and the total national production of hard ice cream by plants listed as wholesale by USDA. In the third column the comparison is with the total national wholesale production, less "captive" or "affiliated" plants, and in the last column the production of "captive" plants and those under 50,000 gallons have both been eliminated from the universe with which respondents' production is compared.

COMPARISON OF PERCENTAGE POINT CHANGES IN RESPONDENTS' PRODUCTION, 1947-1955

	Total frozen products production in States where respondents produce	Total U.S. hard ice cream wholesale production	Less "captive" plants	Less "captive" plants and those under 50,000 gallons
National	−5.0	−2.7	−2.6	−2.8
Borden	−1.7	−1.2	−1.2	−1.3
Foremost	[1] +1.4	+3.5	+3.8	+4.1
Beatrice	+1.0	+1.3	+1.4	+1.6
Arden	−3.1	+0.2	+0.3	+0.3
Fairmont	[2]	+0.2	+0.2	+0.3
Carnation	+1.0	+0.4	+0.4	+0.4
Hood	−7.5	−0.3	−0.4	−0.4
Pet	0.0	+0.01	+0.01	+0.01

[1] The above percentage is based on a comparison between 1950 and 1955 production figures, since there are no figures in the record for this respondent's total frozen products production in 1947.

[2] No figures.

As is apparent from the above table, with the exception of Foremost and Beatrice, none of the respondents has improved its production share by as much as 1 percent, irrespective of whether the production of respondents is compared with that of the states in which they produce or with the national production of hard ice cream at wholesale. Likewise, in the case of a comparison on the latter basis, the figures disclose that there is no significant difference between one based on total wholesale production as reported in official USDA figures, and one based on such wholesale production less the production of affiliated plants or less the production of both affiliated plants and plants under 50,000 gallons. The figures fail to disclose any trend toward concentration of the frozen products business in the hands of respondents, either individually or as a group.

In the case of Foremost and Beatrice, as already indicated above, the increase in their shares of production between 1947 and 1955 is accounted for largely by the production of companies which were acquired, rather than by any expansion in production or sales through their own plants. Several of the other respondents have also gained production by virtue of the acquisition of other companies, except for which some of their shares would be lower than above indicated. While some of these acquisitions may be subject to question under

Section 7 of the Clayton Act, they are not directly involved in the instant proceedings, in which the question is whether respondents' production shares have been increased significantly by the use of the complaint practices.[30]

11. In addition to the primary charge of injury, involving competing ice cream manufacturers, the complaints make oblique reference to two other groups as being adversely affected, viz., retail ice cream dealers and "regular licensed facility dealers." There is not a scintilla of evidence of any injury to either of the latter groups.[31]

12. Based on the foregoing, and the record as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that there has been any substantial injury to, or lessening of, competition in any relevant market, or that there is any reasonable probability thereof, as a result of the use of the complaint practices by any of the respondents.

(b) While individual competitors in certain markets may have experienced adverse business conditions or competitive difficulties, the record fails to establish, (1) that there is any substantial causal relationship between such difficulties or conditions, and respondents' use of the complaint practices or (2) that competition in the relevant markets involved (as distinguished from the position of individual competitors) has been or is likely to be substantially injured.

(c) The record fails to establish any trend toward concentration of the frozen products business in the hand of respondents, during the period covered by the evidence, as a result of respondents' use of the complaint practices or otherwise.

IV. Conclusions

A. *The Law of Unfair Methods of Competition*

1. The discussion up to this point has been with respect to the factual issues raised by the complaints. These are basically, (a) whether respondents have engaged in the complaint practices and, if so, to what extent, and (b) whether there has been any adverse competitive impact resulting therefrom. The consideration of these issues has assumed that the practices involved are unfair methods of competition,

[30] Such acquisitions might have indirect relevance if it were to appear that the complaint practices were responsible for any competitors selling out to respondents. However, as heretofore indicated, there is no evidence in the record to support an affirmative finding on this score.

[31] In the case of "regular licensed facility dealers", there is no evidence as to who they are or that it has ever been customary to purchase or lease facilities from them.

within the meaning of the Federal Trade Commission Act. This, however, is a fundamental issue in these proceedings, and to a consideration thereof the examiner now turns.

2. As already indicated, the complaints challenge various forms of dealer assistance including (a) the furnishing of facilities and other equipment, (b) the rendering of financial assistance, (c) the performing or furnishing of other services of value, and (d) the granting of various discounts, rebates and allowances. These various forms of assistance have heretofore been referred to loosely as the "complaint practices." However, the complaints do not attack these practices in and of themselves. Basic to the challenge to such practices is the allegation that they occur in a context of exclusive dealing, i.e., that they are expressly conditioned on exclusive dealing or that they necessarily result in exclusive dealing.

3. The complaints in these proceedings are patterned essentially after the complaint in the *Hastings Manufacturing Co.* case, 39 FTC 498, which also involved the offering of various inducements to customers in order to obtain their business on an exclusive or preferential basis. The practices there involved included the making of loans to distributors, the guaranteeing of increased profits, and the purchasing of the distributors' inventories of competitors' products at cost (regardless of age) and then dumping them. The Commission's finding that these practices constituted unfair methods of competition was not predicated merely upon respondent's use of the practices, but rather upon the fact that respondent used the practices to induce distributors to handle its products "upon an exclusive basis or upon a basis highly preferential" to respondent. The Commission also found that respondent had initiated the practices in question as part of "an aggressive campaign to acquire new and, so far as possible, exclusive channels of distribution."

The court of appeals, in affirming the Commission's decision and order, specifically recognized that exclusivity was an essential element of the offense which the Commission had found, stating that the Commission had found the practices to be unfair—

> * * * when done as an inducement to the distributor to discontinue handling competitive products and to handle the petitioner's products exclusively or preferentially. *Hastings Manufacturing Co.* v. *FTC* (C.A. 6, 1946), 153 F. 2d 253, 254.

The court left no doubt as to its own position, that the element of exclusive or preferential dealing was a key element of the offense, in stating (at page 257):

> * * * It is not illegal for a manufacturer to finance his retail outlets or to guarantee them profits, but undoubtedly the utilization of these expedients,

singularly or in combination, as an inducement to jobbers to throw out competing lines and to handle, exclusively or preferentially, the products of a manufacturer "from whom such blessings flow," may well be within the statutory concept of unfair methods of competition. Such inducements as constituent elements in a method of competition, are the "exclusive-dealing requirements" which Mr. Justice Brandeis so vigorously condemned * * *.

4. While the complaints are brought under Section 5 of the Federal Trade Commission Act, the essential element of the offense appears to parallel that under Section 3 of the Clayton Act, which proscribes the sale or lease of goods or equipment on the condition, agreement or understanding that the lessee or purchaser will not use or deal in the goods of a competitor of the lessor or seller (where the effect of such arrangement may be to substantially lessen competition or tend to monopoly). Presumably the present complaints were not brought under Section 3 of the Clayton Act because some of the practices do not technically involve the sale or lease of equipment, e.g., furnishing of facilities on a rent-free basis, rendering of miscellaneous services of value, and the granting of discounts. See *Curtis Publishing Co.* v. *FTC*, 270 Fed. 881, aff'd. 260 U.S. 568. However, it seems clear that the complaints are phrased in terms of a Section 3 Clayton Act type of violation, in order to come within the line of authority which holds that practices of the type that run counter to the public policy disclosed in the Clayton Act (or in the Sherman Act) may also be deemed to constitute unfair methods of competition under the Federal Trade Commission Act. See *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457; *FTC* v. *Motion Picture Advertising Service, Inc.*, 344 U.S. 392; *Carter Carburetor Corp.* v. *FTC*, 112 F. 2d 722 (C.A. 8, 1940).

5. That arrangements or practices which involve the element of exclusive dealing or other preclusive features fall within the category of practices which may be deemed to constitute unfair methods of competition under the Federal Trade Commission Act appears to be beyond cavil. See *FTC* v. *Motion Picture Advertising Service Co., Inc., supra; Fashion Originators' Guild of America, Inc.* v. *FTC, supra; Hastings Manufacturing Co.* v. *FTC, supra; Carter Carburetor Corp.* v. *FTC, supra.* However, while such arrangements are of the type which may be considered to constitute unfair methods of competition, they are not per se illegal. *U.S.* v. *American Can Co.*, 87 F. Supp. 18, 31; see also Commission's decision in *Motion Picture Advertising Service Co., Inc.*, 47 FTC 378, 393. Irrespective of whether a proceeding is brought under the Clayton Act or Federal Trade Commission Act, a showing must be made with respect to the probable adverse competitive impact of such arrangements. An ul-

timate finding of illegality depends on a number of factors, such as the length of the contracts (*U.S.* v. *American Can Co.*, *supra; FTC* v. *Motion Picture Advertising Service Co.*, *Inc.*, *supra*) and the proportion of the market tied up thereby (*Standard Oil Company of California* v. *U.S.*, 337 U.S. 293).

It has been suggested that in proceedings which are not specifically brought under Section 3 of the Clayton Act (in which it has been said that the courts have applied a somewhat automatic standard in determining probable competitive effect), a broader inquiry must be made into competitive conditions in order to determine the probabilities of competitive injury or tendency to monopoly.[32] However, for purposes of the present proceedings it is unnecessary to determine whether there is any valid distinction between the injury test applied under Section 3 of the Clayton Act and that applicable to proceedings under the Federal Trade Commission Act. Counsel supporting the complaint has not presented the case in the narrow frame of reference of the "quantitative substantiality" test of a Section 3 Clayton Act proceeding, but has sought to demonstrate broadly the anticompetitive effects and tendencies of the practices involved. Furthermore, as will hereafter appear, there is no record basis for a determination of the question of injury in terms of the somewhat mechanical quantitative substantiality test.

6. The examiner entertains no doubt that in terms of the issues drawn by the pleadings the complaints state a cause of action under Section 5 of the Federal Trade Commission Act. In reaching this conclusion it must be recognized that in one respect the complaints, as amended, go beyond the theory on which the *Hastings* case was tried. The complaint and order in that case were restricted to challenging the practices when they were used as an inducement for distributors "to discontinue handling" the products of competitors and to handle respondent's products exclusively. In effect, the practices were challenged only when used in a context of pirating away the customers of competitors by offering them illicit inducements. In the instant proceedings, under the amendment to the complaints, the practices are challenged not merely when used to take away the customers of competitors, but also when used to assist respondents' own accounts and when used in obtaining new accounts never previously served by anyone. In this respect, the amended and supple-

[32] See, e.g., *Report of Attorney General's Committee to Study Antitrust Laws*, 25, 141–142; *Times-Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594; *Tampa Electric Co.* v. *Nashville Coal Co.*, 168 F. Supp. 456 (M.D. Tenn., 1958); *Dictograph Products Inc.* v. *FTC*, 217 F. 2d 821 (C.A. 2, 1954).

mental complaints extend beyond the original complaints in these proceedings which, like the complaint in *Hastings*, were limited to challenging the practices when used to induce dealers to switch.

However, in another respect, the amended complaints are narrower than the original complaints in these proceedings. The original complaints, while patterned after *Hastings* in the sense that the various forms of assistance were challenged only when used in connection with "switch" accounts, appear to go beyond *Hastings* in the respect that they did not limit the attack on the practices merely to situations where exclusive dealing was involved. Apparently in amending the complaints it was decided to recede from the broad challenge to the practices as such, and to question them only when used to induce exclusive dealing, in order to be able to broaden the challenge with respect to the *type* of account involved. It is not entirely clear what motivated this change of approach, except that it did become apparent very early in the hearings that an attack limited to switch accounts was not a very practical one since only a small fraction of respondents' expenditures in the complaint practices involved switch accounts. It may be that counsel decided to recede from a theory which was of dubious merit under *Hastings*, in order to make a more realistic attack with respect to the type of account involved even though the latter change involved an extension of *Hastings*. In any event, whatever may have been the motive in amending the complaints, the examiner is satisfied that as amended (with exclusive dealing an essential element of the charge), they are legally sufficient even though they are no longer limited to switch accounts but include existing and pioneer accounts as well.

7. However, the above conclusion that the amended complaints are legally sufficient does not resolve the issue. While the amended complaints are framed in terms of exclusive dealing, counsel supporting the complaint during the course of the proceedings has gradually sought to minimize and ignore "exclusivity" as an essential element of the offense.[33] In the brief filed by him he has come full circle to the position that the complaint practices constitute unfair methods of competition, as such, without regard to whether they are used in a context of exclusive dealing or not. The order which he proposes would seek to require respondents to refrain from using the practices, irrespective of whether they are used as an inducement for exclusive dealing. In this respect the order differs from *Hastings* in which the respondent was ordered to cease using the practices only when

[33] It may be noted that this change of approach largely coincides with a change of counsel in support of the complaint. Present senior counsel was substituted for earlier counsel immediately following the amendment of the complaints.

used to induce distributors "to discontinue handling all products competitive with respondent's."

It is not clear why counsel has abandoned the original theory of the complaints, patterned as it was after the *Hastings* case and the line of authority holding that exclusive arrangements of the type proscribed by the Clayton Act are also unfair methods of competition under the Federal Trade Commission Act. The statement in counsel's brief (page 70) that respondents have used exclusive dealing agreements "until recently", suggests a recognition on his part of the fact that such agreements have for the most part fallen into disuse. In fact, it is undisputed that a number of the respondents have never used such agreements. In any event, counsel recognizes that the theory which he now espouses, unlike the established exclusive dealing theory of the complaints, involves a foray into virgin territory. This seems apparent from his statement that (page 110): "The practices with which we are here concerned have never before been clearly labeled."

8. In seeking to classify as unfair methods of competition, practices which have "never before been clearly labeled", counsel supporting the complaint undertakes to develop a theory concerning the law of unfair methods of competition which has "never before been clearly" recognized. Counsel apparently concedes that the practices do not fall within either of the two broad categories of practices which the Supreme Court held to be encompassed by the words "unfair methods of competition" in *FTC* v. *Gratz*, 253 U.S. 421, 425, viz., (a) practices which are "opposed to good morals because characterized by deception, bad faith, fraud or oppression", and (b) practices which are "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." While later decisions have questioned whether the Supreme Court did not go too far in substituting its own judgment for that of the Commission as to whether the particular methods of competition there involved were unfair (see, e.g., *Hastings Manufacturing Company* v. *FTC*, *supra*, at 258), and some decisions have expressed the basic concept of what constitutes unfair methods of competition somewhat differently than the language used in *Gratz* (see, e.g., *FTC* v. *Keppel & Bro., Inc.*, 291 U.S. 304 [34]), the broad criteria laid down in the *Gratz* case are still good law.

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[34] In the *Keppel* case the Court expressed essentially the same thought as that appearing in the paragraph (a) above of the *Gratz* case when it stated (at page 311):

A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

Counsel supporting the complaint has suggested a new, additional and somewhat esoteric standard for determining whether specific practices may be characterized as "unfair." In addition to the two broad yardsticks suggested in the *Gratz* decision, counsel suggests a new crucible for testing whether practices are unfair, viz., whether they constitute "beneficial competition" or conversely, "worthless competition." This shiney new standard has suggested itself to counsel from a variety of words and phrases found in several cases and in other non-legal authorities cited by counsel.[35] Aside from the questionable nature of the alchemy by which counsel distills his new concept, it is not entirely clear what is accomplished thereby. It is difficult to understand how the terms "beneficial competition" and "worthless competition" shed any further light on the problem of what is meant by the phrase used in the statute, "unfair methods of competition." Presumably "beneficial" competition is equivalent to "fair" competition, and "worthless" competition to "unfair" competition, but having stated this, one has the feeling that he is back at the point where he started.

9. While the terms themselves shed very little enlightenment as to their application, counsel supporting the complaint has endeavored to supply an explanation thereof. Counsel suggests that "beneficial" competition should center around "quality and price", and that other practices, such as supplying dealers with cabinets and signs, and making loans or performing other miscellaneous services, involve "worthless" competition, which results in the public "paying higher prices for second-rate merchandise." Counsel's argument overlooks the fact that there are numerous other factors which legitimately enter into the competitive picture. Among the factors which have long been recognized as falling within the category of accepted commercial competitive practices, in addition to price and quality, are—

[35] These include the *Gratz* case itself, from which counsel takes the phrase "public policy" (which is used to introduce the (b) category referred to above, involving monopolistic practices), and interprets the phrase as being synonymous with "public interest"; the *Hastings* case in which there appears a reference to practices "likely to result in public injury"; the *Cement Institute* case (333 U.S. 683), in which the *concerted* maintenance of a basing point system was held to be unfair and in which reference is made to the traditional concept that Congress intended to outlaw any practice which "destroys competition and establishes monopoly" (clearly falling within the (b) category of unfair practices defined by the *Gratz* decision); a work by A. A. Berle entitled "The Twentieth Century Capitalist Revolution" in which it is suggested that the mighty should be held to a higher standard of conduct than the lowly; and a treatise on the Federal Trade Commission by Thomas C. Blaisdell, Jr. (Columbia University Press), in which reference is made to a similar notion, viz, that certain practices might be regarded as unfair only when committed by large companies (giving as examples tying contracts and price discrimination).

[M]ore extensive advertising, * * * better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing * * *, more attractive and more convenient packages, superior service, and many others * * *. (*Sinclair Refining Company* v. *FTC*, 276 Fed. 686, 688.)

It may be that counsel would also classify some of the above factors as involving "worthless" competition or, as he has sometimes designated such practices, "expensive" competition. Actually some of the competitor witnesses did complain because they could not advertise as extensively as respondents, thus putting them at a competitive disadvantage. Some complained about the expense of packaging, one even complaining about the expense of printing his company's name on the package. However, the examiner does not understand that the level of "fair" competition is determined by what the small manufacturer or any category of producer can afford. The mere fact that a practice is expensive or makes it more difficult to do business does not necessarily make it unfair.[36] While it was the intention of the law to insure "fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain", it was not intended "to compel all competitors to a common level." *FTC* v. *Sinclair Refining Co.*, 261 U.S. 463, 475–476.

Much of counsel's argument with regard to "beneficial competition" suggests that it is the function of the Commission to select from among the broad spectrum of competitive practices, having varying degrees of desirability, those which it deems most wise and beneficient. This, however, misconceives the function of the Commission. It does not "presume to run the economic railroad."[37] Its function is to *prohibit* practices demonstrated to be "unfair", not to *prescribe* "fair" ones.

Counsel's suggestion that the public has a stake in having competition limited to price and quality, and that it is paying more for "second-rate merchandise" is entirely without merit. While it is true that the cost of furnishing services to dealers, such as the supplying of cabinets and signs, must ultimately be reflected in the prices charged the dealer, it does not follow that the public is disadvantaged. If the dealer had to supply his own cabinets and service them, and pay for signs and other equipment, those costs would obviously have to be reflected in his price to the public. As far as the public is concerned it appears

[36] See *Sinclair Refining Co.* v. *FTC*, 276 Fed. 686, 689 (C.A. 7, 1920), where the court held that there was nothing in the law making it "illegal for one competitor to do that which is beyond the financial ability of another"; see also *FTC* v. *Paramount*, 57 F. 2d 152, 157 (C.A. 2, 1932), where the court held that the "mere fact a given method of competition makes it more difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unfair."

[37] Annual Report of Commission, 1956, p. 6.

to make little difference whether respondents furnish equipment and services to the dealer or the latter supplies them himself. In fact, the indication is that if the dealer had to do these things for himself, many would be unable to do so as cheaply and efficiently as the ice cream suppliers and that there would be fewer outlets carrying ice cream, with the result that the public might well have to pay more for a scarcer product.

Counsel supporting the complaint has suggested during the course of these proceedings that possibly the assistance of dealers by ice cream manufacturers has resulted in an oversupply of retail establishments selling ice cream, and that it would be better if there were fewer establishments carrying the product, so that each one could sell more. The examiner cannot subscribe to this concept based on a theory of economic scarcity which is reminiscent of the proposals of a former Secretary of Agriculture who suggested that every third pig be put to death in order to increase the price of pork. The hearing examiner is confident that the natural operation of the economic laws governing our free competitive system will, over any given period, establish a proper balance between the supply of retail outlets handling ice cream and the public demand for such products, without the imposition of the artificial restraints suggested by counsel.

Counsel's suggestion that the public is paying a higher price for "second-rate merchandise" is likewise not supported by the evidence. If anything, the standards of ice cream today are higher than they were in former years for an equivalently priced product. It is true that most companies sell a second grade of ice cream with a lower butterfat content and higher overrun. However, this product sells at a price substantially below the standard brand merchandise. Conversely, some companies today are producing a premium brand which sells at a higher price. The public is given a wide choice in grade and price, and ice cream is made available at convenient retail outlets of all types.

10. Despite considerable argument in which it is suggested that the complaint practices do not involve "beneficial" competition and are therefore unfair, counsel finally concedes that an ultimate finding of illegality depends upon a showing of the adverse competitive impact of the practices.[38] This being so, it is difficult to understand the purpose of the extended discussion with respect to the new standard of

[38] Counsel states in this connection (p. 110 of brief):
It follows that methods or practices * * * which do not have the capacity to benefit the public * * * are unfair *if, of course, the requisite degree of injury is found to exist as a matter of fact.* [Emphasis supplied.]

"beneficial competition", since a showing of competitive injury would establish the illegality of the practices even under what counsel regards as the old-fashioned concepts of the *Gratz* decision, in which practices "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" are held to constitute unfair methods of competition. It would appear, therefore, that counsel has come full circle to a recognition of the fact that the complaint practices are not illegal in themselves, and that a finding of illegality depends on the context in which they were used.

11. It seems clear, therefore, that in order to find that the complaint practices constitute unfair methods of competition in violation of the Federal Trade Commission Act, it must either be found that they are basically opposed to good morals or that, in the context of their use, they have dangerous anticompetitive tendencies. While the governing principles are self-evident, their application to individual cases is difficult. As stated by the Supreme Court in *FTC* v. *Motion Picture Advertising Service Co., Inc., supra*, at 396:

> The point where a method of competition becomes "unfair" will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

The fact that a practice has been "openly adopted by many competing concerns" (*FTC* v. *Sinclair Refining Co., supra*, at 475; *Motion Picture Adv. Serv. Co.*, 47 FTC 378, 389), and not merely by a single competitor as part of "an aggressive campaign" (*Hastings Mfg. Co.* v. *FTC, supra*, at 255), is a factor to be considered. Where a practice is not inherently anticompetitive, there must be a showing of a "purpose or power to acquire unlawful monopoly" or convincing evidence that the "probable effect of the practice will be unduly to lessen competition" (*FTC* v. *Sinclair, supra*, at 475; see also *Hastings Mfg. Co.* v. *FTC, supra*, where respondent's "aggressive" purpose was noted by both the Commission and the court). Where the legality of a practice depends on its effect and it is of a type not clearly recognized as anticompetitive (such as combinations and conspiracies), a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, should take into account "its effect as demonstrated upon the experience of competitors." *FTC* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, 158 (C.A. 2, 1932).

B. *Summary*

1. Illegality Based on Exclusive Dealing.

a. The evidence discloses the use by some respondents of exclusive dealing agreements in connetcion with some of the complaint practices. The evidence with respect to such agreements pertains mainly to the supplying of ice cream cabinets and the loaning of money or rendering of other financial assistance. To the extent that such agreements require a dealer to purchase "all" of his frozen products, or his "requirements" thereof, or to purchase such products "exclusively", from a particular supplier, they involve exclusive dealing arrangements of the type which has been held to constitute an unfair method of competition.

This does not, however, apply to agreements which merely provide that a dealer will use a cabinet or similar equipment supplied by his frozen products supplier only for the storage of that supplier's products. Such agreements are not considered to constitute exclusive dealing arrangements; nor are they illegal as "tying" contracts, since respondents do not have any patents or monopoly or enjoy any dominant position in the cabinet field, and the restriction is confined to the use of the cabinet and does not limit dealers, expressly or in practical effect, in the sale of competing products. *FTC* v. *Sinclair Refining Co.*, *supra*, at 474; *Judson L. Thomson Mfg. Co.* v. *FTC*, 150 F. 2d 952 (C.A. 1, 1945); cf. *United Shoe Machinery Corp.* v. *U.S.*, 258 U.S. 451; *International Business Machine Corp.* v. *U.S.*, 298 U.S. 131. Agreements of this type are sanctioned by the laws of a number of states, which prohibit or restrict the storing of one manufacturer's frozen products in the cabinet supplied by another.[39]

b. While exclusive dealing arrangements fall within the category of practices which have been held to be unfair, they are not illegal per se. As already noted, where such agreements are of limited duration, meet the peculiar problems of an industry, and do not unreasonably restrain trade, they have been held not to be illegal. *U.S.* v. *American Can Co.*, *supra*, at 31; *Motion Picture Advertising Service Co., Inc.*, *supra*, at 392, and at 395 of 344 U.S. For the most part, the agreements here involved are of limited duration. Many of those used in connection with the supplying of cabinets are terminable at will or on short notice or are of a maximum fixed duration of one year. Many of those used in connection with the rendering of financial assistance are terminable at any time by repayment of the balance due, and even when they have a fixed duration are in practice termi-

[39] An example of such laws is the Pennsylvania statute which provides:

It shall be unlawful for any person * * * knowingly to supply or place or deposit ice cream * * * of one ice cream manufacturer or distributor in any equipment, cabinet, can, or other container belonging to another ice cream manufacturer or distributor. (Act No. 512 approved May 8, 1956, entitled "An act amending the Act of May 21, 1949, Pamphlet Laws 1594.)

nable by repayment of the balance. The requirement that the dealer purchase the supplier's products exclusively during the period the financial obligation is outstanding meets a practical need of the industry since the repayment schedule is frequently keyed to the dealer's ice cream purchases by a surcharge on such purchases or some similar arrangement.

c. The examiner finds it unnecessary to determine which, if any, of the exclusive agreements used by respondents should be classified as falling within the "unfair" category, or whether some may be excluded from this category under the above authorities by reason of the limited duration of such agreements or the economic justification thereof in industry conditions. As has already been noted, even where such arrangements are of the type which may be classified as unfair, it is nevertheless necessary to establish the probable adverse competitive impact of such arrangements before it can be concluded that they are illegal. Under the line of authority established by the Supreme Court in the *Standard Stations* case (*Standard Oil of California* v. *U.S.*, 337 U.S. 293), in order to justify an inference or finding that the use of such agreements may adversely affect competition, it must appear that a substantial proportion of the market is tied up thereby. The record in these proceedings fails to establish that a substantial portion of any market has been tied up by respondents' use of such agreements.

As has already been noted, there is no evidence that respondents Beatrice, Foremost, Pet, Fairmont or Hood use such agreements in connection with the supplying of cabinets or that Pet, Fairmont or Hood use them in connection with the making of loans or financing the sale of equipment. The evidence with respect to the other respondents is fragmentary, it appearing that some of them have used such agreements in some areas but not in others, and that some have used them in connection with some types of financial assistance but not others. It also appears that such agreements have little practical effect on the great bulk of small retail establishments, which customarily handle a single brand irrespective of the requirement of any agreement. It further appears that there is a growing trend toward the splitting of accounts, despite exclusive agreements, and that such agreements do not substantially affect the mobility of dealer accounts.

In any event, it is not possible to make any finding with respect to the probable impact of the use of such agreements, based on the quantitative substantiality test of the *Standard Stations* case, since the record fails to disclose what proportion of any respondent's gallonage in any particular market is affected by such agreements nor as to the proportion which such affected gallonage represents of the entire gallonage sold in the market. Furthermore, it may be doubted whether such test would be appropriate in these cases in view of the fact that counsel supporting the complaint has not sought to rely on any inference of injury, but has sought to show actual injury in specific markets. The evidence introduced with respect to actual competitive conditions in these markets would tend to negate any possible inference of injury which might otherwise arise. *Purex Corp. Ltd.*, 51 FTC 100, 167.

2. Illegality Apart from Exclusive Dealing.

a. In apparent recognition of the fact that exclusive dealing arrangements play a minor role in the operation of the complaint practices, counsel supporting the complaint has largely abandoned this aspect of the case, and contends that the practices are illegal without regard to whether they involve exclusive dealing. To sustain a finding of illegality, it must appear that the practices are inherently illegal or that they are illegal because of the context in which they are used.

b. Aside from the fact that counsel's theory extends beyond the allegations of the complaints, the examiner finds nothing inherently illegal about the complaint practices as such. There is nothing about the practices which justifies characterizing them as "opposed to good morals." Most of the practices have been traditional in the ice cream industry. The record fails to establish that respondents are the originators of the practices or the only ones to use them. The court in the *Hastings* case specifically recognized that, apart from its use as an inducement for exclusive dealing, it is "not illegal for a manufacturer to finance his retail outlets." It is clear, therefore, that if the practices are illegal, it must be because of the context in which they are used. It must be because respondents have, as stated in the *Sinclair Refining* case, *supra*, exhibited a "purpose or power" to destroy competition, or because they have used the practices "aggressively" to substantially improve their position, to the detriment of competitors (*Hastings Mfg. Co.* v. *FTC*, *supra*).[40] This, in substance, is the gravamen of much of the criticism of competitors, whose fire was directed more at the excessive and aggressive use of the practices to the detriment of competitors, than at the basic practices themselves. Counsel supporting the complaint has also conceded that a finding of

[40] In the *Hastings* case it was found that as a result of "an aggressive campaign", in which the complaint practices were involved, respondent in the space of four years had grown from one of the smallest manufacturers in the field to the second largest.

illegality rests ultimately on establishing that the "requisite degree of injury * * * exist[s] as a matter of fact."

The records in these proceedings fail to establish the aggressive or excessive use of the complaint practices by respondents or that there has been any substantial injury to competition by reason of respondents' use thereof. While there is some evidence of competitive difficulties by individual competitors in some markets, the record fails to establish a substantial causal relationship between such difficulties and the complaint practices and, moreover, fails to establish any substantial injury to competition in any of the markets involved. The record also fails to disclose any significant improvement in the competitive position of any of the respondents, on an overall basis or in any market area, during the period covered by the evidence (1947–1956), or any trend toward concentration of the frozen products business in favor of respondents during this period.

CONCLUSION OF LAW

It is concluded that counsel supporting the complaint has failed to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents in the above-entitled proceedings has engaged in any unlawful conduct in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaints, and that the complaints should, accordingly, be dismissed.

ORDER

It is ordered, That the complaints in the above-entitled proceedings be, and the same hereby are, dismissed.

APPENDIX TO INITIAL DECISION

This appendix contain an analysis of competitive conditions in each of the market areas concerning which evidence was offered, with particular reference to whether the evidence discloses that the use of the complaint practices by respondents has resulted in competitive injury in any such market area. Counsel supporting the complaint called approximately 90 competitor witnesses and 73 dealers in 25 cities. In a number of instances these witnesses testified with respect to competitive conditions in areas other than the city in which they testified. Consequently this analysis of competitive conditions involves a number of other areas, in addition to the 25 hearing cities.

Before turning to a consideration of the evidence, certain preliminary observations should be made which are generally applicable to the evidence offered by counsel supporting the complaint. The first has to do with the representative character of the witnesses called in support of the complaint, particularly the 90 competitor witnesses upon whose testimony counsel supporting the complaint concedes "these cases rest largely" and who, he claims, are representative of independent ice cream manufacturers generally. While the sheer number of these witnesses and their geographic distribution give a surface impression of representativeness, closer analysis on a market area basis, in terms of the number of companies in the market and the position of some of the witnesses in the market, gives a considerably different picture. While in a few markets, such as Portland, Oregon, the competitor witnesses represented a good cross-section of companies in the market, in most areas the coverage was spotty and the witnesses left the impression of not being truly representative of manufacturers in the market. A number of the witnesses called were from small, marginal and unprogressive companies, which did no advertising and engaged in very little selling effort, but sought to attribute their difficulties to the sins of the larger company, rather than to their own inadequacies. In a number of instances representatives of companies, which the testimony of other witnesses revealed to be substantial and prospering, were excused from testifying after having been subpoened. In some areas, such as New York, not a single competitor witness was called.

Another serious deficiency from the standpoint of the distribution of witnesses was the lack of proper balance between competitor and dealer witnesses. In some areas all or substantially all the witnesses were competitors, with no dealers to corroborate hearsay testimony concerning relations between respondents and specifically named dealers. In other areas, such as New York, there was a plethora of dealer witnesses, but not a single competitor was called to indicate what competitive impact, if any, respondents' relations with the dealers in question had had in that area. When both competitors and dealers were called in an area, the dealers were frequently dealers who had not been involved in the competitive situations testified about by the competitor witnesses, or had been customers of manufacturers other than those who testified and sometimes of manufacturers who had been excused from testifying.

A final comment which should be made involves the general reliability of the competitor testimony. As has been indicated in the main decision, much of the testimony of such witnesses consisted of uncorroborated hearsay with respect to what assistance various respondents had allegedly given accounts which they had lost or been unable to acquire. In addition, there was considerable testimony by some of these witnesses concerning alleged declines in their overall sales or profits. Frequently this involved a comparison of their sales figures in a recent year with those in 1946 or 1947, and sometimes reference was made to sales figures in intervening years. There was also reference to sales figures involving individual customers. Yet the witnesses were not requested to produce their books and records but, for the most part, testified from memory, giving estimates and rough approximations of sales figures going back as much as eight years when all but persons with unusually retentive memories would have little likelihood of being reasonably accurate.

In apparent awareness of the questionable reliability of some of the figures upon which claims of losses were based, counsel supporting the complaint argues in his brief that "books and accounts tell only part of the story" and that the "health of competition involves more than profit and loss statements", but rests on a number of factors "including the state of mind of participants." The subtlety of this argument escapes the prosaic understanding of this examiner. Either a man's sales or profits have declined or they have not. If they have, this will be best reflected in his books and records rather than in his state of mind. If they have not, his disturbed state of mind, unsupported by the realities of his profit and loss situation, is a matter of small moment in these legal proceedings, albeit it may be of considerable interest to those engaged in the fields of psychology, psychiatry or mental divination.

With these general observations concerning the nature of some of the evidence in the record, the examiner turns to a consideration of competitive conditions in the various market areas where counsel supporting the complaint sought to show the competitive impact of the complaint practices. The evidence in each area will be discussed in the same chronological order as the evidence was offered.

1. *Portland, Oregon*

The only respondents doing business in the Portland area are Arden and Carnation, the latter doing business under the name of its subsidiary, Damascus Milk Company. Each of the respondents has a manufacturing plant in Portland and sells in the Portland metropolitan area as well as in other sections of the state. In addition to the two respondents there were approximately eight other manufacturers of ice cream selling at wholesale in the Portland market, as of October 1955, when hearings were held. These are Rogers Ice Cream Company (formerly known as Dairysweet Ice Cream Company), Dairy Cooperative Association (whose ice cream business is operated under the name Mayflower Ice Cream Company), Farmers Dairy Association, Jewel Ice Cream Company, Meadowland Dairy Company, Peter Pan Ice Cream Products Company, Polar Pie Ice Cream Company (an affiliate of Sunnybrook Farms Dairy Company), and Frostkist Ice Cream Company. A former substantial supplier in the market, Swift & Company, left the market in 1951.

In addition to the above manufacturers selling at wholesale, there are two large retail chains in the Portland area which manufacture their own ice cream, Safeway Stores and the Fred Meyers drug chain. Likewise, since the end of World War II there has been a substantial increase in the growth of roadside stands and other retail outlets which sell so-called soft ice cream made from vegetable fats and other ice cream substitutes, and retail establishments which manufacture their own ice cream in counter freezers from mixes purchased from others.

Counsel supporting the complaint called as witnesses seven of the eight ice cream manufacturers in the Portland area [41] and also one manufacturer from the state capital of Salem, which is outside the Portland trade area. No retail dealer witnesses were called from either area.[42]

The testimony of a number of the Portland manufacturers was to the effect that it was becoming more difficult to obtain new accounts and to retain existing accounts because of the expense involved in meeting the requests of dealers, particularly for the newer type ice cream refrigeration cabinets and for financial assistance. Some of the manufacturers claimed that because of their financial inability to meet these demands their volume had either declined or had failed to keep pace with the increase in population, and that their profits were likewise declining. Most of the testimony was of a general nature, not directed at any particular competitor. However, in some instances the witnesses sought to attribute their problems in part at least to respondents Arden and Carnation (Damascus).

[41] The only manufacturer not represented at the hearings was Frostkist.

[42] Counsel supporting the complaint called a representative of the Oregon Independent Retail Dealers Association. However, his testimony was based largely on opinion and hearsay, and portions thereof were stricken. To the extent that his testimony has any relevance, it was duplicated in the testimony of other witnesses.

Insofar as the competitors' complaints involved the furnishing of ice cream cabinets to dealers by ice cream manufacturers, it should be noted that they were not directed at the furnishing of ice cream cabinets, as such, or at any agreements used in connection therewith requiring the exclusive use of the products of the manufacturer supplying the cabinet or that the cabinet be devoted exclusively to the storage of the supplier's frozen products.[43] They were directed rather at the expense of furnishing the more up-to-date cabinets and to the alleged practice of furnishing a dealer more equipment than he required for his ice cream needs.

In order to place the matter of supplying cabinets in its proper perspective, it should be noted that all manufacturers in the Portland area for a great many years have customarily supplied ice cream cabinets to their dealers, except for a small percentage of dealers who preferred to purchase their own refrigeration equipment. Prior to World War II it was the practice of many manufacturers to make a rental charge to the dealer for the use of the ice cream cabinet supplied by them. However, this practice began to dwindle during the depression years, and by 1948 most manufacturers had ceased collecting rentals in the Portland market, except from the smaller dealers whose volume did not justify a free cabinet.

There is nothing in the record to establish that respondents Arden or Carnation were responsible for the discontinuance of the collection of rentals. In fact, when the first manifestations of the practice appeared during the depression years, Carnation (Damascus) had not yet gone into the ice cream business in Portland, its operations being confined to the milk end of the dairy business. The testimony of the representative of Peter Pan Ice Cream Company indicates that all companies played a part in the abandonment of the practice of charging rental for cabinets, and that no particular company was responsible for it.

Aside from the question of whether the two respondents were responsible for or took a leading role in the abandonment of the practice of charging a rental on cabinets, the record does not establish any necessary relationship between such abandonment and the difficulties which any competitor may have experienced. While the Peter Pan representative did testify that his profits during the period when it was customary to collect rentals were "higher than they are now", this does not establish a cause and effect relationship between the two

[43] One of the few witnesses to refer to the subject, the representative of Polar Pie Ice Cream Company, expressed his opposition to permitting the placing of another manufacturer's ice cream in the cabinet supplied by his company.

facts. The cost of doing business, whether it involves the furnishing of cabinets free of charge or any other service, must eventually be included in the price of ice cream. This fact was attested to by witnesses in a number of areas who indicated that the abandonment of rental charges was generally accompanied by an upward price adjustment in order to take care of the increase in costs. As stated by the representative of Polar Pie Ice Cream Company:

> [W]hen we give free cabinet rentals it costs my company some money. It has to be tacked on somewhere in the price of ice cream.

This same economic principle is recognized by the practice of most ice cream manufacturers who grant to dealers owning their own refrigeration equipment a special discount or refrigeration allowance, in recognition of the fact that the manufacturer is relieved of the cost of having to supply such equipment.

As indicated above, the complaints of competitor witnesses with regard to cabinets were centered about the increased cost thereof during the postwar period, when the more expensive display and merchandising cabinets came into vogue to replace the less expensive storage type cabinets previously in use. This, of course, is due primarily to the improvements in cabinets rather than to any action of respondents. The evidence discloses that the impetus for the use of such cabinets came primarily from the demands of dealers, who were frequently educated by salesmen representing cabinet manufacturers concerning the advantages of the newer cabinets. The record fails to establish that respondents initiated the practice of supplying the newer cabinets in the postwar period or that they used such cabinets as an aggressive competitive weapon in acquiring dealer accounts.

The only suggestion of any leadership in this practice was in the testimony of the representative of Rogers Ice Cream Company who testified, in response to the question "whether there was a leader in this offensive", that "there was a leader in the respect that the larger manufacturer was in a position to supply the more expensive equipment." He identified this so-called leader as Damascus. The examiner does not construe this to mean that Damascus was the leader in the sense of instituting the practice or of using it aggressively. In any event, the Rogers' witness was unable to back up his broad assertion of Damascus' leadership in the supplying of cabinets, by naming a single account he had lost or been unable to acquire due to this practice. The only specific instance that he could cite was an account which he endeavored to acquire from Swift & Company, which allegedly was able to retain the account by offering it a bigger cabinet.

While other competitors complained about the increase in the expense of furnishing cabinets, particularly to the larger accounts, they did not suggest that either of the respondents was responsible for this condition. A representative of Farmers Dairy Association specifically testified that he could not say "anyone would be more aggressive than anyone else."

A number of the witnesses recognized that the newer cabinets were of a definite advantage to the industry since they tended to increase sales by appealing to the buying impulses of the public and also cut down on delivery costs by providing larger storage space. Some of the witnesses took note of the fact that the cabinet manufacturers had played a part in educating dealers as to the desirability of the newer type cabinets, and that a good part of the impetus for the supplying of the cabinets had come from the dealers themselves.

The only reference in the record to any specific competitive situation where any respondent had utilized a cabinet as a vehicle for obtaining an account was in the testimony of the representative of Meadowland Dairy, who claimed that Arden had taken an account from him by furnishing them a self-defrosting cabinet in place of the "older-type equipment" which Meadowland had there. Outside of the witness' ipse dixit, there is no evidence in the record that the account in question had been induced to switch because of the self-defrosting cabinet or, in fact, that Arden had even supplied the account with such a cabinet. Furthermore, other evidence offered by counsel supporting the complaint indicates that the account in question had not switched, but was actually being served on a split basis by both Arden and Meadowland.[44]

The evidence with respect to the supplying of cabinets simply boils down to the fact that cabinets are becoming more expensive and some manufacturers would prefer not to have to supply them. However, it was recognized that such cabinets have a legitimate objective to perform and may result in increases in sales and savings in costs. Moreover, there is no reliable evidence that the practice of supplying cabinets, either initially or during the more recent period, was instituted by either Arden or Carnation, or that either has used this practice as an aggressive competitive weapon to obtain accounts from competitors or to secure accounts in competition with competitors. The size and type of cabinet best suited to a particular account involves the exercise of a sound business judgment on the part of the ice cream supplier, and there is nothing to indicate that either Arden or Carna-

[44] The account in question is Singer's Market; CX 175, page 4, identifies this as a split account.

tion acted contrary to ordinary business prudence in furnishing cabinets to dealers which were larger than were needed or of a better type than were needed, or that they were offered as an inducement for the dealer to become or remain a customer. Not a single dealer in the State of Oregon was called to testify that the supplying of a particular cabinet to him was the reason for his doing business with Arden or Carnation, or had any influence on his decision to do business.

There was no evidence offered that exclusive dealing or exclusive storage provisions in connection with the furnishing of cabinets presented any problem in the Portland market. The complaints relating to cabinets were directed at the expense involved, and not at any exclusive agreements used in connection therewith. The only witness who referred to the latter subject was a representative of Polar Pie, who indicated that such restrictive provisions had little practical effect since most of the dealers handled one brand only and that when either party was dissatisfied with the arrangement it could be readily terminated.

The other practice which was the target of considerable complaint was the matter of rendering financial assistance to dealers. While it did not appear to loom as large in the minds of competitors as the supplying of expensive cabinets, some of the competitor witnesses indicated that the lending of financial aid to dealers, either in the form of outright loans to assist them in remodeling or in financing the purchase of equipment, presented a serious problem to them. Those who placed the most stress upon the financing as a problem were Meadowland, Peter Pan and Polar Pie. As was the case with much of the testimony relating to the furnishing of cabinets, a large portion of the testimony on the subject of financing involved rather general complaints about the expense involved in rendering financial assistance to dealers and the financial inability of some companies to engage in it. There was little reliable evidence that the engagement in these practices by Arden or Carnation was responsible for the loss of, or inability to acquire, dealer accounts on any substantial scale.

The representative of Meadowland testified in general terms that the "biggest thing" he had to do to acquire accounts was "loaning money" and that he was losing his bigger accounts "mostly on financing." However, there is little or no evidence connecting the respondents with Meadowland's alleged difficulties. The evidence indicates it to be one of the smallest operators in the Portland market. It does very little advertising and the ice cream business appears to be one of several lines of endeavor in which the principals of this company are interested. The witness made no reference to Arden as being responsible for any of Meadowland's alleged difficulties due to financing. He did refer to two accounts into which Damascus had split, allegedly because of financing. However, his hearsay testimony concerning the assistance rendered to these accounts was largely contradicted by a Damascus representative who also was called in support of the complaint. According to the uncontradicted and credited testimony of the Damascus witness, one of the accounts received only limited assistance (less than one-fourth of the amount testified to by the Meadowland witness) in purchasing a refrigeration cabinet, and the other account not only did not receive any financial assistance, but did not even have an ice cream cabinet from Damascus in his place of business.[45] In neither case is there any evidence, even hearsay evidence, that the financial assistance or alleged financial assistance was a factor in inducing these accounts to add the Damascus brand. The Meadowland witness made no claim that he was so advised by either account and no representative of the dealers in question was called to testify.

The representative of Peter Pan testified generally that he had lost accounts or had been unable to acquire them due to his inability to make loans or finance equipment. Although he testified, in response to a leading question by counsel supporting the complaint, that he had lost such accounts to respondents Arden and Carnation, he could actually recall only a single account falling within this category, which he claimed was lost to respondent Arden. Not only is there no reliable evidence that Arden ever financed the account or that financing was a factor in the account's changing suppliers, but there is other evidence in the record that Arden did not acquire the account in question from Peter Pan but from another manufacturer.[46] The complaints of the Peter Pan representative with regard to financing were not limited to the respondents, but covered most of the other competitors in the field. In fact he indicated that he did not believe the practice of making loans or of supplying equipment would cease merely by the termination of such activities on the part of Arden and Damascus.

[45] The first account mentioned by the Meadowland witness was Joe Hanna, where Damascus allegedly had financed $8,000 worth of equipment. According to the Damascus branch manager, the only assistance given to this account was the sale of a regrigeration cabinet for $1,875, under a conditional sales contract. With respect to the second account, Rask Brothers, to whom Damascus had allegedly agreed to loan money for the remodeling of the store, the testimony of the Damascus manager indicates that no loan was made or offered to this account and that the account was not even supplied with the customary ice cream cabinet. According to the Damascus witness, both of these accounts had indicated dissatisfaction with Meadowland service and merchandising policies.

[46] The account, which was identified as McKeel's, was acquired in 1953 from Mayflower Dairy, according to the uncontradicted and credited testimony of the Arden manager, who was called as a witness by counsel supporting the complaint.

The representative of Sunnybrook Farms (Polar Pie Ice Cream Company) was somewhat more specific than the other witnesses in seeking to assess responsibility for a decline in his company's volume during 1954. According to the Sunnybrook witness, his company had lost approximately five accounts to Arden and two to Damascus because of loans or financing. He claimed that he had lost these accounts after first being asked to make loans by the owners and declining to do so. However, in only two of the seven instances referred to is there any reliable evidence that a loan was ever made to the accounts in question.[47]

The representative of Rogers Ice Cream Company, while stressing primarily the supplying of cabinets as presenting the most difficult problem to his company, also claimed that his company found it difficult to meet demands from dealers for financing. The Rogers' witness could only recall a single account which his company had lost to a respondent because of financing. The account in question had switched to Arden in April 1954, and the record discloses that two months later it received a loan to assist it in remodeling a new store to which it was moving. No evidence was offered to establish that the loan entered into the decision of the dealer to switch to Arden. That such loan did not "captivate" the dealer, as suggested by counsel supporting the complaint, is indicated by the fact that despite a substantial balance on the loan, the account switched to Mayflower Dairy six months later. While the Rogers' representative sought to leave the impression that his own company's financing efforts were on a very modest basis, evidence offered by respondent Arden indicates that Rogers in fact has made loans as large as $20,000 and $30,000.

The only other competitor who indicated that the matter of loans presented a problem was Jewell Ice Cream Company. The representative of that company did not object to the practice of assisting

[47] Although specifying seven accounts as having been lost on account of loans, only five were specifically named by the witness. In two instances there is independent documentary evidence in the record and corroboration by an Arden official that Arden gave financial assistance to the accounts in question. One instance involved the VGA Market which received a loan from Arden, and the other was Rose Park Food Market where Arden had guaranteed a bank loan to the dealer. These loans were used for remodeling or expansion purposes. The Arden representative denied that his company had ever served the third account mentioned by Sunnybrook, viz., Stacey & Young. The fourth account referred to by the Sunnybrook witness, Harney Hill Grocery, did not receive any financial assistance at the time it switched to Arden in 1953, but the dealer did receive a loan two years later for the purpose of remodeling his establishment. This loan obviously could have had no connection with the account's switching. In the case of the only specific instance involving Damascus, viz., Schwary's Grocery, the Damascus representative testified that this account had been acquired from Farmers Dairy and not Sunnybrook. In any event, there is no reliable evidence that such account received any financial assistance.

customers financially as such. In fact, he indicated that his company had assisted customers in remodeling and that it had resulted in increasing the volume of these accounts substantially. Likewise, he indicated that his company had had very little loss from its loans. However, he claimed that a new practice had arisen recently of making loans without interest and this he objected to as tantamount to cutting the price of ice cream. The witness conceded that he hadn't "heard" of Arden making such loans, but claimed that he had lost an account to Damascus due to an interest-free loan.[48] There is not a scintilla of evidence in the record, aside from the witness' hearsay statement, that Damascus has made any interest-free loans in Portland.[49]

The evidence indicates that many of the ice cream manufacturers in the Portland area make loans to assist their customers, particularly for remodeling purposes. The record fails to establish that Arden's and Carnation's activities in this respect are different from those of their competitors, except possibly insofar as they may have a greater number of customers than many of their competitors and therefore possibly may have made a greater number of loans, although this is by no means established by the evidence. Carnation makes approximately twenty loans a year in the Portland area, of which about 90 percent are made to their existing customers and the balance are distributed between new openings and customers of competitors. At the time of the Portland hearings, Arden had 10 loans outstanding out of a total of 500 to 600 accounts in the area. These figures hardly suggest that either respondent has engaged in an aggressive loan campaign to pirate customers away from competitors or to induce new dealers to trade with them.

There is not a scintilla of evidence that either respondent had anything to do with instituting the practice of assisting customers financially. On the contrary, the representative of both Peter Pan and Sunnybrook attributed the inception of the practice of making loans on any considerable scale to Swift & Compay. The extent to which others in the market engage in the practice may be judged from the testimony of the Peter Pan representative, who stated that the practice of making loans by ice cream manufacturers could not

[48] The witness did not identify the account in question, other than by referring to the street on which it was located. He conceded that he hadn't personally followed the ice cream business for ten years and didn't know what competitors were doing, except for what his partner-brother told him.

[49] There are no agreements in evidence used in connection with the making of loans by Damascus in Portland. Such evidence as there is concerning loans in the area indicates that interest is charged (CX 274, pp. 84 and 100). A form of agreement used in connection with financing the sale of cabinets likewise contains provision for the payments of interest (CX 271A).

be stopped merely by the termination of such activity by Arden and Damascus.

While the vast preponderance of the evidence at the Portland hearings related to the practices of supplying ice cream cabinets and making loans, several of the competitor witnesses referred to other miscellaneous practices as being troublesome. These included the supplying of cabinets for frozen foods other than ice cream or permitting the dealer to use ice cream cabinets for storing some frozen foods, the furnishing of signs, the painting of buildings, giving lower prices and giving gratuities. As was the case with so much of the other testimony, these complaints were of a most vague and general nature and almost none of it was directed at the activities of respondents Arden and Carnation.

The only specific evidence involving the supplying of frozen food cabinets related not to the respondents but to Swift & Company.[50] A number of the competitor witnesses indicated that dealers frequently used a portion of the ice cream cabinet for the storage of frozen foods and that it was a constant battle to endeavor to discourage them from doing so. There is not a scintilla of evidence that either Arden or Damascus are the leaders in this practice or that their activities in this respect are any different from any other manufacturers. In fact, there is no specific evidence of their engagement in the practice or that any of their competitors lost or were unable to acquire a dealer due to this practice.

With respect to the furnishing of signs, the record discloses that most manufacturers supply an identification sign to their customers, the major portion of which is devoted to the name of the ice cream manufacturer and containing a smaller "privilege panel" with the name of the retail customer. There is no evidence that the activities of Carnation or Arden in the supplying of signs are any different from those of any of their competitors. In fact, there is no specific evidence of their supplying signs or that any competitor lost or was unable to acquire any account because of respondent's engagement in this practice.[51]

Insofar as the other miscellaneous practices mentioned in the com-

[50] The representative of Rogers Ice Cream Company, who was formerly employed as manager for Swift, testified that his former employer had given a frozen food case to one of his accounts, which he later tried to acquire without success. He also testified that it had been Swift's policy while he was with the company to permit dealers to store frozen food in the ice cream cabinet if their volume was sufficiently large.

[51] The only reference to signs was made by the representative of Sunnybrook (Polar Pie Ice Cream Co.), who testified that his company required all dealers to whom it supplied signs to enter into an agreement which required the exclusive purchase of its ice cream for a specific term.

plaint are concerned, the record is more vague and general and lacking in any connection with the respondents than the evidence above discussed. The representative of Sunnybrook (Polar Pie Ice Cream Company) testified generally to having encountered competition in the form of lower prices, painting, putting in a new floor or paying an advertising bill. Although this witness, in response to a leading question by counsel supporting the complaint, claimed that he had encountered these practices by Arden and Carnation, when pressed for specific instances thereof on cross-examination, he stated that his testimony on direct examination "was directed in a general manner to all competitors" and not to Arden and Damascus specifically. Later the witness purported to recall two accounts which had allegedly received assistance from Damascus falling within the above categories, one of which he claimed had received a $100 gratuity and a home refrigerator for the owner, and the other had had its store painted by Damascus. Not only is there no evidence to corroborate the witness' hearsay testimony with respect to the giving of a gratuity by Damascus, but the Damascus representative specifically denied that his company had made such a gift.[52] With respect to the alleged painting of a grocery store by Damascus, not only is the establishment in question not identified in the record, but the Damascus representative testified unequivocally that it was not this company's policy to paint stores for customers.[53]

Although, as above indicated, some of the competitors in the Portland market complained about certain of the practices engaged in in that market, particularly the supplying of cabinets and the financing of accounts, and in some instances sought to attribute the loss of an account or their inability to acquire an account to these practices, the evidence as a whole fails to indicate any substantial injury to, or lessening of, competition in the market due to respondents' use of these practices. While certain of the competitors claimed that their volume of ice cream sales had declined, it also appears that the volume of other competitors has remained fairly constant and that in some instances competitors' sales have increased. Significantly, the volume of both respondents Arden and Damascus has declined in Portland

[52] According to the Damascus witness the account referred to by the witness had formerly been a Damascus account and had been acquired by Sunnybrook on the basis of the latter giving the owner $100 and an electric range for his home. Since this statement is based entirely on hearsay information received by the witness from the owner, no finding can be based on it any more than a finding can be based on the hearsay testimony of the Sunnybrook witness.

[53] This incident, involving the alleged painting of a grocery store, is of questionable relevance under the complaint since Sunnybrook was supplying the account with milk and not ice cream.

since World War II. Not only does the evidence not sustain any finding that the decline in volume of some competitors is due in any substantial measure to the practices complained of, but there is substantial affirmative evidence that other factors in the market have played a significant role in the competitive picture.

The only competitors who claimed that they had sustained a substantial loss of volume as a result of their loss of accounts were Meadowland and Peter Pan. Meadowland claimed that its volume had declined from 78,230 gallons in 1947 to 58,844 gallons in 1954.[54] Since this company's estimated volume for 1952 and 1953 was likewise approximately 58,000 gallons, it seems evident that the decline of approximately 20,000 a year must have occurred during the period from 1948 to 1951. The testimony of most of the competitor witnesses suggests that the supplying of cabinets and financing of accounts began to become a noticeable problem around 1952. It therefore seems apparent that Meadowland's decline prior to 1952 must have been due to other factors. The representative of Peter Pan estimated that his company's volume reached its maximum right after the end of World War II, at approximately 80,000 gallons, and that it had thereafter declined by approximately one-third. There is no indication in the record as to the rate of the decline or as to the period in which it occurred.

Two other competitors also indicated that there was some decline in their business, but the extent thereof was somewhat uncertain. The Jewell representative testified that his company's present gallonage was approximately 273,000 gallons and that this was somewhat below its 1947 gallonage, although the extent thereof was not indicated. The Rogers' representative, who was its salesmanager from July 1950 to September 30, 1954, indicated that when he came with the company its gallonage was approximately 300,000 a year, that the amount thereafter increased until it reached about 400,000 gallons in 1953, and that when he left the company in September 1954 it had begun to decline. The amount as of the time he left the company's employ, which was over a year prior to the Portland hearings, was somewhat uncertain, but apparently it was the same as the 1950 volume.

Contrasted with the experience of the above competitors is that of three other manufacturers whose entry into the ice cream business postdates that of most of the above competitors. The Dairy Cooperative Association, which entered the Portland market with ice cream in

[54] The above figures are apparenty actual figures, of which the witness had made a memorandum before testifying. This represents one of the few instances where a witness had come prepared with some actual figures.

1948 as Mayflower Ice Cream Company, built up its annual gallonage from nothing in 1948 to approximately 300,000 gallons as of the time of the Portland hearings in October 1955. The smaller Farmers Dairy began manufacturing ice cream in 1941, which it orginally sold through its own store, and as of March 1955 (when the witness who was the former controller left the company's employment), its volume was approximately 100,000 gallons. This represented a doubling of its volume during the period between 1950 and 1955, when some of the other competitors were complaining that they were finding it difficult to compete. Sunnybrook Farms, which went into the ice cream business as Polar Pie Ice Cream Company in 1949, increased its volume from approximately 75,000–80,000 gallons in the 1949–1950 period to approximately 135,000 gallons in 1955. While the representative of this company at first claimed that its ice cream operations were not profitable, he declined to produce the pertinent records and later conceded that during the latest six-month period his company was making a substantial profit.[55]

While it may be that a few of the competitors did suffer a decline in sales between 1947 and 1955 and that a few did not move ahead during that period, the record fails to support a finding that the practices charged in the complaint played any substantial part in this situation. On the contrary, there is considerable evidence in the record that other factors were responsible in large measure for this condition. Most of the competitor-witnesses were agreed that 1947 represented a highwater mark for the ice cream industry in the Portland area. Following the lifting of sugar rationing imposed during the war and the return to a peace-time economy, there was a tremendous upsurge in the pent-up public demand for ice cream and other frozen desserts.

With the increase in demand, new competitors began to become active in the market such as Farmers Milk, Mayflower and Swift & Company. In the next few years new competitors of another kind entered the market. These included the vendors of soft ice cream such as Dairy Queen, and retail establishments which manufactured their own ice cream in counter freezers. In addition, some of the chain stores, such as Safeway and Fred Meyers, began manufacturing

[55] This witness was subjected to strenuous cross-examination concerning the question of his increased costs, which allegedly prevented him from making a profit, and he finally agreed to bring in his records to substantiate his claims. However, during the interval provided for his obtaining the records he had a change in heart, due in part at least to advice received from counsel supporting the complaint, and he declined to produce any records to substantiate his testimony. In an apparent effort to avoid having to bring in his records, he conceded, for the first time, that his company was operating at a profit.

hard ice cream themselves, thus withdrawing as potential customers from some of the Portland manufacturers who had previously supplied them. That the competition from the soft ice cream establishments and counter freezers has become a substantial factor for the traditional ice cream manufacturers was attested to by the representatives of Mayflower, Jewell, Meadowland and Peter Pan. The representative of Jewell estimated that the counter-freezer operations and soft ice cream establishments now account for approximately 30 percent of the frozen dessert business in Portland. The representative of Jewell also acknowledged that during the period from 1952 to 1955 unfavorable climatic conditions had had an adverse effect on ice cream sales generally.[56]

Some of the competitor witnesses indicated that their decline in volume was not due so much to a loss of accounts as to a decline in volume of ice cream sold per account. The Jewell representative attributed this decline in large part to the competition of counter freezers and soft ice cream establishments, which gave the consumer larger portions for the same price. Other manufacturers attributed the decline in sales per account to the fact that more ice cream was being sold in grocery supermarkets than had formerly been the case, to the disadvantage of the smaller grocery store and bulk ice cream establishment. While some of the competitor witnesses complained about their inability to get into the supermarkets because of the complaint practices, there is no substantial evidence to support these claims, most of which have been discussed above.[57] The aggressive, medium-sized companies appear to have obtained their fair share of supermarket business. The smaller companies, as the testimony of the Farmers Dairy representative indicates, never had many supermarket accounts even before the inception of some of the complaint practices.

The sales and production figures of respondents Arden and Carnation, which are in evidence, fail to establish any such improvement in their position as to suggest that they had been utilizing unusual, novel or aggressive practices during the period complained about. In fact the figures disclose that both companies were going through the same downward and sideward experience as some of their competitors. The sales figures for Carnation's Portland plant disclose that from a peak of 960,000 gallons in 1947, it declined to 772,000

[56] This witness testified that the summers from 1952 to 1955, which were the periods of heaviest consumption of ice cream, had been unusually cool and short.

[57] Although there was reference made to cabinets and other complaint practices as affecting the ability of competitors to get supermarket business, some of the witnesses indicated that there were other important factors, such as price, which affected their ability to obtain these accounts.

gallons in 1951. Sales in 1952 rose to 870,000 gallons but thereafter declined to 854,000 gallons in 1954. This decline occurred despite a substantial increase in its territory. In the year 1950 Carnation's share of the Portland market was 18.6 percent. By 1955 this had declined to 17.4 percent. Its experience in the state as a whole has been similar, with its production declining by 115,000 gallons between 1947 and 1954, and its share of state production from 10.8 percent to 8.8 percent during the same period. In the year 1955 it did experience an upturn of 65,000 gallons, but was still 1.3 percent below its 1947 production share.[58]

A similar situation exists in the case of Arden. While its actual sales figures for the Portland market were not in evidence, it was estimated that its sales had declined by approximately 50,000 gallons between 1951 and 1954. Its share of the Portland market declined from 18.9 percent in 1950 to 17.1 percent in 1955. Its production of ice cream products in the State of Oregon declined by 326,000 gallons between 1947 and 1955, and its share of state production from 27.9 percent to 22.0 percent. The decline experienced by both companies took place in the face of a population increase of 22.63 percent from 1947 to 1955.

The record fails to establish any significant change in the ranks of competitors during the period when Arden and Carnation were supposed to be particularly active in the use of the complaint practices, viz., from about 1950 to 1955. During the postwar period there was the significant entry into the market of the local ice cream company, Mayflower Ice Cream, which enjoyed a rapid rise. The most significant departure was that of Swift & Company, a so-called national company of the type which counsel supporting the complaint contends has the capital to engage in the complaint practices. While the evidence indicates that four small local companies ceased doing business in the postwar period, there is no evidence to connect their departure with the practices complained about. Two of the companies, Westover Dairy and Holly Dairy, were acquired by Carnation in 1946, several years prior to the time when it was claimed the practices in question had become a competitive problem, and at a time when all companies in the area were experiencing their best sales. The third company, Broadview Dairy, with a relatively small volume of 40,000 gallons, was acquired by Carnation in 1951, there being not a scintilla of evidence that the complaint practices had anything to do with its selling out. A fourth company, Maplewood Dairy, ceased doing

[58] The 1954 figure is more nearly comparable to those of competitors since that was the latest year for which they gave any sales or production figures.

business at some unspecified time for reasons not disclosed in the record. It is not amiss to note that Carnation's increase in gallonage by almost 100,000 gallons, after reaching its lowest volume in 1951, coincides almost exactly with the gallonage which it purchased from two of its competitors.[59]

To the extent that respondents Arden or Carnation engage in any practices falling within the scope of the complaint, the record fails to establish that they originated them or used them to the substantial detriment of competitors in the Portland market, or that there has been or is likely to be any substantial impairment of competition in the Portland market as a result of the engagement by said respondents in any of such practices.

a. Salem, Oregon

There are five companies selling ice cream in the state capital of Salem and the surrounding territory. Four of these, Arden, Carnation, Mayflower and Meadowland, have plants in Portland and distribute in the Salem area. The fifth is a local manufacturer, DeLuxe Ice Cream Company. Arden has sold in the territory for a great many years, while Carnation began selling there around 1950 or 1951.

Neither the Mayflower nor the Meadowland witness, who testified in Portland, made any reference to competitive conditions in the Salem market, their testimony being confined generally to the Portland metropolitan area. The only witness called by counsel supporting the complaint who testified concerning competitive conditions in Salem was a representative of DeLuxe Ice Cream Company. No dealers were called.

The DeLuxe witness referred to the increase in the expense of supplying cabinets due to the increased cost of such cabinets, and to the gradual disappearance of the former practice of charging rentals. He also testified that it was necessary to make loans to the larger accounts, a practice in which his company did not engage because of its alleged financial inability to do so. The testimony of the DeLuxe witness was directed at competition generally in the market and not at any particular competitor. He specifically stated that he did not know who started supplying customers with more expensive equipment and made no effort to attribute the decline in the practice of collecting cabinet rentals to any particular competitor.

The only effort which the witness made to attribute to any respondent the loss of, or inability to acquire, any account involved a single

[59] The gallonage of Westover Dairy was estimated at 40,000 gallons a year. Carnation also acquired 55,000 gallons by purchase from Swift & Company when the latter left the market in 1951.

account which he had endeavored to take away from respondent Arden, but regarding which his salesman later reported the owner had changed his mind about switching because Arden had "taken up half the note" which a fixture company had on the dealer's equipment. In the absence of testimony by the store owner or other reliable evidence to indicate that Arden had, in fact, financed the account in question, no finding can be based on the uncorroborated, second-hand hearsay testimony of what the witness' salesman reported to him concerning a conversation with the store owner, who in turn related what Arden had done for him.

Despite his alleged inability to acquire this account, the DeLuxe representative conceded that his company had acquired as many accounts from Arden as the latter had acquired from him. His volume had increased from approximately 73,000 gallons in 1947 to approximately 117,000 to 123,000 in 1954, and his 1955 volume was expected to exceed the previous year. While the witness claimed that his profit per gallon had decreased since 1947 due to increased distribution and manufacturing costs, he made no effort to attribute this condition to any of the complaint practices. On the contrary, he stated that a large part of his increase in expenses was due to increased labor costs. He made no claim that his over-all, as distinguished from unit, profits had declined.

There is no evidence in the record to establish that there has been any injury to competition in the Salem area as a result of Arden's or Carnation's engagement in any of the complaint practices. In fact there is no evidence that either respondent was able to acquire any customers in the area by the use of any of the complaint practices or has ever endeavored to do so.

2. *Seattle, Washington*

The hearings at Seattle involved witnesses from four different areas in the state, viz., Seattle, Snohomish County, Aberdeen and Bellingham. Each of these appears to be a separate market area, with substantially different groups of competitors and competitive conditions, except that respondents Arden and Carnation sell in each of the areas. Each of these respondents has a plant in Seattle and sells in the Seattle area, as well as other parts of the State of Washington.

a. Seattle Area

The competitors operating in the Seattle area include, in addition to the two respondents, Dairigold, Meadowsweet, Velva, Vita Rich, Richmaid, Horluck's, Happy Valley and Royal Dutch. Two other competitors, Arctic and Vita Freeze, sell ice cream novelties only. There is also Regal Ice Cream Company, which is owned by Safeway. The only competitor witness to be called from the Seattle area was Royal Dutch. Witnesses from Dairigold (which is next in size in the area after Arden and Carnation) and from Horluck's Creamery were both excused at the request of counsel supporting the complaint after having been subpoenaed. Not a single dealer witness from the Seattle area was called to testify.

The main complaint of the representative of Royal Dutch was that during the past five years the cost of cabinets had increased from a range of between $350 and $400 up to $600 and $800, and that as a result of the more frequent changes in cabinet styles the life of a cabinet was now about five years as compared to the previous life expectancy of about ten years. He stated that as the stores became larger and more modern they demanded larger and newer equipment. The witness made no effort to attribute this condition to any of the respondents, but stated that all companies were "in the same boat" insofar as being subject to the demand of dealers. The Royal Dutch witness indicated that he would prefer to charge rentals for supplying cabinets, but indicated that this practice had begun to decline in 1940 and was no longer in vogue in the area. He made no effort to attribute the decline in the practice of charging cabinet rentals to any particular company, stating that his company found that it was generally not the practice to charge rentals. No complaint was made that the supplying of cabinets involves any exclusive arrangements.[60]

The Royal Dutch witness gave no indication that his company had lost any accounts or was unable to acquire accounts because of cabinets, nor was any claim made that his company had sustained any loss in sales. On the contrary, the witness conceded that his company had grown in size since 1940. There is likewise no definitive evidence that the Royal Dutch Company has sustained any decline in the profitability of its operations. The witness did make the ambiguous observation that his company was "not any richer" as the result of the expense involved in furnishing the newer cabinets and that "if we don't make any profit we are going backwards." However, the examiner cannot infer from this vague statement that the company had actually sustained a loss in profits, or that if it had that the loss was substantial, or, more importantly, that such loss is attributable to the supplying of cabinets by respondents.

[60] The Arden sales manager testified that approximately half the accounts in Seattle were split, stating that this was particularly true of the larger stores. He estimated that 35 to 40 percent of Arden's larger accounts were split.

In any event, whatever may be the situation with respect to the individual competitor Royal Dutch, there is no evidence of any injury to competition generally in the Seattle market. As above indicated, none of the other seven competitors testified and the fact that two of them were excused, including particularly the third largest company in the area, hardly suggests that these competitors had any complaints regarding competitive conditions. Certainly it cannot be argued that the testimony of the two competitors who were excused could have been cumulative on the basis of the testimony of a single competitor from the area. The fact that counsel supporting the complaint in Portland called six of the seven competitors in the area hardly suggests that the excusing of two competitor witnesses in Seattle was due to cumulativeness.

There was no evidence introduced to indicate any undue mortality among competitors in the market. The so-called national company, Swift & Company, ceased operating in the area around 1951, but the reason therefor does not appear from the record. A local company, Alpine Dairy, sold out to Dairigold, whose representative counsel supporting the complaint excused. Dairigold is the most recent entrant into the ice cream business in the area and has worked itself up to the number three position in the market. Despite a 14.82 percent population increase in Seattle between 1947 and 1955, Arden's sales increased only 5.28 percent during this period. Its 1954 gallonage was 2.51 percent below its 1947 gallonage and was lower than its gallonage in 1926. The record contains no information with regard to Carnation's experience in the Seattle market although, as will hereafter appear, its position in the state as a whole has not improved significantly.

b. Snohomish County Area

Snohomish County lies directly north of Seattle. The principal competitors include Snohomish Dairymen's Association (a farmer's cooperative of Everett, Washington), respondent Arden and Meadowsweet Dairy, also of Everett. Carnation only operates on a limited basis in the area. There are two other minor competitors, Horluck's and Happy Valley from Seattle. The only competitor witness called from this area was Snohomish County Dairymen's Association. No dealer witnesses were called on to testify.

The representative of the Snohomish County Dairymen's Association had no complaint against any competitor, unless his reference to the fact that the former practice of charging cabinet rentals had been abandoned within the past five years may be construed as a complaint.

However, he made no claim that any competitor was responsible for this condition. In fact he specifically stated that the abandonment of the practice was not due to Arden and Carnation and that he had abandoned it because it cost more to collect the rentals than it was worth. He also stated that the supplying of cabinets by Arden and Carnation had had no effect on his business. He further indicated that he expected the increased sales resulting from the better display cabinets to offset the cost thereof.

Snohomish County Dairymen's Association is the number one company in sales in the area,[61] followed by Meadowsweet, Arden being number three. There is no indication of mortality among competitors or of any change in relative size of competitors in the area.

c. Aberdeen Area

The Aberdeen area is located about 100 miles southwest of Seattle. The principal competitors are Arden, Hay's, Newman's, Arland's, Dairigold, and Firlands. The only competitor called as a witness was one of the owners of Hay's Dairy. There were no dealer witnesses. The principal complaint of the representative of Hay's Dairy was that cabinet costs had gone up from about $200 for the older type cabinets to about $700 to $800 for the modern open-top cabinets, and that he had to supply more of the latter to his customers. He was not prepared to state that Arden was the first company in the area to start using the more modern cabinets, but claimed that the practice of supplying cabinets on a more liberal basis occurred about the time that Arden entered the territory.

The evidence discloses that Arden came into the Aberdeen area in 1946 by the purchase of Smith's Dairy which was then the largest company in the area. Prior to that time, according to the Hay's witness, the competitors in the area had a "gentleman's agreement" that they would not offer one another's customers better cabinets. Although Hay's apparently would have preferred Arden not to have broken the gentleman's agreement by offering better cabinets, the witness conceded that the newer type of cabinets had actually helped his company sell more ice cream, that it probably was a good thing for the ice cream business, and that the supplying thereof had not caused his company any difficulties.

In addition to the matter of supplying cabinets, the Hay's representative indicated that some of the competitors loaned money to dealers, but that this was not a widespread practice. He did endeavor

[61] While the Association's witness declined to reveal its gallonage, he conceded that it was in excess of 300,000 gallons.

to attribute to Arden his company's inability to acquire two accounts a year previously because it could not comply with requests for financial assistance, but his testimony in this regard was pure hearsay, there being no reliable evidence that Arden had offered any financial asssistance to the accounts in question.

Despite Arden's alleged breach of the gentleman's agreement with respect to soliciting competitors' accounts, Hay's Dairy has been able to increase its volume by over 25 percent since 1947.[62] Its profit picture has likewise improved between 1950 and 1955. While Hay's had been number two in the market, ranking behind Arden's predecessor (Smith's Dairy), it now has at least 50 percent of the volume in the area. The record is utterly lacking in any evidence to sustain a finding of injury in the Aberdeen area.

d. Bellingham Area—Whatcom County

Whatcom County is located in the northern part of the state, directly north of Snohomish County. The principal city is Bellingham. The main competitors are Whatcom County Dairymen's Association (a farmer's cooperative selling under the name Dairigold), Arden, Cyr Brothers and Metcalf Dairy, the latter being a recent entrant into the market. Respondent Carnation entered the territory a few weeks prior to the Seattle hearings and apparently had only a few accounts. Representatives of Whatcom County Dairymen's Association (Dairigold) and of Cyr Brothers were called to testify by counsel supporting the complaint. Likewise, for the first time during the hearings in the Pacific Northwest, four dealers were called.

Although Arden had sold in the territory for about 25 years, it was not too active until 1952. At that time it had about 5 or 10 percent of the Whatcom County market, as compared with approximately 90 percent held by Dairigold. In October 1952 it sent a salesman up from the Seattle territory to solicit new business. As a result of these sales efforts, Arden was able to acquire about 25 accounts during the period from 1952 to 1954, and to increase its volume to the point where it had about 20 percent of the market as compared with 70 percent on the part of Dairigold.

The representatives of Dairigold and Cyr Brothers claimed that they had lost accounts to Arden, mainly because the latter offered newer and larger cabinets, which in some instances were used to store frozen foods. Reference was also made to other inducements such

62 The witness at one point estimated the increase at 25 percent, but later conceded that it was possible his gallonage had actually doubled since 1947. He stated he could testify better if he had his figures with him, but had not been requested to bring any.

as outright gifts, signs and paid vacations. Most of the testimony as to what Arden had offered dealers was hearsay, being based on what dealers had allegedly told the witnesses Arden had offered them, and counsel supporting the complaint was advised by the examiner that it would be necessary to offer independent evidence as to the nature of the alleged offers made by Arden to dealers, in order to support a finding concerning such offers. The Arden salesman, who was also called as a witness in support of the complaint, testified that his sales approach was based on excellence of his company's products and its advertising and merchandising methods, and that the matter of cabinets was referred to only as an incidental matter in connection with assuring the dealer that he would receive a cabinet appropriate to his establishment to replace that from his present supplier. The witness indicated that he found a number of new style cabinets already installed in the territory.

The Dairigold witness claimed that his company had lost about 25 accounts and about 50,000 gallons in sales between 1952 and 1954, after Arden became more active in the territory. This, however, was not a net loss since his company regained about 13 accounts, including some it had previously served. It did this by becoming more active in advertising its product and by supplying its dealers with more modern equipment. The Dairigold witness conceded that the furnishing of better equipment to customers had increased their sales of ice cream, and that competition had forced his company, which previously had had little competition in the area, into becoming a better company. Its sales, which had allegedly fallen from approximately 200,000 in 1952 to 150,000 in 1954, increased again by approximately 17 percent in 1955 and were running at the annual rate of about 175,000 gallons.

Although counsel supporting the complaint called two Dairigold customers, neither was involved in the somewhat extravagant giveaway referred to in the hearsay testimony of the Dairigold witness. One witness, a woman who operated a food market with her husband in Bellingham, had changed from Dairigold to Arden in 1952 because her husband, whom she described as "the boss of the family", decided that Arden was a "better ice cream." The witness volunteered the fact that she concurred in the change because she "liked the new case." The owner of the other account, also a food market in Bellingham, testified that he had changed from Dairigold to Arden because the former's cabinet was inadequate, it being a small, storage-type cabinet intended primarily for frozen foods. However, he later switched back to Dairigold when he became dissatisfied with Arden's service and because there was a considerable demand for the Dairigold brand in his territory. The latter supplied him with an equivalent cabinet, and agreed to service his frozen food cabinet, as well as its own ice cream cabinet, whereas Arden has serviced only its own equipment. Significantly, after this store had switched from Dairigold to Arden, it experienced an increase in sales, which the witness attributed to the open display feature of the cabinet.

The representative of the other competitor witness, Cyr Brothers, likewise complained about the fact that he could not meet the demand from merchants for the more expensive equipment. He conceded that much of what he heard from dealers concerning what other manufacturers were offering was "hearsay." Although testifying without the aid of books and records, the Cyr representative claimed that his company's gallonage had fallen from about 125,000 in 1945 to about 61,000 in 1954, and he estimated a further decline to 55,000 in 1955. It is evident from the testimony of the Cyr witness that this decline cannot be attributed wholly or primarily to the respondents since he lost 25 accounts during this period and only claimed that Arden was responsible for six of these and Carnation for two. These accounts were not further identified and there is nothing in the record to indicate that any of the complaint practices was responsible for the respondents' acquisition of such accounts, assuming arguendo that they were acquired by the respondents. The testimony concerning the loss of accounts to Carnation is particularly dubious since, according to the Dairigold representative, Carnation had only come into the area two or three weeks prior to the hearing.

In seeking to determine the true cause of Cyr's decline, it is significant that his company had had a gradual growth until 1951, at which time the company sold out the milk end of its business and continued only in ice cream. That the decline in ice cream began with the sale of the milk business is no mere coincidence, as the Cyr representative himself conceded in his testimony that part at least of his company's decline was due to the fact that it was now operating only in ice cream. Competitors in other areas stressed the advantage to a company of being in both milk and ice cream. Even accepting the witness' estimate of the number of accounts he had lost to Arden and Carnation, there are 17 other accounts which must be accounted for. It is obvious that other competitors have been active in the area. It may be noted in this connection that Metcalf, which was not represented at the hearing, is a recent entrant into the Whatcom County market.

The testimony of two dealer witnesses, who were former Cyr customers, indicates that the company was far from being an active and progressive competitor. One of the witnesses, the operator of a restaurant in Bellingham, testified that he had an old bobtail fountain from Cyr which had a leaky sink and which was so small that he would run out of ice cream on weekends. He was thinking of quitting Cyr before Arden even appeared on the scene. Arden supplied him with a small fountain and also a small cabinet for the storage of package ice cream. The latter cabinet enabled him to increase his sales, since he had not been able to store package ice cream in the old-fashioned Cyr cabinet. The other dealer witness, a woman who operates a grocery in Bellingham, testified that she had a small, old-fashioned Cyr cabinet which was 16 years old, and that the Cyr driver had agreed that she needed a new cabinet, but, despite the fact she had been promised one for a year, nothing was done about it until the day after they had received a new cabinet from Arden. The testimony of the two dealer witnesses suggests that the statement by the Cyr witness that his company "has more or less been inactive, relative to sales" since 1951 has more than a grain of truth to it, although not for the reason he gave, viz., that his competitors had caused him to be less active.

The record is lacking in substantial and reliable evidence that there has been any injury to competition in the Bellingham-Whatcom County area. What it does show is that one company, Whatcom County Dairymen's Association (Dairigold), almost completely dominated the area, that it was able to maintain its position by the sheer momentum of history until Arden began a concerted selling campaign in the area. While this resulted in some loss of gallonage by Dairigold, it later regained a large part of its loss by modernizing its operation, including the adoption of an aggressive advertising campaign, doubling the number of its flavors and supplying its customers with more modern equipment where required. The activities of Arden caused Dairigold to become, in its own words, "a better competitor", and not to take its previous dominant position for granted. The advance of Arden from an insignificant share in the market to approximately one-fifth of the volume in the area, was primarily the result of a selling job on its part. The furnishing of cabinets by it was a secondary matter and simply filled the vacuum created by its competitors' failure to furnish dealers with adequate equipment appropriate to their needs. The other competitor, Cyr, apparently has still not adapted its selling methods to the times and has continued a policy of drift following the discontinuance of its milk business. Accepting at face value the testimony of the Cyr official, Arden was responsible for only six of the twenty-five accounts he lost, and there is no reliable evidence that any of the complaint practices was used as an inducement to acquire those accounts.

* * *

Viewing the State of Washington as a whole, the record fails to disclose any substantial improvement in Arden's position at the expense of its competitors. On the contrary, its sales in the state have declined from 3,124,000 gallons in 1947 to 2,735,000 in 1955, while at the same time the population in the state had increased by 16.24 percent. In terms of its share of state production of frozen products, it sustained a decline from 25.88 percent in 1947 to 17.91 percent in 1955. Carnation has undergone a similar experience, although its decline was not as pronounced. Its share of state production declined from 16.0 percent to 15.0 percent between 1947 and 1955.

3. *San Francisco, California*

The hearings in San Francisco involved witnesses from five different markets in the Northern and Central California area: San Francisco-Oakland, Vallejo, Sacramento, Modesto and Lodi. Before discussing competitive conditions in these areas, it should be noted that the dairy industry in California is regulated by state law, so that certain practices which are commonplace in many parts of the country are prohibited or are permitted only under prescribed conditions. Among the practices regulated by state law are the making of loans, the sale of equipment, the furnishing of refrigeration equipment, and the charging of off-list prices.[63]

Under the California statute the making of money loans to a retail ice cream dealer is specifically prohibited as an unfair practice. However, it is permissible to sell equipment to a dealer (including refrigeration equipment) for cash or under conditional sales contracts. In the latter instance one-third cash must be paid at the time of sale and the balance must be paid on a monthly installment basis for a term not to exceed eighteen months, with interest at current rates. Ice cream cabinets and other refrigeration equipment cannot be supplied free of charge, but may be supplied on a rental basis, in accordance with a schedule of rentals fixed by the state. The ice cream supplier may furnish only such refrigeration facilities as are reasonably necessary to preserve the frozen products of the supplier. The payment of secret rebates, refunds or unearned discounts is made an unfair practice. However, the meeting of a lawful competitive price in good faith is permitted, even though below the supplier's list price, but the

[63] Agricultural Code of California, Ch. 16, Sec. 4125–4143.

latter is required to submit evidence to the state of the basis upon which the special price is being offered.

a. San Francisco-Oakland Area

The ice cream companies doing business in the Bay area include Spreckels-Russell Dairy Company, Tomales Bay Creamery, Dreyer's Grand Ice Cream Company, Green Glen Ice Cream Company, Swift & Company, and the respondents Borden, Arden, Beatrice, Carnation, and Foremost (the latter doing business under the name Golden State Ice Cream Company). The evidence at the San Francisco hearings consists of the testimony of representatives of two competitors, Spreckels-Russell and Dreyer's, as well as testimony by an official of Borden and Golden State, respectively. Representatives of two retail chains were also called.

The evidence discloses that ice cream cabinets have been supplied to dealers in the San Francisco area at least as far back as 1929 when Spreckels-Russell entered the ice cream business. Most of the companies in the area at the time were so-called independent local companies, and they supplied the cabinets to dealers free of charge. This practice continued until the time of the passage of the California law which required that a rental charge be made.

The two practices mainly emphasized by the Spreckels-Russell witness were "financing" and price cutting. In the case of financing, his testimony was somewhat ambiguous, confused and contradictory. At first he appeared to be complaining about the increase in the cost of furnishing ice cream cabinets, which he claimed had risen from a former maximum of $500 to as much as $5,000 in the larger establishments. However, he later indicated that ice cream refrigeration equipment was not usually financed, in the sense of selling it to the dealer on a conditional sales basis, but was supplied under a rental arrangement. He conceded that the increase in the cost of such equipment presented no problem since he was able to collect a rental for the cabinets under state law to compensate him for the cost thereof. He also agreed that the newer type cabinets had helped considerably in increasing ice cream sales. The type of financing which he apparently regarded as objectionable was the sale of other equipment and of fixtures to remodel or open a new establishment.

Although complaining generally about "financing" and the increased cost thereof, the Spreckels-Russell representative made no reference to any particular company or companies as having initiated the practice or as having used it aggressively to acquire any of his accounts or to prevent him from obtaining accounts. He declined, in response to the leading question of counsel supporting the complaint, to attribute the practice to the entry into the market of the "big outside companies", although he did claim that the practice became "progressively worse" after that time. However, the company or companies involved were not identified, nor was the nature of the so-called financing. As noted above, the California law permits the sale of equipment on a conditional sales basis, one-third down and the balance in eighteen months, with interest at current rates. It is not clear whether it was this practice about which the witness was complaining or some possible deviation from the state law. He expressed the opinion that some companies were guaranteeing bank loans, but conceded that his information was hearsay and that this would be a violation of state law.

With respect to the witness' price complaints, he referred in general terms to the fact that "ice cream companies" deviated from their published prices in order to acquire "certain accounts." However, no identification was made of which companies deviated from their published prices, nor is there any other indication in his testimony that any of the respondents were so involved. No specific accounts that Spreckels-Russell lost or failed to acquire by reason of such deviations were mentioned. As previously noted, the California law prohibits price deviations, except to meet competition, and then only upon a filing of notice of such deviation with proper state officials, giving a justification thereof. It is not clear whether the testimony of the witness involves deviations of this type. In any event, there is no evidence that the respondents were involved in such deviations.

Despite the Spreckels-Russell witness' general complaints, the company has managed to maintain a consistent pattern of growth. Although having no records available, its representative estimated that its ice cream gallonage had increased from about 300,000 in 1934 to 750,000 in 1955, and that its gallonage in 1955 was greater than it had been five years previously. The company's dollar volume of sales in 1955 was in excess of $1,000,000. Its capitalization increased from approximately $500,000 in 1929 to about $1,000,000 in 1955. The company built a new plant in 1952 worth about a million and a quarter dollars. It has expanded its operations from San Francisco and San Mateo Counties into Marin and Santa Clara Counties. It serves a very substantial number of hotels and restaurants in the San Francisco area.

While the Spreckels-Russell representative complained that his company only served 15 or 20 supermarkets in the area, there is no reliable evidence in the record as to the number of such markets in the area or anything to indicate that his company has an inordinately small percentage of such markets. In any event, there is no substantial evidence that any respondent or group of respondents is responsible for the company's alleged inability to acquire more of such accounts, or that such inability is due in any way to respondents' use of the complaint practices.

The other competitor called as a witness was Dreyer's Grand Ice Cream Company which does business principally in Alameda County (of which Oakland is the main community), although it makes some sales in San Francisco. The Dreyer representative complained that his company was prevented from getting into the newer stores in the area because of "financing arrangements or price arrangements." He did not further identify the nature of the "arrangements" or indicate that any respondent was involved in such arrangements. Approximately 20 percent of Dreyer's volume was estimated to be in the smaller, so-called independent stores, which Dreyer serves on an exclusive basis, and the balance is in the larger establishments which are split with other suppliers. Apparently Dreyer would like to serve more of the larger establishments. His alleged inability to do so, however, is not based on any refusal to "finance" such establishments since, admittedly, he was never asked to finance such accounts; nor is the company's inability to acquire more of such accounts due to any exclusive dealing arrangements with other suppliers, since many of them are split between more than one supplier, and the witness conceded that he was never advised that an exclusive dealing arrangement was the reason for any store's refusal to purchase his product.

Despite the vague insinuations of competitive difficulties with unnamed competitors, Dreyer has been able to make remarkable progress in its area. Prior to 1947 the company was selling under another name exclusively to a chain of retail confectionery stores. It reorganized under its present name in 1947 and began to solicit other types of establishments. From a volume of only 50,000 gallons in 1947, it had grown to approximately 225,000 gallons in 1955. This growth is all the more remarkable because the company sells only a single premium brand of ice cream of the high butter-fat variety, unlike most of its competitiors who have a standard or so-called "price" brand, in addition to their premium brand.

There is no evidence of any significant mortality among competitors in either the San Francisco or Oakland areas since the war, although there were a number of mergers and consolidations in the

1930's. A new company entered the ice cream business in San Francisco in 1954, Tomales Bay Creamery. In the Oakland area, Dreyer is substantially a postwar entrant, since its prior operation was more or less that of a "captive" creamery in that its sales were made exclusively to a single group of stores. Challenge Creamery has also entered the Oakland market in recent years.

That the respondents who do business in the Northern California area do finance some of their customers, in the sense that they sell fixtures and equipment either for cash or under a conditional sales contract, is not disputed. However, so far as appears from the record, the sales are made strictly in accordance with the California law. The customer is required to pay at least one-third down and the balance within 18 months. In addition to such sales of equipment under conditional sales contracts, there is evidence that two of the respondents, Arden and Foremost, lease equipment other than refrigeration equipment, such as store fixtures and showcases, to retail establishments on a regular rental basis. In the case of Foremost, such leases are made by a wholly owned subsidiary, Acme Investment Company. The latter is primarily in the investment business, in that it makes loans to milk producers and distributors and owns stock in grocery supermarkets. In addition, Acme leases store fixtures and other equipment from equipment manufacturers or jobbers and, in turn, sub-leases such equipment to retail dealers. Arden makes similar lease arrangements with retail dealers. In none of such arrangements is there any requirement that the retail dealer must purchase his ice cream from the lessor.

The two retail dealers called by counsel supporting the complaint both involve instances where Foremost and Arden, respectively, had leased store equipment to a retailer. In the case of Foremost, the dealer was Littleman Grocery Store, which operates nine supermarkets or superettes in San Francisco and two in the adjacent counties. In its suburban stores, Littleman carries the ice cream of both Spreckels-Russell and Foremost's affiliate, Golden State. In its San Francisco stores it handles only Golden State. In Littleman's newest store in San Francisco, it leased $15,000 worth of fixtures from Acme Investment Company on a regular rental basis. However, this was not responsible for the decision to deal with Golden State since, according to the testimony of the Littleman witness, his organization had been selling Golden State in its other stores in San Francisco for a good number of years and had found its merchandising and advertising program "very beneficial to our operations." So far as appears from the record this was its sole reason for continuing to deal with Golden State at its newest store in San Francisco. There is no provision in the lease requiring that Littleman purchase Golden State's products during the term thereof and, according to the witness "we can change [from Golden State] right now."

The other instance of the leasing of equipment involves a large drugstore in the heart of downtown San Francisco, owned by Milton F. Kreis Enterprises, which also operates four drugstores in other areas. At the San Francisco store, which represents an investment by the owner of approximately $350,000, part of the equipment and fixtures having a value of approximately $100,000 is rented from Arden at a monthly rental of approximately $1,600. Although the lease is for seven years, there is no requirement that the lessee purchase Arden ice cream. According to Kreis:

> We have no obligation to Arden at all. If their product does not come up to * * * specifications, we can throw them out.

The witness stated that seven manufacturers had tried to get the account and that he had chosen Arden because, after a visit to their very modern plant, he was convinced that they would manufacture the ice cream properly in accordance with his specifications and in the quantities which he required. It may be noted that Arden does not have a similar arrangement at the other stores of the chain, three of which are located in Southern California and are supplied by another ice cream manufacturer under an arrangement similar to that in San Francisco.

The record fails to show any marked improvement in the market position of respondents, as might be expected from some of the testimony of the competitor witnesses. Borden's share of the San Francisco market has actually declined from 12.3 percent in 1950 to 10.9 percent in 1955, while Beatrice's share has declined from 4.9 percent to 4.6 percent in the same period. Carnation has shown only a slight increase during the same period from 8.4 percent to 8.9 percent, while Arden's share increased slightly from 6.0 percent to 6.3 percent. No comparative figures are available for Foremost since it did not enter the market until 1954 by the acquisition of Golden State.

b. Vallejo Area

Vallejo is northwest of Oakland in Contra Costa County. The respondents doing business in that area include Foremost (Golden State), Carnation and Beatrice. Borden does not do business directly in the area, but sells through a jobber. The local competitors include Red Top Dairy of Vallejo and Milk Producers' Association, a farmers' cooperative. Red Top Dairy was the only competitor from the area represented at the hearings. No retail dealers were called.

The principal complaint of the Red Top Dairy witness was that most of his accounts were the smaller "mamma and papa" stores and that he couldn't get into the larger supermarkets, most of which are chain establishments. The principal chains operating in the area are Safeway, Hagstrom and Purity. However, there is not a scintilla of evidence that Red Top's inability to get into these chains has any connection with the complaint practices. Safeway and Hagstrom are "captive" outlets, i.e., they have their own ice cream manufacturing facilities and hence do not buy from outside manufacturers. Purity, according to the witness, buys from Beatrice, but the only reason the witness could give for their not buying from him was that "probably" they "just liked Beatrice." Red Top does sell to some of the independent supermarkets, a large percentage of which handle more than one brand of ice cream.

The Red Top witness also complained about his company's inability to sell to several drive-ins and hamburger establishments because one was allegedly financed by Carnation and the other by Golden State. Outside of the witness' hearsay testimony, there is no evidence in the record that Carnation or Golden State financed either establishment, nor is there any evidence that if they did, what the nature of such financing was, or that it had any connection with either establishment's choice of a supplier.[64] In the case of the establishment served by Golden State, the record discloses that the so-called financing occurred prior to the time that Golden State was acquired by Foremost, and the testimony in this respect was stricken from the record.

The witness also referred to two hamburger establishments served by Carnation, to which he stated he was unable to sell "because of price." There is no reliable evidence in the record as to what price the establishments in question were paying Carnation. Under the state law an ice cream manufacturer is required to sell in accordance with his established price schedule, except to meet the lawful price of a competitor, and then only upon filing evidence of the price reduction and the reason therefor. It cannot be assumed, in the absence of evidence to the contrary, that the so-called "price" of Carnation was other than a lawful price under the California statute. Despite the witness' hearsay and conclusory testimony that some of his competitors were not living up to their established schedules, there is not a

[64] The witness' testimony with respect to the Carnation account was based partly on what the owner allegedly told him, and partly on what he had learned from several former Carnation employees three years after they had left Carnation's employ.

scintilla of reliable evidence in the record to support a finding to this effect in the Vallejo area, and certainly not with respect to any particular respondent.[65] Moreover, there is no evidence that the price arrangements were conditioned on exclusive dealing, as alleged in the complaints.

The record is lacking in evidence of any significant mortality among competitors in the Vallejo area since Red Top entered the ice cream business in 1944. One local company, Lakeside Dairy, has been taken over by another local company, Milk Producers' Association, for reasons which do not appear in the record. In addition, Carnation and Beatrice have entered the area, as well as the Borden jobber. It would therefore appear that more companies are competing for available business since Red Top's entry into the market. However, to counterbalance this, there has been a significant population increase in the area.

Despite Red Top's inability to acquire every account it has sought to get, the evidence indicates that it has made excellent progress in the competitive struggle. Starting with no accounts in 1944, it had managed to acquire 120 accounts by 1955, either exclusively or on a split basis. Its gallonage grew from zero in 1944 to 50,000 in 1950, then doubled to 100,000 by 1954, and it was still increasing in November 1955. From a market share in the Vallejo area of less than 10 percent in 1950 it had increased to approximately 20 percent in 1955. Red Top's growth is all the more remarkable because it sold only a single premium brand until 1954, when it began to manufacture a competitive standard brand.

Its president conceded that the company was holding its relative position among its competitors. His main concern seemed to be the drift of sales away from the smaller establishments to the supermarkets. However, most of these, as above indicated, are captive establishments and therefore involve a situation which is outside the issues in these proceedings. With respect to the nonchain supermarkets, there is no reliable evidence that the engagement by any of the respondents in the complaint practices has prevented Red Top from getting into these establishments.

c. Sacramento Area

The manufacturers selling ice cream in the Sacramento area include the respondents Arden, Carnation, Borden, Foremost (Golden State), and Beatrice, and the local companies Crystal Creamery, Home Milk, Country Maid, and Taylor Dairy. The only witness

[65] The witness conceded that "in many cases" when he had checked on reports that competitors were offering a better price he found it was "not a fact."

called from the Sacramento area was a representative from Taylor Dairy. A representative of Crystal Creamery was excused at the request of counsel supporting the complaint.

Most of the stores in the Sacramento area sell two and sometimes three brands of ice cream. Only about 10 percent of the accounts own their own ice cream cabinets. The balance rent them from their ice cream suppliers. None of the suppliers permit dealers to keep another company's brand in its cabinet. As in many other areas, there is a trend in the sale of ice cream away from the smaller establishments toward the chain stores and supermarkets. However, this has not hurt Taylor Dairy but has actually "helped" it because the company is in "all the local chains." The only national chain store in the area is Safeway, which manufactures its own ice cream. There is also a state-wide chain, the Lucky Stores, to which Taylor sells milk but not ice cream. The Taylor representative's only explanation for not selling them ice cream was that he "guessed" he was a "lousy salesman."

The Taylor witness claimed that he had tried to get into some supermarkets in the area (which he did not identify), but had been "told" that if "we would finance we could get in some." The financing was described by the witness as "financing equipment for stores." The Taylor representative failed to identify any respondent as being involved in such financing, and even conceded that "whether it was being done by our competitors, I do not know." The only account specifically referred to by Taylor as being involved in any competitive situation was a drive-in which had allegedly requested a loan of $75,000, with the understanding that he would get this account as well as another establishment owned by the same individual. According to the Taylor witness he "laughed it off and that was the end of it." The establishment at the time was being served by Borden and later changed to Beatrice. There is no evidence that either of the latter two companies loaned the establishment anything or financed it in any way. In fact, under the California law, a loan of money would have been illegal.

Taylor made no claim that his company was having any serious competitive problems in the area. The company's profits have increased between 1952 and 1955, as has its volume. During 1955 its volume increased 17 percent over the previous year. This improvement in sales is particularly significant in view of the fact that Taylor's price is 15 cents a gallon higher than that of most of its competitors. Taylor's share of the market has increased from about 5 percent in 1946 to approximately 15 percent in 1955.

There is no evidence of any significant mortality among competitors in the area. The only company to cease operating since 1941 (when Taylor entered the ice cream business) is Home Ice Cream Company, which sold out to another local competitor, Country Maid. The latter company has entered the market since 1941, as have Carnation and Beatrice. The area is rapidly growing in population. The largest competitor in the area is a local company, Crystal Creameries, a representative of which was subpoenaed, but was later excused at the request of counsel supporting the complaint. The record is lacking in evidence that competition in the Sacramento area is anything but vibrant.

d. Modesto Area

Modesto is located approximately 93 miles east of San Francisco in Stanislaus County. The only wholesale ice cream manufacturer in Modesto is Velvet Ice Cream Company, which operates throughout most of Stanislaus County and in parts of San Joaquin County to the north and Merced County to the south. The other principal local company is Milk Producers' Association of Central California, a farmers' cooperative which sells ice cream under the name Peterson Ice Cream Company. In addition, two small companies, Richmaid of Lodi and Farm Maid of Madera, operate on the northern and southern fringes of the Modesto area. The respondents which operate in the area include Borden, Carnation, Arden, Beatrice and Foremost (Golden State). Likewise, the nonrespondent national company, Swift & Company, sells in the area. The only witness called from Modesto was a representative of Velvet Ice Cream Company. A representative of Richmaid also testified, but his testimony related primarily to the Lodi area and is discussed below.

Most of the testimony of the Velvet witness related to certain accounts which his company had allegedly lost or had been unable to acquire due to the activities of several of the respondents. For the most part, the testimony was of a hearsay nature as to what the witness had been told certain competitors had done for the accounts in question. The testimony with respect to three of the six accounts mentioned by the witness was so unreliable that it was ordered stricken.[66] The other

[66] One instance involved the alleged giving of free ice cream to offset the rental charge by Arden to a food market in Modesto. Another involved the charging of a "distributor's" price by Arden to another market which allegedly was not entitled to such a price. In both instances the information had allegedly been gleaned by the witness from a former Arden driver at the time he was seeking employment from Velvet. The third incident involved the alleged failure by Carnation to charge a rental on some of the cabinets which it had supplied to a market in Modesto. This information was allegedly reported to Velvet by an employee of the market. All three instances, if true, would have constituted violations of the state law. In only the last-mentioned incident did Velvet claim to have reported the incident to the state authorities. So far as appears from the record, the state authorities fail to sustain Velvet's complaint.

three instances also involved hearsay evidence as to what a store owner or manager had reported to Velvet at the time an account was lost or could not be acquired. The evidence was received, subject to the offering of independent evidence that the three accounts had been favored in the manner indicated, but no such evidence was ever offered.

One of the three instances mentioned involved the alleged "financing" of a drive-in by Carnation, the nature, extent, or even the fact of which, was never established for the record.[67] The other instance involved a Chinese restaurant in Modesto to which Velvet had agreed to sell certain equipment on a conditional sales time-payment basis, but which Borden allegedly acquired by agreeing to "put up the money to pay for that equipment." According to the Velvet representative's testimony, the owner informed him of the Borden offer but agreed to give Velvet the account if the company would loan him $10,000 to pay for the equipment. Not only is there no evidence to support the witness' hearsay testimony, but there is reliable affirmative evidence by a Borden official that what Borden did for the restaurant owner was precisely what Velvet had offered to do, viz., to sell him the equipment on a conditional sales basis, in accordance with the California law, one-third down and the balance within eighteen months, and that no loan was made to the owner.[68] The third incident involved the loss of a drug store in Modesto to Carnation because the latter had allegedly given it a chain store discount. Although the store was apparently part of a chain, the Velvet witness objected to the practice of giving a volume discount to the separate stores of a chain, based on the chain's overall volume, it being his opinion that the discount should be based on the volume of each separate store. There is no reliable evidence in the record as to what discount, if any, Carnation gave the store in question or that it granted special prices to any accounts in the area.

The record fails to establish any substantial loss of business by Velvet. The company's principal complaint was not that it had lost gallonage, but that its volume of approximately 200,000 gallons had not increased since 1947, despite a substantial increase in population in the area.[69] However, there is no reliable evidence that this static

[67] The witness at first claimed that the drive-in was financed "partially" by Carnation, but later expanded this to claim that the owner had informed him it was being "financed 100 per cent" by Carnation. The witness' suggestion that his testimony could be corroborated by subpoenaing the owner was not adopted by counsel supporting the complaint.

[68] The testimony of the Borden official indicates that his company had been serving the owner at another location, and that the owner had approached Borden for assistance in purchasing some equipment at the time he contemplated opening an additional restaurant.

[69] The Velvet witness was unable to give any exact figures as to his 1947 volume since he had no records with him, but he estimated his volume as approximately 200,000 gallons. The latter appears to have been merely a rough approximation of his gallonage during the earlier period.

condition is due to the use of any of the complaint practices by respondents. In fact, at least two of the three respondents referred to by the Velvet witness as having been involved in specific competitive situations appear not to have fared any better than has Velvet. The sales of Borden's Modesto Branch have declined sharply from 216,000 gallons in 1947 to 134,000 gallons in 1955. Arden has only ten or twelve customers in the area, with an estimated annual gallonage of 5,000–7,000, which has not changed much in recent years. No comparable information appears with respect to respondent Carnation. However, from its static position in the nearby San Francisco market (referred to above) and in the state as a whole (which will hereafter be discussed), there is no reason to believe that it has made any significant advance in the Modesto area. There is no information in the record with respect to Golden State's or Beatrice's volume in the market, but it should be noted that no claim was made by the Velvet witness that Golden State or Beatrice had been responsible for any of his company's difficulties.[70]

The only significant recent change in the status of competitors, referred to by the Velvet witness, is the fact that Swift & Company "is gradually going out of business * * * for some unknown reason" and that a local competitor, Peterson Tracey, has sold out to another local company, Milk Producers' Association of Central California. There is no reliable evidence that these departures are connected in any way with the complaint practices.

e. Lodi (San Joaquin County)

Lodi is located in San Joaquin County which is directly north of Modesto. The only company manufacturing ice cream in Lodi is Richmaid Ice Cream Company. Several other local companies which have their plants in nearby areas also sell in competition with Richmaid. These include Milk Producers' Association of Central California (Peterson Ice Cream Company), Crystal Creameries of Sacramento, which competes in the northern part of Richmaid's territory, and Velvet Ice Cream Company of Modesto, which competes to a small extent in the southern part of the territory. In addition, respondents Borden, Arden, Foremost (Golden State), Carnation and Beatrice sell in most of the territory. Swift & Company competes in the Stockton area.

The only witness called from the area was the head of Richmaid Ice Cream Company. The Richmaid representative claimed that his

[70] The only reference to Golden State by the witness was that Golden State had replaced Borden in one of the chain stores which Velvet had been splitting with Borden. However, this had no effect on Velvet's sales to the establishment.

company's volume had gone down during the past year due to "financing and furnishing fancy equipment without compensation." He also claimed that his company could not compete for supermarket business because of "low prices and the type of equipment they are furnishing." There is little evidence of a specific nature in the record to sustain the blanket claims of the Richmaid witness, and no reliable evidence upon which to base any findings that any of the respondents are responsible for the company's alleged difficulties.

While at first claiming that his company's gallonage had declined during the past year (i.e., during 1954–1955), the Richmaid official later conceded that he had lost only one account during the year. He then claimed that he had lost a number of accounts to Carnation four or five years previously, soon after Carnation had entered the territory. Although this would suggest that his major decline occurred during 1950 or 1951, the Richmaid gallonage figures indicate that the company's sales increased from 65,000 gallons in 1950 to 80,000 gallons in 1951, continuing in the latter amount during 1951, and did not decline again until 1953 when they returned to 65,000 gallons.

Aside from this confusion in the testimony of the Richmaid witness, there is not a scintilla of reliable evidence to support a finding that the company's decline in gallonage is due to the use of the complaint practices by any of the respondents. Most of the Richmaid witness' testimony consisted of unsupported conclusions or hearsay. Indicative of the insubstantiality of such testimony is that relating to the one account which the Richmaid witness claimed he had lost during the past year. He claimed that the owner had asked him for a loan of $10,000 to remodel the establishment and that when he refused he lost the account, which is now being served by Borden. Not only was no reliable evidence offered to indicate what, if any, assistance Borden gave the account in question, but the testimony of a Borden official affirmatively establishes that Borden did not finance the account in any way and, in fact, that the account later switched to a nonrespondent competitior. The evidence suggests that Richmaid's loss of the account may have been connected with the fact that the owner was considerably in arrears in the amount which he had owed Richmaid on its purchases of ice cream and that he resented the fact that the latter had started suit against him.[71]

Another specific instance cited by the Richmaid official was an account which he had sought to acquire from Arden but which later

[71] Although the Richmaid witness denied that his company had instituted suit against the former customer, documentary evidence offered by respondent Borden establishes that such suit was in fact instituted.

allegedly told him it had decided not to change because it was "all tied up with Arden." Not only was no evidence offered to indicate in what way Arden had "tied up" the account in question, but an Arden official denied that the account was tied to it in any way. As already indicated, Arden does not have any exclusive dealing contracts in California. Another instance cited by the witness to illustrate his general charges involved an account from which Richmaid had received a request for a loan, which it declined, and Carnation later acquired the account. The witness admitted that he did not know what, if anything, Carnation had done for the account. The final incident cited involved an account which had allegedly asked for a loan, so that the balance of a loan from Golden State could be paid off. Not only is there no reliable evidence to establish any loan from Golden State, but an official of Acme Investment Company, the Golden State affiliate, denied that his company ever made any loans. Moreover, such practice is specifically prohibited by state statute.

The Richmaid witness also claimed that he did not even try to get supermarket business because he could not meet the low prices that were being offered. However, no evidence was offered to show that such supermarkets were being served by any of the respondents or as to the prices being charged or that there was any element of exclusive dealing involved in such price arrangements.

Assuming the accuracy of the figures given by the Richmaid witness, which indicate a decline in gallonage of 15,000 gallons between 1952 and 1953, there is nothing to suggest that any of the respondents is responsible for this decline and, more importantly, there is nothing to indicate that their use of the complaint practices played a significant role therein. The Richmaid witness' reference to the fact that he couldn't meet the low prices in the supermarkets suggests that ordinary price competition was a factor in the company's difficulties. In any event, there is no indication that any of the respondents referred to by the witness has experienced any unusual improvement in its position in the area. The sales of Borden's Stockton Branch (which includes Lodi) remained almost constant between 1949 and 1953 (the period covered by the witness' testimony). Arden has only four or five accounts in the Lodi area, and the number and gallonage of its accounts in the area are smaller than in previous years. While there is no information as to the position of Golden State (the third of the respondents referred to by the witness), it was not acquired by Foremost until 1954 and, according to the Richmaid witness, his company's losses had occurred prior thereto.

The record contains no meaningful information with regard to any departures from business in the area during the postwar period. While the Richmaid witness did refer to seven companies he had seen "come and go", there is no indication as to when such companies ceased operating or as to the reason therefor.[72]

* * * * * * *

The evidence offered at the San Francisco hearings fails to establish that competition in the northern and central area of California is being adversely affected by respondents and, more importantly, that any difficulties which are being experienced are due to the complaint practices. Four of the six competitors called have substantially improved their market position or sales in recent years. One has remained on an even keel, while the sales of one have declined somewhat.

The record fails to establish any significant improvement in the position of respondents in the area. Their position in the state as a whole likewise does not appear to have improved markedly. In fact the production shares of three of the respondents have declined between 1947 and 1955. Arden's has declined from 13.8 percent to 12.9 percent; Carnation's from 11.1 percent to 10.7 percent; and Borden's from 8.2 percent to 6.6 percent. Beatrice's share has increased from 3.1 percent to 7.5 percent. However, a large part of this increase is due to its acquisition of Creameries of America in 1953. Foremost's production share has increased from 16.84 percent in 1954, when it acquired Golden State, to 17.79 in 1955.

4. *Washington, D.C.*

The hearings in Washington, D.C., involved evidence of competitive conditions in four distinct areas, the Washington Metropolitan area, the Baltimore area, an area around Winchester, Virginia, and an area around Cumberland, Maryland. Each appears to be a separate market area, and the evidence with respect to each area is discussed separately below.

a. Washington, D.C., Area

The respondents doing business in the Washington area include National (Breyer and Southern Dairies divisions), Arden (Melvern-Fussell subsidiary), Beatrice and Borden. The local companies include Colonial Ice Cream Company, Washington Maid Ice Cream Company and Briggs Ice Cream Company. There are also a number

[72] One of the companies mentioned was Peterson Ice Cream Company which, as previously noted, sold out to Milk Producers' Association of Central California, an active competitor.

of substantial regional companies which have plants or sell in the Washington area, including Richmond Dairy, Abbotts Dairies, Delvale Ice Cream Company, Mayfair Ice Cream Company, and Hershey Ice Cream Company. In addition there are several "captive" manufacturers, which sell only through their affiliated stores, including High's, Giffords, Howard Johnson, Hot Shoppes, and Safeway. Counsel supporting the complaint called as witnesses representatives of two ice cream manufacturers, Colonial and Washington Maid, and eleven dealers. A representative of the other local company, Briggs, was present during the hearing but was not called.

The testimony of the two competitor witnesses indicates that it has been the practice of ice cream manufacturers in the Washington area to supply ice cream cabinets to their dealers since the earliest days of the industry, even before any of the so-called national companies entered the area. Both local manufacturers agreed that it was necessary and desirable for the ice cream manufacturer to furnish equipment for storing and merchandising the ice cream, and to service such equipment. The representative of Colonial was particularly emphatic in his testimony that the industry should furnish and maintain the equipment through which the ice cream is sold, for the reason that the product is highly perishable and that if the cabinets are not functioning properly the manufacturer will be called upon to replace the ice cream which has become spoiled. While the Washington Maid representative indicated that the cost of furnishing the cabinets represented a considerable expense to a smaller manufacturer, he also agreed that a great many dealers would not carry ice cream if the manufacturer did not supply them with a cabinet.

The Colonial witness claimed that when he entered the business in 1926 it was customary to make a rental charge of five cents a gallon to defray the expense of supplying a cabinet, and that this practice was discontinued around 1945 or possibly earlier, with the Breyer Division of National Dairy allegedly taking the lead in the discontinuance of such rental charge. The Washington Maid witness, however, testified that so far as he was aware, and going back to 1932, when his company was started, it had not been the practice to make any rental charge in connection with supplying ice cream cabinets. Irrespective of which of these versions is correct, it does not appear that the failure to make any rental charge has had any adverse effect on the industry since, as the Colonial witness testified, the price of the ice cream was adjusted to take care of the discontinuance of the rental charge "so that it did not make any difference finally to us one way or another."

While the Colonial representative did not feel that the matter of furnishing or servicing ice cream cabinets was a significant competitive factor in the ice cream industry in Washington, he did express disapproval of the practice of making loans to dealers. However, his testimony gave no indication that any of the respondents was responsible for this practice or had used it aggressively against his company. On the contrary, the testimony of the Colonial witness indicates that the practice has been utilized as far back as 1926, which antedates the period when the major national companies entered the Washington area, and that Colonial and other manufacturers in the area do make loans to assist their dealers. The Colonial witness conceded that the making of loans to independent retailers for modernizing purposes has helped such dealers compete with the larger chain establishments.

Although the Colonial representative did not refer to any of the respondents as having been responsible for his loss of any accounts or for his company's inability to acquire any accounts because of loans, counsel supporting the complaint called one retailer witness who had received a loan and whose testimony indicated that Colonial had sought to acquire the account. The dealer in question was the operator of a drugstore which had received a $4,000 loan from Southern Dairies in connection with opening up his establishment. The proprietor had previously operated two other drugstores at different periods, in one of which he had carried Colonial's Wadrex brand and in the other Southern Dairies' Sealtest brand. Before opening up his newest establishment, the owner had had a consumer survey made, for which he paid $100, and found that Sealtest was the most popular brand in the neighborhood. Based on the results of the survey and his own satisfactory experience with Sealtest at the latest of his two prior locations, he chose Sealtest. So far as appears from the record, the loan which was made to assist him in opening the store had nothing to do with his choice of Southern Dairies as his supplier. In fact he had received similar offers from other competitors, including one from Colonial Ice Cream Company, which had loaned him money at one of his prior locations. It seems apparent that the loan, which was amply secured by a chattel mortgage and which, so far as the witness was aware, contained no requirement that the dealer use Sealtest ice cream, was not a significant factor in his choice of suppliers.

The area where Colonial has been the weakest is in the supermarket and chainstore field. While claiming that requests for loans and equipment had been involved in these accounts, the Colonial witness conceded that "price was the principal factor" which had prevented his company from obtaining such accounts. In fact, he conceded that the supplying of a large chain would be beyond the capacity of his company's present plant, and that he was reluctant to tool up the plant to serve such a chain because of the possibility that he might lose it if "all of a sudden somebody gives him a better price." When the wheat is separated from the chaff in the testimony of the Colonial witness, it is clear that the reason for the company's not obtaining the larger accounts was not the making of loans by competitors or any of the other complaint practices, but the fact that the company has not made any serious effort to obtain such accounts, as the witness himself conceded. The reason for this is that the company has had a very conservative business approach, feeling that it is "more safe in doing business with independent people than I am with the man that can walk and cancel an order on me for 200,000 gallons." It has apparently been the company's business philosophy that there is "security * * * [in] number[s]."

According to the Colonial witness, his volume has declined by about 50 percent since the peak years of 1947 and 1948. However, he made no effort to attribute this in any way to the respondents or to their engagement in any of the complaint practices. On the contrary, the record indicates that other factors were largely responsible. In 1948 about 60 percent of Colonial's sales were to drug stores where the ice cream was mainly sold in bulk. Since that time the trend in ice cream sales has been away from the drug stores to the food stores (where it is sold in package form). Within the food store category, there has been a marked shift in sales away from the smaller neighborhood grocery to the supermarkets and chain stores in the large shopping areas. Colonial's failure to sell to the latter establishments, so far as appears from the record, has been due to the fact that it has been reluctant to go after these accounts aggressively because of its "safety in numbers" philosophy, and its unwillingness to compete on a price basis for such business.[73] As the Colonial witness somewhat plaintively conceded:

> [T]his development with the parking-shopping area and the chain store with its facilities today on a large-sized scale, has developed a new field for ice cream that heretofore we in the ice cream industry, some of us, missed, probably, and others saw the advantage and went ahead with it.

[73] The Colonial witness testified that while his company did give quantity discounts and had in fact initiated the practice in the Washington area, it would not give a special price to a chain or cooperative buying group, based on the total purchases of the stores, since that would be unfair to the independent merchant.

It seems evident from his testimony that the Colonial witness regarded his company as falling within the former category of those who had "missed" the boat. This cannot be attributed to the respondents or the complaint practices.

The evidence offered by the Washington Maid witness likewise fails to indicate any marked loss of business or inability to acquire business by reason of the engagement by any of the respondents in any of the complaint practices. While he testified in general terms that dealers asked for loans, rebates, bonuses and "everything else that you can imagine", his testimony was extremely vague insofar as establishing that any of the respondents had engaged in such practices or had caused his company any competitive difficulties. The Washington Maid representative cited only three instances where his company had lost or been unable to acquire an account because of the demands of dealers and in only one of such instances is there any evidence in the record to indicate that any respondent met the demands of a dealer.

One instance involved an alleged request for a loan by an account to enable it to move to another location. Although the witness claimed that the account was later acquired by Beatrice, there is no evidence in the record that the account received a loan or anything else from Beatrice. Another incident involved Washington Maid's alleged inability to acquire a drug store account, which it was soliciting, due to Beatrice's allegedly offering the owner a lower price. Not only is there no reliable evidence that Beatrice offered such a price to the account in question but there is no evidence that such price represented any deviation from Beatrice's regular price list or involved any exclusive arrangement. The third instance cited involved an account which had requested Washington Maid to put in some neon lights to light up the front of its establishment and later switched to Southern Dairies when the former refused. This represents one of the relatively few instances in the record where the dealer referred to by a competitor was called to testify. The witness in question, while testifying in response to the leading question of counsel supporting the complaint that he "guessed" that the lighting of the sign (which he estimated cost $50) was one of the things that interested him in Southern Dairies, also stated that the fact that Sealtest had a national reputation and his feeling that he could get better service than he had been receiving were the basic reasons for his change. The testimony of the witness also indicated that his volume of sales had increased substantially after the change.

Assuming, without deciding, that the supplying of some neon lights worth about $50 was the reason why Washington Maid lost this account, the record fails to establish this as a significant factor in Washington Maid's loss of accounts or in its inability to compete. Although the Washington Maid witness claimed that he had lost 70 to 80 accounts since 1947, he also conceded that he had gained more accounts than he had lost, so that he actually had about 300 accounts in 1955 as compared to 200 in 1947. His volume, however, has not increased since 1947 because of the fact that his individual accounts are selling less ice cream per account. Here again the reason is somewhat similar to that of Colonial. Washington Maid serves mostly small restaurants and groceries. As already noted, the trend in ice cream sales in the Washington area has been away from this type of establishment to the supermarket and chain store. It was these establishments which Colonial could not acquire, mainly because of price competition. There is no reason to believe from the evidence in the record that the situation is any different in the case of Washington Maid.

The fact that Washington Maid's volume has remained constant since 1947, while that of Colonial has declined by about 50 percent, does not necessarily mean that abnormal conditions in the market were responsible. The evidence discloses that 1947 and 1948 were the biggest years in the ice cream industry. The volume of ice cream sales in the area has declined by about 20 percent. In addition there has been a substantial increase in the number of competitors in the area. These include Briggs, which came into the area in 1953 by acquiring a local company and now has a substantial volume. Several regional manufacturers, including Hershey, Richmond Dairy, Abbotts and Mayfair have also entered the Washington market since the war. Safeway, Hot Shoppes, High's, and Howard Johnson, which have all expanded in recent years, likewise have been substantial competitors for the consumer's ice cream dollar. Despite Colonial's and Washington Maid's problems, both appear to be in good financial shape. The Colonial witness conceded that his company had not lost any money in its operations and expected to make a profit during the current year. Washington Maid is also operating at a profit, although its representative claimed that its profits were down in 1955. Both companies have paid dividends regularly to their stockholders. The record fails to establish any significant improvement in the market position of the respondents operating in the Washington area. Arden, which entered the market by the acquisition of Melvern-Fussell in 1953, when its market share was 11.9 percent, declined to 8.3 percent by 1955. Beatrice's share declined from 9.4 percent in 1950 to 7.8 percent in 1955. Borden, whose share was a minute 0.4 percent, managed to increase modestly to 1.4 percent in 1955. National's share has remained almost static, being 24.9 percent in 1950 and 25.4 in 1955.

In addition to the two dealers referred to above (a former Washington Maid dealer and an account for which Colonial had been competing), counsel supporting the complaint called nine other dealers in Washington, none of whose testimony related to any of the competitor witnesses. Three of the dealers were the owners of drug stores and one the owner of a confectionery establishment, all four having received loans from either the Southern Dairies or the Breyer division of National Dairy in connection with the opening of a new store. In each instance the owner had been dealing with National Dairy at an existing establishment for a number of years and had approached National Dairy for a loan to assist him in opening a new store. In each instance a competitor had also offered to finance the dealer in opening a new establishment and, in some instances, had even offered more favorable terms than National Dairy's, but the owner preferred to deal with National because of the reputation of its brands (Sealtest or Breyer's), and the consumer demand therefor. In the two instances where counsel supporting the complaint broached the subject with the witness, the dealer indicated that he didn't know or hadn't paid any attention to whether he was obligated by contract to buy National Dairy products exclusively during the period of the loan. One of the dealers stated that if he desired to change from National Dairy for any reason he would pay off the loan and change suppliers. The owner of the confectionery establishment indicated that without the financial assistance received from National Dairy he never could have opened up his new, and much larger establishment, located in a suburban shopping center. While he also had received offers from other suppliers he was only interested in National (Breyer) because of his past highly satisfactory relationship with them over a period of ten years.

Of the five remaining establishments, one involved a large supermarket chain with 31 stores and a volume of approximately 200,000 gallons a year.[74] The evidence offered with respect to this account was that it had received a volume discount from Southern Dairies, based on the maximum discount in the latter's published schedule. In addition, the account received a discount in some of its stores for the use of dealer-owned equipment to store ice cream. The chain had been dealing with Southern Dairies for a number of years, and there

[74] The 200,000 gallon account to which the Colonial witness made reference, as being one which he would be reluctant to handle, was the dealer in question.

was no testimony that the discounts had entered into the decision to choose Southern Dairies as a supplier or any evidence that exclusive dealing was involved in the granting of such discount. The fact that such discount did not have the effect of "captivating" the account is demonstrated by the fact that, within a year following the hearing, the account had switched to a local competitor, Briggs Ice Cream Company.

Two of the remaining witnesses were owners of small supermarkets who had received advertising allowances from Beatrice and had switched to that company from Briggs. In one instance the advertising allowance was $2,000 and the owner was under no obligation to spend the money exclusively for advertising. The other establishment received a $500 so-called advertising allowance for which it signed a demand note, which would be cancelled if the store stayed with Beatrice for two years. In the latter instance the granting of the allowance appears to have entered into the account's decision to switch to Beatrice. Both of the so-called allowances would appear to be suspect as legitimate advertising allowances, although apparently only one of them involved an exclusive dealing arrangement. However, it does not appear that this type of practice is engaged in to any substantial extent by respondent Beatrice, and, more important, it does not appear that it has had any significant effect in the Washington market. The company primarily affected by the switch of the two supermarkets, Briggs Ice Cream Company, was not called as a witness although a representative of the company was present in the hearing room. The lack of probability that the competitive position of this company has been seriously jeopardized is suggested by the fact that it was able to regain one of the two accounts approximately a year later, in addition to acquiring the 200,000 gallons of the 31-store food chain, referred to above, from National Dairy.

The last two dealers involved in the Washington hearings were relatively small accounts. One was a neighborhood grocery and the other a bakery, both of which had received some free ice cream from Breyer's at the time they switched from Briggs. In one instance the dealer was the new owner of an existing store to whom the Breyer salesman offered $100 worth of ice cream, without charge, to help him get started in his new enterprise. The owner had initially approached Breyer about handling its brand. The owner of the second establishment received $30 worth of ice cream, free, to assist him in making the switch from Briggs, to whom he still owed $30 on a $50 advance from that supplier. The furnishing of free ice cream, over and above what is required to replace the remaining stock of the former supplier, would appear to be a questionable practice. It does not appear, however, that any exclusive dealing arrangement was a condition of such liberality. In any event, considering the small amounts involved and the fact that they related to the single supplier Briggs, there is no substantial basis for any finding of injury to competition.

b. Baltimore Area

The respondents doing business in the Baltimore area are Beatrice, Borden, and National. Borden does business under its own name and under the name of Hendler, a company which it acquired. National Dairy's products are distributed through its subsidiary, Marvadel Ice Cream Company, which distributes both the Breyer and Sealtest brands in the area. National Dairy's sales are limited to the area outside the city limits of Baltimore since a local ordinance prohibits sales within the city by any company not having its plant inside the corporate limits of the city. Local companies having their plants in the city and distributing in the Metropolitan area include Delvale Ice Cream Company, Eckels Ice Cream Company, Mount Vernon Ice Cream Company, and Brimer's Ice Cream Company (Good Humor). Likewise, the regional company, Abbott Dairies, which recently bought out the local competitor Bettar Ice Cream Company, operates in Baltimore. The only local company to testify at the hearings was Mount Vernon Ice Cream Company. In addition, four retail dealers were called as witnesses. A representative of Eckels Ice Cream Company was excused from testifying at the request of counsel supporting the complaint.

Mount Vernon Ice Cream Company is one of the smallest companies in the Baltimore area. It originally sold through its own retail store and later through vending machines. It began selling at wholesale around 1940. The company had an annual volume of approximately 50,000 gallons as of 1955, and the company representative estimated that it had been increasing at the rate of approximately 2,000 gallons a year since 1947.

The Mount Vernon witness testified that his company served only the smaller establishments and could not get into the bigger stores. He attributed this primarily to the fact that his brand was not too well known. While the witness also referred to the fact that his company was not in a position to supply customers with anything, other than a cabinet or sign, there is no evidence that this alleged inability has been responsible for his company's inability to acquire larger outlets. Although counsel supporting the complaint suggested that the company's inability to make loans had been an inhibiting factor, the witness indicated that the company had been requested to make a loan in only one instance, which involved an account later lost to Borden. He conceded that outside of this account his information as to what inducements other companies were offering was "mostly hearsay". The witness could recall only one instance of soliciting a supermarket account. However, he conceded that he had not been asked for a loan or any other form of assistance by this account. He also conceded that the fact the company does little or no advertising was a major factor in its slow growth, stating that "the only way it is * * * possible to expand is to start advertising, the way I see it," since the "larger percentage" of the public buy "on a brand preference" basis. Indicative of the lack of demand for Mount Vernon's brand is the fact that even where the company has been able to get its product into a larger store alongside of one of the well-known brands, Mount Vernon's brand admittedly does not "move fast".

The only incident which the witness cited where a loan had been involved in the loss of an account involved a restaurant, the owner of which was also called as a witness by counsel supporting the complaint. The owner of the establishment had originally sought to do business with Borden because of the quality of its ice cream and its good reputation in Baltimore. However, the latter company refused the owner's request for a $7,500 loan to assist him in opening the establishment, so he made arrangement to buy Mount Vernon's ice cream. The latter could not offer him a loan, but gave him a better price on the ice cream. Later when the business began to decline the owner sought to borrow $500 from Mount Vernon. The latter refused because the owner already was in arrears for six weeks on his ice cream payments. The restaurant owner then persuaded Borden to assist him with a loan of $3,000 and switched to the latter. This loan helped to keep the establishment in business for a few months longer, but it finally closed still owing Borden $2,000. This undoubtedly is an instance where Borden was able to acquire the account of a competitor because of a loan. However, Borden did not solicit or seek the account but literally had it thrust upon it and would have been better off without it, as later events disclosed.

In addition to the restaurant which had been a Mount Vernon ac-
other where the owner of a small store, in anticipation of an increase in volume in the area by reason of the opening of a new school, asked for a bigger cabinet. When Mount Vernon refused, the owner switched to Borden which supplied him with a larger cabinet. Here again, Borden did not seek the account or offer it the inducement of

a larger cabinet, but was sought out by the owner and, so far as appears from the record, made a reasoned business judgment as to whether the man's anticipated increase in volume would justify a bigger cabinet. The witness also mentioned two other very small accounts which had switched to Borden. However, in both cases he was about to take out his cabinets because the volume did not justify them, and the witness conceded that neither account represented any real loss to his company.

In addition to the restaurant which had been a Mount Vernon account and which later closed down after receiving a loan from Borden, counsel supporting the complaint called three other dealer witnesses. However, none of these were former Mount Vernon accounts, or accounts which the latter had sought to obtain. Two were Borden accounts and one was a Beatrice account. In only one of these instances had the account been acquired from another ice cream manufacturer.

The first of the witnesses was the comptroller of a group of three food stores which had been receiving a discount of 10 cents a gallon from Borden on a portion of its ice cream purchases. The arrangement to pay this discount antedated the witness' employment with the food chain and he knew little about it, except that it was in the nature of a refrigeration allowance to compensate the stores for permitting Borden to use store-owned storage facilities for storing additional ice cream during periods of special sales and other periods of peak demand. Counsel supporting the complaint suggested that possibly the storage facilities were not actually used to any significant extent, and that the discount was therefore a subterfuge, but the witness indicated that this was a matter with which the store manager was familiar and that he had very little knowledge about it. In any event, there is nothing to indicate that the stores in question had chosen Borden as their supplier because of this arrangement or that any other supplier had lost or been unable to acquire the account because of such arrangement.

Another witness was the president of a group of supermarkets, two of which were company-owned and nineteen were operated under a franchise arrangement pursuant to which all purchases were made centrally. The chain had originally sought to purchase its ice cream from Borden, but had been unable to do so since it had been Borden's policy in prior years not to service supermarkets. Accordingly, the chain arranged to purchase its ice cream from Delvale. However, after the Borden policy changed, the chain in question switched to Borden. The witness' testimony indicates that the chain was receiving a quantity discount based on its total purchases, that it had also received a $6,000 loan from Borden, and that Borden made a contribution toward the cost of the store's television advertising program. In no instance was any evidence offered that any of these represented more favorable treatment than the firm had been receiving from Delvale or that they operated as an inducement for the chain to change suppliers. Insofar as the quantity discount is concerned, the witness testified that the stores had received a similar discount from Delvale and that the net price of each company was the same. While he did buy his ice cream exclusively from Borden, the witness indicated that he had done the same when dealing with Delvale because he preferred to deal with a single supplier. The loan did not enter into the decision to switch to Borden, since it was not made until three years after the chain had changed to Borden. The contribution to the television program amounted to $100 weekly, out of a total weekly cost of $750, and represented Borden's proportionate share of the advertising which it received on the program, to which other suppliers of the chain likewise contributed.

The third dealer witness was the owner of a drug store who had received a $15,000 loan from Beatrice when he opened his place of business three years previously. The witness indicated that he had borrowed money from the bank, but was in need of additional funds and went to Beatrice for assistance. He also received equivalent assistance from other suppliers in the form of merchandise on credit. There is no evidence that any other supplier was bidding for the account or was unable to acquire it on account of the loan. On the contrary, the witness testified that he had chosen Beatrice because of his family's close social relationship with certain of the local officials of the company and that he had made no effort to contact any other ice cream manufacturer. The evidence also establishes that the owner received a refrigeration allowance of 10 cents a gallon for ice cream stored in the owner's own refrigeration facilities. There is nothing in the record to indicate that this was anything but a bona fide refrigeration allowance or that it was an inducement for the owner to choose Beatrice as his supplier.

Counsel supporting the complaint also called as a witness an official of the National Dairy's subsidiary, Marvadel Ice Cream Company, which distributes Breyer's and Sealtest in the Baltimore suburban areas. The testimony of this witness establishes that the company has 25 loans outstanding out of a total of 378 customers, with the largest of these loans amounting to $1,919. The Marvadel official testified that the company originally did not make any loans, but that after several years experience in the area it found that it was necessary to furnish financial assistance to some customers in order to enable them to do a good merchandising job and to take full advantage of the merchandising assistance offered them by the company. Some of such customers had sought bank assistance unsuccessfully. The customers receiving such loans are required to purchase their frozen products from the company during the period of the loan, since the repayment of the loan is keyed to the purchase of ice cream, being based on a surcharge of 20 cents per dollar of purchases. However, the witness indicated that this had not prevented dealers from switching when they were dissatisfied with the company for one reason or another, and cited a recent instance where there was still a balance of $1,700 due on a loan which the dealer paid off and switched to Delvale.

The record of the Baltimore hearing is wholly deficient insofar as establishing that the complaint practices have injured any competitor, let alone competition, in the area. The evidence with respect to the only competitor witness called, Mount Vernon, discloses that that company has made a gradual, albeit not a spectacular, improvement in its position. While the company has failed to make rapid strides in recent years, this cannot be attributed to the complaint practices, but rather to its failure to advertise and to popularize its brand, to its lack of an organized selling effort, and to an increase in competition generally in the area, including competition from some of its local competitors. Delvale Ice Cream Company, which advertises extensively, has made excellent progress and serves the A & P chain. While it does appear that respondent Borden managed to acquire a single account from Delvale, the record does not establish that this change was due to the complaint practices. Another local competitor, Eckels Ice Cream Company, has managed to build up a volume substantially in excess of Mount Vernon's. Although a representative of Eckels was subpoenaed to testify, counsel supporting the complaint excused the witness.

The record also fails to show any significant improvement in the position of the respondents in the Baltimore area during the postwar period. Borden has actually suffered a substantial decline in gallonage, with Borden's Hendler branch sales declining from 2,179,739 gallons in 1946 to 1,402,679 in 1955, and the Borden branch's Baltimore sales declining from 1,091,663 in 1946 to 799,526 in 1955. Borden's market share in Baltimore has declined from 30.8 percent in 1950 to 28.0 percent in 1955. Its share of production in the State of Maryland as a whole has declined from 36.0 percent in 1947 to

23.1 percent in 1955. The sales of Beatrice's Washington plant, which include its sales in the Baltimore area, have declined from 1,664,394 gallons in 1946 to 1,230,882 in 1955. Its share of the Baltimore market increased by only one percent between 1950 and 1955, being 14.9 percent in the latter year. Its share of production in the State of Maryland as a whole declined from 10.8 percent in 1947 to 9.5 percent in 1955. National's market share in the Baltimore market in 1955 was only 6.9 percent, as compared with 6.4 percent in 1950.

c. Winchester, Virginia, Area

The respondents operating in Winchester, Virginia, and surrounding areas in northwestern Virginia include National Dairy (Southern Dairy and Breyer divisions), Arden Farms (Melvern-Fussell), Borden, Fairmont Foods (Imperial), and Beatrice. Other companies operating in the area are Garber Ice Cream Company, Nicodemus, Brickstraw, Royal Dairy, Maine Ice Cream Company, Monticello Ice Cream Company, Hershey, and Penn Dairy. The only witness to testify from the area was the owner of Garber Ice Cream Company, which has its plant in Winchester. Another local competitor from the area, Nicodemus, was subpoenaed to testify but was later excused at the request of counsel supporting the complaint.

For the most part, the testimony of the Garber witness consisted of gossip, rumor and hearsay. He testified vaguely about the "big boys" and of having heard that dealers were being promised "everything from the sky down". Most of his testimony was of a highly subjective nature, relating to the supplying of more equipment to dealers than he thought justified, some of which he surmised was being used for frozen foods other than ice cream. The witness could name only two or three accounts where this was allegedly involved. One was a restaurant in Winchester to which Garber had supplied a six-hole cabinet and which later switched to Fairmont after allegedly receiving two six-hole cabinets, one of which the owner had told him could be used for "meats and stuff". On cross-examination it developed that the account had actually changed owners and that the new owner had picked Fairmont as his supplier. No evidence was offered to establish that the furnishing of an additional cabinet was a consideration for the new owner's selecting Fairmont, that it was supplied for the storage of frozen foods or that it was actually used for that purpose with the knowledge of Fairmont. In the same category is a diner in Front Royal, which the witness claimed he had tried to acquire from Fairmont but was unsuccessful because the latter had allegedly supplied the account with an additional cabinet for frozen foods.

Finally, the witness referred to another restaurant on the highway outside of Winchester which he had allegedly lost to National Dairy (Breyer) because the latter had furnished it an additional cabinet. The witness conceded that he had no information as to whether Breyer had supplied the additional cabinet for the storage of frozen foods, and admitted that he found dealers placing frozen foods in his own cabinets, despite the fact that he did his best to discourage such practice. Not only is there no evidence to sustain the witness' hearsay testimony, but a National official testified that it was not the company's policy to supply cabinets for anything other than the storage of ice cream, and the Breyer salesman later testified that according to the company's records the account in question had only one "used" cabinet in its place of business.

It should be noted that the Garber witness' testimony was directed at the use of cabinets for the storage of products other than ice cream, and not at the practice of supplying cabinets as such. The witness indicated that it had been the practice for his company to supply ice cream cabinets for as long as he could remember and that there never was any rental charge made. Not only has the company supplied such cabinets, but it has serviced the cabinets and, as an accommodation to the dealer, has likewise serviced the dealer's own refrigeration equipment.

Another competitive practice referred to briefly by the witness was that of making loans, but he indicated that he knew of only one such instance. The witness' testimony in this respect was somewhat confused. On direct examination he referred to the fact that he had been informed by the owner of a new restaurant in Front Royal that Breyer had "loaned" him about $14,000 "in equipment furnished." On cross-examination he referred to this account as involving a loan of money. However, he conceded that he didn't know who had made the loan, although the restaurant was serving Breyer's ice cream. There is no reliable evidence in the record as to what, if anything, the account in question received from Breyer's. The witness also referred to a 5 and 10 cent store in Winchester which he had been trying to get from Fairmont, but that the owner had informed him Fairmont's price was 32 cents a gallon below his. There is no reliable evidence as to what Fairmont's price was, or that it was anything other than its regular schedule price or that it was connected in any way with an exclusive dealing arrangement.

Despite the alleged loss of or inability to acquire the accounts referred to above, for whatever reason, there is no evidence that Garber has sustained any competitive injury in the area where it operates. While it allegedly was unable to obtain one 5 and 10 cent store in Winchester, it serves the stores of another such chain in both Front Royal and Winchester. Its volume has increased from about 9,000 gallons 22 years ago to 130,000 in 1947 and 160,000 in 1955. This may be compared with a decline in sales of approximately 190,000 gallons between 1947 and 1955 by National's branches operating in the area.

The Garber witness expected his business to keep improving in the future. He had just spent $30,000 for a new hardening room in order to expand the company's capacity. His principal complaint was that he wasn't progressing rapidly enough since World War II. However, he did not attribute this to the complaint practices, but to the fact that so many additional competitors had come into the area since the war and that there are now "so many places handling ice cream all over the country and along the roads * * * and every hole in the wall in town * * * has got ice cream", with the result that each individual stop is selling less ice cream. Another factor which may have contributed to the company's lack of progress is the fact that the company employs no salesmen, and the owner only goes out three or four times a year to solicit accounts.

d. Cumberland, Maryland, Area

The respondents operating in the Cumberland, Maryland, area are National and Fairmont. There are two local manufacturers, Lear & Oliver, and Speelman Ice Cream Company. Several other non-respondent companies having their plants elsewhere also sell in the Cumberland area, including Walker, Hershey, and Hagan. The latter two companies entered the area from Pennsylvania after World War II. Both of the local manufacturers were called as witnesses at the Washington, D.C. hearings. In addition, two dealer witnesses were called to testify at hearings later held in Pittsburgh.

Franklin Lear, a partner in Lear & Oliver, testified that his company's gallonage had been steadily declining and was approximately 70,000 gallons in 1955, as compared to 100,000 gallons a few years previously. He attributed the decline primarily to the fact that there were more competitors in the area, which had resulted in more stops selling ice cream and less ice cream being sold per establishment. However, he also claimed that part of his company's decline was due to a loss of accounts. While he at first estimated he had lost six accounts in four years, he later conceded that this was not a net loss since he had also gained some accounts during this period. Likewise, he at first suggested that he had lost "several" accounts because he could not lend them money to remodel, but on cross-examination it turned out to be a single account which he had lost to respondent National Dairy in 1950. The witness also spoke of competitors putting in more equipment than he could afford to do, but on cross-examination he conceded that he had lost only one account to a competitor for that reason. The competitor was unnamed and he could not recall the name of the account. The witness also attributed the loss of one account to respondent Fairmont in five years, but the name of the account and the reason for its loss was not given.

In addition to the loss of a few accounts, the witness also referred to his inability to acquire new accounts. He attributed this primarily to his company's unwillingness to supply the newer open-face cabinets which customers were demanding. His company likewise has made no effort to obtain supermarket business. He conceded that this was not because of the equipment involved, but because he couldn't "meet the price." While he indicated that respondent National serves the A & P and Acme stores in the area, there is no evidence as to the price being charged to these accounts or of any exclusive dealing arrangement in connection therewith.

The sole dealer whom Lear could recall having lost to a respondent was called as a witness in Pittsburgh. This was the dealer to whom National had made a loan. The evidence concerning this transaction indicates that it was more a lack of imagination, than a lack of finances, which was responsible for the loss of the account. The account in question was a combination general store and grocery. It had been steadily going down hill and had to either enlarge and modernize its premises in order to encourage new business or go out of business. The owner asked Lear, with whom he had been dealing for some time, for a loan. The latter was somewhat indecisive and indicated that he wanted to consider the matter. In the meantime, the store proprietor talked to the National Dairy salesman who had been calling on him from time to time and explained his predicament. After consulting with a company official as to the feasibility of assisting the account, National agreed to loan the owner $4,000 at 6 percent interest, secured by a chattel mortgage. Shortly thereafter Lear advised the owner that his company would make the loan at 3 percent interest, but the owner had decided to deal with National. After completion of the repairs, which cost $17,000, the business gradually improved until its ice cream volume had increased from 1,000 gallons a year to 3,000 gallons, and the balance of its sales increased proportionately.

While undoubtedly the loan was an important factor in the account's decision to change suppliers, the evidence demonstrates the sound business motivation for a supplier's willingness to assist an account in remodeling or modernizing its establishment. In any event, as the evidence as a whole indicates, this single transaction had no significant effect on the fortunes of Lear & Oliver. Aside from the factors adverted to above, there is more than a suggestion in the record that the decline in the fortunes of Lear & Oliver has coincided with the death of the former members of the family who had previously run the business.

The other local Cumberland manufacturer, Speelman Ice Cream Company, testified that about five years prior thereto his company's ice cream gallonage had started "slipping a little" (for reasons which he did not specify), but that he had added frozen foods to his ice cream line, "went out and plugged pretty hard", and that its gallonage thereafter improved to the point where it was "up to where it should be" (around 75,000 gallons). He did, however, complain that he had been unable to get two grocery stores because they were allegedly "tied up" with National Dairy due to a loan. In the case of one of the establishments, no evidence was offered to indicate that it had ever received any loan from respondent National. In the case of the other establishment, the proprietor was called as a witness in Pittsburgh and indicated that respondent National had loaned him approximately $2,000 in 1950, after he had been dealing with them for about ten years, and that he received two additional loans of approximately $4,000 in 1952 to help remodel his establishment in order to be in a better position to compete with a new supermarket that had moved into the area. Irrespective of what agreement he signed at the time, the witness was under the impression that he was under no obligation to continue purchasing National Dairy's ice cream, and that if he wished to switch he could simply make his monthly payments at the bank as he had been doing. He denied having advised any other ice cream company that he was tied up with National "because I never thought about it. It is the best ice cream there."

In addition to the two accounts which were allegedly "tied up" with National, the witness claimed that he couldn't sell to the A & P stores because the divisional manager of the stores had told him that the chain was going to deal with "one of the big ice cream companies that could make it national for them, over the country." The witness indicated that the A & P stores in Cumberland purchased their ice cream from National Dairy which makes it up under a private label. There is, of course, no allegation in the complaint which challenges the right to sell ice cream under a private label or the right of a chain to deal with a single supplier in all or any portion of the country.[75] The witness also referred to the fact that the worst competition his company had in the area was the low price at which A & P was retailing its ice cream. However, there is no evidence in the record as to National Dairy's price to A & P and nothing to indicate that it involved an exclusive dealing arrangement.

Aside from not being able to obtain two accounts from respondent National Dairy, the witness could only recall having lost a single account which his company had lost to National in three or four years. He claimed that the owner had informed him National had given the store an additional cabinet for frozen foods. There is not a scintilla of evidence in the record to support this hearsay testimony. The witness also testified to having lost a few small accounts to respondent Fairmont (for reasons unspecified), but conceded that he had gained as many from them and thought he was about even as far as that company was concerned. He also conceded that he actually had more accounts than he had five years previously, but claimed that each account was selling less ice cream. This cannot, of course, be attributed to the complaint practices, but would appear to be due to the same condition referred to by the Lear & Oliver witness, viz., an increase in the number of competitors in the area and the number of ice cream establishments.

The evidence fails to establish that respondent National has used loans or cabinets as an aggressive competitive weapon in the Cumberland area, or that there has been any substantial injury to competition in the area from the few loans it has made or due to any of the other complaint practices. The record indicates that the sales of its Cumberland branch have actually declined by over 50,000 gallons between 1947 and 1955. The evidence is wholly deficient, insofar as establishing that respondent Fairmont has engaged in any of the complaint practices in the area, let alone been responsible for any injury to competition.

5. *Richmond*, *Virginia*

The respondents doing business in the Richmond area are Pet, Beatrice and National Dairy (Southern Dairies and Breyer divisions). Other companies selling in the area are Virginia Ice Cream Company, Awalt Ice Cream Company, Arnett Ice Cream Company, Perkinson Ice Cream Company, Richmond Dairy and Swift & Company. Repre-

[75] In point of fact, the witness was not properly informed since the evidence shows that A & P does deal with different suppliers in different sections of the country; e.g., in the Pittsburgh area a local manufacturer supplies the A & P stores in that area with all their ice cream.

sentatives of Virginia Ice Cream Company and Awalt Ice Cream Company were called as witnesses by counsel supporting the complaint. No dealer witnesses were called. However, respondent Pet, during the presentation of its separate defense, offered the testimony of 14 dealer witnesses in Richmond.

The testimony of the Awalt witness indicates that his company has made good progress in the Richmond market and is not experiencing any serious competitive difficulties. The company, which began manufacturing ice cream for sale through its own retail store in 1936, gradually began to sell at wholesale and the number of its customers became quite substantial during the period after World War II. The company is now at the peak of its gallonage. The Awalt witness was reluctant to state whether his company's gallonage was now in excess of 200,000 a year and merely commented: "Well, I make a pretty good living at it. I started with nothing and I make a pretty good living at it." He indicated that the matter of supplying cabinets had presented no problem to his company. It has been able to purchase the cabinets on credit from equipment manufacturers and has found that in the ordinary case ice cream sales will be sufficient to enable the company to pay off a cabinet in about two years. As of the end of 1955, the company had about 123 accounts, of which it has supplied cabinets to about 100. Customers who own their own equipment receive a special 10 cent a gallon discount. Awalt services all its own equipment and, in addition, services dealer-owned refrigeration equipment, charging the dealer only for replacement parts.

The advent of the newer type glass-front or open-top cabinets in the Richmond market does not appear to have caused Awalt any serious difficulty. The witness agreed that the newer type cabinets do sell more ice cream in the proper location, but indicated they were not suitable for the smaller grocery stores or service stations to which he mainly caters. While the witness did cite an instance where Beatrice had allegedly supplied an open-top cabinet in place of one of his conventional cabinets, no evidence was offered to establish that this was the reason why the owner had switched. Although the Beatrice cabinet was of the open-top variety, it was actually smaller than the cabinet Awalt had supplied the establishment.[76] The only other specific accounts cited by the witness were a school to which Beatrice had allegedly offered a lower price, and an unnamed account to which Pet had allegedly offered a lower price, both of which accounts he

[76] The witness also referred to the fact that he had been told Beatrice had furnished the account in question with a sign and other assistance. However, he conceded that this was "all hearsay" and did not know what the account had actually received.

was able to retain. There is no reliable evidence in the record to support the witness' hearsay testimony as to what Beatrice or Pet had offered these accounts.

While the Awalt witness testified that his company had lost two or three accounts in the last year or two, he also indicated that his company has been able to acquire about ten new accounts each year, so that its net position has gradually improved despite these small losses. The witness made no claim that the fact the company serves mainly smaller establishments is due to the respondents or to the complaint practices. Awalt has failed to solicit any of the national chains in the area because of its owner's alleged understanding that these chains prefer to deal with some big company on the basis of arrangements made through their central office in Chicago, New York or some other city. The company likewise has not solicited the local independently-owned supermarkets because, as stated by the witness, "I just don't have the time to call on them and call on them and call on them, so I just leave them go." While the witness also added that he was reluctant to seek such accounts because they allegedly requested advertising allowances and special prices in connection with special sales, he indicated that he had no personal knowledge of this, but had learned it from a "very close friend of mine" (who was otherwise unidentified). Despite its allegedly limited representation in the supermarket field, Awalt has made good progress in the Richmond market.

The evidence offered through the representative of Virginia Ice Cream Company was perhaps the most confused and contradictory of that received from any competitor witness. The owner of the company, a gentleman of Near East origin, had considerable difficulty in understanding questions addressed to him and in making himself understood. In addition, his account of alleged losses, unsupported by any records, was so confused as to merit little or no credence.

The evidence indicates that when the witness entered the ice cream business 25 years previously, his only competitors were National Dairy (Southern Dairies division), and Perkinson Ice Cream Company. However, a number of other companies, both local and national, have entered the market in the succeeding years, resulting in a substantial increase in competition in the market. The witness made the sweeping assertion that as a result of these changes: "The small people no given a chance." The primary basis for this sweeping claim appeared to be that competitiors were servicing dealer-owned refrigeration equipment without making any charge therefor. The only specific instance which the witness could cite of this practice was an account which had allegedly been taken from him by respondent National. Not only is there no reliable evidence in the record that respondent National acquired the account by agreeing to service the dealer's own refrigeration equipment free of charge, but, according to the uncontradicted and credited testimony of a National Dairy official, on the two or three occasions when his company had serviced the dealer's equipment it charged for both parts and labor, unlike the practice of many manufacturers (including the local manufacturer Awalt) who charge only for parts. The evidence also discloses that within a year after the loss of the account, Virginia Ice Cream Company was able to reacquire it. The witness conceded that he had not lost "much" accounts to National.

The witness was able to cite only one account which he had lost to respondent Pet, allegedly because of the financing of fixtures. His confused testimony concerning the transaction, based either on conjecture or hearsay information received from the fixture company, was stricken from the record. His remaining testimony with respect to the loss of unidentified accounts to Pet was so thoroughly confused and contradictory as to be unworthy of credit. At one point he claimed that Pet took "twenty to twenty-five" accounts from him by giving them "couple extra machines, couple extra stuff. He loaned them money." Then he asserted that "Richmond Dairy was the culprit" (rather than Pet). Thereafter he whittled the 20 to 25 accounts down to "two" and then increased it slightly to "five or six", but conceded that the customers "don't tell nothing" as to why they had changed suppliers. Nevertheless, the witness insisted that Pet must have "give something to take them". However, the witness finally conceded that Pet had not taken "much" from him since the accounts they had acquired were "just small stops" and that "I don't worry about them [Pet]." The witness also claimed to have lost "two, three small places" to Beatrice, but gave no reason therefor. After considerable backing and filling, the witness finally conceded that he had lost most of his accounts to Richmond Dairy and that they were his "best stops". It should be noted that during the period in question, Richmond Dairy was an independent local company, although it was later acquired by respondent Foremost following the issuance of the complaint in this proceeding.

Aside from the fact that the record fails to establish that any of the respondents has been responsible for any substantial loss of business by Virginia Ice Cream Company, the record is so thoroughly confused as to how much of a loss the company sustained that no specific finding can be made thereon. Testifying without records, the witness at first estimated his 1946 gallonage as 58,000 and claimed that this had declined to 35,000 to 40,000 at the time of the hearing. At a later point he gave his 1946 gallonage as 55,000 gallons and his present gallonage as 20,000 to 22,000. However, when he was asked if his gallonage was less than it had been previously he testified: "I am not much hurt," and conceded that he had a "good business". The company still has about 120 accounts, which is approximately the number it had in 1946.

It is significant that during the period when Virginia Ice Cream was allegedly suffering a decline in volume, its more recent local competitor, Awalt, was able to build up a substantial volume and was still growing. It may also be noted that Virginia Ice Cream Company's experience is not dissimilar to that of respondent National. The sales of its Southern Dairies division in the Richmond area declined by 270,000 gallons between 1947 and 1955. Its share of the Richmond market declined from 33.1 per cent in 1950 to 28.5 per cent in 1955. Respondent Beatrice's sales have remained almost static between 1950 and 1955, and its share of the market has declined from 5.9 per cent to 5.2 per cent.

Counsel supporting the complaint also called as a witness the manager of Pet's Richmond plant. The testimony of this witness establishes that Pet makes loans to selected customers, a fact which is not in dispute. These accounts, for the most part, are drug stores which require assistance in remodeling, and are mainly Pet's existing accounts. Of the fourteen dealer witnesses called by respondent Pet during the defense hearings in Richmond, most had been acquired from respondent National. None were former Virginia or Awalt accounts. In most instances any loans which they received were made after the account had been dealing with Pet. In no instance was the account under any legal obligation to confine its purchases to Pet and, in one instance, was actually purchasing a portion of its requirements from another supplier.

The record wholly fails to sustain a finding that there has been any injury to competition in the Richmond market or that any decline which any competitor may have experienced was due to any of the complaint practices.

a. Danville, Virginia, Area

The respondents doing business in Danville, which is located in the extreme southern portion of Virginia near the North Carolina line, are Pet, Beatrice and National (Southern Dairies division). The only company with a plant in Danville is Danville Dairy Products Company. Several other competitors with plants in nearby areas are Quality Dairy and South Boston Creamery of Lynchburg, and Coble Dairy, Boston-Durham Dairy and Blue Ribbon Dairy of North Carolina. The only witness called to testify regarding the area was a representative of Danville Dairy.

The gallonage figures for Danville Dairy from 1950 to 1954 were given as follows: 1950—158,000; 1951—131,000; 1952—136,000; 1953—128,000; and 1954—134,000. The witness sought to attribute its decline in sales largely to a loss of accounts resulting from the fact that competitors were furnishing free refrigeration service on dealer-owned equipment. He also claimed that competitors were supplying elaborate signs and deep-freeze boxes, and were selling other equipment to customers at cost. The witness agreed that the making of loans was not a competitive factor in the area, and made no claim that the supplying of ice cream refrigeration equipment, as such, had caused his company any difficulty.

While conceding that no one company could be called the leader in the practice of furnishing free service on dealer-owned refrigeration equipment, the witness claimed that respondent Pet had given his company more trouble in this respect than any other competitor. However, there is no reliable evidence in the record to support the witness' bald assertion nor to support his other conclusory testimony as to why he had been losing accounts. The witness could name only a single account which he had lost to Pet in recent years. While seeking to attribute this to the furnishing of free refrigeration service, a new ice cream cabinet, a deep freeze for the storage of all frozen products and a fluorescent sign, the witness conceded that he had no direct knowledge of why he had lost the account (the facts testified to by him having been received secondhand from his salesman). Aside from the fact that the witness' testimony is unreliable hearsay, insofar as establishing what Pet supplied to the account or as to the reason for the switch, the witness' own testimony indicates that this incident was magnified out of all proportion to its significance. The witness conceded that the cabinet supplied by Pet was merely a replacement of a similar one which his company had furnished the account and that the so-called deep freeze was nothing but a depreciated ice cream storage cabinet whose actual value was substantially under $100. It is customary for manufacturers to supply such cabinets to volume accounts for use in storing excess ice cream in the back of the store, and customers periodically avail themselves of the use of the box to store additional frozen products. The Danville witness conceded that his company had also furnished such depreciated cabinets to some of its customers. In the case of the so-called fluorescent sign, it does not appear that it was anything more than the routine sign supplied by manufacturers for the primary purpose of advertising their ice cream.

Insofar as the primary charge of the witness, relating to the free servicing of equipment, is concerned, the record is wholly lacking in reliable evidence that this has been a significant factor in Danville's loss of business. According to the reliable testimony of a Pet official, it is not the regular practice of the company to service dealer-owned equipment. However, where a service man is on the dealer's premises servicing the company's own cabinet he may in some instances, as an accommodation, service dealer-owned equipment which has been giving trouble, but a charge is always made for replacement parts. The amount of time and money involved in this practice is too negligible to have represented a serious competitive problem to Danville Dairy. The Danville witness estimated that his company had spent approximately $1,300 a year during the past several years in servicing all refrigeration equipment for customers, both dealer-owned and company-owned. The amount represented by the cost of servicing dealer-owned equipment presumably represented only a fraction of the $1,300. It is inconceivable that the Danville Dairy could have lost any significant number of accounts because of its unwillingness to perform an additional service for its dealers in the order of magnitude referred to by the witness. Another manufacturer in the Fredericksburg area, who referred to this practice, indicated that it represented more of an "inconvenience" than an important competitive problem.

In addition to the single incident involving the loss of an account to Pet, primarily because of alleged free refrigeration service, the Danville witness cited another account which it allegedly lost to Pet because the latter had furnished a box for cold drinks. The hearsay testimony of the witness regarding this incident, based on the oral report of his salesman, was stricken from the record. However, it may be noted that Danville regained the account within a week without supplying an additional box for the storage of cold drinks. While it also appears that Pet supplied the account in question with a modern ice cream cabinet, the Danville witness made no claim that the supplying of the new cabinet was a reason for the switch to Pet. The witness made no complaint against the supplying of a modern cabinet as such. On the contrary, he indicated that he had been able to cut his loss of gallonage, resulting from the loss of accounts, by an increase in sales through his existing accounts due to supplying them with new glass-top display cabinets. He further conceded that he had acquired accounts from Pet by furnishing them with new cabinets and indicated that the question of furnishing a particular type of cabinet involved the exercise of a sound business judgment on the part of the ice cream manufacturer, as to which cabinet was best suited to merchandise ice cream in the particular establishment.

The Danville witness made the bald assertion that he had had similar experiences in the loss of accounts to Southern Dairies, as those involving Pet. However, he could not name a single account which he had lost to Southern Dairies, and finally conceded that his problem with Southern Dairies was not one of losing accounts but of not being able to acquire some of Southern Dairies' accounts. He indicated that he had had no difficulty with the latter on account of price, since its prices were higher than his. Insofar as respondent Beatrice is concerned, the witness conceded that he had had no competitive problems with that company.

There is no evidence in the record, other than the witness' own unsupported conclusions, to support a finding that the use of any of the complaint practices by any of the respondents has been responsible for Danville's decline in gallonage. On the contrary, the witness' own testimony strongly suggests that other factors have played a role therein. As indicated by the gallonage figures cited by him, the principal decline in gallonage occurred in 1951 and his sales since then have fluctuated within a relatively narrow range, with 1954 being slightly above 1953. The witness conceded that a strike in one of Danville's large textile plants had resulted in a decline in consumer demand during 1951. In addition, he indicated that several new competitors had come into the area, including Coble and Blue Ribbon from North Carolina, both of which he admitted had given his company "severe competition." In addition, Boston-Durham entered the market in 1953 and became a substantial factor. It may be noted, in this connection, that Danville's gallonage dropped by 8,000 gallons in 1953, coinciding with the period when Boston-Durham entered the market.

The failure of Danville to make significant progress in recent years appears to have been due primarily, as in many other areas, to the entry of additional contestants into a hitherto relatively uncontested market. Such increase in competition has affected not only Danville Dairy, but also respondent National Dairy as well. From a gallonage of 187,002 in 1947, National Dairy's sales in the Danville area declined to 172,641 gallons in 1950 and then to 166,537 in 1951. While its sales climbed back to 180,447 in 1952, the downward trend was resumed in 1953, when they declined to 176,901 gallons, and then to 169,107 in 1954.

b. Portsmouth-Norfolk Area

The respondents operating in the Portsmouth-Norfolk area include National Dairy (Southern Dairies division), Pet, Beatrice, and Arden (Melvern-Fussell). Another so-called national company operating in the area is Swift & Company. Local companies in the area include Virginia Ice Cream Company, Birtchard Dairy, Rosedale Dairy and Best Ever. High's Dairy manufactures and sells through its own outlets. The only witness called was the owner of Virginia Ice Cream Company of Portsmouth (not to be confused with Virginia Ice Cream Company of Richmond).

The Virginia Ice Cream Company witness testified that business was "very good" until right after World War II, but that thereafter it began "to get slack because a lot of ice cream people came in." The exact extent of the decline in Virginia's gallonage is difficult to determine from the somewhat confused testimony of the witness, testifying as he did without the aid of any books and records.[77] At one point he claimed that during the period of the war his company was selling "500,000 gallons, maybe 400,000." However, in the next breath he stated that in 1948, after the war, "business was very good," although his gallonage had declined to approximately 175,000. If the witness' estimate of 500,000 gallons or "maybe 400,000" was even reasonably accurate, it is difficult to understand how business was still "very good" in 1948 when his gallonage was only 175,000 (representing a decline of 255,000 to 325,000 gallons). Nevertheless, he claimed that business continued "very good" until about 1952, when it declined to 150,000 gallons and business became "slow". How the witness' business could decline by over a quarter of a million gallons and remain "very good", and then decline by only 25,000 and become "slow" involves financial considerations which are beyond the comprehension of this examiner.

The witness sought to attribute the company's alleged decline in gallonage to the fact that competitors were giving customers "big" cabinets, "big" signs, and "anything to get a customer." The witness conceded that he too supplied customers with cabinets and signs, and when pressed for an explanation of what his competitors did beyond what he did for customers, he replied: "They give a lot of stuff which they ain't supposed to give. That is all; I don't know." He conceded he had no direct knowledge of what competitors were furnishing customers.

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[77] The witness conceded that he was unsure of his company's gallonage since: "That's on the books, and I don't stay inside the plant. I am outside the plant."

Insofar as the furnishing of cabinets is concerned, the Virginia Ice Cream witness agreed that it was necessary to supply dealers with a cabinet in order to assure that the ice cream will reach the customer in the proper frozen state. His principal complaint in this regard appeared to be directed at the practice of furnishing more modern display cabinets to customers. This was not based on the fact that the furnishing of such cabinets is not desirable, since the witness conceded that when he had supplied such cabinets to customers their sales had increased. The ground of his complaint was rather that his company could not afford to supply more of such cabinets. However, the witness could recall only one account lost to a competitor because of the furnishing of a cabinet. He claimed to have lost this account to respondent Beatrice because of a cabinet for ice cream and a freezer for "storage". There is nothing in the record to indicate that there was anything unusual about the cabinet which Beatrice allegedly furnished, it being merely a six-hole cabinet, or that the freezer was intended or was used for anything other than the storage of ice cream. Moreover, there is no reliable evidence in the record to establish that the furnishing of such equipment was the reason for the account's change of suppliers.[78]

With respect to his accusation that he had lost accounts due to the supplying of signs, the witness finally conceded that he couldn't recall any accounts which he had lost because of this practice, and that he was merely referring to the supplying of signs by other ice cream manufacturers to their own accounts. No particular competitor was singled out as supplying any more or any different signs than any other competitor.

One of the principal reasons for the decline of Virginia Ice Cream Company of Portsmouth appears to be the substantial increase in the number of competitors in the area. For many years his principal competitors were Southern Dairies and Melvern-Fussell (prior to its acquisition by Arden). In the last ten years Swift, Beatrice, Pet, Birtchard and Rosedale have entered the market. The witness agreed that Birtchard, in particular, had become a substantial competitor and while he declined to hazard a guess as to whether their gallonage had reached 500,000 a year, he agreed that they were "much bigger" than his own company, which has been in business since 1922. Birtchard, a local company, was recognized by the Virginia witness as "very aggressive", as having engaged in all the practices about which

[78] While the witness' testimony indicated that the account had changed to Beatrice, he made no claim that the account had informed him that it had switched because of the supplying of such equipment.

he complained, and as having taken "quite a few accounts" from his company. Another factor contributing to Virginia's decline, according to the testimony of its representative, has been the fact that for several years business in general has been "slow" in the area, and not merely in the ice cream business. There is nothing to indicate that the extent of the decline of Virginia Ice Cream's sales has been any greater than that of business generally in the area. More importantly, there is no evidence in the record upon which a finding may be made that any such decline has been due, to any substantial degree, to the engagement by any of the respondents in the practices charged in the complaint.

The record fails to establish any significant improvement in the position of any of the respondents operating in the area. The sales of National's Norfolk plant (which distributes in Portsmouth) have declined from 745,000 in 1947 to 685,000 gallons in 1955. Its sales in 1951, when Virginia Ice Cream began experiencing its decline, were as low as 550,000 gallons. National's share of the Norfolk market declined from 20.5 percent in 1950 to 18.8 percent in 1955. Beatrice's share of the market declined from 1.2 percent to 0.9 percent in the same period, and Arden's from 10.5 percent in 1953 (when it entered the market) to 8.7 percent in 1955.

c. Fredericksburg, Virginia, Area

The respondents operating in the area of Fredericksburg, Virginia (which is located approximately half way between Washington and Richmond) include National (Breyer and Southern Dairies divisions), Arden (Melvern-Fussell), Beatrice and Pet. There is only one local manufacturer in the area, Farmers Creamery Company. In addition there are the Safeway and High chains, which manufacture their own ice cream, and a number of soft ice cream establishments such as Dairy Queen. The representative of Farmers Creamery was the only witness from the area called by counsel supporting the complaint.

The Farmers Creamery representative indicated that his company's gallonage had declined from approximately 330,000 in 1948 to 250,000 in 1954. This decline, however, has not been due to any loss of accounts, the company having more accounts today than it had five years ago, but to a decline in sales per account. The witness attributed this decline mainly to the fact that there were more competitors in the area than in former years and more establishments selling ice cream.

The witness cited as an example a change which had taken place in the downtown area of Fredericksburg. In former years his company had served a drugstore, which was one of the few ice cream outlets in that section of downtown Fredericksburg. Thereafter, the F. W. Woolworth store located next door, which had not previously sold ice cream, expanded its store and began to sell Fussell's ice cream. Shortly thereafter, the J. J. Newberry store also began selling ice cream (the brand sold being unnamed by the witness). During this period the drugstore which Farmers Creamery had served went out of business and when it later opened up under a new owner it began to serve Breyer's ice cream. The witness made no claim that the choice of Breyer by the new owner was due to any of the complaint practices. He attributed it to "good salesmanship" and commented that he had "no complaint on it".[79]

The witness did make mention of the fact that customers were now asking for more than they did in prior years, such as merchandising-type cabinets in place of conventional closed-top cabinets, service on dealer-owned equipment, and signs. However, he made no claim, nor does the evidence establish, that any of the respondents were responsible for these demands, nor that Farmers Creamery lost any accounts by reason of competitors supplying more than the witness felt justified.

Insofar as the furnishing of cabinets is concerned, the Farmers Creamery witness agreed that it was necessary for the manufacturer to supply the dealers with such equipment in order properly to merchandise their product, although he claimed that it was sometimes difficult to finance such cabinets. While citing an instance where he had allegedly had to supply one of his customers with a display cabinet because of a report from his salesman that Breyer's would get the account, there is no reliable evidence in the record as to whether Breyer's had in fact offered such equipment to the account. Moreover, in connection with another account which his own company had taken from Breyer's and to which it had supplied a display-type cabinet in place of a conventional-type cabinet, the witness stated that this had nothing to do with the account's switching. He conceded that there were many reasons for an account switching unconnected with the fact that it received a newer type of cabinet. In any event, the witness made no claim that he had lost any accounts or had been unable to acquire any because of his unwillingness or inability to supply an appropriate cabinet.

[79] While he referred to the fact that Breyer's had a large storage box in the back of the store, he made no claim that it was being used for anything but ice cream. He indicated that it was his understanding the box was put in for Breyer's convenience, rather than the owner's, since Breyer made only weekly deliveries to the store, whereas his own company had served the former owner daily.

While, as above mentioned, the witness also referred to the practice of servicing dealer-owned equipment, he agreed that this involved a matter of "slight expense" and was merely "an inconvenience". No claim was made that he had lost any accounts by reason thereof or that it presented a serious competitive problem to his company. Moreover, he made no effort to attribute this practice to any of the respondents. In the case of the supplying of signs, which he claimed was a more recent innovation, he conceded that they were a benefit to his company because of the advertising value. The cost thereof, including sign, pole, and labor charge, was estimated to be around $40.00. No claim was made that he had lost any accounts or been unable to acquire any because of such signs.

Outside of the single drug store account, which had changed to Breyer's under its new ownership, and the account to which, according to the hearsay testimony of the witness, Breyer's had offered a display-type cabinet, the witness made no other reference to respondent National Dairy as having been involved in obtaining or seeking to obtain any of his accounts. No mention was made by the witness of any competitive difficulties with Arden or Beatrice. No claim was made as to having lost any accounts to Pet, although the witness did testify that Pet had obtained an account which he too was seeking to get, but no reason was given for the latter's success.

While it may be that the Farmers Creamery witness does not approve of some of the practices which he cited, it is clear from his testimony that they have had no significant effect on his company's decline in gallonage between 1948 and 1954. As already mentioned, the witness himself conceded that this was due mainly to an increase in the number of competitors and ice cream stops. Other factors have been the decline in ice cream sales generally in the area, the loss of the three Safeway stores in the area, which Farmers Creamery served on a split basis with Melvern-Fussell and which now make their own ice cream, the entry of the High stores into the market which make their own ice cream, and the growth of soft ice cream establishments in the area.

Despite these problems, Farmers Creamery has managed to retain 70 per cent to 80 per cent of the ice cream business in the Fredericksburg area. The company has also acquired a 51 per cent interest in another dairy operating in the Manassas area and a 100 per cent interest in another company operating in Westmoreland County.[80] In contrast to this, National Dairy's Southern Dairies division sales in

[80] A witness from the latter company was subpoenaed to testify, but was excused by counsel supporting the complaint.

Fredericksburg have declined from 12,107 gallons in 1948 to 3,358 in 1954. Breyer's sales in the area in 1954 were less than 10,000 gallons.

* * * * * * *

Counsel supporting the complaint has failed to establish any injury to competition by reason of the use of the complaint practices by any of the respondents in any of the areas above discussed or in the State of Virginia as a whole. The evidence in the record, for the state as a whole, establishes that none of respondents has made any significant improvement in its position. Of the respondents referred to most frequently by the competitor witnesses, respondent National's share of the state production of frozen products has declined gradually from 20.9 per cent in 1947 to 14.1 per cent in 1955. Respondent Pet, which had 6.3 per cent in 1947 and was able to increase its share to 10.5 per cent by 1951, thereafter began to decline and reached 8.3 per cent in 1955. These figures hardly suggest that these respondents are engaged in any aggressive campaign to take over the Virginia market.

6. *Easton, Maryland*

Easton is located in the center of what is known as the Eastern Shore of Maryland, separated from most of the rest of the state by the Chesapeake Bay. It has a relatively small static population, but during the summer months there is a considerable influx into the seashore and bay communities. The only respondents doing business in the area are National Dairy (Breyer and Southern Dairies) and Borden. The local companies include Cupid Ice Cream Company, Stoker Ice Cream Company, Cook's Ice Cream Company and Stephen's. There are also a substantial number of regional companies operating in the area, including Delvale Ice Cream Company of Baltimore and Washington, and Philadelphia Dairy, Penn Dairies, Abbotts Dairy, Hershey and Richman, all of Pennsylvania. The competitor witnesses called from the area included representatives of Cupid and Stoker, and the owner of another company, Shoremaid, which had sold out to Delvale. A witness subpoenaed from Cook's Ice Cream Company was excused at the request of counsel supporting the complaint. A single dealer from the Eastern Shore testified.

The local companies operating in the area are almost infinitesimal in size when compared to most of the other competitor witnesses who testified in these proceedings. They operate on a very marginal scale and have been slow in supplying customers even with the most rudimentary services. Most of their complaints revolved about the fact that competitors were supplying dealers with cabinets (not large merchandising cabinets, but ordinary electric storage cabinets) and with signs, which they claimed they could not afford to furnish. The evidence indicates that cabinets have been supplied by ice cream manufacturers in the area since the earliest days of the industry and apparently presented no problem when they involved the non-mechanical wooden cabinets. However, when the mechanical electric cabinets came into vogue during the middle 1930's some of the local companies were slow in making the change and lost many of their accounts. Very little of the testimony dealt with the activities of the respondents, as such, but involved competitive conditions generally in the area. The evidence indicates that there has been a considerable influx of non-respondent regional companies into the area in recent years, and that they have acquired a number of former local companies and have been very aggressive in their sales efforts.

In the case of Cupid Ice Cream Company of Greensboro, Maryland, the evidence indicates that it had begun to decline long before most of the companies now on the scene came into the area. By admission of its owner, it was among the last companies in the area to convert to electric cabinets, and from a maximum of 300 accounts in 1930 it had declined to 100 accounts by 1947, unlike the experience of most other competitor witnesses who testified that 1947 represented a high-water mark in sales. At the time of the hearing Cupid had approximately 60 accounts and its sales amounted to approximately $45,000 a year. The company does no radio or newspaper advertising, although it does utilize name signs outside of its customers' places of business. It engages in little solicitation of new accounts. It manufactures and sells only four ice cream flavors, unlike most of its competitors who distribute a wide variety of flavors.

Cupid's decline has involved partly a loss of accounts and partly a decline in sales per account. The latter has been the result of an increase in the number of competitors in the area and in the number of establishments selling ice cream. As an example of this the Cupid witness cited the town of Greensboro, where the company's plant is located, which seven years previously had only four retail outlets selling ice cream and at the time of the hearing had 18 such establishments. Insofar as the loss of accounts is concerned, this has involved not merely the switching of accounts to competitors, but the fact that "quite a few" of the company's customers have gone out of business. Of the accounts which had switched to other competitors (estimated by the witness to be approximately 18), most had switched to the non-respondent companies, Penn Dairy and Philadelphia Dairy; several had switched to respondent National and one to respondent Borden. No evidence was offered from which it can be found that any of the accounts which switched to the respondents did so because of the complaint practices. The witness conceded that the only reason he had ever been given by former customers for switching was that they wanted a more highly advertised brand. While the witness testified that customers were demanding new cabinets and signs, no reliable evidence was offered to establish that any of the witness' former customers had switched to any of the respondents by reason of such inducements.

The evidence with respect to Stoker Ice Cream Company indicates it to be microscopic in size. The present company is the successor of two companies, Cambridge Ice Cream Company (which was operated by the present owner's father) and Corkran Ice Cream Company (which was operated by his uncle). Stoker achieved its maximum volume around 1929 or 1930 and today is merely a shell of an operation. The witness indicated that most of the company's good accounts, which consisted of large fountain stops, were lost during the 1930's. It does not appear whether such accounts simply went out of business or were acquired by competitors or what the reason for the loss was. Today the company operates "more or less a back road business on the offbeat highways". The company has a gallonage of approximately 15,000 to 18,000 a year and is operated in combination with a wholesale candy business. It does no advertising, furnishes no point-of-sale material and does not even have its name printed on its package. While it did at one time supply signs to customers around 1934, it has ceased this practice also. The only way a consumer could know where the company's ice cream was being sold would be by word of mouth from persons in the community. So inactive and unaggressive is the company that when the community center in its home-town of Cambridge decided to put in ice cream, the company was not even asked to supply an ice cream cabinet, but a cabinet was obtained from Penn Dairies. Likewise, the local elementary school did not even ask the company to submit a bid, but obtained its ice cream from Penn Dairies.

The only respondent referred to by the Stoker witness was Borden, to whom he claimed his company had lost three accounts. The only indication given by the witness as to why such accounts switched was his understanding that some dealers had been told by Borden that if they switched to a nationally advertised brand their gallonage would increase. Since Stoker was already operating on a very marginal basis long before most of the present competitors entered the area, it seems evident that reasons other than the complaint practices are responsible for its present moribund condition.

The third competitor witness, the owner of the former Shoremaid Ice Cream Company, entered the ice cream business in 1947 in Salisbury, Maryland, and sold out in March 1955 to Delvale Ice Cream Company. The "reasonably steady progress" which this small company admittedly made between 1947 and the time it went out of business suggests that factors other than the supplying of signs and cabinets were responsible for the sorry condition of the other local competitor witnesses who testified at the hearing. Compared to Cupid Ice Cream Company, which went into business in 1921 and declined to 100 accounts by 1947 and then to 60 accounts in 1955 with an annual gallonage of less than 40,000, and Stoker Ice Cream Company which had been in business since 1910 and had managed to work itself down to 75 customers in 1946 and to 50 in 1955 with a gallonage of 15,000 to 18,000, Shoremaid, starting with nothing in 1947, was able to achieve a gallonage of 50,000 in 1953 with 75 customers.

The Shoremaid witness gave as his reason for selling out the fact that he did not think he could compete with the bigger companies in the coming years. While he referred to a gamut of competitive practices, including the "buying of accounts", he conceded that his information was hearsay and that the only practice of which he had any personal knowledge was the furnishing of large signs to customers.[61] The Shoremaid witness claimed that the furnishing of such signs was responsible for his loss of some accounts because he could not afford to supply them. Although conceding that it had been the practice to supply such signs to the bigger accounts "as long as I can remember", he claimed that the practice had been extended in recent years to the little country stores, which was the type of establishment he served. However, he singled out Penn Dairies as the initiator and "worst offender" in the use of this practice. While he included respondents National and the Borden Company, as falling within the category of "all the companies" who followed "after that", it is clear that the latter companies were merely following the pattern which had been set. The Shoremaid witness made no claim that either National or Borden had taken any accounts from him because of this practice. The only company specifically named was Penn Dairies, which he claimed was the "worst offender in the matter of extra ice cream cabinets and signs".

[61] The witness estimated the cost of such "large" signs at approximately $100.00, plus cost of erection which he estimated at $50.00.

The Shoremaid representative claimed that his gallonage had declined by 8 to 10 per cent in 1954. However, he attributed this more to a decline in sales through his existing accounts than to any net loss of accounts. He indicated that his main problem was his inability to acquire any new accounts, since he could not afford to supply the equipment that was required. Shoremaid's competitive problems were made more difficult by the entry into the market of the additional contestants, Hershey and Delvale, in 1952 and 1953. With respect to the latter, it may be noted that it not only bought out Shoremaid in 1955, but earlier took over three other local competitors, Blossom Ice Cream Company, Gill Brothers and Delmarva Ice Cream Company.

The testimony of the only dealer witness on the Eastern Shore called by counsel supporting the complaint tends to support the hearsay testimony of some of the competitor witnesses concerning the role played by national advertising and national brands, as a factor in the switching of accounts. Presumably the witness was called to establish that he had been induced to deal with Borden instead of a local company because of a loan which he had received from the former. The dealer in question opened a restaurant outside of Salisbury on a main north-south arterial highway. In order to equip his restaurant with a soda fountain and booths costing $12,528, the dealer put up $5,000 in cash and received a loan from Borden in the amount of $7,528, covered by a promissory note with interest at six per cent and secured by a chattel mortgage. There is no evidence that any local competitor ever solicited the account. The witness testified that he was only interested in an ice cream with a nationally established name since his restaurant is located on the U.S. highway to Florida and catered to a considerable transient, non-local clientele. Although the loan was paid off three years previous to the hearing, the establishment continued to handle Borden ice cream despite the fact that it was under no obligation to continue handling the latter's product. The dealer was also supplied with a plywood non-neon sign, which bore Borden's name in at least six places, as well as the name of the restaurant. It is clear that such a sign located on a main highway is of distinct advantage to an ice cream manufacturer and warrants the expense involved, which is insignificant when compared to the cost of billboard advertising on the highway.

Whatever may have been the cause of the difficulties of the local competitors on the Eastern Shore, whether it be a lack of sufficient capital to supply customers with such customary equipment as ordinary ice cream storage cabinets and signs indicating the brand of ice cream sold, or an increase in the number of competitors, or an in-

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crease in the number of establishments selling ice cream, the record is lacking in reliable evidence that respondents National's or Borden's use of the complaint practices has been a significant factor in such decline. The record discloses that both of the respondents involved in the testimony, National and Borden, have experienced a very substantial decline in their own sales on the Eastern Shore. The sales of National's Salisbury, Maryland branch declined from 716,000 gallons in 1947 to 550,000 gallons in 1955. The sales of Borden's Laurel, Delaware branch declined from 284,000 gallons in 1947 to 181,000 gallons in 1955.

7. *Charlotte, North Carolina*

At the hearings in Charlotte, North Carolina, evidence was offered as to the competitive conditions in the west central portion of the state and with respect to several areas in South Carolina. Although the hearings were held in Charlotte, no competitor witnesses were called from that city, nor were any competitor witnesses called from the other larger cities of North Carolina such as Asheville, Durham, Raleigh, Winston-Salem or Wilmington. The only competitor witness from any sizeable community was Clover Brand Dairy of High Point. The other competitor witnesses were Mooresville Ice Cream Company of Mooresville, a community of less than 10,000 population, and Cabarrus Creamery of Concord, a community of about 15,000. Although a witness from Coastal Dairy of Wilson, in the east central part of the state, was subpoenaed, he was excused at the request of counsel supporting the complaint. In addition to the competitor witnesses referred to above, counsel supporting the complaint called three dealer witnesses from Charlotte, another from High Point and another from Winston-Salem. Since the evidence with respect to North Carolina and South Carolina involves different competitive areas, each is discussed separately below.

a. Western North Carolina Area

The evidence offered through the three competitor witnesses from North Carolina involves almost entirely communities in the west central portion of the state, including High Point, Greensboro, Burlington, Salisbury, Mooresville and Concord. None of the competitor witnesses operates throughout the area. Clover Brand does not operate in either Mooresville or Concord where Mooresville Dairy and Cabarrus Creamery operate, and the latter two did not refer to Clover Brand as one of their competitors. Cabarrus Creamery operates only in a small portion of the area served by Mooresville Dairy.

The respondents operating in most of the west central portion of the state are Pet, National (Southern Dairy) and Borden. Foremost does not compete with Clover Brand or Mooresville, but does sell in the area where Cabarrus operates. The non-respondent local companies include, in addition to the three competitor witnesses, Coble, Biltmore, Guilford, Lyndale, Buttercup, Dick's, Honeykist, Gastonia, Superior, and Carolina Dairy. Of these, only Coble and Biltmore operate throughout the entire area.

The largest of the competitor witnesses called is Clover Brand Dairy of High Point. The company appears to enjoy a very favorable position throughout the area where it operates. Its volume is between 200,000 and 300,000 gallons a year, and it has experienced a "pretty steady" increase over the five-year period prior to the hearings (early in 1956). Its volume of sales in 1955 represented an increase over 1954. The company is affiliated with a Virginia company of the same name, doing business in the southwestern portion of Virginia adjacent to North Carolina, and between them the two companies have a volume of over one million gallons a year. There are a greater number of companies doing business in the area where Clover Brand operates than when the company first entered business, with at least three local companies having entered from nearby North Carolina areas.

The Clover Brand witness indicated that it was the practice for all ice cream manufacturers in the area to furnish their customers with ice cream cabinets, signs and compressors for soda fountains, and to service the cabinets and compressors. Most companies also make some loans to assist customers. The cabinets are furnished without any rental charge, and there is no indication in the testimony of the Clover Brand witness that this practice has presented a financial burden or a competitive problem. The furnishing of neon signs containing the name of the ice cream manufacturer and a smaller panel with the name of the retail establishment has been a more recent innovation, although the furnishing of plain metal signs with privilege panels has been customary for a great many years. The witness did not, however, attribute the initiation of the practice of furnishing neon signs to any of the respondents. In fact, the first such sign which the witness noted in the area belonged to a local competitor, Buttercup. Respondent Pet does not use the more expensive metal neon signs, which range in cost from $250.00 to $300.00, but supplies its customers with a less expensive plastic sign. The witness made no claim that the furnishing of signs had resulted in his company's loss of or inability to acquire any accounts.

The making of loans is not too widespread a practice in the area. Clover Brand makes loans to some of its customers and had about $3,000 in loans outstanding at the time of the hearing. The only account which he claimed to have lost because of a loan was one which switched to respondent Pet. The establishment, a drive-in, had received a loan from Clover Brand at its original location and later tried to get a further loan to assist it in moving to a new location. However, Clover Brand refused to make the loan because there was still a balance due on the old loan and the account had not been prompt in its payments. The owner tried to get a loan from the bank but was refused. He thereafter approached Pet and received a $1,500 loan. While the owner of the establishment, who was called as a witness by counsel supporting the complaint, claimed that his friendship with some of the Pet employees was a factor in his switching, it is clear from his testimony as a whole that the making of the loan was at least an important reason for the switch.

The only other indication of any competitive difficulty by Clover Brand was the claim of its representative that it has been unable to sell ice cream to the supermarkets and chain stores in the area. However, the witness made no claim that this was due to any of the complaint practices. He indicated that he had been advised by the stores that they preferred to handle a national brand of ice cream. Despite Clover Brand's alleged inability to acquire any of the larger supermarket or chain accounts, the company has, as already mentioned, made steady progress and increased its sales. It is now the number one company in sales in the city of High Point, which has a population of 40,000. The witness summed up its position by stating, in response to the question whether the company was in a "pretty sound and solid position", that "We are discounting our bills, and just getting along fine."

The evidence offered with respect to Mooresville Ice Cream Company indicates that that company also enjoys a favorable position in its market area. While its volume was not given, the witness stated that it had "increased appreciably since the war", despite the fact that "all ice cream men will agree [1946] was the Utopia of the ice cream business." The company had "nice increases in 1953 and 1954", although the witness anticipated that 1955 might be down "just slightly".

It is the common practice in the Mooresville trade area for ice cream suppliers to furnish their dealers with ice cream cabinets and to service them. The Mooresville representative expressed the opinion that most dealers would not go to the expense of purchasing an ice cream cabinet if it were not supplied by the manufacturer, because it is a type of equipment that is not suited for the storage of other products and therefore has limited utility to the dealer.[82] He also indicated that it was desirable for the manufacturer to own and maintain the equipment, since it encouraged the dealer to request maintenance service promptly in the event the cabinet began to act up, thereby assuring the manufacturer that his ice cream would reach the public in "saleable composition" and relieving him of the obligation of replacing defective ice cream. Most of Mooresville's customers are supplied by the company with an ice cream cabinet. The minority of dealers who own their own equipment receive a special discount of five per cent from the regular list price.

Mooresville also supplies its customers with a relatively inexpensive sign, which identifies its ice cream and also contains a panel with the name of the dealer. The witness expressed the opinion that the supplying of such signs was well worth the expense involved because of the advertising value thereof, and that the additional expense in providing a privilege panel for the dealer's name was justified on the basis of the advertising value of the sign. The company has expended $3,000 for signs and, in addition, has supplied about 100 of its dealers with electric clocks for use inside the store, which advertise its brand of ice cream. Mooresville does not supply the larger neon-type signs, although it does have one in front of its plant. The witness had no recollection of being requested to supply such signs to any of its customers or of having lost any account for this reason.

Mooresville has between 2,500 and 2,600 customers. While, as previously indicated, the company has had a slight decline in sales in 1955, the company witness could not state whether this was caused by a decline in sales through its existing accounts or by a loss of some accounts. The company sells in some of the local independent supermarkets but, except for the A & P, does not sell in any of the national chains. The witness did not attribute this to the fact that such chains were receiving signs or equipment or loans. The only reason he had ever been given was that they wanted to receive the benefit of the national advertising supplied by the larger companies. Another reason given was that they were getting a better volume discount. However, the witness claimed that even though he had no volume discount his base prices were lower than the big companies', even after including their discounts. Another reason assigned by the witness for his in-

[82] The witness stated that the ice cream cabinet is dissimilar from the home freezer because of its much heavier construction. He also indicated that the temperature at which the freezer operated in maintaining ice cream was different from that of a refrigerator utilized for milk or meat.

ability to obtain the chain accounts is the fact that the choice of a supplier is not made by the local manager of the store but by the divisional manager, who may be located in another city or state. While the company has only a single food chain store account, it does serve a number of drugstore accounts and was able to acquire the most recently opened drug store in Mooresville.

In addition to a slight decline in sales in 1955, for which the witness could not account, the Mooresville representative indicated that his company's rate of profit had not increased since 1950 and had possibly declined some. However, he attributed this to the fact that its costs, particularly raw milk and cartons, had increased since 1950, while the price of ice cream had remained constant.

The Mooresville witness had no complaint about the activities of any particular competitor. The only company to which he made reference as having acquired any of his accounts recently was Coble Dairy, which he indicated was a big competitor in the area. Respondent Foremost has ceased coming into the area. The last time Mooresville had lost any appreciable number of accounts to Pet was back in 1932, for reasons not appearing in the record. Viewing the evidence as a whole, Mooresville Ice Cream Company appears to be in a relatively favorable competitive position in its trade area. In the main, it has enjoyed a steady growth and has not lost any appreciable number of accounts. While its representative would not confirm the fact that his company enjoyed 70 or 80 percent of the business in the Mooresville area, he conceded that it had "a good majority of the business".

The third competitor witness from North Carolina, representing Cabarrus Creamery, appears to have fared equally as well as the two other competitor witnesses. The company appears to be considerably smaller in size and operates principally in Cabarrus County. It entered the wholesale ice cream business in 1947, after having operated a retail store from about 1928. Purchasing 33 cabinets in 1947, which it supplied to various retail accounts as they were acquired, by 1955 it had a total of approximately 150 dealers with an annual gallonage of 75,000 to 80,000 gallons.

The witness testified in general terms to having lost some accounts because they had been supplied with "up-to-date cabinets" or neon signs, and as to having been advised by dealers which his company was trying to acquire that they were "financed or tied in some manner" to their present supplier. However, the names of the accounts and the competitors involved were not identified, except in two or three instances, and the witness conceded that his hearsay and conclusory testimony was not based on any actual knowledge.

One of the few accounts referred to by the witness was a supermarket which the witness' driver informed him had been lost to respondent National because the latter had supplied the account with a cabinet for storing frozen food. The witness conceded that he had no actual knowledge as to what National had furnished the account, and his hearsay testimony was stricken. The other instance involved the alleged supplying of a neon sign by Foremost to one of Cabarrus' accounts. There is no reliable evidence that the supplying of such sign, assuming it did occur, was the reason for the change of suppliers. The third instance involved an account having two stores which the witness sought to acquire from respondent Pet, but was allegedly unsuccessful because of the fact that Pet was giving the account a quantity discount based on the volume of both stores. There is no reliable evidence that the account (not identified in the record) received a discount from Pet or that, if it did, such discount was other than the regular quantity discount based on Pet's price list, or that such alleged discount was in any way tied to an exclusive dealing arrangement. The witness conceded that the practices of the local North Carolina companies, Biltmore and Coble, were comparable to those mentioned in connection with several of the respondents.

Despite his apparent lack of approval of some of the practices of his competitors, the witness' testimony indicates that the company's volume is still growing. He attributed this to the more aggressive advertising and merchandising policies which his company had adopted about two years previously, including radio and newspaper advertising and the emphasizing of special flavors. This has resulted in an increase in sales through its own accounts. While the witness claimed that most of the new accounts acquired were small grocery stores, he conceded that they served some chains and supermarkets, including A & P and Dixie stores. The company's ice cream business is admittedly operating at a profit and is, in fact, more profitable than its milk business. Within its trade territory it is at least second to respondent National Dairy in market share. Viewing the evidence as a whole, it does not appear that the company is in any serious competitive difficulty and, to the extent it is confronted with competitive problems, there is no reliable evidence upon which a finding can be made that this is due, to any significant extent, to the engagement by any of the respondents in the complaint practices.

As previously mentioned, counsel supporting the complaint called five dealers in addition to the three competitor witnesses. In only one instance did the testimony of these witnesses tend in any respect to support the allegations of the complaint. This was the High Point dealer, previously referred to, who switched from Clover Brand to Pet after receiving a loan of $1,500. However, while the loan may have been an "inducement" in the account's switching, the loan agreement contained no exclusive dealing requirement. Accordingly, there is no record basis for concluding that the account was induced to handle Pet's ice cream "exclusively". Furthermore, since Clover Brand itself had originally financed the account in the purchase of a fountain, its refusal in this case was based on the exercise of a business judgment, rather than a policy against loans.

Another dealer witness was the owner of six restaurants, five in Charlotte and one in Gastonia. Pet is the supplier for four of the restaurants and the local competitor, Biltmore, supplies two. There is no evidence that Pet has supplied the account with anything which is not customarily supplied by competitors in the area. The owner has handled Pet ice cream for 23 years in various establishments operated by him. In one of the restaurants, where there is a soda fountain, Pet supplies the compressor for refrigerating the fountain. As has already been noted, the local North Carolina company, Clover Brand, also supplies compressors for soda fountains to its customers. Pet services the refrigeration equipment used for selling ice cream in the stores handling its product and Biltmore does the same thing in the stores which it serves. The witness indicated that he was required to pay Pet for replacement parts and, in the case of extensive repairs, had to pay for both labor and parts. Since the dealer in question owns the ice cream cabinets in some of the stores, he receives the customary five per cent discount granted by most ice cream manufacturers. There is not a scintilla of evidence of any exclusive dealing arrangement between the account and Pet. The witness specifically denied the suggestion contained in counsel supporting the complaint's leading question that he was a "captive" of Pet, but stated that on the contrary "I could quit Pet Dairy tomorrow if I so elected."

The third dealer witness was the owner of a drug store in Charlotte who had purchased a fountain for $1,850 from respondent National, under a conditional sales arrangement, at the time the owner opened up the establishment. There is no testimony that National induced the dealer to handle its products by the sale of the soda fountain on a time-payment basis. On the contrary, the witness testified that he had contacted the respondent with regard to purchasing its ice cream based on the recommendation of an official of a drug manufacturer or wholesaler. The agreement accompanying the sale does, in this instance, reflect an exclusive dealing arrangement since it requires the owner to purchase all of his dairy products from respondent National until payment in full of the purchase price of the fountain or until the last installment under the contract falls due "whichever is later." However, despite this arrangement, when the owner became dissatisfied with National Dairy's rebate payments he repaid the balance on the fountain and switched to the local North Carolina manufacturer, Coble Dairy. Although respondent National could have insisted that the owner continue to deal with it under the "whichever is later" clause of the contract, because the date of the last installment (based on a 24-month installment period) was later than the date of the repayment of the balance, it nevertheless made no attempt to hold the account. Accordingly, in addition to the lack of evidence of "inducement", there is also a lack of evidence that the written agreement, in its practical operation, had any tying effect.

The fourth witness was the owner of a drug store in Charlotte, who had received a $10,000 loan from respondent National to assist him in buying out his partner. He had been handling Sealtest ice cream since 1941 and when he moved in 1945 to another store, which had been handling Biltmore, he soon switched to respondent National. The loan, however, was not made until 1949 and there is no evidence that it constituted an inducement for the account to switch to, or deal with, respondent National. While the loan agreement did contain a so-called requirements clause calling for the exclusive purchase of the respondent's frozen products, the loan had been paid off several years prior to the hearing and the account had received no further assistance from National but, nevertheless, continued voluntarily to deal with it. There is no evidence that this transaction had any effect on competition in the Charlotte area, there being no evidence that any other competitor in the area sought to obtain or was unable to obtain the account. In fact, as above indicated, no evidence of competitive conditions in the Charlotte area was offered through competitor witnesses.

The final instance involves the owner of a grill and soda shop in Winston-Salem, who at different times had received loans from respondent Borden and respondent National, but who is now dealing with the local competitor, Coble Dairy. During the period when the account was handling Borden, it had received a "small" loan, the amount and terms of which do not appear in the record. Later the owner decided to open another establishment and asked Borden for a loan, which that company declined to do. The owner then obtained a loan of $4,000 from respondent National and moved into the new establishment, transferring his ice cream business to that respondent. About a year later he needed additional assistance and turned again to respondent National, which this time refused the request. Thereupon, the owner made arrangements to obtain a loan of $4,500 from the local company, Coble Dairy, which enabled him to pay off the balance of the loan due to respondent National and gave him sufficient additional funds for his needs. While this incident indicates that a loan may be an inducement for an account to change suppliers, it also demonstrates the volatility of supplier-dealer relationships and the fact that a loan cannot hold a dealer if he wants to switch, despite the fact that he has signed an exclusive dealing contract. It also demonstrates that the two respondents involved do not make loans indiscriminately, for the purpose of acquiring or holding accounts, but do so only when they think the account is a good business risk. It further indicates the availability of financial assistance from local manufacturers.

The evidence offered with respect to North Carolina fails to indicate any weakening of competition or any marked improvement in the position of respondents. When Clover Brand entered the ice cream business in 1925 there were only two other local competitors in its area, Lyndale and Buttercup, and there were also two of the respondents doing business, National and Pet. Since that time additional local companies have entered the area, including Guilford, Dick's and Biltmore, as well as the respondent Borden. The only company to have gone out of business in the western part of North Carolina is Gibson, which was purchased by respondent Borden in 1949. Outside of the western portion of the state, there are approximately twenty other ice cream companies operating in North Carolina. One of these, Coastal Dairy, entered the business at the end of World War II and has "grown very substantially", according to the Cabarrus witness. A representative of Coastal was subpoenaed to testify, but was excused by counsel supporting the complaint.

The state production shares of respondents Pet and National have declined slightly between 1947 and 1955. Pet's production share in North Carolina was 7.7 percent in 1947 and 6.5 percent in 1955. Respondent National's production share was 24 percent in 1947 and 23.9 percent in 1955. Respondent Borden, which entered the North Carolina market in 1948 when it achieved 1.1 percent of the production of the state, was able to increase its share to 7.1 percent in 1951. However, since then its share has remained almost constant, with its 1955 share being 7.4 percent.

b. South Carolina

The respondents operating in South Carolina include Borden, National (Southern Dairies), Foremost and Pet. Another so-called national company operating in the area is Swift & Company. The local companies include Purity Ice Cream Company of Charleston, Paradise Ice Cream Company of Orangeburg, Caromaid Ice Cream Company of Dillon, and Velvet Ice Cream Company of Newberry. In addition, the North Carolina companies Coble, Buttercup and Biltmore operate in portions of South Carolina. Counsel supporting the complaint called as witnesses from the area officials of Purity Ice Cream Company and Paradise Ice Cream Company. No dealer witnesses from the area testified.

The two competitor witnesses who are located in Charleston and Orangeburg, respectively, compete with one another and with the respondents above named, except that respondent Pet does not compete to any significant extent with Purity and the latter's competition with Foremost is limited to the area outside of Charleston. The evidence offered through the two competitor witnesses fails to disclose that they are experiencing any serious competitive problems. Purity did not enter the ice cream business until 1947 when it purchased Raphen Sanitary Dairy in Charleston. About a year later it acquired the machinery and equipment of Carolina Ice Cream Company, which was in the process of going out of business. Beginning with a nucleus of about 50 or 60 accounts and a gallonage of approximately 50,000 in 1947, Purity had managed to acquire 350 to 400 accounts by 1955. While the amount of the increase in terms of gallonage was not revealed by the witness, it is admittedly over 100 percent of the company's 1947 gallonage.

While the Purity witness indicated that his company had lost a few accounts to some of the respondents, there is no reliable evidence that the company has had any serious competitive difficulties arising out of the complaint practices. The witness identified two grocery accounts as having been allegedly lost to respondent National because of larger cabinets. Not only is there no reliable evidence to support the witness' hearsay and conclusory testimony (based on information received from his salesman) as to why these accounts had switched to respondent National, but there is affirmative evidence in the record offered by counsel supporting the complaint which directly contradicts the witness' testimony. In one instance where the witness claimed that his company's eight-hole cabinet had been replaced by a larger display cabinet, the evidence indicates that respondent National likewise supplied the account with an eight-hole cabinet. Moreover, the witness' testimony indicates that the account did not request a larger cabinet from his company and that the account switched to respondent National at the time when it joined a cooperative buying group of stores which was then being served by respondent National. A more likely explanation for the account's switching would be the fact that it became associated with the buying group already being served by National, rather than the furnishing of any cabinet. In the case of the other grocery establishment referred to by the witness, documentary evidence offered by counsel supporting the complaint directly contradicts the witness' testimony since it appears therefrom that the account received no cabinet from respondent National. The Purity witness recognized the advantages of the more modern cabinets because of the "better display", and indicated that company was replacing older ice cream cabinets with newer and better types, including some of the open-face variety.

The Purity witness also complained that he could not sell to drug stores because "it takes entirely too much advertising, billboards, neon signs, concessions, so we just let the others have them." The witness was able to identify only one drug store which had been lost to a respondent, viz., Borden, because the latter had allegedly supplied it with a soda fountain. However, he conceded on cross-examination that he had no direct knowledge of what, if anything, Borden had supplied to the account, or whether either Borden or National had financed any soda fountains for drug stores in the area.

The only reference made by the witness to respondent Foremost was that he had lost a group of two grocery stores to the latter when the stores became part of a chain which Foremost was servicing. There is no indication in the record that any of the complaint practices was responsible for Purity's loss of these two stores. Assuming that the chain is receiving a quantity discount (as to which there is no evidence in the record), it cannot be inferred that this was a factor in the account's switching since Purity also grants a quantity discount to a collective buying group of twelve or thirteen stores which it serves, based on the group's overall purchases. Outside of this incident, the witness indicated that his company competes only to a very limited degree with Foremost, since the latter does not sell in Charleston where Purity does the bulk of its business. While at first claiming that his company competed with Pet on the fringes of its territory, the witness finally conceded that they did not compete and that he had had no competitive difficulties with that company.

The evidence fails to disclose that the loss of the few accounts referred to by the witness has had any significant effect on Purity's competitive position. The company, as previously indicated, has grown from 50–60 accounts to 350–400 accounts in a space of approximately eight years. While claiming that his company's progress had been slowed somewhat in the past two years, the witness conceded that he expected the figures for the latest year (1955) to reveal it to be one of the best and that he was "proud of it, tickled to death". What is particularly significant about this record of achievement is that two years previously the company had lost several government installations, which had accounted for approximately 25 percent of its volume, because of a lower bid by an unspecified competitor or competitors. Despite this, the company was able to improve its position to the point where the witness expected 1955 to be close to his best year. If the company's rate of progress has been slowed somewhat in the past few years, as claimed by the witness, the more obvious explanation would appear to lie in the loss of its valuable government business, rather than in the complaint practices. The Purity witness also conceded that his company made a "fair" profit. While claiming that the rate of profit had declined in recent years, the witness did not attribute this to the complaint practices but rather to increases in the cost of materials, gasoline and drivers' salaries and to an inability to increase prices.

The evidence with respect to Paradise Ice Cream Company likewise fails to disclose that that company is experiencing any serious competitive difficulties. On the contrary, the company appears to be making reasonably good progress and its sales are on the increase. While its representative also complained about some of the practices of competitors, his testimony was of a rather general nature and insofar as specific accounts were referred to, the testimony was for the most part based on unsupported hearsay information.

Paradise has approximately 350 accounts. While the company has made "some gain" since 1950, the Paradise witness claimed that in general it had been "standing fairly still, so to speak" since that time. Although no records were available against which to measure the witness' claim of "standing fairly still", he conceded on cross-examination that the latest year, 1955, was the company's best year and that the company had been increasing the number of its accounts. The evidence indicates that until the Paradise witness joined the company ten months previously as general manager and salesman, the company had had no sales staff and relied entirely on the incidental solicitation of its drivers to acquire new accounts. The fact that the company's sales resumed an upward trend following its institution of a concerted selling campaign, suggests that its lack of forward movement in the previous few years may have been due to a lack of selling effort. In any event, there is no reliable evidence upon which to base a finding that the claimed static situation which existed for a few years was due to any of the complaint practices.

The Paradise witness had no complaint about the practice of supplying customers with ice cream cabinets. In fact the witness agreed that some of the smaller stores would not carry ice cream if they had to purchase their own cabinets. The witness likewise had no complaint about permitting dealers to store other frozen foods in ice cream cabinets, since his company handles a line of frozen foods and permits its customers to place them in the company-supplied ice cream cabinet.[83] No complaint was made about the making of any monetary loans to dealers by any competitor.[84] The Paradise witness did, however, claim that he had been unable to acquire some drug store and other fountain accounts because respondent National had financed their purchase of soda fountains, a practice in which his company allegedly could not afford to engage.[85] The witness mentioned no specified drug store which his company had been unable to acquire, but did refer to two drive-in restaurants for which respondent National had allegedly financed a fountain. There is no evidence to support the witness' hearsay testimony concerning the alleged financing of fountains by respondent National in these two instances. Furthermore, after claiming that his company could not afford to finance fountain equipment, the witness admitted that in at least two instances his company had taken over the financing of the balance due on fountains which had been sold by respondent National when his company acquired such accounts.

Another practice to which the witness attributed his loss of accounts was the granting of volume discounts to chain stores. He indicated that one of the chains was being served by respondent National, another by respondent Foremost and the third by both his former employer, Coble Dairy, and respondent National, and that some of the store managers had advised him that "they were getting a volume rebate based on their volume sales, and if we were interested in doing that they would be glad to figure with us." No explanation was offered as to why the witness did not "figure" with these stores, it appearing that his company does give a volume discount to some of its larger accounts.

The record fails to support a finding that Paradise Ice Cream Company has experienced any serious competitive difficulties because of the engagement by any of the respondents in any of the complaint prac-

[83] The witness admitted that his company had obtained a grocery account from respondent Pet by installing a cabinet for both ice cream and frozen foods, after Pet had declined to furnish the account with a cabinet for frozen foods.

[84] The only reference to loans which the witness made was to his former employer, Coble Dairy, which he testified did make loans in the Columbia area.

[85] The witness acknowledged that he encountered no such problem with respondent Borden.

tices. The company was able to resume its upward climb by virtue of using ingenuity and sales effort, and had more accounts at the time of the hearing than it ever had. Although the witness claimed that these were mostly smaller accounts, he conceded that the company had a number of good accounts including a five-and-ten variety chain store in Orangeburg, and most of the other good accounts in that community. Its gallonage in Orangeburg is greater than that of any of its competitors. No claim was made that the company's operation is not profitable or that its profits are declining.

The evidence dealing with the South Carolina area fails to disclose any injury to competition in the area. Although counsel supporting the complaint sought to show that several South Carolina companies had gone out of business, most of these sold out to respondents' competitor, Coble Dairy, and there is no reliable evidence that any of these cessations was due to the engagement by respondents in any of the complaint practices. The evidence also shows that one of the competitors (Purity) was able to buy out a moribund company and the assets of another company, and build a thriving business in a competitive climate no different from that of the local companies which had sold out. The evidence also indicates that another small local company, Velvet Ice Cream Company, has recently entered the ice cream business in the Newberry, South Carolina area.

The only community in the state for which there is any market share information in the record is the state capital of Columbia. From this it appears that respondent Borden's market share has declined sharply from 53.0 percent in 1951 to 26.9 percent in 1955. Respondent National's share has declined slightly from 20.8 percent to 20.0 percent. Respondent Foremost's share has increased modestly from 11.2 percent in 1951 to 14.2 percent in 1955. The only respondent for which there is any state production share data in the record is Borden, which is apparently the only respondent with a plant in the state. Borden's share of state production has increased sharply from 11.3 percent in 1947 to 29.6 percent in 1955. This increase occurred in 1950 and 1951, and appears to be the result of its acquisition of the production of two other companies, rather than an increase in production by existing facilities.[86] Borden was unable to retain all of this increase, since its 1955 production share was 3.1 percent below that of 1951.

[86] As of June 30, 1950, Borden acquired Greenwood Creamery with sales of $407,000, and Richland Dairies with sales of $358,000.