmanager to a salesman relating to the former's conversation with a visiting dealer who discussed taking on a competitive line, concludes:

> So as matters now stand, Roy has agreed to go along with us and knows what will happen if he figures otherwise.[18]

[14] Commission's Exhibit 78 (95).
[15] Commission's Exhibit 78 (98).
[16] Commission's Exhibit 78 (60).
[17] Commission's Exhibit 78 (80).
[18] Commission's Exhibit 78 (144).

25. The conclusory finding therefore is that respondent has been, and as of the date of the complaint was, making sales and contracts for the sale of its Johnson and Evinrude outboard motors in commerce to its direct factory dealers and distributors on the condition, agreement or understanding that they shall not purchase or deal in any outboard motors manufactured by a competitor or competitors of respondent. Respondent, through the practice set forth in the above findings, controls the sales policy of all purchasers of its outboard motors, including direct factory dealers, distributors, distributors' dealers, and associate dealers of direct factory dealers, to the extent of preventing them from selling the products of respondent's competitors.

26. Gale has never had, does not have, and is not charged with having, a single dealing or exclusive dealing policy such as Johnson and Evinrude and the policies and practices of the latter as found above extend to each other—that is, Johnson will not sell to an Evinrude dealer or vice versa.

27. The agreements entered into by Johnson and Evinrude with dealers were not requirements contracts. They did not provide for the purchase from Johnson or Evinrude by the dealer of all outboard motors required or sold by the dealer. They did not provide for the purchase by any dealer of any stated or minimum quantity of outboard motors, nor did they provide for the sale to the dealer by Johnson or Evinrude of any stated quantity, or minimum number, of outboard motors. Respondent did not require dealers to purchase any minimum quantity of motors.

28. These agreements, sometimes referred to as franchises, are for respondent's fiscal year, renewable upon expiration and terminable by either party on thirty days' written notice. From this, respondent argues that its dealers have that freedom which Congress sought to insure them by Section 3 of the Clayton Act—that the dealer is free to buy where he pleases. Legally and technically this is partially correct. Realistically, it is not. Respondent, as one of its witnesses put it, is the General Motors of the outboard industry; the oldest and best according to its proof. Its motors are prestige products, the most widely advertised and sought after. Its dealerships are apparently avidly sought after and its products find a ready and profitable market. The commercial balance between respondent and its dealers is so lopsided that rarely does a dealer cancel. Out of thirty terminations documentarily evidenced in the record, only one was by the dealer, Bloomingdales of New York City, which is too big to submit to any such sales policy as respondent's. As respondent has proved, most outboard motor dealers are economically weak. The compulsion to behave is far stronger than any desire to buy and sell free of

restriction. To this is to be added the dead loss of former local and "tie-in" advertising, and the more modest problem of disposing of stock parts. Upon termination, respondent sometimes buys these back, sometimes does not. Furthermore, while a dealer may cancel, he still may not merchandise the motors of all makers; it's either Johnson or Evinrude, or others but there is no freedom of varied or universal choice. Lastly, optional termination by the buyer, as here, was present in both the *Dictograph Products Inc.* v. *F.T.C.* (217 F. 2d 821), and the *Anchor Serum Company* (217 F. 2d 867) cases.

29. Outboard motors are designated for convenience principally as to size by horsepower rating but two motors of the same, or substantially the same, horsepower rating vary in construction, price and other details. Respondent's Johnson and Evinrude Motor Divisions have consistently manufactured and offered for sale a fairly complete line of outboard motors, ranging in size from low horsepower ratings to high horsepower ratings. All other manufacturing competitors of respondent, except one, have consistently manufactured and offered for sale more limited lines of outboard motors consisting principally of low horsepower ratings. Beginning in 1949 the manufacturer of Mercury motors began to offer a full line of motors.

30. After the remand in this proceeding, counsel supporting the complaint offered direct evidence to show that the effect of respondent's exclusive dealing "may be to substantially lessen competition, or to tend to create a monopoly" in the testimony and records of three of respondent's competitors.

31. The first of these was Champion Motors Company, whose president testified in considerable detail. Respondent's counsel asserts this to be incredible because of many contradictions between it and that of numerous other witnesses.[19] For the purposes of these findings, this testimony is disregarded, although counsel for respondent nevertheless cites and relies on it in some instances where it supports his argument. Regardless of that, however, the statistics of the company cannot be called false. These show dollar volume of sales as follows:

1947	$ 5,394,373.49	1949	$ 1,015,418.35
1948	3,425,785.94	1950	[1]1,418.200.99

[1] Commission's Exhibit 80.

and unit sales as follows:

1947	$75,474	1949	$10,688
1948	39,775	1950	[2]13,544

[2] Commission's Exhibit 81.

[19] The request of counsel for respondent that he be branded as a false witness by specific finding is denied. There are other reasons for direct conflict than deliberate lying.

32. Respondent's counsel asserts that Champion's annual report of 12–31–48 explains fully the 46.3% drop in unit sales for 1948 over 1947 as due to delay in securing aluminum permanent mold castings seriously reducing production at the height of the selling season, and a strike at the plant of Champion's supplier of aluminum die castings. But the cited report says the sales decline was due only *in part* to these two factors.

33. Respondent's counsel also seeks to explain the 73.2% decline in Champion's unit sales in 1949 over 1948 as due in the first place to Champion moving its plant that year, and again cites Champion's annual report as so stating. There is no annual report of Champion for the year 1949 in evidence—only those for the fiscal years 1948 and 1950. The report for the year 1950 includes October and November of 1949; the remainder is the first ten months of 1950. The move was apparently in 1950—not in 1949. Secondly, counsel points to the business recession in 1949 as producing a 38% drop in sales, but the record shows this only as to Evinrude and Johnson whereas Champion's sales decline in units was far more—73.2%. Thirdly, counsel asserts that Champion's inability to produce to satisfy demand for its new Hydro Drive in 1950 explains its 1949 drop but there is no evidence as to 1949 of this new device.

34. At most, this explaining away and counter-assertion of respondent is inadequate and speculative, subject to inference only, just as is the inference, without the witness' rejected testimony, that the decline was due to respondent's exclusive dealing. The hearing examiner is of the opinion that these precipitate declines were due in part to all these causes and perhaps to others as well, in what precise degree to each being unknown.

35. The president of another competitor of respondent, the Scott-Atwater Company, manufacturing and distributing outboard motors under that name since 1946, testified, and it is so found, that its line was short in horsepower range compared to respondent's, that respondent's exclusive dealing policy made it difficult for his company to add dealers in the field, and that he was unable to get many first class retail outlets; that he had less dealers in 1951 than when he entered the field in 1946 notwithstanding the expansion of his line in the interim at considerable capital expenditure.

36. A third competitor, the National Pressure Cooker Company, manufactures, through a subdivision, the Martin Motor. Its records show its sales and number of dealers as follows:

	Unit	Dollar volume	Dealers
1946	8,094	$830,033.83	2,500
1947	52,059	5,526,305.91	3,500
1948	59,129	5,815,059.78	3,151
1949	20,829	2,039,534.36	2,697
1950	21,102	2,438,164.97	2,891
As of May 15, 1951			[1] 2,627

[1] Commission's Exhibit 82-b, d.

The cause of the decline reflected above is in dispute. The company's vice president in charge of sales since 1949 attributed the decline to respondent's exclusive dealing arrangements. The former general manager attributed it to satisfaction of pent-up war demand; recession in 1949; improper inspection and rejection; connecting rod trouble resulting in large returns and repairs with consequent dealer and customer dissatisfaction; and failure of top management to originate or offer new horsepower ratings and improvements. He stated flatly that respondent's exclusive dealing arrangements had no material effect on Martin sales. Dispute with top management over these matters of policy led to this witness' discharge by the company in June 1949. The former general manager's testimony regarding cause of sales decline is largely corroborated by two other witnesses —one, Martin's ex-service manager; the other, a distributor—and the lack of experience in the outboard field of the vice president and the fact that he had no connection with it until June 1949 gives the weight to respondent's contention that its sales policy was not the sole or even primary cause of Martin's sales decline and it is so found.

37. The fact that Martin's vice president in charge of sales was, prior to his appointment in June of 1949, a millinery salesman, or a peddler of pots and pans as respondent's counsel refers to him, does not detract from his personal knowledge of being told by respondent's dealers, whom he approached in an effort to sell Martin motors, that, although some of them wanted to buy Martin, they could not because it would be at the risk of losing their Johnson or Evinrude franchise; or from his evidence that Martin did not have a satisfactory number of first class or satisfactory dealers to market its product and that Martin did not have as complete horsepower range as did respondent.

38. Whether or not respondent's exclusive dealing policy was the direct and sole cause or the partial cause of the decline in the sales and dealerships of those of its competitors who testified, or whether this was due, as indicated, to other causes, wholly or in part, the fact remains and it is so found that respondent's policy did foreclose a substantial number of established dealers to those competitors who sought satisfactory outlets for their outboard motors, thereby sub-

stantially lessening and hindering their competitive efforts and causing them substantial injury.

39. The Martin distributor for lower Michigan since 1948, who directed his early efforts toward building up a dealer organization, found that he was considerably handicapped by two factors—having only a 7.2 hp motor in 1948, a 2.3 hp and a 4.5 hp motor in addition in 1949 and a 10 hp motor added in 1950; and by respondent's exclusive dealing policy. He was never able to sell his Martin motors to a Johnson or Evinrude dealer, although several of them would have purchased his motors had it not been as one Johnson dealer expressed it, "restrained from handling any competing line of engines by my franchise" and by another, "Johnson forbade him taking any other line on. If he had been able to, his business would have increased." Even his one 7.2 hp motor would have complemented the Johnson line since the latter then had no horsepower rated motor between 5 and 10 . The best dealer for his organization was an established marine dealer of good repute, with facilities and experience for constant maintenance and service and in business long enough to have built up contacts. In his area respondent had most of these dealers. Because of respondent's exclusive dealing policy, he was therefore confined to inferior dealers. His business declined in 1949 over 1948 but if he had had the subsequently introduced 10 hp Martin motor, it would not have. He had unsuccessfully solicited other "good" dealers than respondent's, succeeding in not much more than 10% of his attempts. Between 1948 and 1951 he increased substantially the number of his dealers apparently from other than competitive sources. He never had any exclusive dealing policy nor did Martin and some of his good dealers sold other brands than Martin. His lower sales in 1949 over 1948 were not in his opinion caused by respondent's exclusive dealing policy but by his short line and by competitors bringing out new and attractive features such as gear shift and auxiliary gas tank which Martin did not have. He lost no good dealers to respondent until 1951.

40. The Martin distributor or factory representative for Missouri, Illinois and Iowa from 1948 to 1951 lost four dealers to respondent at Mattoon, Illinois; Mount Carmel, Illinois; Harrisburg, Illinois, and Poplar Bluff, Missouri. They had been selling Martin motors, or Martin motors and others, but when they were franchised by respondent to sell either Johnson or Evinrude they ceased to buy Martin's because they "had to agree not to sell another motor" or "if they wanted another line, then they could forget the franchise" from respondent. Some of these outlets had been established by this distributor and from his standpoint were good outlets. He was never

able to sell to a dealer handling respondent's motors. Because he knew respondent's policy, he would not ordinarily contact Johnson or Evinrude dealers who, in some cases, were the best outlets but did reach the point at times and in various places where he could find no other suitable outlet and approached them—without success, however. He had in his territory about 200 dealers in Martin motors of which about 15% were first class outlets, the remainder being second class or lower. He was not always able to sell dealers handling other makes than respondent's but he did not lose any dealers to such other makes. The four accounts which he lost to respondent were buying 20, 25, 10 and 15 motors annually, respectively. Two of them continued to sell Martins surreptitiously after taking on Johnson but sales of Martins fell to almost nothing. This distributor preferred a dealer to handle only his brand but some of them did not and he made no effort to compel them to. To develop a good dealer from scratch takes from one to three years. Johnson dealers in his territory, where he lost his four accounts, were selling 60 motors a year. When he lost these accounts to respondent he had to seek other outlets and develop them but the substitutes were not as good as the ones he had lost. If a Martin dealer took on another make, Martin's sales to that dealer would decrease. His principal competitors were respondent and the makers of Mercury.

41. One of these four accounts denied, in testifying for respondent, that he had become a Johnson dealer prior to the date of issuance of the complaint and that he had ceased dealing with Martin as of that date or for the reason that respondent's policy required him to; further, that he was dissatisfied with the Martin motor because it did not have the new features other outboards had, did less advertising and was two or three years behind Martin competitively. His outboard business was only about 1% of his total sporting goods business.

42. Another Martin dealer in St. Louis, whom the Martin dealer had established and built up, although not considered a first class outlet, testified for respondent that he sold Martin motors exclusively until May of 1951 but had tried to obtain a Johnson franchise because of his dissatisfaction with the Martin motor; that it was obsolete; that key personnel had left the Martin organization; that it was an incomplete line, not up to date, and he could see no future in it for himself.

43. The distributor for Scott-Atwater outboard motors in most of Michigan since 1948 testified that on starting to merchandise them, "we just went out to attempt to find dealers in outboard motors and as such went to the dealers who we thought were the finest marine dealers that you could go to, and we found that they were tied up with other

competitive motors," in many cases, respondent's, and that he was unable to sell them because "we were told when we called on these various outlets that they were franchised on an outboard motor and that they were happy with their present franchise and that as such if they considered other motors they were in jeopardy of losing their present franchise." When he called on dealers in other makes than respondent's, he was able to sell and he secured multiple distribution. He found no other make of motor in his area handled on an exclusive or single basis than respondent's. Scott-Atwater has no objection to its dealers handling other makes. All of respondent's dealers in his area were desirable dealers to him. Unable to secure what he regarded as the best dealers, he solicited what he regarded as second-rate outlets. Scott-Atwater was then selling only two sizes of motors, one of which the 7.5 hp would have, in his opinion, "rounded out" the Johnson and Evinrude line in a dealer's stock because neither of these at that time had a motor at, nor near, that horsepower rating but he was unable to sell that motor to any of respondent's dealers. He was unable to build up what he considered a strong dealer organization. In addition to outboard motors, witness' organization sold a varied line of household appliances. As of May 1951 it had about 100 dealers for Scott-Atwater motors but witness did not know how many handled that motor only. He preferred a dealer to do so because in his opinion the dealer could do a better job for him. However, he had both single and multiple dealers who were doing comparable jobs. Single dealers, in his experience, concentrate on that one line and do a better job for him but he did not know whether they did a better job for themselves. He was not only unable to sell respondent's dealers in setting up his organization but due to the short line of Scott-Atwater at that time had some difficulty in selling to dealers in other makes than respondent's, but he had a number of Mercury and Martin dealers take on his line. As a distributor, it is good business for him to handle only one line of outboard motor. It takes about $900.00 to become a small dealer. No dealer can make a living selling outboard motors only. Witness knew of no dealer who carries as many as seven different brands of outboard motors and would not franchise such an outlet. Three different brands were the most he knew of being carried.

44. On this question of distributor effect and injury, it is also found that pent-up postwar demand for outboard motors caused respondent to ration supplies thereof to its dealers during 1946, 1947, part of 1948 and again in 1950 and 1951, but in spite of these insufficient shipments respondent refused to allow its dealers to buy and resell competitive motors and terminated its franchise with them if they did. There is

substantial documentary evidence in the record that respondent's exclusive dealing policy caused some of its dealers curtailed sales and volume.

This competitive race for dealers between respondent and its competitors and the latter among each other is shown in the following table in which Company "H" is identified as respondent's Johnson and Evinrude Divisions, Gale products not selling through dealers. Company "G" is Martin Motors. Companies "A" and "C" are omitted—one was bought out and the other discontinued manufacturing motors. Company "D" is omitted as it furnished no dealer figures. Blanks indicate no figures available.

Company	Number of dealers as of—					
	1946	1947	1948	1949	1950	May 15, 1951
B		520	736	717	803	823
E	1,252	1,550	1,174	981	944	639
F	372	401	427	0	201	92
G	2,500	3,500	3,151	2,697	2,891	2,627
H	7,029	7,132	7,168	7,265	7,421	6,789
I				424	934	1,576
J	2,445	2,860	3,241	3,460	3,324	3,039
K	1,500	3,000	3,500	4,000	3,750	3,500
	15,098	18,963	19,397	19,484	20,268	[1] 19,085

[1] Respondent's Exhibit 22-G to -M.

45. The evidence is preponderant that an established outlet, in business for years, with the public confidence, reputation and contacts which that usually connotes, is the best outlet for outboard motors, particularly where, as is usual, such an outlet has trained service mechanics; that it takes from 1 to 3 years or even longer to develop someone new to the outboard business to the point of becoming a satisfactory dealer.

46. From the above evidence of effect on distributors, it is found that respondent's exclusive dealing policy adversely affected its own dealers during some years by curtailing their business potential and deprived them of unlimited choice of brands and that it hampered and prevented distributors of other brands from securing satisfactory outlets by foreclosing many, if not most, of the best outlets to them and directly therefore affected manufacturers of competitive brands in the same way. At the least it was a clog and obstruction in the competitive race for outlets.

47. There is no substantial evidence of any injury to outboard motor retail dealers of brands competitive with respondent's Johnson and Evinrude motors—on the contrary, the evidence is affirmatively the other way and the fact is so found.

48. There is no evidence that the buying public had any difficulty in finding dealers from whom to buy motors manufactured by competitors of respondent, and the fact is so found.

49. In addition to the negative evidence developed by cross-examination, respondent has offered, and due to the language of the remand, there was received, much statistical and other evidence as an "economic" excuse or justification for the sales policy complained of, or as proof that the prescribed effect of that policy does not in fact exist.

50. Thus, respondent has shown, testimonially and by survey, that about 95% of outboard motor dealers prefer to handle only one brand of motor, that less than 5% handle two brands and ½ to 1% handle three or more brands[20] and that this is because the outboard motor market is thin, seasonal, non-necessitous for the most part; that outboard motors require constant service and repair, hence, adequate parts inventory; that parts are not interchangeable between brands; that the outboard motor business is always incidental to other lines of merchandising and is easy and relatively inexpensive to enter; that location is relatively unimportant and credit unnecessary, although there is conflict in the evidence on the latter; that no competitor of respondent requires exclusive dealing from its outlets, hence, single dealing is not imposed by respondent but is a spontaneous and voluntary matter with dealers; and that single dealing is frequent among competitors' dealers also. The evidence as to whether long and specialized training is necessary to become a dealer, whether a good mechanic can service different brands equally efficiently, whether different horsepower ratings of different brands would complement satisfactorily competitive brand lines, is in conflict, which conflict it is not necessary herein to resolve because all this evidence was flatly rejected as a defense by both the Commission and the Court of Appeals in the recent cases of Dictograph Products, Inc., (217 F. 2d 821) and Anchor Serum Company (217 F. 2d 867). Similarly rejected therein were the claims, here made in more muted fashion, that this exclusive dealing was not initiated or imposed by the respondent on the buyer or that such restriction is really for the benefit of the latter.

51. Respondent has also proved, and it is so found, that its Evinrude motor has been known to the public since 1909, its Johnson since 1922; that these motors have been long and favorably known to and sought after by the public; that it has contributed more improvements and "firsts" than any of its competitors; that its motors are among the best, if not the best, on the market; that it makes a wider range of sizes in both lines than most of its competitors; that it maintains

[20] This naturally raises the question: Why have the policy if respondent can secure single dealing from 95% of the dealers without it? The commercial reasons therefor were never satisfactorily explained to this examiner (Tr. 1593–5).

schools for the training of dealers and service personnel at great expense; that it spends more on advertising than any of its competitors, and in some years than all of its competitors did; and that it maintains more salesmen than any of its competitors. This is claimed to show that respondent's often dominant, always substantial, share of the market was not due to its exclusive dealing policy. But the record shows the latter to have been consistently adhered to since respondent's organization. On this record, and from the very nature of the "policy" it is impossible to say that it did not contribute, and contribute strongly, to its position of affluence and economic power in the industry and with its necessarily insulating effect against competition, inevitably contributes to the maintenance of that position.

52. Respondent has proved, and it is so found, that from respondent's incorporation in 1936 to May 15, 1951 79.5% of its Evinrude dealers had had no previous experience before becoming such, and 69.8% of Johnson dealers had likewise had no previous experience in selling outboard motors before becoming dealers. Johnson sent out 3,000 questionnaires to obtain this information and received back 2,215 replies; Evinrude sent out 2,200 questionnaires and received back 1,941 replies. Broken down further, Johnson had 898 replies from dealers who became such prior to World War II, 636 of whom had had no previous experience in selling outboard motors prior to becoming Johnson dealers; 212 had had such experience. Of 1,317 replies from dealers who became such since World War II, 911 had had no previous experience; 406 had had. Comparable data for Evinrude showed of 957 replies of pre-World War II dealers, 792 had had no previous outboard experience but 157 had had; and of 984 replies from post-World War II dealers, 682 had had no previous outboard selling experience but 297 had had. Respondent has also shown, and it is so found, that its dealer turnover between 1941 and May 15, 1951 was 53% for Johnson dealers and 73% for Evinrude dealers. This evidence is claimed by respondent to show that outlets with no previous outboard experience can be developed into dealers, and this is so found also. But that can be no justification for respondent foreclosing experienced and "developed" dealers from its competitors or their distributors. The fact that the latter can go the longer and more expensive route is no answer to the law's evident command that they should have equal competitive opportunity to sell through all dealers, "developed" as well as ignorant. Here they have been walled off from the best outlets and left to persuade and train newcomers.

53. Next, respondent has proved, and it is so found, that a number of manufacturers of outboard motors have entered the industry since respondent's organization in 1936; that as of 1951, these were all still

actively engaged therein; that during this period some of its competitors have increased their business while others have lost ground; therefore, that its sales practices had no actual, and have no potential, effect on competition. This same claim was made, argued and laid to rest in the Dictograph Products, Inc. case, supra. Furthermore, the record shows that in 1946 it cost a capital outlay of $1,500,000 to produce one size motor, the cost being substantially higher now, and $350,000 to add one more size.

54. Respondent has also shown, and it is so found, that its dealers are primarily engaged in a wide range of other pursuits ranging from marine dealers and sporting goods stores to undertakers, optometrists, insurance agents and barbershops. Then, by taking 18 of the most prevalent of these occupations and going to the 1948 U.S. Census for the number of such establishments in the nation, respondent arrives at the figure of 963,551 potential outboard motor dealers prospects as a basis for argument that there are plenty of prospects available to competitors. This argument ignores the fact that outboard business is geographical as well as seasonal; that there are many unprofitable areas for outboard sale in the nation; that it takes from one to three or more years to develop a dealer; that it takes six months to a year to train service mechanics; that respondent has many, if not most, of the best dealers in some localities and that as respondent itself asserts there is a relatively low saturation point for the number of worthwhile outlets. Lastly, this "plenty of business for everyone" argument was likewise interred by the Dictograph decision.

55. All this evidence of economic necessity or justification was ordered received and considered by the remand. It has been so received, considered and is rejected for the reasons stated. In its remand, the Commission did not hold or indicate that any or all of it was necessarily considered as a defense or justification except by the implication arising from ordering it received and considered. There is no Commission opinion since then so holding. On the contrary, since remand, the Commission has sucessfully defended appeals in Dictograph Products, Inc. and Anchor Serum Company, in which much of this same evidence was rejected by it and the two Circuit Courts of Appeals have affirmed. The hearing examiner is of course bound to follow these decisions. To sustain as defenses the evidence summarized in paragraphs 49–54, supra, would, as the Second Circuit said in another connection "quite effectually draw the teeth of Section 3 and of the anti-trust laws generally"[21] and in effect amend it to provide exemption for all those sellers who supply side line products only.

[21] 217 F. 2d 821.

56. The instant case is far stronger than the Dictograph case. Dictograph's sales volume was almost $2,000,000 a year, respondent here in 1950 on Johnson and Evinrude alone sold more than $17,000,000; Dictograph is third largest in its industry, respondent here is the largest, accounting for never less than 33% up to 50% of sales; Dictograph had one-fifth of the prime dealers, respondent had no less than one-third of all dealers. Furthermore, there is here more substantial evidence of inability of respondent's competitors and their distributors to secure adequate outlets because of respondent's "single dealing practice and policy," and some evidence of loss of sales by respondent's competitors.

57. Respondent's counsel argues that the Dictograph case is not in point, because hearing aids are the sole product handled by Dictograph dealers whereas outboard motors are a side line to other businesses. To the hearing examiner this is a distinction without a difference. Hearing aids are a side line to many dealers. The law makes no differentiation in the "goods, wares and merchandise" as to whether they are main or incidental products to a dealer. Lastly, outboard motors are no more of a side line or incidental line than hog cholera serum, nail polish, or salt were to the dealers involved in the following cases:

Anchor Serum v. *F.T.C.*, 217 F. 2d 867.
F.T.C. v. *Revlon Products Corporation*, Docket 5685.
International Salt Co. v. *U.S.*, 332 U.S. 392.

58. The conclusory finding, therefore, is that respondent has, in commerce, sold its outboard motors on the condition, agreement or understanding that the purchasers thereof would not deal in the outboard motors of respondent's competitors and that the effect thereof has been and may be to substantially lessen competition and tend to create a monopoly.

CONCLUSIONS OF LAW

1. Respondent has sold its Johnson and Evinrude outboard motors to purchasers thereof in commerce, for resale, on the condition, agreement or understanding that such purchasers will not deal in outboard motors manufactured and sold by competitors of respondent.

2. Because of such condition, agreement or understanding the great majority of purchasers from respondent have refused to deal in, and in fact have been prevented from dealing in, competitive products.

3. As a result thereof, such purchasers have been deprived of their freedom to deal in all makes of outboard motors. That such purchasers may or do wish to deal in one make of outboard motors only is no

defense. That they must be left free to do so, if they wish, is the primary purpose of Section 3 of the Clayton Act.

4. As a result of this exclusive dealing condition of sale, respondent's competitors and their distributors have been foreclosed from a substantial segment of the best marketing outlets, have been relegated to creating, training and developing inexperienced potential outlets and have thus been hampered and restrained in marketing their products.

5. The number of the best marketing outlets thus foreclosed by respondent constitutes both quantitatively and qualitatively a substantial and important segment of outboard retail distribution.

6. As a result of this exclusive dealing condition of sale, respondent's competitors have suffered loss of sales, which condition will, in all probability, continue if not become more marked.

7. The effect has been and will be to substantially lessen competition between respondent and its competitors, and this exclusive dealing condition of sale has the tendency to create a monopoly in respondent in the sale of such outboard motors.

8. The acts and practices as herein found constitute a violation of the provisions of Section 3 of the Clayton Act (15 U.S.C.A. 14).

ORDER

It is ordered, That the respondent, Outboard Marine and Manufacturing Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offer for sale, sale or distribution of outboard motors for boats, or parts therefor, or other similar or related products in commerce, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or deal in, or sell, outboard motors or parts therefor, or other similar or related 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 such products shall not use or deal in outboard motors or parts therefor, or other similar or related products supplied by any competitor or competitors of respondent.

ON APPEAL FROM INITIAL DECISION

Per Curiam:

We are of the opinion that the issues presented in this matter are basically the same as those previously decided by the Commission in

Maico Company, Inc., Docket 5822; *Dictograph Products, Inc.*, Docket 5655, aff'd, 217 F. 2d 821 (2 Cir. 1954), cert. den., 349 U.S. 940 (1955); *Anchor Serum Company*, Docket 5965, aff'd, 217 F. 2d 867 (7 Cir. 1954); *Harley-Davidson Motor Company*, Docket 5698; *Revlon Products Corp.*, Docket 5685; and *Beltone Company*, Docket 5825. The trial record fully supports a conclusion of probable injury to competition through the foreclosure of competitors from a substantial and highly desirable portion of the outboard motor market.

Upon the basis of our review of the whole record herein, respondent's appeal is denied and the initial decision is adopted as the decision of the Commission.

FINAL ORDER

Respondent, Outboard, Marine & Manufacturing Company, having filed on September 26, 1955, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That respondent, Outboard, Marine & Manufacturing Company, 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 contained in said initial decision.

IN THE MATTER OF

THE YALE AND TOWNE MANUFACTURING COMPANY

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

Docket 6232. Complaint, Sept. 16, 1954—Decision, June 28, 1956

Order dismissing, for lack of reliable evidence to support a desist order, complaint charging one of the nation's largest manufacturers of industrial trucks, with discriminating in price between customers through use of quantity discount plans.

Mr. William H. Smith and *Mr. Brockman Horne* for the Commission.

Milbank, Tweed, Hope & Hadley, of New York City, for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

GRANTING RESPONDENT'S MOTION TO DISMISS

The complaint here charges that by reason of respondent granting single order quantity discounts, and cumulative volume discounts, available to all, on the sale of its industrial lift trucks, respondent has diverted business to itself from competitors who do not grant such discounts, and that there is a reasonable probability that such discounts will so divert business whereby competition in respondent's line of commerce is or may be substantially lessened and hindered and that such discounts have a dangerous tendency to create a monopoly in respondent. Answer admitted the descriptive and jurisdictional facts, the respondent's acts and practices charged, in substance, but denied the effects thereof charged. At the close of proponent's evidence, respondent moved to dismiss for failure to adduce sufficient substantial, reliable, and probative evidence of the results and effects charged as to make out a prima facie case. After argument by contending counsel said motion was granted. Pursuant to the Commission's Rules of Practice and after consideration of proposed findings conclusions submitted by respondent's counsel, the hearing examiner therefor makes the following:

FINDINGS OF FACT

1. Respondent Yale & Towne Manufacturing Company is a corporation, organized, existing and doing business under the laws of Connecticut with its principal office located in the Chrysler Building, New York 17, New York.

2. Many years ago, respondent began the manufacture of materials handling equipment, or industrial trucks used in many industries to move merchandise from place to place on plant property, including warehouses, steel mills, foundries, railroad stations and airports. Some of the smaller models are operated by hand (hand lift trucks) while larger models of greater capacity are powered by gasoline, diesel or electric motors. This equipment is manufactured by respondent at two plants located at Philadelphia, Pennsylvania and Chicago, Illinois.

3. Respondent's industrial trucks are classified into four categories. Two of these are identified as Class "S" and Class "M". Class "S" identified respondent's handlift truck, which contains no motor and is the most inexpensive, that respondent manufactures. Respondent's Class "M" type of truck consists of its "Work Saver Trucks" and "Warehouser Electric Trucks." These are equipped with batteries which will move the truck at about 3 or 4 miles per hour. The other two classes of trucks made by respondent are known as Class "K" and Class "KG" trucks. Class "K" identified the trucks powered by batteries, and Class "KG" are those powered by gas, diesel, and propane.

4. Respondent's industrial trucks differ widely as to specifications and price. For example, respondent's small hand lift truck with a capacity of about 1000 pounds may be purchased for approximately $300.00; whereas respondent's large electric models with capacities ranging up to 100,000 pounds are in a price range from $4,000.00 to over $61,000.00 each.

5. Respondent sells its industrial trucks for use and not for resale both through its branch office salesmen and through independent sales representatives to a large variety of purchasers, principally to large manufacturing plants, steel manufacturers, automobile makers, railroad companies, and other large concerns desiring equipment to move material or merchandise upon their own premises.

Respondent is one of the largest manufacturers of industrial trucks in the United States and has secured for itself a large portion of the total available market. Respondent's 1953 sales of industrial trucks from its Philadelphia, Pennsylvania factory were more than substantial and from the Chicago, Illinois factory of its wholly owned subsidiary, or division, were $15,000,000.00.

6. In the course and conduct of its business, respondent engaged in commerce as "commerce" is defined in the Clayton Act having sold and shipped its products manufactured by it at its said factories located in the States of Pennsylvania and Illinois, and caused the same to be transported from said states to purchasers located in other States of the United States and in other places under the jurisdiction

of the United States. Respondent also sold substantial quantities of its products to purchasers located in the States of Pennsylvania and Illinois.

7. On August 1, 1950, following its discontinuance during World War II, respondent resumed the practice of granting quantity discounts to its customers. Such discounts are now in effect and apply to purchases of respondent's Class "S," "M," "K," and "KG" industrial trucks.

Such quantity discounts granted by respondent are both single order (Schedule A) and cumulative (Schedule B). Single order quantity discounts are as follows, to wit:

Amount of discount	Applicable to a purchase of class "S" and/or class "M" equipment	Applicable to a purchase of class "K" and/or class "KG" equipment
Percent:		
0	Up to $5,000	Up to $5,000.
1	$5,000 to $10,000	$5,001 to $10,000.
2	$10,001 to $15,000	$10,001 to $20,000.
3	$15,001 to $20,000	$20,001 to $30,000.
4	$20,001 to $25,000	$30,001 to $40,000.
5	Over $25,000	Over $40,000.

In accordance with the above Schedule A, purchasers are entitled to quantity discounts based on the total price of all such classes or product (Classes "S" and "M") purchased on any order or group of orders bearing the same date and thereafter shipped, provided that the number and type of units and the dates for shipment, are specified on such order or group of orders. Such discounts are stated on the original invoices, and are deducted from the purchase price of all trucks actually shipped.

Quantity discounts under Schedule B in effect since 1950 apply to the cumulative total of the shipments of such classes of product upon orders received from the purchaser during each 12-month period (ending December 31st of each year, or on such other date as may be the end of the purchaser's regular contract year with the company), excluding, however, all shipments upon which Schedule A discounts shall have been allowed, as provided. Schedule B discounts do not appear on the original invoices, but are rebated in a lump sum after the close of such year. Under both Schedules A and B, purchases of Classes "S" and "M" trucks may be combined to secure maximum discounts. Purchasers are required to indicate on their purchase orders whether Class A or B discount applies.

Respondent's cumulative quantity discounts are as follows:

Amount of discount	Applicable to purchases of class "S" and/or class "M" equipment	Applicable to purchases of class "K" and/or class "KG" equipment
Percent:		
----	Up to $5,000	Up to $5,000.
½	$5,000 to $10,000	$5,001 to $10,000.
1	$10,001 to $15,000	$10,001 to $20,000.
2	$15,001 to $20,000	$20,001 to $30,000.
3	$20,001 to $25,000	$30,001 to $40,000.
4	$25,001 to $30,000	$40,001 to $50,000.
5	Over $30,000	Over $50,000.

With the exception that the percentages of discounts granted and amounts upon which computed as to purchases of Class "K" and Class "KG" trucks are in some respects different from the allowances applicable to Class "S" and Class "M" trucks, in all other respects the requirements and conditions for receiving them as hereinbefore stated as applicable to Class "S" and Class "M" trucks are the same.

8. The record abundantly shows that these discounts were granted, and that the rebates by separate credit memorandum made annually by respondent to those entitled thereto under Schedule B, supra were substantial in many instances, and necessarily resulted in a lower net acquisition cost to the purchaser than the cost to a purchaser buying in quantities not entitling him to any discount.

9. Although respondent in its answer has admitted that it is in competition with other manufacturers of industrial lift trucks, and the record so shows, nevertheless respondent's counsel in the cross-examination of the officials of five of these competitors has brought out that the various models of their trucks and its trucks are not identical, that their features differ in some respects, that the specifications and engineering differ. This however, does not conclusively establish that two given products do not compete for purchase. The best evidence of whether both strive for the same purchaser's dollar comes from the man with that dollar—if he is interested in both for a given job of work, if he weighs one against the other for its function, then they are competitive. Such evidence is not in this record but the fact that such evidence is the best evidence does not mean it is the only acceptable evidence. Here respondent's competitors have each designated certain models of theirs and certain models of respondent's which they testified were comparable in function and performance and therefore competitive. While this is of course opinion, it is nevertheless based on years of endeavoring to sell against respondent's equipment and is of sufficient weight at this stage of the case at least to warrant a finding, here made, that respondent's prod-

ucts do directly compete with designated products of other manufacturers.

10. To sustain the charge of actual or potential diversion of trade and its effect, counsel offered evidence from five of respondent's competitors, a responsible official of each testifying plus a salesman of each two of them. Since this is the focal point of attack for insufficiency and the nub of this decision it is felt this testimony whose quality, weight and credibility are in direct dispute should be outlined.

11. George Raymond, 33, president of the Raymond Company, Greene, New York, with that company since 1946 as sales manager, then vice president, and recently president, testified that it began the manufacture and sale of hand lift trucks in 1930 and entered the electric truck field in 1950, was competitive with respondent on a limited number of models of the latter as well as with 15–18 other manufacturers of material moving equipment, that the Raymond Company ranks fourth out of 10 or 20 manufacturers of electrical trucks and sells between 5% and 10% in that field; entirely through independent manufacturers representatives, generally at list price without discounts, except single order quantity discounts, and for one year a cumulative volume discount to one customer of 1% on $16,723.00 which he testified was necessary to get that business. He further testified that his selling agents had complained to him repeatedly over the fact that he did not give cumulative discounts and "it has been a considerable problem to us to keep the sales force satisfied for the past five years against facing a discount policy and not having one ourselves," and that respondent's discount policy makes a very difficult selling job to the Raymond Company. But he admitted that between January 1, 1950, and December 31, 1954, his business had increased 300%, 75% of which was in electric trucks in the sale of which he is most competitive with respondent. He gave as his opinion, nevertheless, that it is difficult for him to compete against respondent, and that the latter's cumulative discount policy tends to tie business to it. Although he said he knew of his own knowledge generally that he had lost sales to respondent, he admitted on cross-examination that he had likewise taken sales away from respondent, that it was a day to day occurrence to both lose and gain orders as against respondent as well as other competitors, that he had sold to purchasers who were using respondent's equipment, that his prices were generally higher than respondents' and generally higher than those of his other competitors, some of whom give cumulative discounts, and some of whom, do not. He also, admitted that his salesmen were chronic complainers, that they and he had frequently discussed putting in a discount policy, the last time being immediately

before this proceeding started, that if respondent were ordered to cease giving its cumulative discounts in this proceeding he would not adopt such a policy, otherwise he would. Further he admitted that he had had no trouble selling his equipment to large volume purchasers against respondent's competition, although his company does not make or offer the wide range of equipment which respondent does, but more or less specializes; that his equipment is not identical with respondent's, the differences therefrom being stressed as selling points, and that all other factors—engineering, quality, performance, service, parts, etc.—must be equal or nearly equal before price becomes the prime consideration in purchasing. Finally he said his salesmen were interested in a discount policy more as a selling argument rather than in any lower acquisition cost to the purchaser.

12. A salesman for national accounts of the Raymond Company testified that he had sold two Raymond trucks to Loblaw Groceterias, that when he went back to sell another one he was told by the warehouse manager that Raymond's product was better and he could have the business if he would meet the price of competition, and that he had never been able to sell Loblaw since; that respondent had a "much lower price than we were ever able to think about meeting if we had a discount schedule which we do not have." This was in the summer of 1953. The witness did not see Loblaw's purchasing agent, was unable to fix the times of subsequent visits or attempts to sell and was unable to point out in respondent's tremendous catalog the trucks which he indicated Loblaw bought in preference to Raymond's. Hence price comparisons are impossible as well as any other comparison of function, engineering, etc. which might have influenced or determined the purchase. Cross-examination also developed that Loblaw had complained about breakdowns and functional defects in the two Raymond trucks previously purchased and that considerable repair and adjustment had been necessary. Further, respondent's discounts could not have been a factor in the loss of sales, because he admitted Raymond could not have met the price, even with a discount schedule. This testimony is given but little weight by the hearing examiner, not only because of its vagueness on vital points but because the witness impressed the hearing examiner as carrying his selling onto the witness stand and seeking to make a point, rather than objectively telling the facts—all the facts.

13. O. M. Lund, Vice President and Secretary of Barrett Cravens Company, 21 years in the materials handling equipment business 15 of which were spent in connection with sales, testified that that company has manufactured hand lift trucks since 1914 and got into the electric truck business in 1951 through the acquisition in that year

of the Crescent Truck Company; that his company sells exclusively through manufacturers' representatives on a national basis mostly to small volume purchasers without benefit of discounts; that his company was third in size in the hand lift truck business but being relatively new in the electric truck end was but a small factor in that branch of the industry and that the respondent was a competitor of his company on both hand lift and electric trucks. He gave it as his opinion that a large buyer would benefit more from a cumulative discount than a small purchaser, that such discounts did not bother his company until it got into the electrical equipment field; that such discounts do have a bearing on the placement of business as an additional incentive to the customer. "To get the order you have to offer the same thing"—cumulative discount. He stated that single order quantity discount is not difficult to compete with and had no effect on his company's business. It is not clear from the record whether or not his company gave them although some of his testimony seems to so indicate. He further testified that his salesmen tell him of loss of orders because of cumulative discounts offered by competitors; that purchasers switch to competitive equipment especially if buying in the fourth quarter of the year because they get additional discount from the same source even though the prices quoted may be the same.

14. On cross-examination he stated that his trucks are not identical with respondent's, that they are of different design and construction although they perform the same functions; that the majority of business in Chicago produce market went to his company up to five years ago and that Barrett Cravens had most of the bottling industry but lost it. Both losses were to power equipment rather than to hand lift competitors. He testified that purchasers buy his product on the basis of price without regard to quality but nevertheless gave as his opinion that if he were a purchasing agent quality would be his first consideration and price his second even though he also stated that if he were purchaser a cumulative discount would influence him in buying. He further testified on cross-examination that there is a tendency to replace electric equipment with trucks from the same manufacturer because of the parts and maintenance problem but that this tendency was not present in hand lift trucks and that the Crescent subsidiary has gone backwards since its acquisition in 1951 although the parent company's asset position has grown. This retrogression is principally due to moving and consolidating three plants into one and also partly due to the fact that Crescent trucks were too heavy for floor load which gave rise to a great many complaints and a good deal of difficulty, that engineering changes have been made but that these difficulties have not yet been overcome "by a long shot." Another reason

for the retrogression was that Barrett Cravens inherited a great many special orders that Crescent had when acquired, and that these have not as yet all been filled and that Barrett Cravens had made substantial changes which have not as yet produced results. As to what he had heard of the effect of cumulative discounts he could name but one salesman in Columbus, Ohio, who told him he lost the sale of an Elwell-Parker lifter to an unknown competitor because a cumulative discount offered by that competitor had a "bearing" on losing the sale. He stated he had such conversations with other salesmen but did not remember when, with whom, or what competitors were involved. He admitted that his company had sold large accounts such as Grand Union and Revere Electric Company in competition with respondent and with other competitors who give cumulative discount and still does so with fair regularity. He did not think that a $300 price difference greater on his truck than on respondent's comparable product prevented competition between the two or that it was too hard to overcome because of other features present in his company's truck but he could not state what those features were. When Crescent was acquired it had a discount system which was subsequently discontinued but he did not know what sort of discount system it was. He stated that the industry is characterized by active, good and healthy competition and "we enjoy working against them and with them." He stated he had no quarrel with his competitors and the reason his salesmen concentrate on small purchasers is because there are not so many people to convince.

15. L. C. Daniels, Vice President, Buda Division of Allis Chalmers Manufacturing Company, testified that Buda was organized in 1881 to manufacture railroad equipment; in 1897 started making gas and gasoline engines in 1927 Diesel; in 1948 began making hand lift trucks for railway car loading; and in 1947-48 acquired two companies which were making small fork lift trucks. In 1950 he came to Buda from Towmotor where he was chief engineer; that at Buda he found a 2,000-pound fork lift truck and immediately began redesigning it and a new line of fork lift gas-powered trucks. Allis Chalmers acquired Buda as a division November 1, 1953, Buda sells to distributors who in turn resell to users on 20% margin and at a suggested resale price which Buda attempts to maintain by threats to revoke the distributorship. Buda makes neither hand lift nor electric equipment. He gave as his opinion that a schedule B discount "would certainly give you a very good leverage on the company to continue buying equipment over a period of years knowing that if you buy over $50,000 worth of merchandise they would get a 5% discount" and the "only way we or anybody else could compete with

this practice is to have an equivalent schedule or give the 5% to start with" or a lower list price, if the purchaser is buying on price only which they frequently do.

16. On cross-examination the witness admitted that Buda's business since he went with them in 1950 has shown a steady upward growth which was tremendous percentagewise and very "unusual" and that he could not point to any sale which Buda had lost to the respondent on a price basis; that quality and engineering are primary considerations rather than price, that his distributors may in effect give indirect discounts by reason of trade-in allowances and that they frequently do so, that his company's trucks are not identical with those of respondents or his other competitors and that the different features are selling points. He further stated that Buda has some accounts to which it sells exclusively, just as the respondent does, and that there are accounts that buy from both and that not infrequently Buda does sell to purchasers who also buy from the respondent in sufficient volume to entitle them to the respondent's cumulative discount and notwithstanding such discounts. He further stated that purchasing agents will tell you anything as to why they did not buy and that it is therefore impossible to say why business is lost. He further testified that he sold to many large purchasing firms who were respondent's customers in spite of respondent's cumulative discount; that the Ford Motor Company was one of respondent's customers for years but that he got into that company with his products and that he is continually making inroads into accounts which formerly bought either from respondent or from other competitors. He thinks this is because he makes a better product. Lastly, he stated that the competition in the industry is very active and very keen, that he saw no lessening of competition therein, that it is more active than in 1953 or prior years, that this may be due to current prosperity or it may be due to the fact that the motor lift truck industry is only 15 or 18 years in substantial volume and is constantly expanding.

17. P. K. McCullough, Vice President in charge of sales, Mercury Manufacturing Company, testified that that company had been manufacturing material handling equipment for 45 years, that he had been with the company 22 years, that they make battery electric fork lift industrial trucks as well as tractors and trailers, that the electric trucks account for 30% of its business and it is merely upon these that he competes through manufacturers' agents and directly through the company's sales organization with the respondent; that his electric truck business is about 4% of the entire industry; that his company has granted discounts to meet competition to offset transportation allowances and to match trade-in allowances; that Mercury had a cumulative

discount system 20 years prior to 1940 and then discontinued until 1953 when it was reinstated with six customers only and on battery electric trucks only. These were national accounts and the schedule remained in effect for only one year, it being adopted to make sales because of competition and at the end of the year discontinued because of the accounting problems involved and because it had no effect on sales. It was replaced by order discounts wherever the company felt it necessary to do so; that there was no pattern to these discounts each one being a matter of individual negotiation, that the cumulative discount schedule of these six customers was identical with respondent's schedule B but that it was not given to meet any definite competition. "We had no definite feeling at that time that we were going to be written out of a customer's picture by virtue of not being allowed discount." He gave it as his opinion that a 5% cumulative discount is an influencing factor when all other factors have been considered. While the cumulative discount was in effect for the one year with these six customers his company neither gained nor lost business.

18. On cross-examination he stated that competition was keen in the industry, that respondent's discount schedules have no measurable effect on his business, that he did not believe that they had affected his company at all; he could not name a single sale which had been lost to respondent or any other competitor where the discount was the deciding factor; that quality, service, and delivery were the primary factors in influencing purchases, that the differing features of various trucks were their selling points; that his company's products were not identical with those of any other competitor, that he had no trouble in selling Alcoa from $10,000 to $15,000 a year's worth of business over a 10-year period without any discount granted whatsoever and he had no idea why they bought his products, and that one of the trucks they bought listed at $6,600 whereas the respondent's comparable truck listed at $6,110.

19. William E. Ripley, formerly Assistant Sales Manager, Towmotor Corporation, testified that his primary concern between 1951 and Oct. 1, 1954, was contacts with the national accounts likely to purchase trucks, a national account being a company with a number of plants throughout the country and home offices located either in New York or Chicago. Towmotor's major competitors were respondent and Clark Equipment Company and the decisive factors influencing the purchase of these trucks is the basic design of the equipment, the engineering, the utility, maintenance, service and price. The Towmotor Corporation built its first gasoline fork lift truck in 1943 and has been making them ever since. Price is a very prominent

factor when purchase is by national accounts because the purchasing office is away from the plant and the purchasing officer does not have first hand contact with the equipment and is primarily interested in price and, in his opinion, respondent's discount schedule B definitely tends to divert business from Towmotor and his basis therefore was conversations he had either with the buyer or the purchasing agents of five very large purchasers. The buyer for Continental Can Corporation told him that Towmotor at one time received in excess of 80% of Continental Can's gasoline truck business but that they had decreased to less than 10% and that Towmotor had better get on the ball and join the band wagon and match this competitive deal if it expected to get back to the position it once held with Continental Can and that by competitive deal he meant a cumulative discount schedule. He further testified that he called upon the purchasing agent of American Car & Foundry for the purpose of selling them Towmotor trucks and was told that if Towmotor hadn't changed its policy the purchasing agent could not do anything for them, by which he meant that he was getting a cumulative quantity discount from a number of competitors, among them respondent, because he was shown some of these discount agreements, among them respondent's; that he was told that Towmotor could not hope to sell American Car & Foundry any equipment unless it met these competitive discount schedules. At the Robert Ghair Company he was told by a buyer in the purchasing office that the company had a discount agreement with the respondent, that they had lately received a rebate from them and as a result, the buyer was inclined to influence various plant managers to specify respondent's equipment in order to increase volume and thereby increase discount; that this company had formerly bought Towmotor trucks, that he was able thereafter to sell them some equipment but only in those instances where the local plant still insisted upon having Towmotor equipment. He further testified that the purchasing agent of United States Plywood Corporation stated that there was no reason why they should consider Towmotor equipment inasmuch as they were receiving the full 5% discount from respondent. This, however, was taken off the face of the invoices and was not a cumulative discount. As a result Towmotor could not sell United States Plywood any more equipment. He likewise spoke to the purchasing agent of the Union Carbide & Carbon Company and was told in effect that if Towmotor did not see fit to adopt a discount policy similar to that which was being offered to them by other manufacturers, including respondent, that Towmotor had very little hope of selling Union Carbide & Carbon but the witness did not know the circumstances. He further testified that all these companies had

Towmotor trucks in considerable quantity in their service and that he never heard any complaint from them regarding their performance or specifications or otherwise.

20. On cross-examination this witness testified that since leaving Towmotor he has been vice president of Erie Equipment Company which is the Towmotor sales representative for the Cleveland territory and that his compensation as such is the same as all other representatives—12½% commission off list; that he made no written reports of his conversations with the purchasing officials of the five companies testified about; that Towmotor gave no discounts in 1953 or 1954 but its sales representatives gave trade-in allowances and Towmotor has on occasion absorbed freight; that trade-in allowances frequently exceed what competitors would allow but that this is strictly the profit or loss of the sales representative. He further testified that Continental Can Company was buying gas trucks from the respondent and Clark Equipment Company; that the man he talked to there did not mention either one but the witness assumed he meant them. Respondent and Clark Equipment Company were mentioned as his competitors by the American Car & Foundry purchasing agent; that that company did not buy from Towmotor in 1952, 1953, or 1954, Continental Company did in 1951–52–53–54, that he was shown discount agreements from five firms by the Continental Company purchasing official. Further he testified that the Ghair Company bought from Towmotor in 1951 through 1954 although they were using respondent's trucks and buying from them then also; that United States Plywood bought nothing from Towmotor during these years although he thought he had seen respondent's equipment being used at their Chicago plant; that he was sure that Union Carbide bought from his competitors but did not know from which one; that Towmotor sold to Union Carbide in 1951 but not to his knowledge in 1952 or 1953 and that he did not know about 1954. Further he testified that when these five separate conversations occurred he was not working on any order but was doing missionary work and called to see why Towmotor was not getting more business. He could not name a single order which Towmotor had lost to respondent because of the latter's discount and his cross-examination revealed that he had practically no knowledge of the engineering features of competitive equipment. Towmotor makes only gasoline equipment, no elcctric trucks, except one small insignificant model. He further testified that Towmotor placed business in 1953 against Buda, Hyster, Clark and respondent, that each of these all got business in competition with Towmotor and that Towmotor got business in competition with them in 1953 and 1954 that all of them with the exception of Buda gave

cumulative quantity discounts; that 85% of Towmotor's sales were direct to the consumer, 15% being to its sales representatives, that on the latter he understood Towmotor gave discounts. He testified that he knew Towmotor was competitively priced but he did not know the competitive prices and had never reviewed them, the basis being what someone told him.

21. Robert Fairbanks, Sales Manager of Towmotor from 1951 to the time of testifying gave it as his opinion that "I believe that the cumulative discount plan of Yale very definitely tends to and does divert business from Towmotor and other competitors who do not have a similar policy." He further testified that the decisive factors in selling were quality of engineering, workmanship and material, service, sales contacts, design, price and safety factors; that Towmotor began the manufacture of fork lift trucks in 1933 and respondent began it in 1949. He further testified that Owens Illinois Glass Company had for many years been an important customer of Towmotor, that he got reports from sales representatives located where Owens Illinois plants were situated, that Towmotor was not going to remain a supplier of Owens very much longer unless it met the cumulative discount plan of respondent and that in January 1953 he went out with a Towmotor Vice President to visit the executive vice president of Owens at Toledo to see whether or not it really was a threat. The visitors were referred to the purchasing agent who told them that the fact that Towmotor did not have a cumulative discount program was very damaging and that Towmotor was not on Owens home office list for supplies but that if Owens' plant manager wanted particular equipment, the purchasing agent would not overrule them and he was shown respondent's agreement and schedule. He further added "we were put on guard by them that we were going to have a tough row to sell equipment into their plant unless we had a similar program." Towmotor has continued to sell Owens Illinois Glass but also buys from other competitors including respondent and he thought the reason that Towmotor had maintained the business so far was that it products had preference in the plants. He stated Towmotor's net sales in 1953 to be $19,896,200 and in 1954 to be $16,264,843 and further testified that his market position had dropped 25% in 1954 over 1953. This was an estimate based on total industry figures taken from the industrial truck associations' reports.

22. On cross-examination it developed, however, that these industrial figures did not include in some years certain competitors; that deductions were made for what was considered to be non-competitive products so that they cannot be said to be complete or accurate or comparable in some respects. The witness refused to give exact figures

but stuck to percentages. He admitted competitors' sales also decreased in 1954 but how much is not shown. Towmotor's annual report to the stockholders shows net profit in 1954 of 4.9 of sales as against 4.0 of sales in 1953. Cross-examination further revealed that the witness did not know the engineering or performance features of his competitors' products such as drive front axle, trailing axle, engine capacity, engine feed, gas tank location, sliding channels or anticavitation valves in the tilt cylinders, nor did he know whether or not parts were interchangable between gasoline and electric trucks made by the same manufacturer. He admitted that Towmotor's president had put out reports that Towmotor was gaining a more substantial place in the industry and further stated that competition was active in 1953 in the industry as a whole and presently, and that it was on the increase and that he knew no member in that industry who was obtaining a monopolistic position. He further admitted Towmotor has 95% of the business of several national accounts, 50% of the business of approximately 100 national accounts and he was unable to name a single instance where a respondent's truck was bought as against a Towmotor truck where the deciding factor was the discount schedule of respondent. His testimony that Towmotor's business declined in 1954 over 1953 or 1952 was not meant to state that it was declining now. On redirect examination he gave it as his opinion that respondent's cumulative discount has a tying effect on business in favor of respondent and he estimates that Owens Illinois Glass has 20 plants and that Towmotor had shipped to six or seven of them in 1953 and 1954. He further stated that the total units sold by Towmotor in 1953 was 3,737 and in 1954 was 2,685. He was unable to point to a single sale lost to respondent because of respondent's discounts. In 1954, Towmotor Corporation moved into a new larger plant with some dislocation of function resulting.

23. The cross-examination of the last two witnesses, in the greater detail as shown by the transcript, than above summarized, and their attitude under it, detracts greatly from its weight and raises a serious question of credibility on one or two points. Their opinions that respondent's cumulative discounts diverted or probably would divert business are seriously undermined by the striking ignorance which both displayed about engineering features of competitive trucks, when both admitted that quality of engineering, design, etc. were decisive factors in influencing purchases. Price alone cannot be pilloried as a sole cause, when ignorance of other admittedly determinative factors is so amply demonstrated. This testimony was far from being wholly dispassionate and objective—both men were obviously interested witnesses to the point of impressing the examiner that stopping respond-

ent's cumulative discounts had become a private objective and policy of their employer, in strong contrast to the frank and disinterested attitude of the officials of Raymond Company, Buda or the Mercury Company, for example. Furthermore, there were frequent retreats behind "I don't remember" or "I don't have the basic figures" available when conclusions and sweeping statements made on direct examination were sought to be probed.

24. The above summarized evidence adduced to support the charge of actual or reasonably probable diversion of substantial business to respondent from its non-discount granting competitors, allegedly resulting in a substantial lessening of competition in respondent's line of commerce falls into two rough categories in the main—opinion and hearsay. The opinions have three principal facets—first, that if the witness were a purchaser, respondent's cumulative discount plan would influence him to buy from the grantor, if all other considerations were equal, second, that that respondent's discounts tend to tie business to the grantor by offering a progressively lower net cost of acquisition for centralizing volume in respondent, and third, that such a discount makes it difficult to compete with respondent without offering a similar cumulative volume discount. The latter was expressed in variant ways "difficult to keep the sales force satisfied," giving a "leverage" to respondent's sales efforts, having a "bearing" on the placement of business, "tend to and does divert business" to respondent.

25. Opinions, or "informed business judgments" of necessity depend for their validity or weight, upon the record facts from which they are deduced, and cannot prevail if these facts lead irresistibly or more reasonably to an opposite conclusion. In the first group above, salesmen speculated as to the effect on them, if they were purchasers, of respondent's cumulative discount, with no showing of any prior experience by them of purchasing functions, either generally or specifically. Their conclusion that they would be affirmatively influenced thereby to buy from respondent, is considerably diluted by the qualification "when all other factors have been considered" in view of the testimony of most of these competitors of respondent, that engineering, design, and performance are major considerations and price secondary; and the record's reflection that rarely if at all in this industry, are all other factors equal. No purchaser or purchasing agent was called as a witness to give evidence on this point from the best and most authoritative source. These speculations are further invalidated by the preponderant evidence from the same witnesses that they have never lost a specified sale to respondent where respondent's cumulative discount was the deciding factor and by other evi-

dence of the steady and even luxuriant sales growth of their employers.

26. The second phase of this opinion evidence—the tying effect of a cumulative discount, is, of course, inferable from its very nature, but the facts in this industry, at this time at least, are contradictory. These competitors of respondent admitted that it is a day to day occurrence for them to sell against respondent to large volume purchasers who had bought and were buying from respondent, under its discount plan, and, in the case of national accounts, even though the home office purchasing department might want to channel purchases for cumulation, the plant managers prevailed in their choice of other equipment, again demonstrating that price is secondary or even tertiary to performance and engineering. There is further credible evidence that some of respondent's competitors, giving no discounts, have broken into large volume buyers, such as Ford Motor Company, where respondent, or some other discount granting manufacturer, had been previously established as its supplier.

27. The last class of opinions—competitive handicap—are likewise invalidated, in this examiner's opinion—by the record facts of this highly specialized industry. Two of these five competitors of respondent were new entrants into the field—Raymond Company into the electric truck field in 1950, Buda with a line of gasoline fork lift tractors of entirely new design and "starting from scratch" therewith in the same year. In the four succeeding years, Raymond's sales increased 300%, 75% of which increase was on electric trucks with which it is most competitive with respondent. Buda's increase was a steady and most unusual growth—a "tremendous percentage." The examiner is unable to believe, as asserted by counsel for the complaint, that inflation, "Eisenhower prosperity," or boom times does or can account for more than a minor portion of such a precipitous gain. In fact, Raymond's president denied that as a cause. Such dramatic performances do not bespeak stagnant or withering competition but rather what every witness, who was asked, testified to, that competition was keen, active, and vigorous and increasing. Neither of these firms had any trouble selling large volume purchasers, and had made substantial inroads and entrees into accounts, where respondent or other manufacturers with similar cumulative discount plans to respondent's, had been firmly established for years. Both also sold to other accounts—to purchasers who buy in sufficient volume to entitle them to respondent's discounts, some of them buying exclusively, or nearly exclusively from these two firms.

28. One of respondent's smallest competitors—Mercury Manufacturing Company—could see no measurable effect on its business by respondent's discounts, and did not believe they affected Mercury at

all. A fourth competitor, Barrett-Cravens Company, got into the electric truck business 1951 through the acquisition of a subsidiary, which subsidiary had lost sales ground since then, but this retrogression was principally due to moving and consolidating three plants into one, engineering difficulties and redesigning, and other reasons unconnected with respondent's discount policy. Its vice president characterized competition in the industry as active, good and healthy and "we enjoy working against them and with them."

29. The opinions of the former and present sales officials of the fifth competitor testimonially represented in this proceeding—Towmotor Corporation—are the only ones directly supported, in part at least, by factual, as distinguished from hearsay evidence, discussed below—Towmotor's sales dollarwise declined from 19 million in 1953 to 16 million in 1954 and unitwise from 3,737 to 2,685. There is no showing, however, as to where this business went. The sales of many others in this business went down also in these years but to what extent is not shown. The estimate of market position decline of 25% was based on unknown totals, deductions and comparisons, shown by cross-examination to be too uncertain to be relied on. On the other hand the sales manager was of the opinion that competition in the industry was active and on the increase and stated that he knew of no member thereof who was obtaining a monopolistic position therein. He was unable to name any sale lost to respondent where the latter's discount decided the sale. The ex-salesman likewise admitted that Towmotor secured business from discount givers as well as from nongrantors—how much not being shown.

30. This brings us to the question of hearsay evidence—the opinion of the last two witnesses being largely based on their relation of what they had been told by the purchasing officials of six large volume purchasers—namely, that without a cumulative discount schedule such as respondent's, Towmotor could not hope for future orders. With three of these Towmotor was thereafter unable to sell to the best of the witnesses' knowledge. In the case of the other three, sales continued but in what volume is not shown. There is also hearsay from Raymond's salesmen as to the reason for his losing the sale of three Raymond trucks to respondent, although he was unable to identify what trucks.

31. The hearing examiner is bound by statute [5 U.S. 1007 (c)], as is the Commission, to decide this proceeding only upon reliable, substantial, and probative evidence. The former does not believe this hearsay meets that test for several reasons. The record here shows that purchasing officials will, and do, tell salesmen anything, as to why they did not buy and it is therefore impossible to say why business is lost. The record further shows that salesmen in this industry

are chronic complainers and give alibis for lost sales as a matter of course. Furthermore, cross-examination seriously detracted from the general weight (as distinguished from the fact, that it is hearsay) to be accorded the testimony of these two witnesses and the credibility of the first two, as hereinabove pointed out. Moreover, not a single purchasing official was called as a witness although obviously his testimony would be the best evidence and no explanation appears of record for this failure, except the reply of counsel in support of the complaint to an inquiry from the examiner on this point. It was his statement that no purchaser wanted this discount stopped because of self interest from which the examiner can only infer that either they would not testify or else would give adverse evidence. Whether this is simply surmise or a deduction on counsel's part or whether it is based on actual experience or knowledge, counsel did not state. Nor is there any showing of the non-availability of the men whose purported statements were related, except the death of one. The fact remains that "the absence of the primary evidence raises a presumption, that if produced, it would give a complexion to the case at least unfavorable, if not directly adverse."[1] "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."[2] Commission counsel in many other cases[3] under the same section of the law for many years past have consistently, vociferously and successfully objected to salesmen of a respondent relating what they were told by purchasing officials about being able to buy more cheaply from named competitors, in support of the "meeting competition defense." There is no basic difference between the one type of hearsay and the other—in both the source is the same, the relator is the same type of employee and the witness in each situation interested in the outcome of the case. What is sauce for the goose should be sauce for the gander and the Bureau of Litigation of this Commission cannot blow both hot and cold on the same subject.

32. The record shows the list prices on products of Raymond, Barrett-Cravens, Mercury, and Towmotor compared with list prices on respondent's comparable products—or at least those testified to be comparable and competitive by officials of these companies. Many of them are considerably greater or less per unit than the maximum 5% which respondent allows on purchases of $50,000.000 yet sales are constantly being made thereof. Furthermore, the testimony is that the differential between $4,200.00 for a competitive truck as against $3,815.00 for respondent's truck "is not too bad to overcome." Other differentials run as high as $500.00 in favor of respondent's products.

[1] *Clifton* v. *U. S.*, 4 How 242.
[2] *Interstate Circuit* v. *U. S.*, 306 U. S. 208.
[3] The most recent of these D. 5770, E. Edelmann Co., and D. 5768, C. E. Niehoff Co.

33. There is no evidence whatever that respondent's single order discount (Schedule A) had any of the effects alleged or that it was reasonably probable or possible that it would, in fact the only evidence as to it was that it had no effect whatever and was not a competitive factor.

34. The outstanding and largely determinative factor in this price discrimination proceeding is that in this industry price is not the prime nor determinative factor in the great majority of sales.

Finally, applying to this situation various tests or criteria suggested by writers, or economists and in some instances recognized in court decisions, this record affirmatively shows that in this industry in the years in question there has been ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity and flexibility of market and of competition therein. The evidence is unanimous that competition in this industry in respondent's line of commerce is active, keen, healthy and increasing, and the fact is so found.

It is believed that the underlying theory and principles of *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.*, 191 F. 2d 786; the Sparkplug decisions—Dockets 3977, 5624, and 5620; the General Foods dismissal, Docket 5675; the Purex Corporation, Docket 6008 support the above conclusions.

35. Although not so stating in so many words, counsel in support of the complaint, in his oral argument on this motion to dismiss, seemed to contend that a cumulative volume discount conclusively presumes the alleged tendency to divert business, substantial lessening of competition and tendency toward monopoly. Looking at such a discount plan in a vacuum, without regard to any particular industry such a presumption is easily inferable but the commercial facts of life revealed by the record as to this industry show the fallacy and the danger of such a mechanistic interpretation. There may be industries or even lines of commerce, perhaps in fungible goods, for example where such a conclusive presumption may safety be indulged in to the public good but this is not one of them. The law does not so provide, although it would have been easy for Congress to have flatly and unequivocally forbid cumulative volume discounts, nor does the legislative history of the law hint at such a legislative intention. No case so holds, either court or Commission. Indeed, recent opinions of the Commission indicate a rejection of such an automatic disposition of this type of proceeding. If this be counsel's position, it is rejected.

CONCLUSIONS

There is insufficient reliable, substantial and probative evidence to show that "respondent's discriminations in price * * * in many instances in the past, have been enough to divert, and have diverted substantial business from respondent's competitors to respondent, and are enough to divert substantial business from respondent's competitors in the future; and, therefor * * * there is a reasonable probability that the effect of * * * may be substantially to lessen competition in the lines of commerce in which respondent is engaged" or that "said practices of respondent also have a dangerous tendency unduly to hinder competition and create a monopoly respecting effects not only as to respondent's existing competitors, but also as to respondent's potential competitors."

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

After the reception of evidence in support of the case-in-chief was closed, the hearing examiner filed an initial decision granting the respondent's motion to dismiss the complaint under which this proceeding was instituted. That decision holds that the evidence has failed to establish that the differing prices under which respondent has sold its industrial trucks to users have constituted price discriminations within the category of those rendered unlawful under subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The decision below, accordingly, provides for dismissal of this proceeding and counsel supporting the complaint has appealed.

The respondent is one of this country's largest manufacturers of industrial trucks, which is the term used in the hearings to designate equipment for moving materials and merchandise from place to place in and about plants, warehouses, mills and railroad stations. They range from small models operated by hand up to large capacity trucks powered by batteries, gas or other means, and vary in price from approximately $300 each up to $61,000. The company's equipment is sold through its branch office salesmen and through independent sales representatives. The manufacturing plants and other concerns which are respondent's customers do not buy the trucks for resale but for their own use.

Respondent's equipment is offered at list prices and its purchasers have been accorded applicable discounts or rebates provided under two

discount plans designated Schedule A and Schedule B. The first schedule is limited to purchases made under a single order or a group of orders bearing the same date. For purchasers receiving this form of allowance, the quantity discount is reflected on the invoice and ranges from 1% on purchases of a minimum of $5,000 up to 5% for the largest quantity brackets. The cumulative volume discounts afforded under Schedule B have been granted in the form of annual rebates and computed on the aggregate volume of customer's purchases during each twelve-month period. Respondent's counsel reported in the course of his oral argument that the Schedule B discounts were discontinued shortly after the hearings were concluded in this case. In figuring discounts to be allowed customers under Schedule B, respondent has excluded any shipments on which said customers had been allowed quantity discounts under Schedule A.

In addition to alleging that the differing prices at which the respondent sold its merchandise under each of the aforementioned schedules constituted discriminations in price, the complaint further charged they have had or may have the adverse effects on competition which are proscribed under the statue and accordingly were unlawful. In this connection, the complaint alleged that the discriminations have diverted and will continue to divert substantial business from the respondent's competitors to it, that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition and that they have a dangerous tendency unduly to hinder competition and to create a monopoly in the respondent.

The following are among the facts in the record which are not in dispute: (1) That discounts and rebates were granted by the respondent to its customers under Schedule A and Schedule B; (2) that in many instances these discounts and rebates represented substantial amounts; and (3) that the said discounts and rebates resulted in lower net acquisition costs to some purchasers than to others whose purchases of respondent's products were in such amounts that they were either not entitled to any discounts or rebates at all or they were entitled to discounts and rebates which were less than the highest percentage quantity brackets of the said schedules.

Appellant did not challenge the hearing officer's finding that there is no record support for conclusions that the adverse competitive effects alleged in the complaint may result from the price differentials granted by the respondent under Schedule A applicable to single orders or group orders of the same date. Since this finding and the ruling thereon in the initial decision have sound record basis, we proceed on to a consideration of evidentiary matters relied upon by appellant in his contention that the hearing officer erred in reaching

similar conclusions with respect to the price discriminations inherent in the respondent's Schedule B which provided for cumulative volume discounts. That schedule was as follows:

Amount of discount	Applicable to purchases of class "S" and/or class "M" equipment	Applicable to purchases of class "K" and/or class "KG" equipment
Percent:		
0	Up to $5,000	Up to $5,000.
½	$5,000 to $10,000	$5,001 to $10,000.
1	$10,001 to $15,000	$10,001 to $20,000.
2	$15,001 to $20,000	$20,001 to $30,000.
3	$20,001 to $25,000	$30,001 to $40,000.
4	$25,001 to $30,000	$40,001 to $50,000.
5	Over $30,000	Over $50,000.

A wide and variable range of the products involved in this matter is available for selection and purchase from the numerous companies which are engaged in their production. Some of these companies offer a long line of equipment and others specialize in trucks for designated purposes and capacities. There is great diversity between competing products in respect to engineering specifications, performance, service and parts, and this holds true even on specialized equipment offered for generally similar purposes or jobs. On some of the comparable items of equipment, price variations between the respondent and its competitors approximated 5%; but, on many others, the differences were small.

Officials of five competing manufacturers of industrial trucks and salesmen identified with two of them appeared as witnesses in this proceeding. In essence, they expressed views that respondent's cumulative discount plan would be influential in diverting business in situations where other factors were equal; that this program tended to or served to tie business to respondent; and that it has constituted a competitive handicap. Counsel supporting the complaint contends that the hearing examiner should have concluded that substantial evidence was presented supporting inferences that price is a prime and determinative factor in large volume users operating through branches whose buying is carried on through a centralized purchasing office. In support of this contention counsel directs attention to the views expressed by certain witnesses that price is frequently the paramount factor in influencing sales. No representative of a national account or other concern which was a user of the industry's products was called as a witness in the proceedings.

The hearing examiner found that in the majority of cases, instead of price, the controlling factors in inducing sales of these products were performance, engineering specifications, and related attributes,

including adaptability to the customers' individual requirements. This is supported by the preferences of customers' plant managers which are based on such factors and have prevailed over the inclinations of said customers' home purchasing departments to cumulate their purchases for larger discounts under Schedule B. In further corroboration of the hearing examiner's finding, there is other evidence indicating that certain of respondent's competitors who gave no discounts have established themselves with large volume buyers in situations where respondent previously was the established supplier for those accounts. On this basis, we reject the appellant's contentions that the record supports conclusions that the effects of the respondent's pricing practices may have been substantially to lessen or hinder competition or tend to monopoly.

The following excerpt from the initial decision which is a partial summary of existing conditions in the lift truck industry supports our view on this phase of the matter at hand and serves to evaluate any future competitive effects which may result from respondent's pricing practices:

"* * * this record affirmatively shows that in this industry in the years in question there has been ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity and flexibility of market and of competition therein. The evidence is unanimous that competition in this industry in respondent's line of commerce is active, keen, healthy and increasing, * * *."

These conclusions have ample record support. The appeal does not seriously challenge their basic accuracy as descriptive of the industry in general. However, appellant contends that they are not mandatory guides in determining the legal validity of the respondent's price discriminations. In maintaining that continuance of the respondent's cumulative volume discounts would represent a substantial future threat to competition, counsel in support of the complaint states that there is no way for competing manufacturers to meet the respondent's pricing plan except by offering similar programs. While it may be inferred from the record that some of the respondent's rivals have adopted volume discount programs, it is clear that others have not. Among those in the latter category are firms who have markedly increased their business and improved their competitive positions.

Counsel supporting the complaint also contends that it is inevitable that manufacturers in this industry who offer only a limited line of

products will be injured in the future, because, appellant argues, volume buyers who desire to pool their purchases of all types of lift trucks with one full line manufacturer for the purpose of cumulating discounts will not be interested in any of their similar discount programs. As previously noted, engineering design, performance, and service are of paramount importance to the producer in preserving his competitive position in this industry wherein wide diversity among competing products is traditional. There can be no doubt but that the flexibility of market factors to which the initial decision refers has included pricing matters. Illustrative of this is the initial decision's quotation from the testimony indicating that the differential between $4,200 for a competitive truck and $3,815 for the respondent's comparable unit "is not too bad to overcome." It is evident, therefore, that many counterbalancing forces are operative in the line of commerce in which the respondent engages.

We find that the record fails to support inferences that competing producers will not be able to meet the problems posed by respondent's pricing program without impairment of service or efficiency, or that they will be unable to protect their competitve positions in the face of lower prices of the pattern which the record shows the respondent has afforded to some of its customers. As previously indicated, the appeal has not challenged the finding in the initial decision that the 5% and lesser differentials provided in the respondent's single unit quantity discount program (Schedule A) present no past or future threat to competition. This absence of injurious effects from the lower prices afforded in single unit sales of large quantity orders (Schedule A) suggests, in and of itself, that similar competitive factors may be largely operative with respect to the comparable rebate differentials applicable to orders to which the cumulative discount is applied (Schedule B). We therefore reject the contentions of counsel supporting the complaint that the record supports the inference that a continuance of the challenged pricing practices of the respondent will probably result in the adverse effects upon competition which are proscribed by the statute.

Although it was found in the initial decision that the role which is played by prices in this industry in inducing sales had been comparatively subordinate in a majority of cases, that conclusion does not necessarily mean that price has not influenced the placing of business in individual competitive situations. In contending that the initial decision is based on an erroneous construction of the Act, the appellant argues that a showing that a seller's discriminations are sufficient to divert business from his competitors suffices to establish a prima facie case of law violation and that, even assuming that the evidence fails

to show actual diversion of business to respondent, such circumstance does not render the record deficient. In support of this proposition of law, the appellant relies on the fact that the statute does not require a showing that price discriminations have, in fact, injured competition, but requires only a showing that there is a reasonable probability that they may have that effect.

This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facets of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations refute conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed. The Administrative Procedure Act provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." [5 U.S.C.A., Sec. 1006(c).] Also see *Norment* v. *Hobby*, 124 F. Supp. 489; *National Labor Relations Board* v. *Haddock-Engineers, Limited*, 215 F. 2d 734, 737; *McKiver* v. *Theo. Hamm Brewing Co.*, 297 N.W. 445, 447; *Turner* v. *Central Mut. Ins. Assn.*, 183 S.W. 2d 347, 348; *Rupp* v. *Guardian Life Ins. Co. of America*, 170 S.W. 2d 123, 128; *State v. Pressler*, 92 P. 806, 808; *Walker* v. *Carpenter*, 57 S.E. 461; *Willett* v. *Rich*, 7 N.E. 776. Sec. 2 (b) of the Clayton Act, as amended [5 U.S.C.A. 13 (b)] provides affirmatively that the initial burden is on counsel supporting the complaint.

Another alleged ground of error relates to whether the hearing examiner, when considering the motion to dismiss, failed to view the evidence and draw inferences therefrom most favorable to the complaint in a manner consonant with criteria approved for such determinations in the interlocutory stages of cases under the Commission's decisions in the matter of *Vulcanized Rubber and Plactics Company*, Docket No. 6222 (issued November 29, 1955). The initial decision was filed herein on November 18, 1955. The two basic principles of law which the Commission has deemed controlling in its rulings on the merits of counsel's appeal are (1) that proof of tendency or capacity of a seller's price discriminations to divert business to him from his competitors is not in every situation proof per se of unlawful injury to competition with the seller, and (2) that in determining the merits of motions to dismiss, inferences by hearing officers respecting the

probable future effects of a seller's price discriminations on his competition should be those reasonably to be drawn from the entire record. We deem the inferences drawn by the hearing examiner on the salient points of the case to be reasonable and proper inferences. Hence, no useful purpose would be served by a detailed evaluation of the extent to which the hearing examiner's appraisals of evidentiary matters relating to each of the various issues in the proceeding may or may not have been predicted on inferences most favorable to the complaint. Because we think that the record lacks reliable evidence which, when considered in connection with inferences reasonably to be drawn therefrom, would support an order to cease and desist, this aspect of the appeal is likewise denied.

The testimony of two witnesses connected with a competitor of the respondent pertained to their conversations with purchasing officials of six large volume buyers in which the witnesses assertedly were informed that their company could not hope for future orders or would experience reduced business unless they adopted a cumulative discount plan comparable to the respondent's. The hearing examiner referred to this testimony as hearsay evidence and stated in effect that testimony by the purchasing agents themselves, had it been offered, would have greater probative value in determining the attitudes of respondent's customers toward its cumulative volume discounts. In further commenting on this testimony, the hearing officer cited matters which he believed detracted from its weight and raised serious questions as to candor and credibility. Appellant argues that such testimony alone warranted denial of the motion to dismiss.

This testimony was properly received into the record and came within one of the recognized exceptions to the hearsay rule. However, the hearing officer apparently was not persuaded that purchasing officials are completely free at all times from motives of self-interest when conversing with representatives of present or former suppliers, and none of the matters cited in the appeal is persuasive that his evaluations on matters of credibility were essentially inaccurate. For these reasons and others previously noted as controlling to our decision here, the exceptions relating to this aspect of the appeal are likewise denied.

Having determined that the appeal is without merit, the initial decision is adopted as the decision of the Commission.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision granting the motion to dismiss

filed by the respondent at the close of the case in chief; and this matter having come on to be heard upon the record, including the briefs and oral arguments of counsel; and the Commission having rendered its decision denying said appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

Appearances

IN THE MATTER OF

H. J. HEINZ CO., ET AL.

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

Docket 5994. Complaint, May 21, 1952—Decision, June 29, 1956

Order requiring eleven corporate canners of raw tomatoes and their trade association to cease boycotting a cooperative association of tomato growers and its members in the "Ohio tomato area," in carrying out which boycott they destroyed the tomato market for members of the co-op by refusing to purchase tomatoes from them, attempted to destroy the co-op by refusing to recognize or negotiate with it as the marketing agent of its grower members, and effectuated the boycott by holding meetings to agree upon ways and means for maintaining a united front to combat and destroy the co-op.

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

Covington & Burling, of Washington, D. C., for H. J. Heinz Co., and various other corporations, and their officers thereof, and along with—

Reed, Smith, Shaw & McClay, of Pittsburgh, Pa., for H. J. Heinz Co., Joseph J. Wilson, Howard E. McKinley, Everitt E. Richard and Cyril P. Roberts;

Marshall, Melhorn, Block & Belt, of Toledo, Ohio, for Campbell Soup Co., Joseph Campbell Co., Walter A. Scheid, Edgar W. Montell and Harold R. Collard;

Mr. G. Lincoln Lewis and *Barnes, Hickam, Pantzer & Boyd*, of Indianapolis, Ind., for Stokely Van-Camp, Inc., Herbert F. Krimendahl and A. A. Ehrman;

Holloway, Peppers & Romanoff, of Toledo, Ohio, for Foster Canning, Inc.;

Mr. Joseph R. Harmon, of Fullerton, Calif., for Hunt Foods of Ohio, Inc.;

True & Meyer, of Port Clinton, Ohio, for Lake Erie Canning Co. of Sandusky, J. Weller Co. and George Wenger;

Mr. Carl C. Leist, of Circleville, Ohio, and *Ham & Ham* of Wauseon, Ohio, for Winorr Canning Co.

Marchal & Marchal, of Greenville, Ohio, for Beckman & Gast Co., Inc., Greenville Canning Co., Inc., St. Mary's Packing Co., Inc., Robert H. Timmer, Thomas G. Timmer, Luke F. Beckman and Charles F. Stemley.

Avery & Avery, of Bowling Green, Ohio, for Buckeye Canning Co., Inc.

Estabrook, Finn & McKee, of Dayton, Ohio, for Gibsonburg Canning Co., Inc. and St. Mary's Packing Co., Inc.

Fuller, Harrington, Seney & Henry, of Toledo, Ohio, and *Mr. Joseph R. Harmon*, of Fullerton, Calif., for Hunt Foods, Inc. and Hunt Foods of Ohio, Inc.

Short & Dull, of Celina, Ohio, for Sharp Canning Co.

Gebhard & Hogue, of Bryon, Ohio, for Richard C. Boucher.

Lusk & Shaw, of Wapakoneta, Ohio, for Henry A. Diegel.

Ham & Ham, of Wauseon, Ohio, for George W. Conelly.

Order Dismissing Complaint as to Certain Charges and as to Certain Respondents

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 answers of respondents, testimony and other evidence introduced in support of the allegations of the complaint, and motions of counsel for all respondents to dismiss the complaint at the conclusion of the taking of testimony in support of the allegations of the complaint on the ground that insufficient evidence has been adduced in support of the allegations of the complaint. These motions and briefs in support thereof were filed in September 1953. Thereafter, in December 1953, counsel in support of the complaint filed answer and brief opposing respondents' motions and the matter was argued orally before the Hearing Examiner on January 7, 1954.

The complaint in this proceeding alleges, among other things (Paragraph 10), that respondents had been and now are engaged in unfair methods of competition in that they have entered into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes and that, as a part of said understanding, agreement and combination, have engaged in a planned common course of action:

1. To boycott, and in boycotting, the growers of tomatoes, in Ohio and in the adjoining and contiguous portions of Michigan and Indiana, who are members of the said cooperative growers association, Cannery Growers, Inc.;

2. To prevent, and in preventing, competing purchasers from buying raw tomatoes from growers who are members of Cannery Growers, Inc.;

3. To destroy, and in the destruction of, the tomato markets of growers who are members of Cannery Growers, Inc., by agreeing and resolving not to purchase tomatoes from said growers;

4. To destroy, and in the destruction of, the said cooperative growers association, Cannery Growers, Inc., by refusing to recognize or negotiate with it as the marketing agent of its grower members;

5. To make effective, and in effectuating, the boycott, held meetings following the organization of Cannery Growers, Inc., to discuss, devise, and agree upon ways and means for forming and maintaining a united front among themselves to combat, defeat and destroy the said cooperative growers association;

6. To contact and police, and in contacting and policing, respondent processors to discourage them from purchasing tomatoes from growers who are members of said cooperative growers association;

7. To attempt to induce, and in attempting to induce, some of the said growers into breaching their respective contracts of membership with said cooperative growers association;

8. To fix and establish, and in fixing and establishing, prices to be paid by respondent processors to the growers for their raw tomatoes; and

9. To adopt and use, and in adopting and using, as a part of the aforesaid understanding, agreement and combination to fix and establish prices, a price leadership plan whereby respondent, H. J. Heinz Company, respondent Campbell Soup Company, or respondent Joseph Campbell Company, or two or more of said respondents, at times have led in the announcement and publication of their price or prices for raw tomatoes, after which, pursuant to mutual understanding among all respondent processors, the other respondent processors adopted, announced, published and followed the same prices.

Upon a careful consideration of all the oral testimony and written evidence in the record, the undersigned Hearing Examiner is of the opinion that there is not sufficient competent evidence in the record to support the allegations of subparagraphs 2, 6, 8 and 9 of Paragraph 10 of the complaint as to any or all of the respondents named in the complaint. The preponderance of the evidence indicates that the prices announced at the meetings of the respondent processors were prices already independently published by them and there is not sufficient evidence of uniformity of such prices to indicate, *prima facie*, that they were the result of agreement between the processors.

On the other hand, it is believed that there is sufficient competent evidence in the record to support the allegations of subparagraphs 1, 3, 4, 5 and 7 of Paragraph 10 of the complaint as to all of the

respondent's with the exception of the respondent Ohio Canners Association, its officers and directors, including Paul Hinkle, Secretary; also respondent Albert F. Dreyer, Secretary of Indiana Canners Association, and certain small processors hereinafter named. In arriving at this opinion the undersigned Examiner is unable to find sufficient competent evidence in the record indicating that respondent Ohio Canners Association or respondent Hinkle were responsible for the meetings attended by respondent processors in March and April 1951 at which discussions took place with respect to the cooperative growers association. Although respondent Hinkle called the meeting of respondent Ohio Canners Association held on April 13, 1951, there is insufficient evidence of his prior knowledge of, or presence at, the meeting of tomato processors on the afternoon of that date at which discussions were had concerning the cooperative growers association.

With respect to the small processors hereinafter named, there is a failure of proof as to their connection with the alleged conspiracy. Some of the processors are located in southern Ohio and were never contacted by representatives of the growers association and others were not represented at the meetings. One contracted with the growers as usual with the approval of the cooperative growers association. Accordingly,

It is ordered, That the complaint in this proceeding as to the allegations in subparagraphs 2, 6, 8 and 9 of Paragraph 10 thereof be, and the same hereby is dismissed as to all respondents.

It is further ordered, That the entire complaint in this proceeding be, and the same hereby is, dismissed as to the following-named respondents:

The Ohio Canners Association, Inc., incorporated as The Ohio Canners Association;

Walter A. Scheid, individually, and as President of The Ohio Canners Association, Inc.;

French Jenkins, individually, and as 1st Vice President of The Ohio Canners Association, Inc.;

Paul Hinkle, individually, and as Secretary-Treasurer of The Ohio Canners Association, Inc.;

Roy Irons, individually, and as Assistant to the President of The Ohio Canners Association, Inc.;

Paul Korn, Norman M. Spain, Karl Hirzel, and Leroy Wenger, individually, and as Directors of The Ohio Canners Association, Inc.;

Albert F. Dreyer, individually, and as Secretary-Treasurer of Indiana Canners Association, Inc.;

Beckman & Gast Co., Inc.;

Buckeye Canning Co., Inc.;
Greenville Canning Co., Inc.;
St. Mary's Packing Co., Inc.;
Charles F. Boucher, individually, and as a copartner in the partnership of Bryan Canning Co.;
Richard C. Boucher, individually, as a copartner in the partnership of Bryan Canning Co., and as a Director of The Ohio Canners Association, Inc.;
George A. Hathaway, individually, as the present sole owner, and formerly as a copartner in the partnership of Home Canning Co.;
Lawrence B. Hall, individually, and as a former copartner in the partnership of Home Canning Co.;
Robert H. Timmer, individually, and as a copartner in the partnership of Tip Top Canning Co.;
Thomas G. Timmer, individually, as a copartner in the partnership of Tip Top Canning Co., and as 2nd Vice President of The Ohio Canners Association, Inc.;
Henry A. Diegel, individually, and trading under the name and style of Diegel Canning Co.;
Luke F. Beckman, individually, and trading under the name and style of Minister Canning Co.;
Charles F. Stemley, individually, and trading under the name and style of Stemley Canning Co., and as a Director of The Ohio Canners Association, Inc.

ORDER DENYING APPEAL FROM INITIAL DECISION

This matter coming on to be heard by the Commission upon the appeal of counsel in support of the complaint from that portion of the initial decision of the hearing examiner dismissing the price fixing allegations contained in subparagraphs 8 and 9 of Paragraph 10 of the complaint herein, and the respondents' briefs in opposition to said appeal; and

The Commission having considered the entire record, including the exceptions raised by counsel in support of the complaint, and having determined that the hearing examiner's initial decision was correct:

It is ordered, In conformity with the written opinion of the Commission being issued simultaneously herewith, that the appeal of counsel in support of the complaint be, and it hereby is, denied.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course.

Commissioner Carretta not participating.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Respondents include 24 companies engaged in the processing of tomatoes in Ohio, the Ohio Canners' Association, Inc. (a trade association), individuals who are officers, directors, employees, or owners of the above companies, and officers or directors of the Ohio Canners' Association, Inc. or the Indiana Canners' Association (also a trade association).

Briefly stated, the complaint charges respondents with violation of Section 5 of the Federal Trade Commission Act by entering into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes, and as a part of said understanding, with engaging in a planned common course of action to, first, boycott and otherwise illegally interfere with said tomato growers, and second, to fix and maintain prices to be paid for raw tomatoes.

At the conclusion of the evidence in support of the complaint, the hearing examiner dismissed the entire complaint as to the Ohio Canners' Association, Inc., its officers and directors, the secretary-treasurer of Indiana Canners' Association, Inc., and certain canning companies and individuals named in the initial decision. He also dismissed the complaint as to the allegations in Subparagraphs 2, 6, 8 and 9 of Paragraph 10 as to all respondents. Counsel supporting the complaint appealed from the decision only insofar as it dismissed the allegations in Subparagraphs 8 and 9 of Paragraph 10 as to the "remaining respondents," that is, the respondents not included in the list set out in the initial decision as to whom the complaint was dismissed in its entirety. The appeal was submitted on written briefs without oral argument.

The only question involved in this appeal has to do with the sufficiency of the evidence to make a prima facie case as to the following allegations in Paragraph 10 of the complaint:

"The respondents herein have been, and are now, engaged in unfair methods of competition and unfair acts or practices in commerce, as 'commerce' is defined in the Federal Trade Commission Act, in that they have entered into an understanding, agreement and combination to restrain trade and interstate commerce in raw tomatoes. The respondents, as a part of the aforesaid understanding, agreement and combination, have engaged in a planned common course of action:

* * * * * * *

8. To fix and establish, and in fixing and establishing, prices to be paid by respondent processors to the growers for their raw tomatoes; and

9. To adopt and use, and in adopting and using, as a part of the aforesaid understanding, agreement and combination to fix and establish prices, a price leadership plan whereby respondent, H. J. Heinz Company, respondent Campbell Soup Company, or respondent Joseph Campbell Company, or two or more of said respondents, at times have led in the announcement and publication of their price or prices for raw tomatoes, after which, pursuant to mutual understanding among all respondent processors, the other respondent processors adopted, announced, published, and followed the same prices."

All of the companies included among the remaining respondents operate tomato processing plants in Ohio. Most of the raw tomatoes to be processed are bought from individual growers under written contracts entered into just prior to the planting season, although some are bought later on the open market from growers or brokers. It is the practice for individual processors to announce their prices shortly before contracts are offered to the growers. In determining its opening price, each processor takes into consideration many circumstances, often including prices already announced by other processors.

Late in 1949, certain tomato growers formed a cooperative organization known as Cannery Growers, Inc. Under the contract between Cannery Growers, Inc. and its members, the cooperative was designated as the sole agent of the members to negotiate contracts with the processors for the growing and selling of tomatoes and the members agreed not to enter into a contract with any processor unless such contract had previously been approved by Cannery Growers, Inc.

In January 1951, Cannery Growers, Inc. notified the processors that it was ready to negotiate contracts in behalf of its members at a price of $40–$34, that is, $40 per ton for U.S. Government Grade 1, and $34 for Grade No. 2. Most of the processors did not negotiate with the cooperative for various reasons, among which was that the asking price was too high. Early in 1951, various processors announced their prices and began the effort to sign up growers. The prices announced by some processors were identical. For example, Joseph Campbell Company (buying agent for Campbell Soup Company), H. J. Heinz, Hunt Foods, Inc., and Winorr Canning Company, announced $33–$21. Other opening prices varied from $36 to $33 for Grade No. 1 and from $26 to $20 for Grade No. 2.

In their appeal brief, counsel supporting the complaint "do not contend that the record establishes that the prices announced at the meetings were agreed upon in advance by the respondent companies; nor * * * that the record establishes that there was uniformity among the respondents as to those prices or as to prices they actually paid for tomatoes." They do contend, however, that there was cooperation

and agreement among the respondents to adopt and adhere to the prices previously announced by certain of them and that such cooperation and agreement was for the purpose of negotiating with the growers for advance contracts during the critical period, that is, the "contracting season." In other words, the claim is that there was concerted action to adhere to the prices individually announced (even though different) to further the boycott of Cannery Growers, Inc.

The record in the case is very voluminous both in regard to the allegations of boycotting and price fixing. The evidence shows that meetings were held on March 17, March 31, and April 13, of 1951, at which most of the respondents were represented. At these meetings, many things of mutual interest were discussed and some mention was made of prices already announced by some processors. Among the many exhibits are letters from the manager of the Toledo, Ohio, plant of respondent Hunt Foods, Inc., to his immediate superior giving a running account of the situation as the local manager observed it. After the opening price announcements, some processors changed their prices. For example, after announcing $33–$21 in March, Hunt Foods, Inc., went to $34–$22.50 in April, and to $36–$26 in May. Other respondents also made changes, although some did not occur until after the normal contracting season was over.

The hearing examiner held that there was not sufficient competent evidence in the record to support the allegations of Subparagraphs 8 and 9 of Paragraph 10 of the complaint. After considering the record, we conclude that the hearing examiner decided this issue correctly.

The appeal is therefore denied and it is directed that an order issue accordingly.

Commissioner Carretta did not participate herein.

Initial Decision by Everett F. Haycraft, Hearing Examiner

PRELIMINARY STATEMENT

Respondents herein are engaged in purchasing raw tomatoes and processing same into tomato food products, such as canned tomatoes, tomato juice, tomato puree and tomato catsup, with their processing plants located in the States of Ohio, Indiana, Illinois, and Pennsylvania.

On May 21, 1952, the Federal Trade Commission issued its complaint against 18 corporations, their officers and directors, and a number of individuals operating as partnerships engaged in the tomato processing business and also the Ohio Canners Association, Inc., a trade association, its officers and directors, and the Secretary-Treasurer of the Indiana Canners Association, Inc., charging them with having violated Section 5 of the Federal Trade Commission Act by

entering into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes, and, as a part of such understanding, agreement, and combination, with engaging in a planned common course of action to boycott and otherwise illegally interfere with tomato growers located in the northwestern portion of Ohio, the southern part of Michigan, and northeastern Indiana, generally referred to as the Ohio tomato area, from whom they purchased raw tomatoes; and, to fix and maintain prices to be paid for raw tomatoes. After answers were filed generally denying the allegation of the Commission's complaint, hearings were held in the States of Ohio and Indiana, at which oral testimony and other evidence was received in support of the allegations of the complaint. Thereafter, counsel for respondents filed motions to dismiss the complaint in September 1953, which motions were opposed, briefed and argued before the hearing examiner, who rendered his first initial decision February 16, 1954, dismissing the complaint as to all of the respondents except the following: H. J. Heinz Company; Campbell Soup Company; Joseph Campbell Company; Stokely Van-Camp, Inc.; Bauer Cannery, Inc.; Foster Canning, Inc.,; Gibsonburg Canning Company, Inc.; Hirzel Canning Company; Hunt Foods, Inc., and its subsidiary, Hunt Foods of Ohio, Inc.; Lake Erie Canning Co. of Sandusky; Sharp Canning Co.; J. Weller Company; Winorr Canning Company, and certain officers and employees of the said corporate respondents. (All reference to respondents hereinafter made will refer to said respondents.)

The hearing examiner, also, in his first initial decision dismissed certain allegations of the complaint, particularly those allegations having to do with the fixing of prices to be paid growers for their raw tomatoes and the allegations with respect to preventing competing purchasers from buying raw tomatoes from certain growers. (The Commission affirmed the initial decision of the hearing examiner and remanded the case to him for procedure in the regular course on August 10, 1954.) So that there remains for consideration in this decision only the boycott charges.

Specifically, the charge under consideration is that these remaining respondents, through agreement, understanding, and planned common course of action, boycotted an association of tomato growers, namely Cannery Growers, Inc., hereinafter referred to as "Co-op," and its grower members and that in carrying out said boycott, the respondents (*a*) destroyed the tomato market for members of the Co-op by refusing to purchase tomatoes from them; (*b*) attempted to destroy the Co-op by refusing to recognize or negotiate with it as the marketing agent of its grower members; (*c*) effectuated the boycott by holding

meetings following the organization of Co-op to discuss, devise and agree upon ways and means for forming and maintaining a united front to combat, defeat, and destroy the Co-op; and (*d*) attempted to induce Co-op members into breaking their membership contracts.

The taking of testimony in opposition to the allegations of the complaint began November 29, 1954, and was concluded January 4, 1955. Proposed findings were filed with the hearing examiner in March, 1955, and oral argument was had thereon on April 8, 1955. Consideration having been given by the undersigned hearing examiner to all the reliable, probative, and substantial evidence in the record, and upon all material issues of fact, law, or discretion, the following findings, conclusions, and order are hereinafter set forth.

FINDINGS OF FACT

I. Historical Background of the Tomato Processing Industry

For many years last past it has been the practice of the respondent processors, as well as of other processors in the Ohio tomato area, to negotiate contracts with individual growers for specific acreages of tomatoes before the tomato crop is actually planted, and in many instances to furnish the tomato plants for planting. On the basis of knowing the capacity of a given processing plant and with a knowledge of the potential yield per acre, respondent processors normally contract for substantially their entire tomato requirements in advance of the planting season.

The respondent processors usually begin contracting for their tomato acreage requirements in February, and such contracting is usually concluded by the early part of May each year. This period of time is generally referred to as the "contracting season." During this time the contracts are executed in one of or a combination of two ways: (*a*) the grower is notified and invited to come to the processor's plant or loading station, where he is advised of the price the processor is offering to pay, when he may enter into a contract to grow, harvest, and sell a specified acreage to the processor and the processor's agents to purchase and accept the tomatoes produced on the acreage specified in the contract, and (*b*) field men of the processor go out into the field and contact the growers and urge them to contract to grow, harvest, and sell tomatoes on specified tomato acreages for the processor. The amount of tomato acreage which a grower may contract to cultivate for a processor varies from as little as one or two acres to as much as 100 or more acres.

In the Ohio tomato area, tomatoes for processing purposes are usually produced from plants which are grown in the South, shipped

North by the processor, and sold to the growers, although in some instances the plants are home-grown plants. The plants are set out usually by the beginning of the month of May and all planting is concluded by the end of the first week in June, which period is known as the "planting season." The growers usually pay for the plants at the end of the harvest season when the processors deduct their cost from the proceeds to the grower for the tomatoes sold to the processors.

The larger processors employ field men, who, in addition to contracting with the growers for tomatoes for the processors, also maintain continuous contacts with the growers throughout the planting and growing seasons and advise the growers concerning the cultivation and harvesting of the tomato crop. They keep the growers fully advised concerning all circumstances and conditions connected with the production of the raw tomatoes, which service is helpful to the grower and enables the processor to maintain a degree of control over the quality of the tomatoes produced.

The tomato growing season in the Ohio area is from early May until the first frost, usually in the first week of October. The harvesting season, during which time the tomatoes are picked and hauled to the processor, begins about the middle of August and continues until the first frost. Raw tomatoes for processing purposes must be allowed to ripen on the plant because the color of the tomatoes is extremely important in determining the quality of the processed tomato products.

The processors agree to pay the growers for the tomatoes harvested from their acreage on the basis of a given price for all of the tomatoes that are graded U. S. No. 1, and another price for the tomatoes graded as U. S. No. 2, with no payment to be made for tomatoes graded as "culls." Another provision appearing in many of the respondent processors' contracts provides that the processor may reject the tomatoes or have them assorted, unless and until they grade at least 40 percent No. 1 tomatoes and contain less than 10 percent culls. Another usual provision of the contract prohibits the grower from producing any tomatoes not covered by the contract, thereby preventing the grower from contracting with more than one tomato processor each year.

Grading is performed at the time of delivery by the grower to the processor by Federal-State graders supplied by an inspection service which has been functioning in Ohio since about 1931. Grade-buying of tomatoes is essential to canners, growers, and consumers alike. The efficient grower benefits by receiving a higher price for the better quality tomatoes; the canner benefits because the quality of the raw

material is substantially reflected in the quality of the finished product. Finally, grading benefits the consumer by providing a greater assurance of quality products and better nutrition.

Prior to the year 1950, tomato growers in the Ohio area had nothing to say with respect to the contracts they executed with the respondent processors. They had no opportunity to negotiate concerning either terms or prices; they could accept or reject or else not grow tomatoes. It was a matter of either "take it or leave it." During the years immediately following the Second World War, particularly during 1948-49, the prices which the processors had been paying growers for raw tomatoes were considered by the growers to be unreasonably low. This condition, together with disatisfaction in the grading of tomatoes, led a number of growers in the Ohio tomato area to organize Co-op, in October, 1949, to act as the bargaining agent or representative of the growers in that area in the negotiation of tomato contracts with tomato processors. The membership campaign by the Co-op and its representatives commenced in November 1949, and continued throughout the following year. A membership contract was employed under which the grower indicated how much tomato acreage he had planted in the year prior to membership and the number of acres he intended to plant in the succeeding year. The contract also provided for the appointment by the grower of the Co-op as his sole agent for the purpose of marketing or contracting for the sale of all canning tomato crops to be grown by him or for him on lands owned or otherwise held by him while the contract remained in effect. It was provided that the contract would not become effective until the Co-op had made contracts with 65 percent of the growers of the Ohio tomato area.

On December 18, 1950, the Board of Directors of the Co-op declared the membership contracts operative and so notified the member growers, advising the growers that the contract with the Co-op would be applicable to the 1951 tomato acreage.

The organization of Co-op first came to the attention of the respondent processors in the fall of 1950 and was a subject of discussion at the meeting of the Ohio Canners Association in December 1950. However, it first began to contact respondent processors with respect to the 1951 tomato acreage in a letter addressed to tomato processors on January 18, 1951, notifying the respondents of its existence and its purposes, and inviting respondent processors to take part in negotiations for contracts for that season. Receiving no reply to this letter, Co-op sent another letter to most of the respondent processors on March 9 and 10, 1951.

In the first letter the Co-op notified the processors that a negotiating committee had been designated and that the Ohio Farm Bureau Federation had been requested to furnish technical information and advice, and the suggestion was made that negotiation should begin as soon as possible so that the 1951 grower contracts could be signed. In the second letter it was stated that after a canner-grower contract is approved by Co-op, "you'll be expected to contact your grower for acreage as in the past." Further attempts were made by negotiating committees of the Co-op to contact respondent processors and negotiate contracts for grower members for the 1951 season. It soon developed, however, that there was opposition to the Co-op on the part of respondent processors. One of the conditions which apparently was the cause of such opposition was the requirement of the recognition of the Co-op as being authorized to speak or contract for its grower members and the agreement on the part of the processor to deduct a check-off of one percent from the amount due the grower and remit the same as Co-op.

During the usual contracting season, Co-op approved the contract of three processors, namely, Lutz Packing Company on April 26, 1951, and the respondents Sharp Packing Company and St. Mary's Packing Company. Co-op enlisted the assistance of the Ohio Farm Bureau Federation in the spring of 1951 in seeking to negotiate with respondent processors after its earlier efforts had been unsuccessful. A Mr. Wayne Schidaker of that organization endeavored by telephone to arrange a negotiating meeting or conference between a negotiating committee of the Co-op and respondents Heinz and Campbell, but his telephone calls were unanswered. He was successful, however, in arranging a conference early in May, 1951, between officials of respondent Stokely Van-Camp and George Wenger, and a negotiating committee of Co-op. No contract was negotiated at this conference. Finally, on May 26, 1951, the Co-op was successful in negotiating a contract with respondent Hunt of Ohio.

In addition, the aforenamed processors of Co-op entered into a contract with a brokerage firm of Alex. E. and William J. Toth, tomato brokers, with the understanding that the Toths would sell the tomatoes to the Morgan Packing Company, which had purchased substantial quantities of tomatoes in the Ohio tomato area from the Toths during the 1950 season. Contracts were entered into by the Toths with grower members of the Co-op for approximately 2500 acres of tomatoes. However, due to failure on the part of Morgan Packing Company to purchase in the Ohio tomato area in the 1951 season, the Toth contracts were not carried out.

II. Cooperative Activities of the Respondent Processors to Boycott or Refuse to Deal With Co-op

A. *Prior to March 17, 1951*

The larger respondent processors, Heinz, Campbell, and Stokely, neither acknowledged nor made any effort to obtain further information about Co-op after receiving the letters written by Co-op in January and March, 1951. However, these letters were considered and widely circulated within the offices of these respondents.

Three of the smaller respondents, Bauer Cannery, Inc., Foster Canning, Inc., and Gibsonburg Canning Company, Inc., contacted Co-op for information after the letters were sent out, but no negotiations occurred. Another small processor, respondent Sharp Canning Co., engaged in negotiations with the local committee of Co-op and entered into contracts with the grower members of Co-op. However, due to some misunderstanding, although Sharp agreed to do so, no check-off was made.

B. *The first meeting of respondent processors on March 17, 1951*

On March 17, 1951, representatives of all respondent processors except Bauer and Weller attended a meeting of tomato processors held at the Commodore Perry Hotel in Toledo, Ohio. Individual respondents present included: Everitt E. Richard, representing Heinz: Harold R. Collard, representing Campbell; Walter E. Scheid, representing Campbell Soup; Samuel Hammond, Russell Kline, and A. A. Ehrman, representing Stokely Van-Camp; George Conelly, representing Winorr Packing Company; and George Wenger, representing the Lake Erie Canning Co. of Sandusky, who called the meeting and presided. The Co-op letter of March 10, 1951, was the principal matter of discussion at this meeting. It had been received by most of the respondent processors present. The Co-op and its activities and the problems various canners were having in contracting for acreage in their territories were discussed. Those in attendance were asked to state how they were making out on their acreage and whether they were getting their requirements. Many of the processsors complained that they had been unable to get their acreage, some indicated the progress they had made, and others expressed concern that they might not obtain their acreage. Respondent Harold R. Collard stated that respondent Campbell had encountered difficulty in signing acreage. He went to the meeting "to find out what the impact was on the other people." Respondent Sharp told of his experience in signing up with Co-op. The matter of grading was also discussed at the meeting as one of the complaints of the growers. It was understood at the close of the meeting that another meeting would be held in a couple of weeks.

C. *The second meeting of respondent processors on March 31, 1951*

The second meeting of the respondent tomato processors was held at the Barr Hotel in Lima, Ohio, on March 31, 1951, and most of the respondent processors had representatives in attendance. They were Heinz, Campbell, Stokely, Gibsonburg, Hirzel, Hunt, Lake Erie, and Sharp. The following individual respondents were present: Harold R. Collard, representing Campbell; Everitt E. Richard, representing Heinz; Cyril P. Roberts, representing Heinz; Samuel Hammond, Russell Kline, and A. A. Ehrman, representing Stokely Van-Camp; and George Wenger, representing Lake Erie. The purpose of the meeting was to find out how the different processors were coming out in acquiring acreage which was an acute problem at that time. Reports of progress of various respondent processors in attendance were made by Everitt E. Richard, representing Heinz; Thomas M. Morris, representing Hunt; Harold R. Collard, representing Campbell; A. A. Ehrman representing Stokely; and Karl Hirzel. Mr. Collard reported some of the activities of Campbell to get growers interested in making contracts (steak dinners), that Campbell was still low on acreage, and had made no offer about $33 for No. 1 and $21 for No. 2. It appeared to be the concensus of opinion of those present that the processors were still "having resistance or lacked signers by certain growers who had been with them in previous years but now were members of the Cannery Growers, Inc." The matter of contracting with members of the family of a grower in order to avoid a breach of a member's contract was also considered, and it was suggested that the processors consult their lawyers as to the validity of the contract. None of the processors present indicated that they were going to have their contracts approved by the Co-op and no one suggested a solution of the problem might be to recognize the Co-op. Also no one said that they would not buy from members of the Co-op. Mr. Norris representing Hunt, in reporting to his superior, said: "From all outward appearances it looks as though no one is going to break the line." At the conclusion of the meeting, it was stated that another meeting would be held in two weeks and it was indicated that if no change had occurred, the processors were going to ask Mr. DiSalle of the Office of Price Stabilization to issue a public statement that the processors cannot collect anything above parity.

D. *The third meeting of respondent processors on April 13, 1951*

This meeting occurred at the close of a meeting of the Ohio Canners Association and was called at the request of respondent Walter A. Scheid, for the purpose of discussing the situation existing between the processors and the growers, and only processors were present. All

of the respondent processors and individual respondents were represented at this meeting. Mr. Norris, in reporting the meeting to his superior in the Hunt organization, stated:

A meeting was held last Friday in Lima, Ohio, to exchange thoughts on what should be done regarding tomato acreage . . . not much progress has developed in the past two weeks. The majority of them are standing on their original offer of $33.00 and $21.00. . . . (Cx–11–A & B)

At this meeting the representatives of respondent processors reported on their acreage that had been signed and the prices they were paying. Heinz reported that 30 percent of its acreage had been signed. Stokely, Hirzel, and Hunt were without contracted acreage because the Co-op had almost 100 percent membership among their growers (Cx–11–A, par. 7). The main topic of this special meeting was the Co-op and the legal aspects connected with it. At this meeting, Mr. Lutz of Lutz Canning Company (not a respondent) announced what he was going to do, as did some others (Tr. 1041–2). Respondent George Wenger, representing Lake Erie, was not present, but his son Leroy was in attendance and presided over the meeting. There was considerable discussion with respect to the legality of the membership contract between the grower and the Co-op and the one percent check-off in the contract. Mr. Alvin Moll, of respondent Stokely, read a legal opinion with respect to the legality of the contract and the possible legal complications involved if the processors attempted to influence growers to breach their contracts with Co-op. There was also further discussion with respect to possible legal complications with Co-op if processors secured contracts with other members of the family of the grower or someone other than the one who had signed with Co-op. Respondent Everitt E. Richard also read a legal opinion concerning the Co-op contract which had been obtained that day from a law firm in Toledo, Ohio. Some of the representatives of the processors stated that they were going to continue to try to contract for acreage without dealing with Co-op, and others said that they were going to raise their own acreage. Some of these representatives were asked whether they intended to recognize and negotiate with the Co-op, and they reported,

. . . that up to the present time that they did not have authority from their home office to meet with the Association [Co-op]; other canners would say they were going out and get the acreage or try and get the acreage without dealing through the Association. (Tr. 1603)

E. *Activities of Respondent Processors between and after the meetings*

Between the first and second and the second and third meetings, no tomato contracts were negotiated, and respondent processors continued to refuse to recognize or deal with the members of the Co-op.

Mr. Norris reported to respondent Hunt officials in a letter dated April 6, 1951:

* * * I have spoken to George Wenger, owner of Lake Erie Canning Company, who has called these meetings, and he feels that we are on the right track.

Campbell Soup, H. J. Heinz, and a number more are still firm on their price of $33.00 and $21.00. Stokely at Curtice have not come out as yet. (Cx–9–A)

Mr. Norris also reported in another letter dated April 12, 1951:

Have spoken to competitive canners, and all believe that the grower is not giving any ground as very little acreage is being signed up. Stokely at Curtice has not announced a price as yet, and both H. J. Heinz and Campbell Soup swear they are going to stick to $33.00 and $21.00, but I cannot help feeling that someone is going to break the line as both the grower and the canner are becoming very uneasy. No canner in this area has met with the Association that we know of, and will let you know as soon as one does.

* * *

In the event that Campbell or Heinz should come out with a price over the weekend it is our understanding we are to offer the same. However, this does not mean if some small canner jumps the line that we will do the same. Will contact you by phone if this should happen. (Cx–10–A & B)

Following the meeting of April 13, respondent processors continued to "hold the line" and refused to recognize and deal with the Co-op although some of the respondent processors did confer with a negotiating committee of the Co-op.

On April 26, 1951, the Lutz Canning Company of Defiance, Ohio (not a respondent), a processor who recognized the Co-op, had its contract approved and obtained acreage by contracting with the Co-op grower members. Mr. Lutz attended the April 13 meeting and had walked out before it was concluded because he was "skeptical" of the procedure "we were taking there." He apparently had reference to "contracting with relatives and things of that nature" (Tr. 1070–71). This was the first tomato processor to "break the line" and deal with the Co-op, and Mr. Norris, in reporting the fact to his superiors in the Hunt organization in a letter dated May 2, 1951, stated that Lutz,

* * * had negotiated with the Association and agreed to deduct 1% of the gross receipts for the Association from the growers involved, and that the price was to be $32.00 per ton * * * the item caused great concern among all the canners in this area and involved a lot of phone calling.

Mr. Norris, also, in reporting to his superior on April 30, 1951, enclosed a newspaper clipping from *The Toledo Blade*, announcing that the Co-op had approved the contract of the Lutz Canning Company at a flat price of $32.00 per ton.

* * * The above company is the only one who has met with the Association, and about 50% of their growers belong to the Association, and they have agreed to deduct 1% of the receipts of the growers who are members. The Lutz Company contracts for about 300 Acres.

The telephones have been busy today from different canners calling and we calling some regarding this article. As far as we can learn, they are not a very reliable company and a sloppy operator, and it is the opinion of the larger packers in this area to ignore this item.

Spoke to Richards plant manager of Heinz at Bowling Green, this morning, who stated he just finished talking to Campbell Soup at Napoleon. He states that Campbell Soup is not going to get excited about this article, and their price is still $33.00 and $21.00. Heinz are still firm on their price of $33.00 and $21.00, and Stokely has yet to announce a price. However, Richards stated that we could look forward to some smaller canners jumping the line this week as both canners and growers are becoming very anxious.

* * *

* * * We don't think it advisable to come out with a new price at this time because we feel sure it would have to have the approval of the Association, and feel they will not O. K. any until some of the other large canners fall in line.

Should we announce a higher price it may have the effect of strengthening the Association and would hold off, waiting for the other larger canners to follow. The way things look at present it is my guess that the price will end up about $36.00 and $26.00, and will call you when we feel we can make a recommendation. (Cx-111-A & B)

Mr. Norris enclosed a copy of the Cannery Growers, Inc., letter of April 27, 1951, which contained a reference to the approval of the "independent canners" contract at a price of $35.70 which Mr. Norris interpreted as meaning $32.00 plus $3.70 covering the price of hampers which are furnished the growers.

Mr. Norris again, in reporting to his superior on May 4, 1951, stated:

Mr. Al. Ehrman of Stokely Foods at Curtice called early this morning telling us that his Main Office in Indianapolis called him last night told him to start out with a price of $35.00 and $25.00 and see what could be accomplished. They are starting out today and he promised to call and let me know tomorrow how they made out. He also stated that his Company called Heinz at Pittsburgh and Campbell Soup at Chicago and informed them of what they were going to do. [Cx-13-A]

Spoke to Richards of Heinz at Bowling Green yesterday looking for gossip and asked if he thought any of the larger canners would jump the prices that were already established. His answer was that he felt quite positive that Campbell Soup would stand firm, and as far as his Company went, if the others stood in line his Company would do the same, but if any were to break the line, like Campbell Soup, Stokely, or ourselves, felt sure that his Company would have to do likewise. (Cx-13-B)

Mr. Norris included in this letter a list of the processors and the prices that they had announced and the dates of the announcement in the Ohio tomato area.

Mr. Norris in his letter to his superior on May 11, 1951, stated:

George Wenger, owner of Lake Erie Canning Co., at Sandusky, called me yesterday and said that a Mr. Wayne Shedaker requested a meeting with him, after being refused by other canners, to discuss the tomato situation. He is either the

attorney for the Farm Bureau or the Cannery Growers. They are having a meeting this afternoon at Sandusky and he believes that something should break in the next forty-eight hours. He also believes that Campbell and Heinz will announce a price of $35.00 and $25.00, with no recognition to the Association. Should they do this, we will follow. (Cx–112–A)

Mr. Norris reported to his superior on May 18, 1951, stating:

One of our plant growers, by the name of Montrie, was approached by the Association that if he came out with a price they would approve it. This is the same as the Toth deal, on Brown Road previously mentioned. Montrie called us and asked if we would be interested, and "thought he could contract for a price of $33.00 delivered to our plant, deducting 1% for the Association, and charging a 5% overall for his services. This we believe is out, but thought it best to convey it to you.

A short time ago we received a telephone call from one of the officers of the Association, requesting us to meet with him and see if we could agree to give some recognition to the Association, stating that it was not a matter of price that they were striving for but just recognition. We do know that they have contacted Stokely in Curtice along the same lines as we have been in communication with them.

As far as we know, all canners in the area at present claim that they are not going to meet with the Association, and we feel quite confident that unless something is done in the very near future we are not going to get enough acreage to run this plant as the general attitude of all growers is that they will not sign any contract until the Association approves of it, and we believe that the Association is going to stick it out to the very end.

We believe that we were the first ones on this offer by Montrie and should we not take it up, believe he will offer it to other canners. (Cx–113)

It also appears that as late as May 23, 1951, the respondent Hunt, as well as the other processors, were still attempting to get growers to sign contracts without the approval of the Co-op (Cx-114-A & B).

Respondent Stokely on May 3, 1951, announced its tomato contracting prices were $35 for No. 1 and $25 for No. 2, which it will be noted was $2 higher for No. 1 and $4 higher for No. 2 than the other leading processors had been offering. As heretofore indicated, before doing so, respondent Stokely informed respondents Heinz and Campbell and on May 4 notified respondent Hunt (Norris) of the new prices (Cx-13-A). Respondent Stokely, after a week of attempting to contract for acreage at the new prices without recognition of the Co-op, so notified Mr. Norris (Cx-20-A), who in turn notified his superior in a letter dated May 9, 1951. At the same time Mr. Norris reported:

H. J. Heinz claim to have about 50% of their acreage signed, and the rumor is that Campbell Soup at Napoleon have about 30%. Both claim they will hold the price and will not bargain through the Association.

* * *

The Association has not approved any more contracts than the one of Lutz Canning at Defiance at $32.00 flat. I believe that if any of the larger canners

would announce their prices and agree to sign through the Association that the Association would O. K. a price of $35.00 and $25.00. If we could believe that Campbell, Heinz and Stokely will not meet with the Association, can see nothing but the breaking up of the Association. (Cx–20–B)

After the meeting of May 10, 1951, at George Wenger's office, hereinbefore mentioned, a meeting of representatives of Stokely and the Co-op was held, at which everything was agreed upon including price and form of contract until the question of the check-off came up in the discussion, and the spokesman, Mr. William Kruger, vice president of respondent Stokely, refused to allow the check-off even though at that time such an arrangement was being observed by this respondent with a Wisconsin cooperative organization in another product (Tr. 245 and 250).

F. *The George Wenger Hunting Lodge Meeting*

On August 19, 1951, during the early part of the tomato harvesting season, representatives of a number of respondent processors met at George Wenger's hunting lodge in Sandusky, Ohio. Respondents represented at that meeting were Heinz, Hirzel, Hunt, Lake Erie, Weller and Winorr. They discussed, among other things, the tomato shortage problem and the tomato acreage which Alex. E. and William J. Toth, tomato brokers, had under contract with grower members of Co-op. It was known that the Toths had contracted approximately 2,500 acres of tomatoes and that they had no market for them. In discussing the situation, respondent George Wenger stated that although he was not in the market he would not buy any of the Toth tomatoes unless he could do so at $5 a ton less than what was being paid the growers and that he would have to have a release from the growers. Respondent Richard also indicated a similar opinion except that $3 a ton was the margin he said would be necessary. Mr. Norris, in reporting this meeting to the superiors in the Hunt organization, stated that those that were present agreed that they must have a written release from the growers before they would purchase from Toth, and "if our competitors stand by their intention, we look for some cheap tomatoes" (Cx-17-A & B). None of the respondents represented at this meeting purchased any tomatoes directly from the Toths during the 1951 season. However, respondents Campbell and Stokely bought substantial quantities of tomatoes from the Toth acreage through brokers and refused to recognize or deal with Co-op in doing so. Other leading respondent processors, such as Heinz, bought some tomatoes on the open market in the Ohio tomato area, but the bulk of their open market purchases were made from other processors in other areas.

G. *Comparison of 1950–51 open market purchases by respondent processors*

A comparison of the quantity of tomatoes processed during the 1950-51 season by the leading respondent processors shows that during the year 1951 the Heinz Company, for instance, purchased approximately 8,000 tons of tomatoes on the open market whereas in 1950 they purchased less than 500 tons. The Campbell Soup Company in 1951 purchased 8,560 tons on the open market and none in 1950. The Jos. Campbell Company of Chicago purchased 4,408 tons on the open market in 1951 and none in 1950. Stokely purchased approximately 2,700 tons in 1951 on the open market and none in 1950. Likewise, there were far more substantial inter-company shipments from other plants owned by these respondents in 1951 than 1950 (Cx-33, 34, 36, 156-A & B, 157-A & B, 175).

H. *Alleged inducement of breaches of grower contracts with Co-op*

Respondent processors, in their efforts to contract for tomatoes in the spring of 1951, allowed their field men to solicit for acreage with any growers who were willing to sign contracts. However, after the discussion at the meetings on the legality of the membership contracts with Co-op, some of the respondents issued definite instructions to their staffs that they refrain from any action that might be construed as inducing a breach of contractual relationship between the Co-op and the grower (Cx-42, 43; Tr. 787, 2974-7; 3456). It appears that a number of Heinz growers who were members of Co-op signed contracts with Heinz but they did not plant tomatoes. When Heinz learned that they were Co-op members, it advised them that they should not violate their Co-op contract (Tr. 2988-9).

Respondent Stokely canceled contracts it had signed with several growers without knowing of their Co-op membership upon being informed by the growers that they were members and upon their request that the contracts be canceled (Tr. 3938, 3948).

Respondent Campbell entered into contracts with some grower members of the Co-op (12 in all) in the spring of 1951 (Cx-40 and 98). There is, however, no evidence that any of these growers was a member of the Co-op at the time the contract with Campbell was signed or that at such time Campbell knew that any such grower was then a Co-op member.

There is no evidence in the record one way or another with respect to the activities of respondents Bauer, Gibsonburg, Hirzel, Lake Erie, Sharp, Weller, or Winorr with respect to this allegation.

III. Contentions of Respondents

It is contended generally by respondents that they did not conspire or agree upon any policy as to the Co-op but each respondent operating independently decided, for reasons of its own, not to negotiate with Co-op during the 1951 season. One of the contentions advanced is that the OPS regulations of the Office of Price Stabilization, which were effective in the year 1951 in respect to canned tomato products, would not allow the respondent processors to pay the prices asked by Co-op on behalf of its members at the beginning of the 1951 season. It is asserted in this connection that on January 26, 1951, General Ceiling Price Regulation No. 1 froze the price of canned foods at the level from December 19, 1950 to January 25, 1951, with the exception that processors were to be permitted to pass on the increases in the cost of raw tomatoes within certain limits, and that in February, 1951, these limits had taken form, and canners had been informed that they would be permitted to pass on to their customers an increase of only $6.50 per ton in their sales price (the difference between the area parity price and the 1950 area average price). On this basis a processor, therefore, who had paid $24 for No. 1's and $14 for No. 2's in 1950 could pay only $30.50—$20.50 in 1951 unless he were able to absorb completely from his own profit margin any increase over the latter figures. It is also asserted that OPS made special efforts to see that processors and growers were informed of the forthcoming limits early in 1951. However, the facts are that the first press release in this connection was made on March 14, 1951, but it was not until June 1, 1951, that the Federal Register carried a copy of the Ceiling Price Regulation No. 42 for canned vegetables of the 1951 spring pack (Rx–18; Tr. 3743), and July 26, 1951, when it carried a copy of the Ceiling Price Regulation No. 55 for a large number of canned vegetables including tomatoes (Rx–19; Tr. 3745–6). According to this ceiling price regulation for tomatoes for the Ohio tomato area, the permitted cost increase was $7.60 instead of $6.50 as indicated in the preliminary release. This referred to tomatoes processed in July, 1951. It would, therefore, appear from the foregoing facts that while the processors may have had some premonition as to what would transpire, they had no definite knowledge until after the contracting season was over.

It is also asserted by the respondents that the Co-op attracted little interest on the part of the canners during 1950. However, Mr. Collard, manager of the agricultural department of respondent Campbell Soup Company, testified with respect to a strike or tie-up on one or two of Campbell's loading stations, "people who purported to be

committeemen or officers of the Cannery Growers, came to our grading platform and asked to get on the platform; and that was the second time that I had heard of them. That was in September, 1950" (Tr. 3248). It also appears that Mr. Norris reported to his superior in the Hunt organization that in the fall of 1950 the Co-op was quite active in trying to straighten out grading controversies with the processors, and that it was through the efforts of the Co-op that most of the respondent processors made an adjustment in the price paid in the fall of 1950 by giving a bonus which increased the price paid to growers by $2 per ton (Cx–102–A & B, 103–A & B, 104–A & B).

Some of the respondents had special contentions and these will now be discussed:

Campbell Soup Company

This respondent contends that it had determined prior to January 18, 1951, the date of the first Co-op letter to processors, that it would not do business with the Co-op; that this conclusion was reached when it learned of the terms of the Co-op contract under which the latter would be the sole agent for the marketing of tomatoes grown by its members. Campbell claims that, although it is not opposed to dealing with cooperatives as such, in the case of tomatoes it was necessary to deal directly with the grower without the intervention of third parties in order to get the necessary quality and yield, and its policy to this effect had been determined independent and without regard to what any other canner was doing or was planning; that once it had determined that Co-op was outside the scope of Campbell's operations, Campbell did not care whether every other canner in the area signed up with the Co-op.

As a matter of fact, Mr. Collard, vice president of this respondent and its spokesman on many occasions, testified that it was not until March 2, 1951, that he knew there was a problem created by Cannery Growers and when he was asked if he had resolved at that time that he would give recognition to Co-op he testified, "There was no reason up to that time for us to even consider, and I did not consider, the problem. I did not know it was a problem" (Tr. 3322). Furthermore, Mr. Collard himself attended a meeting of the processors on March 17, 1951, admittedly "to find out what the impact was with the other people" (Tr. 3333). He further testified that the principal problem was Cannery Growers in operation—"that was the focal point" of that meeting. There is also other evidence indicating that even subsequent to this time Campbell was interested in the actions and reactions of its competitors with respect to dealing with the Co-op. Telephone conversations between Campbell officials and representatives and other respondent processors also support this conclusion.

Stokely Van-Camp, Inc.

It was contended by this respondent that it was willing to negotiate with the local committee of the Co-op in the spring of 1951 but that the price of $40 and $34 for tomatoes was entirely too high. The facts are, however, that representatives of Stokely and the committee of the Co-op were able to agree upon a price of $35 and $25, and negotiations were broken off or discontinued because Stokely would not agree to the check-off—this in spite of the fact that Stokely was buying peas in Wisconsin from a cooperative organization on an advance contract basis with check-off (Tr. 4248, 4250).

H. J. Heinz Company

It is contended by this respondent that its plant managers were instructed to deal with any committee representing their own growers and if negotiations were successful the plant managers were given authority to agree to a check-off of Co-op dues on an approved assignment form executed by each individual grower, and that although the Co-op was advised of this position no committee of Heinz growers was ever appointed. There is a direct conflict with respect to the last part of this contention, and there does not appear to be competent evidence to support it.

Hunt Foods, Inc., and Hunt Foods of Ohio, Inc.

It was first contended by Hunt Foods, Inc., that it is engaged in the purchasing and processing of tomatoes in the State of California only and that it had no tomato cannery in Ohio, Michigan or Indiana in 1951 and purchased no tomatoes in those states. It admitted that it owned over 90 percent of the stock of Hunt Foods of Ohio, Inc. There is no evidence in the record to contradict this contention, and it is believed in this connection that this respondent should not be held responsible for the activities of its subsidiary.

Hunt Foods of Ohio, Inc., contends that it has not cooperated with the other respondents in the alleged conspiracy, understanding, or planned common course of action, and that the vice president in charge of operations of this corporation, Mr. Irving Goldfeder, has sole authority and responsibility for the purchase of all tomatoes and that Thomas M. Norris, vice president and local Ohio plant manager during 1951, was entirely responsible to Irving Goldfeder and entirely subject to his instruction and directions, and that he [Norris] had no authority to make agreements, commitments, contracts or other obligations for Hunt Foods of Ohio, Inc., with its competitors. It is also contended that the information contained in the letters referred to herein consists of gossip and other information which Norris was

required to report to Goldfeder, and it is also contended that as evidence of the lack of such agreement or planned common course of action this respondent had its contract approved by the Co-op and purchased substantial quantities of tomatoes during the 1951 season.

The contentions of respondent Hunt Foods of Ohio, Inc., are not entirely borne out by the evidence in the record. It is true that this respondent did, in the latter part of May at the end of the contracting season, complete negotiations with the Co-op and had its contract approved for that season. However, this action on its part was taken after Norris had attended meetings and had taken part in the various discussions, and, from some of the expressions made by him in the course of his correspondence with Mr. Goldfeder, it is quite apparent that Hunt did not act independent of the other respondent processors until the latter part of May, 1951. It is quite evident that Hunt cooperated with its competitors as long as it could do so without seriously endangering its own business by being deprived of a source of supply of tomatoes (Cx–110–A & B, 111–A & B, 112–A).

Gibsonburg Canning Company

This respondent contends that after it received the letter of January 18, 1951, it arranged a conference on January 28, 1951, at Maumee, Ohio, at the Farm Bureau Cooperative Building, and that at this meeting representatives of the Co-op stated that the price must be $40 and $34, and the negotiations terminated, and no attempt has been made by the Co-op to renew the negotiations. Gibsonburg was willing to negotiate and was willing to pay a reasonable price for tomatoes but it could not afford to pay $40 and $34. There is nothing in the record to contradict this contention, and the only evidence of participating in a conspiracy was the attendance at the meeting on March 17, 1951.

Sharp Canning Company

It is contended by the respondent that within 10 days after the receipt of the Co-op letter, Sharp negotiated with a committee of three of its growers, who represented to Sharp that they were the Co-op committee authorized to negotiate and contract for Co-op members; that contracts were executed between Sharp and each of such three growers on March 12, 1951, at a price of $34 and $20, and that Sharp secured its full 1951 requirements after negotiating similar contracts with other growers. It is further contended that Sharp agreed to deduct the 1% check-off if the growers would protect the company from legal liability by furnishing written authorization therefor. There is no evidence in the record to contradict the foregoing contentions of respondent Sharp. It is contended by the at-

torney in support of the complaint that this respondent's contract had never been approved by the Co-op because the committee which called upon respondent Sharp lacked authority from the Co-op. It is not believed that the allegations of the complaint have been proved against this respondent.

IV. Relations between respondent processors and Co-op since 1951

In 1952, all of the respondent processors with the exception of respondent Campbell had their contracts with the growers approved by Co-op, and there appears to be a friendly relation between the members of the Co-op and respondent processors. In March, 1952, representatives of respondent Heinz conferred and negotiated with officials of Co-op two weeks before the Heinz contract prices were announced. When the prices were announced, the Co-op approved the prices in the Heinz contract. Thereafter, Heinz addressed a letter to Co-op, advising that the Heinz Company would deduct the check-off and remit the same to the Co-op for grower members who authorized such deductions. Mr. A. A. Ehrman of respondent Stokely negotiated with the Co-op in the spring of 1952 and had its contract approved. It addressed a letter to the president of the Co-op similar to the one sent by Heinz, confirming the results of the negotiations. Similar negotiations were continued during succeeding years.

CONCLUSION

From the foregoing findings of fact, it is concluded that the acts and practices of the respondent processors, except Sharp and Gibsonburg, beginning in the spring of 1951 and continuing through the remainder of the tomato contracting and harvesting season of that year, were performed pursuant to a common understanding and planned common course of action (a) to refuse to negotiate or deal with the Co-op as a bargaining agent for its grower members, and (b) to refuse to grant recognition of, or to negotiate with, the Co-op by deducting the dues check-off for grower members of that organization. In arriving at this conclusion, full consideration has been given to the contentions of respondent processors, and, while it is not "crystal clear," as asserted by counsel in support of the complaint, it is believed that the inescapable conclusion must be drawn from all of the facts disclosed, not only by what was said but what was done by the respondent processors, that they were acting pursuant to a common understanding or agreement. It is fundamental law, of course, that the essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other cir-

cumstances as well as in an exchange of words.[4] In this case, as in many cases, in order to establish agreement we are compelled to rely on inferences drawn from the course of conduct of the alleged conspirators. Counsel for respondents emphasize the fact that nearly all, if not all, of the respondent processors were opposed as a matter of policy to dealing with growers of tomatoes through a third party, or, as in this instance, with the selling agent Co-op. Assuming that this is true, such a policy would not justify the action taken by the principal respondents to enforce that policy. Each of the respondent processors, unless he consulted with the others, would not be aware of the policy of the competitors, and it would be only through an exchange of information, that the respondents could be sure that the position or stand taken by them could be sustained over any period of time. Even Campbell, who has vehemently claimed throughout this proceeding that it acted independently of all of its competitors, attended all meetings and there exchanged information as to conditions, and as to acreage and prices, with other respondent processors and also by telephone; so that each and all of the respondent processors not only knew the policy of their competitors but also the extent to which it was being carried out. It is significant that each of the principal respondents took the position in almost the same language in their testimony that they were willing to deal with the growers with whom they had been dealing, but they were all unwilling to negotiate with a committee which represented the Co-op. It is inconceivable that each of the principal respondents in this case would maintain that position if they did not know that the same position was being taken by their principal competitors. There is evidence that even though they all had the same common purpose they were suspicious of each other and were watching each other to make sure that their competitors observed the policy which they asserted they were following.

It is equally significant that at the last meeting of the respondents on April 13, 1951, those present were assured that the large processors had not yet given authority to their representatives to deal with the Co-op. It was not until it was quite apparent that the processors were not going to be able to get sufficient supplies to operate their plants that respondent Hunt of Ohio decided to "break the line" and negotiate a contract with the Co-op.

It is also significant that after the experience of the 1951 season, all of the respondent processors, with the exception of Campbell, freely negotiated with the Co-op early in 1952 and had their contracts

[4] *United States v. Schrader's Son*, 252 U. S. 85.

approved, and allowed the one percent check-off which had been the principal stumbling block to negotiations the previous year.

It is contended by counsel in support of the complaint that the conspiracy in this case began at the time of the first meeting on March 17 and continued throughout the remainder of the season. It is difficult to determine exactly when a conspiracy of this kind is started or begun. However, it is concluded that in this particular case the conspiracy or common course of action began when the respondent processors acquainted each other with what they proposed to do with respect to the Co-op. That might have taken place at the meeting of March 17 or it might have taken place before that time in the course of telephone conversations or other conferences not disclosed by the record. Be that as it may, the respondent processors became parties to the agreement or the planned common course of action when they learned of it and indicated or expressed, either by word of mouth or action, that they were in accord with the plan of operation. By the participation of each of the respondent processors in that course of action, each and everyone of them continued to be a co-conspirator so long as it acted in conformance to the plan. As the Supreme Court said in a decision involving similar charges:

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. * * *
>
> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck* v. *United States*, 253 F. 212, 213, aff'd, 249 U. S. 47. * * *[5]
>
> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. * * *[6]

Reference is made to the decision of the Supreme Court in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al.*, 346 U. S. 537, which counsel for respondents rely upon as authority for their contention that the facts disclosed in this case do not indicate the existence of a conspiracy. In that case, the crucial question was whether the conduct of respondents stemmed from independent decision or from an agreement, tacit or express. It was conceded by the Court that business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. Citing the *Interstate Circuit* case, *supra*.

> * * * But this Court has never held that proof of parallel business behavior *conclusively* establishes agreement or, phrased differently, that such behavior

[5] *Interstate Circuit, Inc., et al.* v. *United States*, 306 U. S. 208.
[6] *Idem.*

itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely. * * * [Emphasis supplied.]

The uniform business behavior relied upon in that case was the refusal by each respondent to grant the petitioner, a moving picture exhibitor in the suburbs of Baltimore, first-run pictures for his theatre, each respondent stating that it had a policy of restricting first-run pictures in Baltimore to the downtown theatres, giving similar reasons. There was no other evidence such as appears in the present case as to meetings, telephone calls, etc., to show a course of action from which an agreement might be inferred. The case is authority for the proposition that parallel business behavior does not conclusively establish agreement in violation of the Sherman Act.

It is now well established by numerous court decisions that concerted action by competitors pursuant to an understanding or planned common course of action between and among them to boycott and refuse to deal with members of the trade, or, as in this case, with growers or common selling agents of growers, constitutes an unreasonable restraint of trade and an unfair method of competition under the Federal Trade Commission Act.[7]

It it also concluded that the Hunt documents, which have been quoted and relied upon in the foregoing findings, are competent evidence to be considered in proving the manner in which respondent processors carried out the common understanding and agreement found to exist.[8]

It is concluded that the allegations in the complaint with respect to the breaching of contracts between growers and the Co-op by the respondent processors have not been proven.

In view of the definite discontinuance of the foregoing acts and practices by the respondent processors before the complaint in this case was issued, and the fact that they have not been committed for more than four years since, and the strong position that the Co-op now occupies in the industry as a bargaining agent for its member tomato growers in the Ohio area, it is believed that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time. In this connection, counsel in support of the complaint concedes that respondents probably will not renew their unfair acts and practices in Ohio again but urges there should be an order to

[7] *Fashion Originators Guild of America* v. *Federal Trade Commission*, 312 U. S. 457.
[8] *Wiborg* v. *United States*, 163 U. S. 632, 657.

cease and desist to prevent them from engaging in those activities against any other growers organization.

It is not believed the respondents will soon forget the lesson learned in Ohio and try the same practices elsewhere. At any rate a dismisal of the complaint without prejudice will give the Commission an opportunity to proceed promptly with a new complaint if the respondents should attempt to use such methods again.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, under Section 5 of the Federal Trade Commission Act, charges respondents, among other things, with conspiring and engaging in a planned common course of action to boycott certain tomato growers. At the conclusion of the testimony in behalf of the complaint, the hearing examiner dismissed the charges as to all respondents except the following: H. J. Heinz Company; Campbell Soup Company; Joseph Campbell Company; Stokely Van-Camp, Inc.; Bauer Cannery, Inc.; Foster Canning, Inc.; Gibsonburg Canning Company, Inc.; Hirzel Canning Company; Hunt Foods, Inc., and its subsidiary, Hunt Foods of Ohio, Inc.; Lake Erie Canning Co. of Sandusky; Sharp Canning Co.; J. Weller Company, Winorr Canning Company, and certain officers and employees of the said corporate respondents.

As to the above-named parties, the hearing examiner dismissed all charges except those involving the boycott.

Upon appeal, the ruling was affirmed and the case was remanded for further hearing. At the conclusion of such hearings, the hearing examiner dismissed the complaint as to three respondents, namely, Gibsonburg Canning Company, Inc., Sharp Canning Company and Hunt Foods, Inc. As to the remaining respondents, the hearing examiner found that a conspiracy did exist but held that because of the termination of the illegal acts prior to the complaint and other circumstances, no order should issue. He accordingly dismissed as to them without prejudice.

Both sides appeal. The appeal of respondents (except the three dismissed with prejudice) is based on the finding by the hearing examiner that a conspiracy did exist. The appeal of counsel supporting the complaint challenges, first, the dismissal of the three respondents above named, and, second, the failure to issue and order.

Respondents are engaged in the processing of raw tomatoes into tomato food products. For many years prior to 1951, it has been their practice to enter into contracts with individual tomato growers for the planting and subsequent delivery of specified acreages of tomatoes.

The contracting usually begins in February and is concluded in the early part of May. Prior to 1951, contracts were prepared by the individual respondents and usually covered such matters as prices to be paid for delivered tomatoes according to grade, number of acres to be planted, a requirement that the individual grower would sell to that particular respondent all tomatoes grown by him that year, etc. The contracts were not the result of individual negotiations. Each respondent at the proper time announced the price and general terms on which it would contract. The individual grower was free to contract with the canner of his choice, although geographic considerations put some limitations on this freedom. Canners also at times made purchases during the canning season on a "spot" or "open market" basis.

Dissatisfaction on the part of some growers with the prices paid by the canners and also with the grading program led to the organization in 1949 of a cooperative known as Cannery Growers, Inc. The general purpose of this cooperative was to act as the bargaining agent or representative of the growers in the negotiation of tomato contracts with the canners. Many growers became members and signed contracts appointing the cooperative as the bargaining agent and providing that the contract would not become effective until the Co-op had contracted with 65% of the growers in the Ohio tomato area.

Appeal of Respondents

In their appeal all the respondents with the exception of the three against whom the complaint was dismissed with prejudice challenge the findings and conclusions of the hearing examiner that the acts and practices of respondents beginning in the spring of 1951 and continuing through the remainder of the tomato season of that year were performed pursuant to a common understanding and planned course of action (*a*) to refuse to negotiate or deal with the Co-op as a bargaining agent for its grower members, and (*b*) to refuse to grant recognition of, or to negotiate with, the Co-op by deducting the dues check-off for grower-members of that organization.

There is no direct evidence of express agreement among the respondents. The hearing examiner based his conclusions on various acts and conduct of the respondents and inferences arising therefrom. These matters are set out in detail in the initial decision. They relate to (1) meetings of the respondents or some of them, (2) other relations between respondents, (3) letters written by Thomas M. Norris, Plant Manager of Hunt Foods of Ohio, Inc., and (4) other matters.

On December 18, 1950, the Co-op declared its contracts with growers were operative and sent letters notifying the growers and at least

some of the canners that the Co-op was prepared to enter into negotiations for 1951 contracts concerning prices, price spread between grades, check-off provisions, non-exclusive growing clause, and other matters. In a letter dated January 30 to the growers (also made available to the canners) asking prices were declared to be $40 for Grade No. 1 and $34 for Grade No. 2 tomatoes. Other proposed terms were set out and the growers were advised not to sign any contract that did not have the approval of the Co-op. Other letters were also sent at various times.

The letters advised of the appointment of a negotiating committee and stated that canner-grower contracts were to be approved by the Co-op before contracts were made with individual growers. Thereafter, further efforts were made to contact the canners and negotiate with them. With a few exceptions referred to later, no contracts were thus negotiated.

On March 17, 1951, a meeting of representatives of most of the respondents was held at a hotel in Toledo, Ohio. At this meeting, there was a general discussion covering the Co-op's letters, the difficulties individual canners were having in signing up acreage, etc. Another meeting, to be held in a few weeks, was agreed upon.

This second meeting was held on March 31 in Lima. At this meeting, there was further discussion of the general situation. Reports were made of the efforts being made to secure acreage and of the difficulties being encountered. The matter of contracting with some member of the family of a Co-op member was discussed and suggestions were made that individual members consult their lawyers as to the validity of such contracts.

A third meeting was held on April 13, 1951, at which there was a continuation of the discussions as to the Co-op. Some canners reported as to their acreage or lack of it. The legality of the Co-op membership contracts and the 1% check-off was also discussed. Legal opinions were read as to the possible consequences of attempts to influence Co-op members to breach their contracts with the Co-op and also as to the possible legal consequences of attempting to contract with members of the families of Co-op members.

There was a final meeting on August 19, 1951, during the harvest season at the hunting lodge of George Wenger of the Lake Erie Canning Company. While this meeting appears to have been primarily social, there was some discussion of the situation, particularly as to buying tomatoes from the Toths, tomato brokers who had contracted 2,500 acres with grower-members of the Co-op and who were apparently looking for a market. Conversations reported indicated

an unwillingness on the part of some respondents to buy from Toths, except on certain conditions.

It also appears that during the tomato season, there was considerable telephoning and other contacts between various respondents in regard to the problems created by the Co-op.

Letters from Mr. Thomas M. Norris, Plant Manager of respondent Hunt Foods of Ohio, Inc. to his superior, Irving Goldfeder, vice-president of Hunt of California, are also in evidence. In these letters, Mr. Norris gave a report on the happenings shortly after they occurred. For example, in a letter of April 2, 1951, he reported the efforts of some canners to get their acreage and other matters. He concluded: "From all outward appearances, it looks as though no one is going to break the line." In a letter of April 6, 1951, he said: "I have spoken to George Wenger, owner of Lake Erie Canning Company, who has called these meetings and he feels that we are on the right track."

In a letter of April 12, 1951, he said:

> Have spoken to competitive canners, and all believe that the grower is not giving any ground as very little acreage is being signed up. Stokely at Curtice has not announced a price as yet, and both H. J. Heinz and Campbell Soup swear they are going to stick to $33.00 and $21.00, but I cannot help feeling that someone is going to break the line as both the grower and the canner are becoming very uneasy. No canner in this area has met with the Association that we know of, and will let you know as soon as one does.
>
> * * * * * * *
>
> In the event that Campbell or Heinz should come out with a price over the weekend it is our understanding we are to offer the same. However, this does not mean if some small canner jumps the line that we will do the same. Will contact you by phone if this should happen.

At the third meeting (April 13), Mr. Lutz of the Lutz Canning Company walked out of the meeting, apparently because of disagreement with some things being said. On April 26, his company had its contracts approved by the Co-op and it began contracting with Co-op members. In regard to this, Mr. Norris wrote:

> * * * The above company is the only one who has met with the Association, and about 50% of their growers belong to the Association, and they have agreed to deduct 1% of the receipts of the growers who are members. The Lutz Company contracts for about 300 acres.
>
> The telephones have been busy today from different canners calling and we calling some regarding this article. As far as we can learn, they are not a very reliable company and a sloppy operator, and it is the opinion of the larger packers in this area to ignore this item.
>
> Spoke to Richards, plant manager of Heinz at Bowling Green, this morning, who stated he just finished talking to Campbell Soup at Napoleon. He states that Campbell Soup is not going to get excited about this article, and their price is still $33.00 and $21.00. Heinz are still firm on their price of $33.00 and

$21.00, and Stokely has yet to announce a price. However, Richards stated that we could look forward to some smaller canners jumping the line this week as both canners and growers are becoming very anxious.

In a letter dated May 18, 1951, Mr. Norris said:

A short time ago we received a telephone call from one of the officers of the Association, requesting us to meet with him and see if we could agree to give some recognition to the Association, stating that it was not a matter of price that they were striving for but just recognition. We do know that they have contacted Stokely in Curtice along the same lines as we have been in communication with them.

A letter dated May 9, 1951 contained this:

H. J. Heinz claim to have about 50% of their acreage signed, and the rumor is that Campbell Soup at Napoleon have about 30%. Both claim they will hold the price and will not bargain through the Association.

* * * * * * *

The Association has not approved any more contracts than the one of Lutz Canning at Defiance at $32.00 flat. I believe that if any of the larger canners would announce their price and agree to sign through the Association that the Association would O. K. a price of $35.00 and $25.00. If we could believe that Campbell, Heinz and Stokely will not meet with the Association, can see nothing but the breaking up of the Association.

In addition to the Lutz Packing Company, contracts with Sharp Packing Company and St. Mary's Packing Company were approved by the Co-op. At a later date (May 26), the Co-op also negotiated contracts with respondent Hunt Foods of Ohio. There were also meetings and negotiations with other canners with whom contracts were not negotiated.

The open market purchases by respondents during the 1951 season also throw light on the subject. On this point, the initial decision points out:

A comparison of the quantity of tomatoes processed during the 1950-51 season by the leading respondent processors shows that during the year 1951 the Heinz Company, for instance, purchased approximately 8,000 tons of tomatoes on the open market whereas in 1950 they purchased less than 500 tons. The Campbell Soup Company in 1951 purchased 8,560 tons on the open market and none in 1950. The Jos. Campbell Company of Chicago purchased 4,408 tons on the open market in 1951 and none in 1950. Stokely purchased approximately 2,700 tons in 1951 on the open market and none in 1950. Likewise, there were far more substantial inter-company shipments from other plants owned by these respondents in 1951, than in 1950.

The Toths who had contracted 2,500 acres through the Co-op sold some tomatoes to three large respondents through other brokers—a deal which did not involve any recognition or dealing with the Co-op.

The respondents argue that the conclusions of the hearing examiner (1) are drawn exclusively from claimed parallel behavior, (2) fail to take into consideration whether respondents' policies accorded with

their individual interest, and (3) based a finding of refusal to negotiate with the Co-op on the fact that they failed to agree on terms.

We do not so construe the initial decision. It appears that some respondents, for one reason or another, did not wish to deal with the Co-op. An individual respondent might properly conclude that dealing with the Co-op rather than the individual grower was not in accordance with the interests of the canner. Nor would the mere failure to agree upon terms of itself prove a failure to deal with the Co-op.

The basis of the complaint, however, is that the respondents engaged in a planned common course of action to boycott the Co-op. On that issue, the evidence has taken a wide range. We think that the hearing examiner decided this issue correctly. His findings thereon are adopted as the findings of the Commission and the appeal of respondents is denied.

Appeal of Counsel Supporting the Complaint

(1) Dismissal of the complaint as to Gibsonburg Canning Company and Sharp Canning Company

Gibsonburg received the letter sent out by the Co-op on January 18, 1951. On January 28, representatives of respondent met with the Secretary of the Co-op at the Farm Bureau Cooperative Building at Maumee, Ohio, and there was some discussion of prices. The Secretary of the Co-op was asking $40/$34 which was not accepted. There apparently was no further offer or counter offer. It appears that a representative of respondent attended the three meetings of the processors.

A representative of Sharp Canning Company also attended the three meetings. Early in March, 1951, and after the notice from the Co-op, Sharp negotiated with a committee of three of its growers, who represented that they were the committe authorized to negotiate for Co-op members. Sharp thereafter secured its full 1951 acreage at a price of $34 and $21. There is evidence to the effect that the committee did not have actual authority to represent the Co-op. Sharp also agreed to deduct the 1% "check-off" if the growers individually gave written authorization. No such authorization was given. In subsequent years, authorization was given and the deduction was made.

The hearing examiner found that the evidence was not sufficient to prove the allegations of the complaint against the Gibsonburg Canning Company and Sharp Canning Company.

We agree with and adopt such finding. The appeal of counsel supporting the complaint as to this issue is denied.

(2) Dismissal of the complaint as to Hunt Foods, Inc.

Respondent Hunt Foods, Inc. is a Delaware corporation with its principal place of business in California. In 1951 it had three subsidiaries: Hunt Foods of Utah, Inc., Hunt Foods of New Jersey, Inc. and respondent Hunt Foods of Ohio, Inc. Respondent Hunt Foods of Ohio, Inc. is a corporation organized under the laws of Ohio with its principal place of business in Toledo, Ohio. Prior to 1948, Hunt Foods of Ohio, Inc., was known as the Harbauer Company. In 1948, Hunt Foods, Inc., acquired a controlling stock interest in the Harbauer Company and the name was later changed to Hunt Foods of Ohio, Inc. In 1951, respondent Hunt Foods, Inc. owned 90% of the stock of respondent Hunt Foods of Ohio, Inc. Irving Goldfeder was a vice-president of all the corporations above named with an office in California. He was vice-president in charge of operations of respondent Hunt Foods of Ohio, Inc. and had sole authority and responsibility for the purchase of all tomatoes for respondent Hunt Foods of Ohio, Inc., during 1950, 1951 and 1952. Hunt Foods, Inc. neither purchased nor processed tomatoes during 1951 in any of the states with which this proceeding is concerned and did not participate in any of the activities charged in the complaint.

The question presented is whether Hunt Foods, Inc. can he held responsible for the activities of respondent Hunt Foods of Ohio, Inc.

Irving Goldfeder was twice called as a witness by attorneys supporting the complaint. He testified that he was executive vice-president of Hunt Foods, Inc. and also vice-president and director of Hunt Foods of Ohio, Inc.; that his duties and sole responsibility as an officer of Hunt Foods, Inc. were in "charge of production" (Comm. Ex. 21, p. 4); that in connection with both corporations, his supervisory and managerial functions were to "help plan the proper equipment, mechanics of the plant, the volume of production, supervise and advise on the purchasing of the supplies which go into production, and help supervise the actual production of the factory."

Q. What is the relationship between Hunt Foods of Ohio, Inc. and Hunt Foods, Inc.?

A. Well, it is practically wholly owned, it is held over 90% by Hunt Foods, Inc.

Q. And as a nearly wholly-owned subsidiary, who exercises the control over the management and operation of Hunt Foods of Ohio, Inc.?

A. Hunt Foods, Inc.

Q. Hunt Foods, Inc.?

A. Yes, sir. (Comm. Ex. 21, p. 5.)

* * *

Q. Under whose control are matters of policy with respect to the purchases of Hunt Foods of Ohio, Inc.?

A. Mine. (Comm. Ex. 21, p. 12.)

Later testifying as to the two corporations, Mr. Goldfeder said:

Q. Now, with reference to the two complaints, are they separate and distinct corporations?

A. They are. (Tr. 4006.)

Q. You control the operation of Hunt Foods of Ohio, Inc., do you?

A. I do.

Q. The Hunt Foods Company of California .....?

A. They control the stock; I directed the operations.

Q. You directed the operations?

A. That's right.

In regard to the two subsidiaries in New Jersey and Utah, Mr. Goldfeder testified:

Q. You direct the operations similar to the way you direct this one in Ohio?

A. I do.

He also testified that as vice-president of the Hunt Foods Company of Ohio, he had sole responsibility for purchasing of tomatoes and for plant operation. It was solely up to him. No one had that responsibility besides him. (Tr. 4008, 4012)

This general subject has often been considered by the courts. *Press Company, Inc.* v. *NLRB*, 118 F. 2d 1937, involves an appeal from an order requiring the Press Company, Inc. and Gannett Company, Inc. to cease and desist from certain unfair labor practices. All of the common and one-half of the preferred stock of Press Company was owned by Gannett Company. Three of Press Company's directors were also directors of Gannett Company. The offices of president, vice-president and secretary in each corporation were held by the same persons. The court pointed out:

There is unquestionably a close community of interest between the different papers, but there is no testimony that the Gannett Company ever exercised control of the internal operation of the newspaper published by Press Company * * *. A careful examination of the evidence shows a complete absence of any which ought to be accepted by reasonable minds tending to show that Press Company was not self-governing.

Reference of problems by Press Company "to Rochester" (the Gannett Company home office) should be construed as reference to its own offices rather than to the Gannett Company. Consequently, the ruling of the N.L.R.B. holding Gannett liable for the acts of Press Company was overruled.

In *Owl Fumigating Corporation* v. *California Cyanide*, 30 F. 2d 812, the court clearly expresses the general rule that ownership of capital stock of one corporation by another or identity of officers does not establish the relationship necessary to holding the parent company liable for the acts of the subsidiary. On the contrary, it is necessary to prove that the one corporation is a mere agency or department of

the other and is used as an instrumentality to perpetuate fraud, justify wrong, avoid litigation, or render it more difficult, or generally to escape liability for what are in substance its own acts.

In *National Lead Company* v. *FTC*, decided December 1, 1955, by the U. S. Court of Appeals, Seventh Circuit, the court, in reversing the Commission's order against Anaconda, said:

> We have searched in vain for evidence of a substantial character to support the findings on this phase of the case. Though the record shows that International, Anaconda Lead and Anaconda Sales are wholly owned subsidiaries of petitioner and in September 1947, at a date after International had withdrawn from the field, Anaconda, Anaconda Sales and International were controlled by interlocking boards of directors and officers, there is no evidence which militates against the existence and activity of these subsidiaries as separate entities at any time pertinent to this inquiry. Thus, though the evidence tends to prove the incidents of a parent-subsidiary relationship, a fact which has never been in dispute, the closely correlated operation of International and Anaconda Sales reflects no sinister connotation of domination by their common parent, keeping in mind that the only function for which Anaconda Sales was organized was to sell products produced by International in certain western states in which the latter was not licensed to do business.
>
> These sparse gleanings from the record fail to support the Commission's findings of substantial identity. To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

The evidence in the instant case falls far short of that required by the courts in order to hold the parent corporation liable when given a reasonable and impartial construction. It appears that the things done by Irving Goldfeder were done as vice-president in charge of operations of Hunt Foods of Ohio, Inc. He was discharging duties and responsibilities which go with that position. Nowhere is there any evidence that the parent company, in any way, participated in any of the matters complained of. There is no evidence of complete control (or, in fact, of any control whatever) of the subsidiary by the parent. Just what the relationship between the corporations was is not disclosed by the record. Counsel supporting the complaint twice called Mr. Goldfeder to the stand; they had access to the books and records of both corporations. If there was a situation not disclosed by the record, it could easily have been discovered. To hold Hunt Foods, Inc. liable for the acts of its subsidiary under the record in this case would be to ignore the repeated decisions of the courts on this subject.

The hearing examiner decided this phase of the case correctly. His findings and conclusions thereon are adopted as the findings and conclusion of the Commission and the appeal of counsel supporting the complaint as to this phase of the case is denied.

(3) Dismissal of the complaint without prejudice and failure to issue an order against certain respondents

Complaint herein was filed on May 21, 1952. The hearing examiner said:

In view of the definite discontinuance of the foregoing acts and practices by the respondent processors before the complaint in this case was issued, and the fact that they have not been committed for more than four years since, and the strong position that the Co-op now occupies in the industry as a bargaining agent for its member tomato growers in the Ohio area, it is believed that the Commission would be justified in assuming from the facts disclosed that the respondents will not again attempt to engage in these acts and practices in this industry and therefore it would not be in the public interest for the Commission to issue an order to cease and desist at this time. In this connection, counsel in support of the complaint concedes that respondents probably will not renew their unfair acts and practices in Ohio again but urges there should be an order to cease and desist to prevent them from engaging in those activities against any other growers organization.

The fact that a respondent has discontinued illegal practices even prior to the issuance of a complaint does not prevent the Commission from issuing a cease and desist order. In such cases, the Commission must exercise its discretion in view of all the circumstances. *Guarantee Veterinary Company* v *FTC* (1922), 285 Fed. 853. In addition to the discontinuance of the illegal practices, the Commission should consider the likelihood of those practices being resumed in the future. The guiding principles are well expressed in *Eugene Dietzgen Company* v *FTC* (1944), 142 F. 2d 321, in the following language:

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all of the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order.

The object of the proceeding is to *stop* the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case.

In *Goshen Manufacturing Company* v. *Myers Manufacturing Company*, 242 U.S. 202, a suit based on infringement of a patent, it appeared that defendant had sold the factory before the suit was filed with no present intention of resuming manufacturing. Nevertheless,

he was still attacking the validity of the patent so an injunction was held proper. In *Sears, Roebuck & Company* v. *FTC* (1919), 258 Fed. 307, respondent had discontinued the illegal practices before complaint issued and in its answer alleged it had no intention of resuming them. Nevertheless, it contended that its acts were not illegal because the law was unconstitutional. A cease and desist order was held proper.

In the matter of *Wildroot Company, Inc.* (1953), Docket 5928, it appeared that the respondent had subscribed to the Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry, which Rules adequately covered the practices complained of. There was also in the record a declaration under oath of respondent's vice president and general manager that the respondent had no intention of resuming the practices. The complaint was dismissed without prejudice.

In *Argus Cameras*, Docket 6199, 1954-55 Trade Cases, § 25, 196, the Commission pointed out that dismissal of a complaint because of discontinuance of claimed illegal practices should not be done unless there is a clear showing of unusual circumstances which in the interest of justice requires it. In that case, the Commission found that the course of dealing over the years between Federal Trade Commission representatives and Argus was such as to justify respondent in the belief, prior to the issuance of the complaint, that no challenge was being made to its practices. It also appeared that respondent discontinued the practices promptly after the complaint was filed "in order to comply with the direction of the Commission" and filed affidavits agreeing to refrain in the future from the acts complained of.

In the present case, it is clear that respondents did cease the practices complained of prior to the issuance of the complaint and have not renewed them. Nevertheless, they have at all times insisted that their course of conduct did not violate the law. No affidavits or statements appear in the record indicating a clear intention to refrain from the practices found to exist. The fact that the Co-op now occupies a strong position in the industry as a bargaining agent is a circumstance to be considered, but we do not consider it sufficient. No criticism is to be made against respondents for vigorously defending the position they had taken. This, of course, they had a right to do. Our conclusion simply is that the facts in this particular case do not warrant a dismissal without prejudice; on the other hand, we think an order based on the findings should be issued.

The appeal of counsel supporting the complaint on this phase of the case is granted and it is directed that a proper order issue against the following respondents:

H. J. Heinz Company; Campbell Soup Company; Joseph Campbell Company; Stokely Van-Camp, Inc.; Bauer Cannery, Inc.; Foster Canning, Inc.; Hirzel Canning Company; Lake Erie Canning Co. of Sandusky; J. Weller Company; Winorr Canning Company; Hunt Foods of Ohio, Inc.

As to all other respondents, the complaint is dismissed.

Commissioner Anderson dissented to the dismissal of the complaint as to respondent Hunt Foods, Inc.

Commissioner Kern did not participate in the decision herein.

OPINION OF COMMISSIONER ANDERSON CONCURRING IN PART WITH AND DISSENTING IN PART FROM THE OPINION OF THE COMMISSION

I am in agreement with the opinion of the Commission in this matter except as to the section thereof in which the hearing examiner is upheld in that portion of his initial decision which proposed to dismiss the complaint against one of the respondents, Hunt Foods, Inc. I respectfully dissent from the views which are expressed in the opinion and that part of the order for dismissal as to this corporate respondent.

The position taken in the Commission's decision is that the record does not support findings by the Commission that respondent Hunt Foods, Inc., the parent corporation of respondent Hunt Foods of Ohio, Inc., is responsible for the acts, practices and methods of record of the latter.

From my examination, study and consideration of the record I would have the Commission find the requisite responsibility by Hunt Foods, Inc., for the acts, practices and methods of its respondent subsidiary to include the parent corporation as a party to the Commission's order to cease and desist.

I have an entirely different understanding from that expressed in the Commission's Opinion of the testimony of Mr. Irving Goldfeder, Executive Vice-President of the parent company and Vice President of its respondent subsidiary which is quoted in that opinion. In addition to these I find many other parts of the record to support my dissent on this aspect of the case.

Hunt Foods, Inc., is a corporation with headquarters at 1747 West Commonwealth Avenue, Fullerton, California. It is in the business of purchasing fruits and vegetables, which it processes for market in glass and can containers and which it sells and distributes throughout the United States. One of the principal aspects of this business is that of purchasing, and processing tomatoes into catsup.

Hunt Foods, Inc., which I shall refer to sometimes as "Hunt," has three subsidiaries: Hunt Foods of New Jersey, Inc.; Hunt Foods of

Utah, Inc.; and respondent Hunt Foods of Ohio, Inc., which I will refer to sometimes as "the Ohio company." Hunt owns the controlling stock in each of these subsidiaries. It owns at least 90 percent of the stock in the Ohio company.

Mr. Irving Goldfeder, who maintains his office at the California headquarters of the parent corporation, is *Executive* Vice President of Hunt, Vice President of the Ohio company and Vice President of the other subsidiaries in Utah and New Jersey.

On the point involved herein, it is important to note that Irving Goldfeder was not merely an officer of the respondent parent and subsidiary. He was *Executive* Vice President of the parent. As such he was answerable to the President and Board of Directors of the parent corporation (CX 21, p. 4). His duties as Executive Vice President of the parent corporation were the same as his duties as Vice President of the Ohio company and as Vice President of the other subsidiaries, namely, (1) in charge of production, (2) establishment of policy, and (3) setting of prices. (CX 21, pp. 3, 4, 5, 12, R. 4005, 4007, 4008.)

Hunt, the parent, operated plants directly in the Pacific Coastal States for the processing, selling, and distributing of fruits and vegetables. Hunt operated indirectly through the aforesaid three subsidiaries, including respondent Ohio company, through other parts of the nation.

That the operation of the parent corporation and its subsidiaries was integrated and as such was national in scope is clearly indicated by a statement made by Mr. Goldfeder at the hearing in Los Angeles on July 11, 1952. The hearing examiner was exploring the question of when and where hearings would be held, having in mind, the convenience of all parties to the action. Mr. Goldfeder stated (R. 24).

> If I may add to that, we have *other* national companies involved, who will be in the same position, for they operate not only in the State of Ohio, but they operate elsewhere, and with the nature *of our business* the perishable features, it would certainly be helpful to all if it could be postponed until November, early in November will be satisfactory. [Emphasis supplied.]

This statement of the Executive Vice President of the parent corporation should be considered in the light of the fact that the Ohio company operates only one plant, which is located in Toledo, Ohio, and which is confined as indicated above to the production of tomato catsup. That operation could in no wise be considered as a nationwide operation as could the operation of the parent and its subsidiaries.

There are many other admissions in the record which support the view that Hunt merely operates its subsidiaries as local units or divisions.

The numerous so-called "Hunt documents," which consist of letters written by Thomas N. Norris, the local plant manager, which are addressed to Mr. Irving Goldfeder, *Hunt Foods, Inc.*, Fullerton, California (of which there are 36 in number), the replies of Mr. Goldfeder, and other documents, were all secured as a result of subpoenas served upon Mr. Irving Goldfeder, Hunt Foods, Inc., at his headquarters in California where the files are located from which the documents were taken.

In Goldfeder's testimony in this matter, he describes the operations of the parent corporation, Hunt, and that of the Ohio company, stating that the production of tomato products, i.e., catsup, of the Ohio company was 3.5 percent of the total production of the Hunt companies (R. 4010). It is clear, when all of Mr. Goldfeder's testimony is considered together, that the Ohio operation was merely one in an integrated whole and looked upon as local, or merely a phase of the whole of the Hunt company business. Following are some of the significant statements made by Mr. Goldfeder which lead me to this inescapable conclusion:

> Well, I can estimate it from this standpoint that in the organization we have —*we* had six—seven—catsup bottle lines, of which one was in Ohio. So *even if we ran them all, in the same relationship to Ohio, had we run them all in the same relationship,* the Ohio company would have had somewhere around one-seventh of the total catsup production. [Emphasis supplied.]

Is it not crystal-clear that Mr. Goldfeder using the word "we" refers to an integrated operation of the parent and the subsidiaries? Could there be any other meaning given to the words "we ran" and "we run" than that which is given them through common understanding of the English language? Could the words "we run" as used by Mr. Goldfeder in this testimony mean anything other than that the operations of Hunt and its subsidiaries were operated through integration, with the subsidiaries treated as local units under the domination and control of the parent corporation? Mr. Thomas N. Norris, who is in charge of the Toledo, Ohio, plant, is referred to constantly throughout the record as the local plant manager. Mr. Goldfeder, testifying concerning how Mr. Norris came to be associated with the Ohio company, stated (R. 4012, 4013):

> Q. Now, with reference to the plant manager, Mr. Norris, did he receive instructions from you as to his duties and authority?
>
> A. That's right.
>
> Q. Mr. Norris first came with the Toledo plant in 1950; did he?
>
> A. He was *transferred* from another area I think the winter of '49, and 1950 was the first season that he operated the Ohio plant.

Q. At that time, that is, when he commenced his duties, which included the supervision of the Toledo cannery and the procuring of tomatoes, did you give him some instructions as to his duties and authorities?

A. Considerably.

See, when he—if you pardon me—when he was *transferred* from New Jersey to Ohio he assumed new duties and new responsibilities which should have been and could have been unfamiliar to him. He had been operating a plant as plant superintendent, and when he took complete charge of this operation it would add responsibilities and duties, such as purchasing of commodities, including tomatoes with which he should not have been too familiar. And it would follow, necessarily, that we would keep in close touch, and I would be constantly instructing him as to how to operate *that phase of the business.*

Q. Did you give him, in the form of writing or a telegram, some instructions with reference to his authority and responsibility with reference to the dealing with growers and securing the tomatoes that were needed for the 1950 and 1951 pack?

A. Unquestionably. [Emphasis supplied.]

Here Mr. Goldfeder who was Executive Vice President of the parent, is testifying that Mr. Norris was "transferred" from New Jersey to Ohio. Mr. Goldfeder, the witness, was also Vice President of the Ohio company and the New Jersey subsidiary. What reasonable interpretation can be given to his testimony other than that the parent corporation transferred a plant manager from one of its local units to another (the two being corporate in form only)? Certainly it would be inconsistent with the compartmentalized theory of the opinion of the Commission to interpret the testimony as being that the Ohio company transferred a man to itself from the New Jersey subsidiary. The reference to the work to be done by Mr. Norris in Ohio is described by Mr. Goldfeder as "this operation" and "that phase of the business." Since the only operation carried out by the Ohio company is that of purchasing and processing tomatoes into catsup for sale and distribution, Mr. Goldfeder must have had, in the use of those words, other operations and other phases in mind which were the operations and phases in the other parts of the nation carried on by the parent directly and through the other subsidiaries. Is it reasonable to interpret this testimony by Mr. Goldfeder as coming from him in any other capacity or with any other viewpoint or perspective than that of Mr. Goldfeder the Executive Vice President of Hunt in his role as coordinator and administrator of an integrated program by the parent and its subsidiaries?

In reference to the *modus operandi* of the Ohio company, there appears the following testimony (R. 4021):

Q. Did you receive further reports from time to time from Mr. Norris with reference to the progress that he was making, or the lack of progress, in signing up acreage in Ohio?

A. Yes, I was in constant touch with him to keep abreast of developments, if any, and insisted that he do the same *in the local area* to keep me posted [Emphasis supplied.]

Since the Ohio company had only one plant which was located at Toledo, Ohio, and which purchased tomatoes in Ohio and Michigan, which apparently was the "local area" referred to by Mr. Goldfeder, is it not reasonable to infer from his testimony that he is again speaking in his capacity as Executive Vice President of Hunt and having in mind at the time of his testimony the picture of the integrated operation of the Hunt companies as a whole?

Mr. Goldfeder further testified (R. 4019):

Q. And when you received that information did you give Mr. Norris any instructions as to what he should do with reference to negotiating with the Cannery Growers?

A. I told him to reject it, and if they ever have any more realistic price, if they want to come around and give *us* a more realistic price, why, *we* would be glad to listen to it and he could report it to me, but *we* were totally disinterested in purchasing tomatoes at the price requested.

Hearing Examiner HAYCRAFT. Was that information given to him in writing or over the telephone?

The WITNESS. I can't recall. I would say it was telephoned.

But I was kept posted of this constantly, because it was quite important to *us*. So I kept my finger on it constantly. [Emphasis supplied.]

The use of the words "us" and "we" support a reasonable inference that Mr. Goldfeder is referring to the integrated operations of the parent corporation and the Ohio company.

All of the actions of Mr. Thomas N. Norris, who described himself as Vice President of the Ohio company, were subject to the detailed guidance and instruction of Mr. Goldfeder. As indicated by the above testimony of Mr. Goldfeder, Norris came into the Ohio company inexperienced in this phase of Hunt's business. Goldfeder broke him in and guided his every movement. Shortly after Norris took over his duties, he received a wire from Goldfeder reading as follows: "Keep me posted any gossip or factual tomato prices to growers by competitive canners." Thereafter, Norris frequently wrote to Goldfeder, addressing him as "Mr. Irving Goldfeder, *Hunt Foods, Inc.*, Fullerton, California" [emphasis supplied].[9] Norris signed each of these letters under the following caption: "Hunt Foods of Ohio, Inc., Formerly The Harbauer Co." Mr. Norris was looking to Mr. Goldfeder, as Executive Vice President of the parent corporation, for instructions and was reporting to him in accordance with those instructions. These letters are appropriately referred to in one of the portions of the Commission's Opinion with which I agree, as follows:

Letters from Mr. Thomas N. Norris, Plant Manager of respondent Hunt Foods of Ohio, Inc., to his superior, Irving Goldfeder, Vice-President of Hunt of Cali-

[9] CXs 1–A, 3–A through 15–A, 17–A, 18–A, 20–A, 102–A through 107–A, 109 through 116–A, 118–A through 121–A, 124–A.

fornia, are also in evidence. In these letters, Mr. Norris gave a report on the happenings shortly after they occurred. For example, in a letter of April 2, 1951, he reported the efforts of some canners to get their acreage and other matters.

That portion of the Commission's Opinion then continues the discussion and analysis of these letters in support of the Commission's Order to Cease and Desist.

Norris was also in almost daily communication during the busy season with Goldfeder by telephone and telegraph, either to receive instructions or to report the details of current developments.

Norris testified in part as follows (R. 1618–1620):

Q. I believe you stated your superior was Mr. Goldfeder, whose offices are in California?

A. Mr. Irving Goldfeder, yes, sir.

Q. Was there some limitations upon your authority as plant manager?

A. Yes, sir.

Q. With reference to the fixing of the price that would be paid growers for tomatoes, what was the fact in that regard?

A. *I would have to have permission from California* before I could so state a price. [Emphasis added.]

Q. And that was true in 1950, '51 and '52?

A. Yes, sir.

Q. What, with reference to questions of policy, that is, general policy?

A. I don't think I quite understand you.

Q. Well, for example, whether you would deal with the Growers Association or not, was that a matter in which you had authority or not?

A. Well, I'd have to have some authority from Mr. Goldfeder on that.

* * *

Q. Was that a field in which you did receive instructions from California?

A. Yes, sir.

Q. With respect to the instructions which you received from your California superior, what was there with reference to making reports?

A. Well, California does have to be informed of all going on, I mean regardless as to whether it is just inside the plant or outside the plant, in reference to contracting acreage, if that's what you mean. It is my duty to inform Mr. Goldfeder of whatever may come up.

No other conclusion can be reached from a reading of the whole record than that Mr. Norris, the plant manager at Toledo, was merely a local agent operating the Ohio company as a division in accordance with complete control and dominance by the parent corporation. Norris testified he was a Vice President of the Ohio company (R. 1551); and that he made reports to Joseph A. Harmon at the address of the parent corporation but did not know whether Harmon was an officer (R. 1475). Goldfeder testified (R. 4033):

Q. Well, did anybody in the Hunt employ of either the Ohio or the parent company have such talks or understandings, to your knowledge?

A. Well, Mr. Norris should have had conversations with some of our competitors, but no understandings. Those were my instructions.

The theory which is presented by the language of the Commission's Opinion, that Mr. Goldfeder, as a practical matter, had the various operations of the parent and the subsidiaries tightly compartmentalized in his mind is, I believe, inconsistent with other of his testimony. In a deposition taken from Mr. Goldfeder in this matter, he was being asked about the telegrams and correspondence which passed between himself and Mr. Norris, a number of which were found in the files of the parent corporation and are in evidence in this proceeding. Mr. Goldfeder, whose office and desk are the same for each of his titles, stated as follows: (CX 21, pp. 9–11):

Q. In the course of your business relationships with Hunt Foods of Ohio, Inc., have you ever sent any telegrams to Mr. Norris?

A. Unquestionably.

Q. Did you retain copies of those telegrams?

A. I assume so.

Q. Where are those?

A. They should be in the files.

Q. Were the telegrams that were received by you from Mr. Norris and the copies of the telegrams sent to Mr. Norris made available for Mr. Sherman's investigation at the time of his visit in your office?

A. I don't recall what correspondence in detail was made available to him. He asked for the correspondence. I called for the files and we gave him the correspondence that was in the files. Bear in mind that I would not attempt to remember, it would be impossible for me to remember all the correspondence that is transacted *between me and our various plants.* We do have a tremendous flow of documents. *We operate numerous plants,* and as the result there is a tremendous amount of correspondence, telephone and telegrams. Offhand to attempt to remember any one or any several particular telegrams or letters pertaining to a general subject matter which unquestionably appears just as a routine business transaction, would be an impossible situation.

Q. Well, any telegrams received by you from Mr. Norris or any copies of telegrams sent by you to Mr. Norris, to your knowledge would they have been placed in the same file where the correspondence was?

A. Should have, yes, sir.

Q. If there are telegrams or copies of telegrams in your file with Mr. Norris, would you now make those available for examination to the accredited representative of the Commission?

A. I see no reason why not. I think, if I may digress here a moment, I think our action with Mr. Sherman would indicate that *we* were quite cooperative in this matter during the time when he called or the time that we had this conference with him.

Q. Mr. Goldfeder, during the period covered by the correspondence produced by your counsel yesterday and today, have you had any telephone conversations with Mr. Norris, of which a memorandum of such conversation was made?

A. *I have numerous telephone conversations with our various plants and plant employees* constantly, particularly during a critical period of either purchasing a major crop or producing a major crop.

Just to give you a rough idea, I unquestionably transact as much or more business over the phone as I do by correspondence, so I did have numerous telephone conversations with Mr. Norris. [Emphasis supplied.]

And he testified further (CX 21, pp. 12 and 13):

Q. * * * Under whose control are matters of policy with respect to the purchases of Hunt Foods of Ohio, Inc.?

A. Mine.

Q. Under yours?

A. Yes, sir. That is, I supervise and am responsible for the proper operation of that *function of the company.*

Q. If matters of policy of an urgent nature arise, they are referred to you, as a general practice by Hunt Foods of Ohio, Inc.?

A. If they are not in the general run of instructions within reasonable limits, they would be referred to me for discussion and approval [emphasis supplied];

also, the testimony which has been quoted in the Opinion of the Commission which I interpret differently (CX 21, p. 5):

Q. What is the relationship between Hunt Foods of Ohio, Inc. and Hunt Foods, Inc.?

A. Well, it is practically wholly owned, it is well over 90 percent owned by Hunt Foods, Inc. That is of record.

Q. And as nearly a wholly-owned subsidiary, who exercises the control over the management and operation of Hunt Foods of Ohio, Inc.?

A. Hunt Foods, Inc.

Q. Hunt Foods, Inc.?

A. Yes, sir;

and (R. 4035):

Q. You control the operations of Hunt Foods in Ohio, do you?

A. I do.

Q. The Hunt Foods Company of California——

A. They control the stock; I directed the operations.

The conclusions drawn by the respondents in their motion to dismiss support my position on the question of this aspect of control by and the responsibility of Hunt. They summarize the evidence of record in this motion to dismiss filed jointly by the parent and the Ohio company. Throughout the motion to dismiss, the two respondents refer to themselves in the singular through the words "Hunt" and "it." For example, speaking together in the motion to dismiss, the two respondents say:

Our basic proposition, indelibly supported by the record made by complainant counsel, is that no trier of the facts can find or remotely infer that Hunt was a conspirator. As to *it* the story is explicit and complete. *For it operated in Ohio through Mr. Norris,* who had no authority of his own, but who instead constantly reported to and sought direction from his California superior by letter. Every letter he wrote discloses his lack of authority—his lack of knowledge as revealed in his constant assemblage of gossip, rumors, often inaccurate third or fourth hand statements, newspaper clippings, reported (and constantly

changing) price announcements by others—and his obvious bewilderment and apprehension as to what either his competitors or the Growers Association was doing that might affect his dealings with his own growers. [Emphasis supplied.]

* * *

Any reader of these letters and of the Norris testimony can readily perceive that one who is an agent in a remote area—who constantly pleads for minute directions as to every phase of his negotiations with growers, his boxes, his tomato plants, his open market purchases, his legal position in contracting, with every detail of his operations controlled from California—both wholly lacked authority, and as an employee would not have had the temerity to attempt to commit his company to the double-barrelled conspiracy alleged in Paragraph Ten.

The relatively insignificant position of Hunt in the area combines with the newness of Norris in Ohio to confirm the obvious. * * *

* * *

To begin with, both Hunt and its battered plant manager Norris need to be put in perspective. * * *

* * *

Fundamentally, Hunt's only possible connection with the allegations of this complaint can lie in its pricing policy on tomatoes in 1951, the attendance of Norris at four of the meetings at which the economic hold-up of the Growers Association was discussed, and his over-all reporting of the 1951 season. * * *

The *dicta* of the United States Court of Appeals for the Seventh Circuit in *National Lead Company, et al.* vs. *FTC*, decided December 1, 1955, which is quoted in the Commission's Opinion to support the dismissal of the complaint as to Hunt Foods, Inc., represents in my opinion an extreme position. Nevertheless, I feel that the facts of record in this matter are such that the parent corporation comes within the applicable rule set out in that *dicta* that:

* * * there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identify of the subsidiary is a mere fiction.

The Commission's Opinion also cites and discusses *Press Co.* v. *N.L.R.B.*, 118 F. 2d 937, and *Owl Fumigating Corp.* v. *California Cyanide Co., Inc.*, 30 F. 2d 812. The *Press* case was a National Labor Relations Board case having to do with labor problems. The Owl Fumigating Corp. case was a patent infringement case. I feel that these are not the most reliable precedents on this point in the antitrust field.

In *U.S.* v. *United Shoe Machinery Company*, 234 Fed. 127, 140–143, which is an antitrust case, the court clearly stated the applicable law on the point, citing numerous supporting cases. The District Court's Opinion in the *United Shoe Machinery* case was affirmed by the United States Supreme Court, 258 U.S. 451, 42 S.Ct. 363. In the *United Shoe Machinery* case the question arose as to whether or not there was proper joinder of parties in a situation in which a New

Jersey corporation owned 98 percent of the capital stock of one of the parties, which in turn owned the entire capital stock of a Maine corporation. In that case as in this case, the officers and directors were practically the same, all of them serving as officers and directors in at least two of the corporations and some in all three. The charge in the complaint was that leases of the United Shoe Machinery Company were in restraint of trade. It was claimed that, as each corporation was an entity and there was no charge of conspiracy, the mere fact that they were owners of the capital stock of the Maine company, the offender, would not justify their being made parties defendant. The situation in this case is even stronger because there is a charge of conspiracy here.

In the *United Shoe Machinery* case the court reviewed the past history of the law of joint liability of related corporations and pointed out that the courts, and especially the courts of equity, will look behind the corporate fiction and, if it clearly appears that one corporation is merely a creature of another, controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice. The court cited the case of *McGaskill* v. *United States*, 216 U.S. 504, 514, 30 S.Ct. 386, 391, in which Mr. Justice McKenna, who delivered the opinion, said:

> Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge the counter presumption that in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporations, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, §§ 663, 664, 727. The principle was enforced in this court in *Simmons Creek Coal Co.* v. *Doran*, 142 U.S. 417 (12 Sup. Ct. 239, 35 L. Ed. 1063).

Along this same line, the court cited many other cases.

In *Northern Securities Company* v. *United States*, 120 Fed. 721, 725, 726 (affirmed by the U. S. Supreme Court, 193 U.S. 197, 24 Sup. Ct. 436), Circuit Judge Thayer, who delivered the opinion of the court, said:

> It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of a majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these

days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. * * * The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in *Pearsall* v. *Great Northern Railway*, 161 U.S. 646, 671 (16 Sup. Ct. 705, 40 L. Ed. 838).

Where one corporation is the mere agent or instrumentality or department of another company, "the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require," *United States* v. *Reading Co.*, 253 U.S. 26, 62, 63. See also *Bishop* v. *United States*, 16 F. 2d 410, 415; *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310; *United States* v. *Del., Lack. & West R R. Co.*, 238 U.S. 516; 35 S. Ct. 873, 59 L. Ed. 1438; *Chicago, M. & St. P. Ry. Co.* v. *Minn. Civic Assn.*, 247 U.S. 490, 38 S. Ct. 553, 62 L. Ed. 1229; *Chicago & C. Ry.* v. *Des Moines & C. Ry.*, 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219; *Lehigh Valley R. Co.* v. *Dupont* (C.C.A.), 128 F. 840; *The Willem Van Driel, Sr.* (C.C.A.) 252 F. 35; *Linn and Lane Timber Company* v. *United States*, 236 U.S. 574; *State ex rel.* v. *Standard Oil Co.*, 30 N.E. 279.

For these reasons, it is my opinion that the complaint should not be dismissed as to respondent Hunt Foods, Inc.

ORDER TO CEASE AND DESIST AND TO FILE REPORT OF COMPLIANCE

Counsel supporting the complaint and certain respondents having respectively filed their cross appeals from the initial decision of the hearing examiner in this proceeding, filed August 9, 1955, and the matter having been heard by the Commission on briefs and oral argument; and

The Commission having rendered its decision in which it denied respondents' appeal, granted in part and denied in part the appeal of counsel supporting the complaint, dismissed the complaint as against certain of the respondents, and directed entry of an order to cease and desist as against certain other respondents:

It is ordered, That the findings of fact and conclusions, excepting those conclusions that the complaint should be dismissed without prejudice because of the discontinuance of the practices involved, as contained in the hearing examiner's initial decision be, and they hereby are, adopted as the findings of fact and conclusions of the Commission; and

It is further ordered, That the complaint be, and it hereby is, dismissed as to corporate respondents, Gibsonburg Canning Company, Inc., Sharp Canning Co., Hunt Foods, Inc., and as to the individual

respondents, Joseph J. Wilson, Howard E. McKinley, Everitt E. Richard, Cyril P. Roberts, Edgar W. Montell, Harold R. Collard, Herbert F. Krimendahl, Samuel Hammond, Russell Kline, A. A. Ehrman, George W. Conelly and George Wenger, in their individual capacities; and

It is further ordered, That respondents, H. J. Heinz Company, Campbell Soup Company, Joseph Campbell Company, Stokely Van-Camp, Inc., Bauer Cannery, Inc., Foster Canning, Inc., Hirzel Canning Company, Lake Erie Canning Co. of Sandusky, J. Weller Company, Winorr Canning Company, and Hunt Foods of Ohio, Inc., their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the procuring, purchasing or contracting for the purchase of raw tomatoes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

(*a*) Refusing to grant recognition of or to negotiate or deal with Cannery Growers, Inc., an association of tomato growers, as a bargaining agent for its grower members;

(*b*) Refusing to purchase or to contract to purchase tomatoes from growers who are members of Cannery Growers, Inc.

It is further ordered, That respondents, H. J. Heinz Company, Campbell Soup Company, Joseph Campbell Company, Stokely Van-Camp, Inc., Bauer Cannery, Inc., Foster Canning, Inc., Hirzel Canning Company, Lake Erie Canning Company of Sandusky, J. Weller Company, Winorr Canning Company, and Hunt Foods of Ohio, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Anderson dissenting as to dismissal of the complaint as to respondent Hunt Foods, Inc., and Commissioner Kern not participating.