8. *Atlanta, Georgia*

The evidence offered in Atlanta by counsel supporting the complaint involved three competitor witnesses, one representing an Atlanta company, another representing a company in the nearby Marietta area, and the third representing a company in Columbus, which is in the extreme wetsern portion of the state. Two other witnesses, one representing French Ice Cream Company of Atlanta and another representing Happy Valley Farms of Rossville were excused at the request of counsel supporting the complaint. No dealer witnesses were called. Since the Atlanta-Marietta area appears to be an entirely separate market area from Columbus, involving substantially different groups of competitors, the two areas are considered separately below.

a. Atlanta-Marietta Area

The only respondents doing business in the Atlanta area are National and Foremost. Swift & Company is another so-called national company which operates in the area. The local companies include Irvindale Farms Dairy, Georgia Milk Producers Association, Atlanta Dairies, Greenwood Dairy, George Moore, French Ice Cream Company, Modern Ice Cream Company, and Druggists' Cooperative. The only Atlanta witness to testify was an official of Irvindale, a representative of French Ice Cream Company having been excused.

The evidence with respect to Irvindale indicates that the company has made very significant progress since it entered the ice cream business in 1947. Prior to that year the company had been solely in the milk business in Atlanta and entered the ice cream end of the dairy business in order to have an outlet for its surplus milk. Its principal operation is still in milk. Starting with no ice cream gallonage in 1947, it managed to reach a gallonage of slightly more than 100,000 by 1953, and in the last full year prior to the Atlanta hearing in January 1956, it had achieved a gallonage well in excess of 250,000. The Irvindale witness indicated that the company had all the ice cream business it could handle with its present facilities, and was in the process of building a new plant with a capacity of one million gallons.

Irvindale is well represented in the large grocery chains in Atlanta. It is the main supplier for the Big Apple Supermarket chain which has 30 stores in the Atlanta area. At one time the chain was served by respondent Foremost, but Irvindale was able to acquire the bulk of the business. Some of the stores are split with Foremost and some with the local competitor, Greenwood Dairy. Irvindale also serves

most of the 20 Kroger stores in Atlanta, although it splits some with respondent National and a few with respondent Foremost. It also serves 10 of the 40 stores of the Colonial Stores chain, and at the time of the hearing was "working" on getting into the other stores of the chain.

Irvindale supplies cabinets to most of its customers. Those who own their cabinets receive a 10-cent a gallon discount. Since it supplies 300 cabinets to approximately 225 customers, it is apparent that some of the larger accounts have more than one cabinet. There is, however, a trend among the chain stores to install their own cabinet equipment in order to receive the benefit of the customary discount paid to dealers who own their own equipment. This has been true of some of the more recently opened stores of the Big Apple and Kroger chains. The Irvindale witness indicated that he would prefer not to have to supply cabinets because of the expense involved, and that he would prefer to give the dealer a lower price in lieu thereof. However, this would not result in any significant benefit to the consumer since, as the witness conceded, the dealer would have to figure the cost of the cabinet in computing his retail price. Irvindale has its own service department and has a regular preventive maintenance program. The witness agreed that the ownership and maintenance of cabinets by the manufacturer helps him to preserve his product better. The Irvindale representative also made some reference to the fact that customers placed other frozen foods in the ice cream cabinets and indicated that it was a constant battle to keep customers from doing this. However, he conceded that he knew of no competitors who supplied cabinets specifically for this purpose.

The only testimony by the Irvindale witness regarding any specific competitive difficulty with any competitior related to the company's alleged inability to acquire a restaurant account because of the amount of equipment which respondent National had supplied. However, the witness conceded that he had no knowledge as to what equipment National had furnished the account other than the hearsay information which he had received from the owner. No finding can be made as to why Irvindale was unable to acquire this account, based on the hearsay, conclusory testimony of the witness.

While the Irvindale witness claimed that his company lost about ten accounts a year, he did not assign any reason for this and conceded that the company gained more accounts than it lost. Such losses appear to be part of the normal turnover experienced by all ice cream companies. The company, which employs three full-time salesmen, is steadily expanding its sales, both in the acquisition of new accounts and

in sales through existing accounts. The Irvindale witness attributed the latter increase, at least in part, to the use of open-top display cabinets.

The evidence as a whole fails to indicate anything but a bright future for Irvindale in the Atlanta area. Its own confidence in its future appears to be amply demonstrated by its recent construction of a plant which will enable it to increase its present production fourfold. The company has been able to acquire not only the Big Apple chain from respondent Foremost, but also one of the largest department stores in Atlanta. It has also succeeded in acquiring a 32,000 gallon account from respondent National. There is no reason to believe that the company will be unable to hold its own in Atlanta. There is no evidence in the record to indicate that the position of other local competitiors in the Atlanta area is any less favorable than Irvindale's. It appears that at least one, George Moore, is a substantial factor in the market, having a greater number of delivery trucks and presumably a larger gallonage than Irvindale. Atlanta Dairies is an even more recent entrant into the market than Irvindale, having entered business in 1952.

In the Marietta area, which is approximately 25 miles from Atlanta, the position of local companies appears to be no less favorable than in Atlanta. In addition to Economy Ice Cream Company, a representative of which testified at the hearing in Atlanta, the other local competitors include Cobb Cooperative, which entered the market around 1950, and Aristocrat. There is also Drug Mutual which sells to many of the drug stores in the area. In addition, Irvindale of Atlanta competes in the Marietta market. The respondents doing business in the area are Foremost and National, and to a small degree, Borden. Swift & Company is also active in the area.

Economy Ice Cream Company, the only Marietta company represented at the hearings, has had a rapid rise in the market. Until World War II it sold almost exclusively through its own retail stores. Thereafter it disposed of most of these stores and began to sell at wholesale to non-affiliated retail accounts. At the time of the hearing the company had approximately 95 accounts, which was the largest number it had ever had since entering the wholesale business. The year 1955 represented one of the company's best years. While the company had lost a few accounts during the year, it was "not enough to amount to anything" and was "more than offset" by accounts which it had gained.

The witness identified only three accounts as having been lost to the respondents since it had entered the wholesale business. Two

were lost to Foremost, allegedly because the latter had supplied a cabinet for frozen food in addition to one for ice cream. There is no evidence outside of the witness' hearsay testimony as to what Foremost furnished the accounts in question. The witness also cited an account allegedly lost to respondent National because of a neon sign, but conceded that he had not yet seen the sign up, and there is no evidence in the record to support his hearsay testimony.

The only other complaint of the witness was with respect to his company's inability to get into the big supermarkets, which he claimed were being served by the "big dairies", viz., National, Foremost and Swift. His only explanation for not being able to get into these markets was that they "want the ice cream too cheap". There was nothing to indicate that these supermarket accounts (not specifically identified in the record) received their ice cream at other than National's and Foremost's published prices or that any price arrangement made with them was conditioned on their purchasing their exclusive requirements from these respondents.

The evidence as a whole indicates that Economy is making reasonably good progress in the Marietta market, considering its size and the recency of its entry into the wholesale ice cream business. There is a complete lack of reliable evidence that the engagement by any of the respondents in any of the complaint practices has been responsible for any significant competitive difficulties by Economy, let alone has resulted in injury to competition in the Marietta market.

b. Columbus Area

The evidence of competitive conditions in the Columbus area is barren of any suggestion of injury to competition by any of the respondents, for any reason. The respondents doing business in the area include National, Foremost and Borden. Swift & Company also operates in the area. The local companies include Kinnett Dairies, Columbus Ice Cream Company and Wells Dairy Cooperative. Velda (Plantation Food) of Florida also sells in the territory. With the exception of Foremost and Kinnett, all of these companies have entered the market since World War II. There are more companies operating in the area than there have ever been and there is no evidence of any business casualties in the area.

Kinnett Dairies was the only company from the area to be represented at the Atlanta hearing. The company is a substantial factor in the Columbus market, operating 12 to 15 delivery routes and having 1,200 to 1,500 accounts, with an annual gallonage of 600,000 to 700,000. The company's volume has been on the increase since the war and

it is now enjoying its maximum volume, except for a period during the war when it was servicing the military installations at Fort Benning, which the witness volunteered would not be an appropriate basis of comparison.

The only respondent to which the Kinnett representative made any reference as having been responsible for the loss of any specific account was respondent Borden, to which his company had allegedly lost a drug store, after declining to make the account a loan because it still owed his company several hundred dollars. The Kinnett witness conceded that he had no knowledge as to whether Borden had ever made the account a loan. Despite this loss, whatever may have been the reason, Kinnett serves a majority of the drug stores in Columbus. It also serves most of the grocery chains, including A & P, Colonial Stores and Kroger's. The witness indicated that his company had lost some of its chain drug store and variety-store accounts to respondents Foremost, Borden and National when the national headquarters of these stores began to enter into contracts for the purchase of ice cream on a national basis, rather than through the local managers. However, there is no evidence that the loss of these accounts was connected in any way with the complaint practices. Despite such losses the witness stated, in answer to the question of counsel supporting the complaint as to whether he was "holding his own" in the market, that: "I think I am doing better than holding my own." He indicated that while the company lost some accounts it had gained more than it had lost.

Aside from the single instance of an alleged loan by Borden, the only other complaint practice referred to by the witness was the furnishing of signs. He indicated that his company supplied his customers with signs, including some containing a privilege panel for the dealer's name, and that the company regarded it as an advantage to place signs with their name in a "strategically good spot". Kinnett has never lost or been unable to acquire an account because of the furnishing of a sign by any competitor. The witness also made oblique reference to the practice of supplying frozen food cabinets. He made no claim that his competitors supplied cabinets for this purpose, and commented that he would not be surprised to find his customers putting frozen food into his company's ice cream cabinets, despite the company policy of discouraging such practice.

Although Kinnett allegedly sells on the basis of "one-price policy", the company has been more than holding its own due to its aggressive selling program, and considers itself "the leaders in the field". The witness indicated that he felt that he could "hold my own with the

big boys". The only way in which he felt that he was at a disadvantage was when a contract was made by officials of a national retail chain on a national or regional level, rather than through local management. However, as above indicated, there is no evidence that the loss of some chain drug or variety store accounts has been connected with any of the complaint practices. In any event, any such losses have had no significant effect on the fortunes of Kinnett which has enjoyed a steady growth in sales since the war, and is now at its peacetime peak.

* * * * * * *

The evidence fails to disclose any injury to competition in either the Atlanta-Marietta market or the Columbus market or in any other area of the state. The evidence also fails to disclose any significant improvement in the competitive position of any of the respondents operating in the Georgia market. Respondent National's share of state production has increased modestly from 7.0 per cent in 1947 to 11 per cent in 1955. Respondent Borden, which did not enter the state until 1950 when it acquired two existing companies, has enjoyed a modest increase from 10.3 per cent in 1950 to 15.8 per cent in 1955. Comparable data for Foremost respondent does not appear in the record.

9. *Jacksonville, Florida*

The respondents operating in the Jacksonville market are Foremost, Borden and National (Southern Dairies). Foremost and National manufacture their product in Jacksonville and Borden has a distributing branch there. The ice cream sold in the area by these companies is manufactured entirely in the State of Florida. There are two local Jacksonville companies, J. R. Berrier Ice Cream Company and Dinsmore Dairy. In addition Velda, which operates throughout the State of Florida and in parts of Georgia, also sells in the Jacksonville market. Counsel supporting the complaint called as witnesses representatives of the two local Jacksonville companies. No dealer witnesses testified. However, counsel supporting the complaint was permitted to read into the record, by agreement of counsel, a list of accounts which had received loans (secured by chattel mortgage) or had been sold equipment on a conditional sales basis by respondents Foremost, Borden or National, as recorded in the Recorder of Deeds' office.[87]

[87] The treasurer of Foremost, who approves all loans in the area, was produced as a witness but counsel supporting the complaint declined to examine him.

At the time of the Jacksonville hearing in January 1956, the Berrier Company was almost entirely out of the wholesale ice cream business, serving only four or five accounts which picked up their ice cream at the company's plant. The company was then distributing through three retail stores which it owned and was about to open a fourth. The owner of the company, Jefferson R. Berrier, is a somewhat quixotic individual who has had a rather checkered career in the ice cream business. Berrier had originally been in the ice cream business in Jacksonville during the 1920's, until he sold his business to respondent Foremost in 1929 and went into the ice cream business in Richmond, Virginia. While still continuing his Richmond operation, he returned to Jacksonville in 1936 and joined his brother who had a small ice cream business serving fifteen or twenty accounts. At the time of his resumption of business in Jacksonville he decided that he would not supply his accounts with ice cream cabinets, although he did sell cabinets to such accounts as wished to purchase them and also serviced customer-owner equipment without making any charge except for parts. Despite the fact that his was the only company which did not supply cabinets to its customers, Berrier was able to increase the number of accounts served to approximately 70–100 by 1952 or 1953. In 1953 Berrier decided that the wholesale ice cream business was not sufficiently profitable and ceased making deliveries to his accounts, with the result that it lost all but four or five who were willing to come to the plant to pick up their ice cream needs. The company at this point opened three stores and at the time of the hearing was in the process of opening a fourth. In the meantime, in 1950, J. R. Berrier discontinued the ice cream business in Richmond, Virginia, when he sold out to respondent Beatrice.

No finding can be made, based on the somewhat desultory testimony of Berrier that his company's decision to cease business in Jacksonville in 1953 was due to the engagement by any of the respondents in any of the complaint practices. While Berrier testified that his business had been going downhill because his bigger accounts were being taken away "by the big boys", which he identified as National, Foremost, Borden and Velda, he conceded that he had no knowledge as to why he lost these accounts, "I only know I lost them." The witness did refer to various practices which he had been told the "big boys" were engaging in, but no specific accounts were identified and there is no reliable evidence that any of the respondents acquired any of Berrier's accounts, whether due to the complaint reasons or otherwise.

The lack of probability that the activities of any of the respondents were responsible for Berrier's decision to go out of the wholesale

business is suggested by the fact that according to his own testimony, his company had reached its high point around 1952 or 1953, just prior to the company's termination of wholesale activities. While it had had a "bad period after the war" in which it lost money, the witness indicated that his "being out of town so much I guess contributed to it some". It therefore appears that the decision to go out of the wholesale ice cream business occurred after the company had resumed profitable operations.

Whether the company's unwillingness to supply its customers with cabinets was an inhibiting factor in its growth cannot be determined from the record. The reason for its adoption of such a policy appears to be wholly incomprehensible in the light of the Berrier witness' own experience in the business. By his own admission, it was he who first supplied customers with mechanical cabinets in the Jacksonville market in 1924, before most of the respondents had even come into the area. Likewise, during the period when he was in Richmond from 1929 to 1950, his company there had supplied its customers with cabinets. When asked why, in the light of this experience and background, he adopted a policy not to supply cabinets when he resumed business in Jacksonville in 1936, the witness gave the following response:

> For some unknown reason I got by with it and made a little money. The *reason I slipped was that I was just out of town too much, I guess.* You see, normally I spent one-third of my time out of town and one year I spent over half of it out of town when I was putting machinery in in Richmond. [Emphasis supplied.]

The witness finally conceded that he "just wasn't a good enough man to take care of both places right", and that if he hadn't had his Richmond business and had concentrated on Jacksonville, he could have remained in the wholesale ice cream business. No finding can be made, based on the testimony of Berrier, that the engagement by any of the respondents in the complaint practices was responsible for his company's going out of the wholesale ice cream business.

The other Jacksonville manufacturer, Dinsmore Dairy, has made reasonably good progress considering the brevity of its experience in the ice cream business and its purpose in entering the business. Dinsmore operates a dairy farm of about 1,400 head of cattle and is primarily in the business of processing and selling milk. It went into the ice cream business around 1952 in order to have an outlet for its surplus milk. Dinsmore adopted a somewhat more realistic attitude than Berrier when it entered the ice cream business. Finding that it was customary to supply customers with cabinets, the company pro-

ceeded to do so, fixing its price at a level which would be sufficient to cover the cost of the cabinet. The Dinsmore representative estimated that it cost the company 10 cents a gallon to supply cabinets and those few customers who own their own cabinets receive a discount of 10 cents from the list price.

By January 1956, Dinsmore had been able to acquire about 30 to 40 wholesale accounts, plus a "reasonable share of the school business" in the area. It also delivers ice cream to an indeterminate number of its regular home milk customers. The record does not indicate what Dinsmore's gallonage is since the witness declined to supply this information. He claimed, however, that most of his accounts were small and that as soon as they were developed the other companies would take them away. The witness singled out Foremost and Velda as being responsible for acquiring most of the accounts which his company had lost, indicating that it had lost none to respondent National and, in the case of respondent Borden, was unable to obtain only one account for which both companies had competed.

While singling out Foremost and the non-respondent Velda, as being responsible for the loss of most of his accounts, the Dinsmore representative failed to indicate the number of such accounts which had been lost or the reason for such loss. While the witness did claim, at one point in his testimony, that he had been asked by customers and prospective customers for loans of money "several times" and for "special prices", and that unnamed competitors had painted stores and put in neon signs, his testimony was not directed at Foremost or at any other competitor, nor was there any indication that he had lost or been unable to acquire any accounts because of these practices.[88]

The witness made reference to only two specific accounts during the course of his testimony, one of which involved respondent Foremost and the other respondent Borden. In neither instance is there any reliable evidence in the record to support the witness' claim that he was unable to acquire these accounts due to any of the complaint practices. The Foremost incident involved an account identified as A. J. Donelson which the witness claimed had asked him for a loan of $2,300, out of which $2,000 was to be used to repay a balance of a loan from respondent Foremost. There is not a scintilla of reliable evidence in the record to support the witness' hearsay testimony.[89]

[88] It may be noted that Dinsmore does make loans in its operations, except that it limits them to the farmers from whom it obtains its milk and does not make them to retail stores. It also supplies its customers "with some signs."

[89] The examiner's ruling that he would not make any finding concerning a loan by Foremost based on the witness' hearsay testimony, brought forth the comment by the witness that "the way to get information direct is, just like the Examiner says, to subpoena the man, the customer. You don't have to go any further than you can throw a stone from this building * * *." The witness' suggestion was not adopted.

The list of loans made by respondent Foremost in the Jacksonville area, which was placed in the record by counsel supporting the complaint, does not contain the name of A. J. Donelson. The second account referred to by the witness was one which he was allegedly precluded from obtaining by reason of the fact that respondent Borden had prevailed upon the account's milk supplier to make it a loan. Not only is there no reliable evidence to support the witness' hearsay testimony but, according to the credited testimony of a Borden official, Borden made no arrangements for the account to obtain a loan from the account's milk supplier (with which Borden has no connection) and, while the account requested a loan from Borden, the latter declined to do so and got the account without furnishing any financial assistance.

There is no reliable evidence in the record from which it may be found that Dinsmore Dairy has been injured or is likely to be injured because of the engagement by any of the respondents in any of the complaint practices. While, as above indicated, counsel supporting the complaint was permitted by agreement of counsel to read into the record a list of transactions involving respondents Foremost, National and Borden in which the latter had made certain loans or sold certain equipment under conditional sales contracts, this evidence furnishes no basis, either separately or in conjunction with other evidence, for concluding that any competitors were injured thereby. None of the dealers involved were called to testify that the assistance received from the respondents was an inducement for their dealing with the respondent. Neither of the two competitor witnesses referred to any of these accounts as being among those which they lost or could not acquire. It cannot therefore be assumed that any competitor was injured as a result of this financial assistance to customers. The record discloses affirmatively that within two years after the four transactions involving respondent National, that company had lost two of the accounts, and that in the case of respondent Borden, only one of the eleven transactions in which it was involved represented an account which had switched from a competitor.[90]

Not only does the evidence fail to support a finding of injury to competition from the activities of respondents, but the likelihood thereof appears to be remote in the light of the evidence offered with respect to market share trends involving these respondents. Respondent National's share of the Jacksonville market has declined from 23.6

[90] The four transactions involving respondent National and the eleven involving respondent Borden represent the total number of accounts assisted by those two companies in the Jacksonville area during 1954 and 1955.

percent in 1950 to 18.9 percent in 1955, while respondent Borden's share has declined from 11.0 percent in 1950 to 7.1 percent in 1955. Respondent Foremost has increased its share only slightly from 32.1 percent in 1950 to 33.1 percent in 1955 in the Jacksonville market, in which one of the company's principal offices is located and where it is one of the oldest companies in the ice cream business.

### 10. *Miami, Florida*

The hearings in Miami involved mainly evidence of competitive conditions in the Palm Beach-Miami areas. The evidence discloses that there are a number of companies which do business in both areas and several whose operations are restricted to one or the other of the areas. In view of the considerable overlap of territories and the geographic proximity of the two areas, the evidence concerning both areas is herein considered together.

The respondents operating in the Miami-Palm Beach area are Foremost, Borden and National (Southern Dairies). Swift & Company also operates in the area. There are also a number of so-called independent, Florida companies which do business throughout the Miami-Palm Beach area. These include Velda, Alfar, Land O' Sun, Superior, DeConna and Rich. Several companies sell primarily in the Miami area, including MacArthur, Dressell and Weber. The Howard Johnson retail chain has recently gone into the wholesale ice cream business in the Miami area. There has been a considerable growth in the number of soft ice cream establishments throughout the south Florida area.

The only competitor witnesses called by counsel supporting the complaint were representatives of Rich Ice Cream Company and Weber Ice Cream Company. Officials of Alfar, DeConna, Velda and Dressell were subpoenaed to testify, but were excused at the request of counsel supporting the complaint. Three dealer witnesses from Miami also testified.

Rich Ice Cream Company, which was represented at the hearing by its owner, Willard H. Rich, and by its sales manager, has had what appears to be a reasonably good record of achievement. It entered the ice cream business in Lake Worth in 1947 and moved to a larger plant in West Palm Beach in 1950. In the following year it expanded into the frozen food business, including frozen bakery products. It gradually extended its territory from the area surrounding Palm Beach south to Miami. Originally storing its frozen products for sale in Miami in a large truck, it leased storage space in 1955, and

in 1957, following the Miami hearings, it moved into a larger distributing plant in the area. Rich started business in 1947 with one truck and by 1956 it was operating six delivery routes. Its volume has been increasing steadily since it went into business and by the end of 1955 it had 675 retail accounts and its annual sales were approximately $500,000. Rich supplies most of its customers with modern cabinets and with signs. It has also sold soda fountains to some of its customers on a conditional sales basis and supplies some of its frozen food customers with freezers which are paid for by a meter arrangement attached to the cases. It grants advertising allowances to some of its customers and gives a five percent discount to those customers who own their own ice cream cabinets.

The owner of Rich, who has not been too active in the sales end of the business for approximately five years, complained that the most difficult problem with which the company had to contend was the "tie-in relation of the milk and ice cream sales by some of the companies that have a joint operation with the two products." He explained this as involving the furnishing of extra equipment or the giving of a better price to an account in connection with its milk business in order to obtain its ice cream business and vice versa. To the extent that the additional equipment and more favorable prices involve the milk end of the business, the practices are not, of course, within the present complaints. Insofar as the witness' testimony was directed to the ice cream end of the business there was no reliable evidence offered to establish that the company's loss of ice cream accounts or inability to acquire accounts was due to any tie-in between milk and ice cream sales. While it is possible that Rich has been somewhat at a competitive disadvantage in competing with companies who operate in both milk and ice cream because of the preference of some customers to make their purchases of both products from a single supplier, this is a matter that is outside the scope of the complaints.

The testimony of Rich and his sales manager involved mainly an enumeration of approximately 17 accounts which they claimed the company had lost or been unable to acquire as a result of the competitive activities of the three respondents doing business in the south Florida area. It may be noted, initially, that approximately half of these accounts were drug stores or drive-in theaters who presumably make only limited milk sales and, accordingly, would not appear to involve any tie-in arrangement of the type which Rich claimed represented his main problem. Aside from this, however, in most of the instances referred to, the reason assigned for the loss of, or inability

to acquire, the account was not one falling demonstrably within the complaints. In nine or ten of the accounts mentioned, price was assigned as the principal reason or as an important factor in Rich's loss of, or inability to acquire, the account. However, in none of these instances is there any reliable evidence as to the price being charged by the particular respondent to the account in question, nor is there any evidence that such price was other than the regular list price of the respondent or that the granting of such price was connected in any way with an exclusive dealing contract or arrangement.[91] Another account the loss of which would appear to have no relation to the complaints is one which Rich allegedly lost to respondent Foremost because the latter had extended the account credit, whereas Rich had put it on a C.O.D. basis after the account had become slow in its payments. Aside from the lack of apparent relevance of this incident, there is no reliable evidence in the record to support the hearsay testimony that the account had been extended credit by respondent Foremost.

Falling at least partially within the complaints were several accounts where it was claimed that one of respondents had either loaned money or sold equipment on a conditional sales basis, or supplied excessive equipment. One such instance involved an account which Rich and National had been supplying on a split basis, and which it was claimed was lost entirely because of a loan made by National. Not only is there no evidence to support the hearsay testimony of Rich's sales manager, but according to the credited testimony of a National official no loan had been made to the account in question in any way, shape or form.[92] Some of the accounts involved the alleged supplying of more equipment than Rich thought justified. However, here again, no reliable evidence was offered as to what equipment had actually been furnished to these accounts and on what basis.[93]

In only two of the instances referred to by the Rich witness is there any reliable evidence to indicate what assistance had been supplied

[91] In several instances Rich, who has not been active in sales for five years, conceded that he did not know what his competitor's price was. In some instances Rich's information was based on hearsay reports received by his sales manager. Indicative of the lack of reliability of this hearsay and conclusory testimony is the conflict between Rich, who attributed the loss of a drug store account to respondent Borden's lower price, and his sales manager, who attributed the loss of the same account to respondent Foremost's lower price.

[92] The only thing that respondent National had done for the account was to paint a sign, with its Sealtest emblem, on the outer wall of the account's premises, at a cost of approximately $35.00. By the time of the defense hearings respondent National had already lost the account to the local competitor, Land O' Sun Dairy, which merely painted its own name over the Sealtest emblem.

[93] In several instances the Rich witness conceded that he was uncertain as to the nature of the equipment furnished by respondents.

by any of the respondents. One involved a drug store account to which respondent National had allegedly sold a fountain and which was reported to have told Rich's sales manager that it was "tied up on an equipment deal". The owner of the drug store, who was called as a witness by respondent National, denied making the statement attributed to him by Rich's representative and testified that he had already paid for the fountain purchased from National when the Rich representative called upon him and was under no obligation to National at the time, but continued to deal with the company because of friendship and his long, satisfactory relationship with the company. The second instance involved a drug sundry store, the owner of which had also allegedly told Rich's sales manager that the account was tied up with National because of the purchase of a fountain. The owner of the establishment, a woman, admitted having made the statement attributed to her by Rich's representative, but claimed that she did so merely as a way of getting rid of the salesman since she had no desire to change suppliers. While it does appear that respondent National had assisted the account in the purchase of a soda fountain, the witness testified that Rich's salesman had offered to "buy out" the fountain and meet respondent's price but that she, nevertheless, declined to change suppliers.

While corroboration does appear in the record for the testimony of the Rich witness concerning the assistance by respondent National in two of the instances cited, the evidence as a whole is too unreliable to support a finding that the respondents have been responsible, in any substantial number of instances, for Rich's loss of or inability to acquire accounts. It should be noted that in one of the two instances for which there was corroboration, National's assistance had already ceased at the time of the solicitation and the account denied the statement attributed to it. In the second instance, where both the fact of assistance by National and the statement made to the Rich representative were corroborated, the evidence discloses that Rich had offered to meet National's terms and that its inability to acquire the account was not due to the sale of the fountain but to the account's unwillingness to change suppliers. In the bulk of the instances referred to by the Rich witness the evidence of assistance by respondents was largely of a hearsay, conclusory nature, not warranting the basing of any findings thereon.[94]

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[94] The examiner can place no more reliance on such hearsay reports than can Rich himself who, when asked by counsel supporting the complaint if dealers could be giving him "imaginary figures [as to competitors' prices], in order to get you to come down in price", testified:

"Oh, I think there is no question about that. There is a great deal of that, yes, sir."

In any event, despite Rich's claims with respect to his company's loss of or inability to gain certain accounts, the record discloses that the company has been steadly growing and expanding. It further appears that the company has acquired a considerable number of accounts from respondents and has apparently had no difficulty in meeting the needs of these accounts. In fact, Rich's owner conceded that his company had acquired more accounts from respondents National and Borden than they had acquired from his company, and had supplied some of these accounts with signs and more modern equipment. While the witness claimed that his profit ratio was declining despite increased sales, he declined to produce any records for use in connection with cross-examination by counsel regarding the basis for such conclusion. However, he admitted that the decline was due to an increase in labor costs, packaging costs and materials such as fruits and flavors. These costs cannot, of course, be attributed to the complaint practices.

The other competitor witness called by counsel supporting the complaint was a partner in Weber's Ice Cream Company of Miami. This company has been in business since 1948, and specializes in a high-quality, catering-type ice cream, which it sells mainly to hotels and restaurants. It confines its business mainly to Miami Beach. It has an annual gallonage of just under 100,000 gallons.

The Weber witness complained that it was difficult to obtain accounts because the larger companies were furnishing excessive equipment, granting high rebates and were assisting accounts financially. However, when it came to designating the companies responsible for his difficulties, he conceded that he had had no competitive problems with respondents Foremost or Borden for at least several years. In the case of respondent National, the only competitive difficulty to which the Weber witness made reference was the loss of one hotel account, which he claimed had been supplied with an extra cabinet by respondent National. However, he conceded that he had no knowledge as to what equipment respondent had supplied the account and had "just surmised the fact" because the account threatened to make a change. Furthermore, it appears that the account was not a desirable one and the Weber representative indicated that he was "glad to lose it". No finding can, of course, be made as to the reason for the loss of this account based on the witness' hearsay conclusory testimony.

Not only does the record fail to disclose any serious competitive difficulties between Weber and any of the three respondents doing business in the area, but it appears affirmatively from the witness' testimony that the source of most of his company's alleged problems has been another competitor, Swift & Company. According to the

witness, Swift was the "worst" competitor in the area and had offered accounts which he had tried to get "the most fantastic propositions and deals, which is far beyond anything I could surmise". Further elaborating on his competitive problems the witness testified:

> [M]y inability to make progress is due to the fact that the hotels have been solidly sold on deals, and I would say that Swift has taken the lead and has practically overpowered Borden, Sealtest and Foremost in those transactions. They have now come to the point where there isn't a hotel that isn't opened up on the Beach that you can say Swift hasn't got.

While no finding can, or needs to, be made based on the witness' conclusory testimony with regard to Swift's activities, it is clear from his testimony as a whole that the activities of the three respondents doing business in the Miami area have not been a significant factor in Weber's alleged inability to make more rapid progress. It may be observed, however, that considering that the company did not enter business until 1948 and has confined its activities primarily to the Miami Beach area, and that its main product is a high-grade, catering-type ice cream which has appeal only to a limited number of establishments, the fact that it has grown to approximately 100,000 gallons by early 1956 hardly bespeaks a serious lack of progress on the part of the company.

In addition to the two competitor witnesses, counsel supporting the complaint called representatives of three dealer accounts. One of the dealers was the operator of a soda fountain concession in a drug store located in the Miami area, which had switched to respondent Foremost from Alfar and had received a discount of 47 cents a gallon on most of his ice cream purchases. Presumably this testimony was offered by counsel supporting the complaint to show that the discount offered by Foremost was the reason the account switched. However, according to the uncontradicted and credited testimony of the witness, the price quoted by Foremost was not the reason he switched. The witness had handled Foremost ice cream at another location for eight years, and when he leased the fountain concession in his present location he found that the prior owner had been using Foremost milk and Alfar ice cream. Because of his former good relations with Foremost and his belief that it would sell better, he changed his brand of ice cream. There was also some dissatisfaction with Alfar's once-a-week delivery schedule. The witness indicated that Alfar and a number of other ice cream companies had offered to meet the Foremost price offer, but that he declined because of his preference for dealing with Foremost. A Foremost representative, who was also called as a witness by counsel supporting the complaint, testified that

the 47 cent discount had been computed on the basis of the account's projected gallonage. Because of the higher Foremost base price, the net price offered by it was only 10 cents a gallon below the Alfar price. Irrespective of whether Foremost's price was on or off list, the testimony of the witness indicates that it was not a factor in his switching suppliers.

The same dealer also testified that many months after he had changed to Foremost, the latter supplied him with an additional box for milk, pies and vegetables. The Foremost witness familiar with the transaction testified that it was not typical, since his company did not customarily supply cabinets for other than dairy products, but that this represented an emergency transaction where the account had had some products which were spoiling and that since Foremost had a storage box not in use it agreed to furnish it to the account. The box was used partly for storing milk which Foremost sold the account. It does not appear from the witness' testimony that the supplying of the box acted as an inducement for the account to continue dealing with Foremost. There is, moreover, no evidence that the supplying of the cabinet or the giving of discount was connected in any way with an exclusive dealing arrangement or contract. The only competitor affected by the situation, Alfar, was excused from testifying by counsel supporting the complaint.

The second dealer witness was the operator of two supermarkets in Miami. Prior to 1951 the account had been handling the milk and ice cream of White Belt Dairy (a company not referred to by any of the competitor witnesses). During 1951 the account switched to Foremost's milk, on which it received a price concession, and several months later it switched to Foremost's ice cream for which it paid the regular list price. Since the discount received on milk is outside the issues in this case, no evidence concerning this portion of the arrangement was permitted by the examiner. Insofar as the milk transaction involved an apparent understanding that Foremost would later get the dealer's ice cream business, it is likewise not covered by any allegation of the complaints, since the transaction regarding the sale of ice cream does not involve any of the complaint practices.

The third dealer witness in Miami was the operator of a drug store which had received assistance from Foremost in financing the remodeling of his store and the purchase of equipment. The amount involved was approximately $7,510, of which the store owner paid $2,000 in cash and the balance was financed by Foremost over a three-year period, under a conditional sales arrangement. The agreement provided that the account would use Foremost's products exclusively

until the balance was paid off. The record does not disclose what, if any, other company the account had dealt with prior to taking on Foremost's products. The dealer indicated that he had received offers of assistance from a number of other ice cream companies, including National, Borden, Swift and Velda. However, he chose Foremost because it sold a quality ice cream and because they were willing to allow him to choose his own equipment dealer, whereas the other companies wanted him to purchase his equipment at places which they designated. The witness indicated that he did not regard the assistance as anything unusual since, to his knowledge, ice cream companies in the area had been giving financial help to retail dealers "for thirty or more years". The evidence regarding this transaction fails to show that Foremost obtained this account because it was willing to finance it, while other companies were unwilling to do so. All that appears is that from among a number of competitors, all of whom were willing to assist the account, the owner chose Foremost because, among other things, he was given the latitude of selecting his own equipment dealer.

Counsel supporting the complaint also introduced in evidence a number of recordings of loans (secured by chattel mortgage) and sales of equipment under conditional sales contracts by the three respondents during 1955. However, with one exception, the last-mentioned witness, none of the dealers were called to testify. There is no indication that any of the other accounts were obtained from competitors or that other competitors sought to acquire the accounts. Since counsel supporting the complaint does not, apparently, contend that the transactions in question are illegal per se, the absence of any evidence to show any actual or probable effect of these transactions on competition in the Miami area makes them of marginal relevance.

The evidence adduced at the Miami hearings fails to demonstrate any significant adverse effect on competition in the area by reason of the engagement by any of the respondents in any of the complaint practices. The two competitor witnesses chosen can hardly be called representative of competitive conditions in the area. Rich operates mainly in the Palm Beach area and, moreover, the evidence indicates that the company has made reasonably good progress since its entry into the ice cream business, and has not experienced any serious competitive difficulties due to the complaint practices. The other competitor, Weber, operates primarily in a limited area around Miami Beach and caters to a limited clientele. This company likewise has made good progress within a relatively short time. Of the competitors who were excused, it appears that Alfar Creamery has a substantial part

of the business in the Palm Beach area and serves a number of the good drug store accounts. Velda is a sizeable company, selling both milk and ice cream, and serves a number of supermarkets, including the Food Fair stores. Land O' Sun is a "big factor" in the market, is in both milk and ice cream, and also sells in some of the supermarkets. No information appears regarding the other excused witness, DeConna.

So far as appears from the record, competition in the south Florida area is vibrant, with a good number of active local companies competing with one another and with the so-called national companies. The latter do not appear to have obtained any special advantage, particularly insofar as the use of the practices charged in the complaints is concerned. Of the three respondents doing business in the area, two have actually sustained a substantial loss in market position. Respondent National's market share in Miami has declined from 27.7 per cent in 1950 to 17.4 per cent in 1955. Respondent Borden's share has declined from 10.4 per cent in 1950 to 5.0 per cent in 1955. Respondent Foremost, on the other hand, has increased its position from 15.1 per cent in 1950 to 26.9 per cent in 1955. However, there is no evidence that this has been accomplished at the expense of its local competitors and, particularly, by the use of the complaint practices. Both National and Borden, who engage in the same practices, have actually declined during the period that Foremost was advancing. It is just as likely that Foremost's gain was at the expense of its fellow respondents than that it came out of the business of local competitors.[95] The testimony of the Foremost official called by counsel supporting the complaint indicates that the company's growth in the area has been due mainly to increased sales through its existing accounts, resulting from improved advertising and merchandising methods. The same witness indicated that most of the company's loans were made to its existing accounts to help increase the sales of such accounts.

For the State of Florida as a whole, two of the respondents have sustained a substantial decline in their share of state production between 1947 and 1955. Respondent National's share has declined from 30.1 per cent to 19.0 per cent, while Borden's share has declined from 18.7 per cent to 11.2 per cent. There is no state-wide data in the record for respondent Foremost. However, it does appear that its Division I, doing business in nine southern states, including Florida, had a production share of 6.15 per cent in 1950 and 8.27 per cent in 1955.

[95] It may be noted that Foremost's increase of 11.8 per cent is less than the combined decline of 15.7 per cent by National and Borden.

## 11. *Houston, Texas*

The Houston hearings involved testimony and evidence with respect to three separate market areas, the Houston area, the Beaumont-Port Arthur area and the San Antonio-Austin area. Each of these appears to be a separate market area, having substantially different groups of competitors, and each is separately discussed below.

a. Houston Area

The respondents doing business in the greater Houston area are Borden, Foremost, Carnation and Arden (Camellia). Swift & Company also does business in the area. The local Texas companies operating in the area include Oak Farms Dairy, Sun Up Ice Cream Company, Sanitary Farms, Lily Ice Cream Company, Lone Star Creamery and Velda Ice Cream Company. Three former local competitors have ceased operating. These are Shamrock Dairy, which sold out to Oak Farms Dairy in December 1955; Smith Ice Cream Company, which sold out to Lily Ice Cream Company in 1954; and Kline Ice Cream Company, which ceased operating at some indeterminate time for reasons not appearing in the record. A representative of the latter company was subpoenaed to testify, but was excused at the request of counsel supporting the complaint.

Representatives of four Houston manufacturers were called to testify. Two were from the now defunct companies, Shamrock and Smith, and two from the still active competitors, Lone Star and Sun Up. Representatives of five retail dealers were also called as witnesses. The evidence adduced at the Houston hearings fails to establish substantial injury to competition, or the reasonable likelihood thereof, due to the engagement by any of the respondents in the complaint practices. The evidence consists in large measure of unsupported opinions, conclusions and hearsay concerning the activities of respondents and, to a considerable extent, involves matters not covered by the complaints. The evidence offered through the various competitor witnesses is discussed below.

The testimony of the former owner of Shamrock Dairy involved mainly a recital of the facts relating to eight accounts which that company had allegedly lost to various of the respondents. Five of the accounts were alleged to have been lost to respondent Arden (Camellia), two to respondent Carnation, and one to respondent Borden. The principal reason or one of the important reasons assigned by the witness for the switching of the accounts in each instance, with one exception, was the fact that the account had received a discount

or rebate from one of the respondents. However, except for one account, there is no reliable evidence in the record as to what discount or rebate, if any, the account had received; nor does it appear that such purported price concessions were connected in any way with an exclusive dealing arrangement. The one exception involves a dealer who was also called as a witness by counsel supporting the complaint, and who testified that he had received a 10 cent a gallon discount from respondent Carnation, which made the latter's price "just a little less" than Shamrock's. However, the dealer indicated that an important factor in his decision to change suppliers was his feeling that Carnation "could do a better job" for him because of its advertising and point-of-sale program. The dealer's sales of Carnation did, in fact, increase substantially after he had changed suppliers. The price concession apparently had no significant effect on the account's loyalty to Carnation since by the time of the hearings in Houston it had already switched to a non-respondent supplier. It does not appear in this instance whether the discount was other than the regular scheduled quantity discount; nor is there any evidence that it involved any exclusive dealing arrangement.

The one instance where price was not referred to by the Shamrock witness as a factor in an account's switching was one where it was claimed that respondent Arden had agreed to supply the account with a sign valued at $1,350, plus a large ice cream case and a cabinet for frozen foods. The testimony of the owner of the establishment, who was also called as a witness by counsel supporting the complaint, is at variance with the conclusional and hearsay testimony of the Shamrock witness. The owner of the establishment in question testified that the reason he had switched was because he had received a 10-cent a gallon discount from Camellia. The equipment which Camellia installed was substantially the same as he had had from Shamrock, consisting of a modern case to display ice cream and another old case for storage. With respect to the sign, the dealer testified that Camellia had not promised to give him any signs, but had agreed to contribute a portion of the cost of the sign (the amount not being specified). However, as of the time of the hearing, which was approximately five months after the switch had occurred, the dealer had not yet made any decision with respect to the purchase of a sign.

In several of the instances where price was alleged to have been an important factor in the loss of an account, the Shamrock witness also referred to the fact that Camellia had supplied the account with various types of equipment which he regarded as excessive. The testimony of the witness was based largely on his own opinion or

conclusions as to whether the equipment was excessive and whether the furnishing thereof was a factor in the account's switching. Furthermore, reliable evidence is lacking in most instances to establish what, if any, equipment these accounts received. No finding can be based on the witness' testimony, based on hearsay and surmise, concerning these accounts.

The evidence with respect to Shamrock's history indicates that the company started in the ice cream business in 1947 and by 1954 had built up a volume of approximately $300,000, or 200,000 gallons. The witness claimed that in the following year his sales had declined by approximately $75,000 and that he decided to sell out because he "saw the handwriting on the wall with all the give-away plans and secret discounts and marquee signs * * *". There is, however, little reliable evidence in the record to sustain the witness' broadly stated conclusions and opinions. To the extent that respondents furnish equipment or signs or grant discounts, it does not appear that their practices differ from competitors generally in the market.

Competitors in the area for the most part supply their customers with ice cream equipment, which equipment has become more expensive as the costly display-type cabinets have come into vogue. While dealers have apparently sometimes taken advantage of the equipment supplied to them, in order to store frozen products other than ice cream, this is a practice which ice cream manufacturers as a whole try to discourage, but not always with success. With respect to signs, the Shamrock witness said that he had no objection to the supplying of neon signs and giving the dealer a privilege panel, but did object to supplying signs on which the ice cream manufacturer's name does not appear. No evidence, however, was offered to indicate the existence of such a practice or that it was engaged in by any of the respondents. Insofar as "secret discounts" are concerned, there is no reliable evidence that the discounts and rebates referred to in the testimony involve anything other than the regular quantity discounts or rebates of the respondents. In any event, there is no evidence that any of the practices referred to is tied to an exclusive-dealing arrangement. On the contrary, the Shamrock witness complained that whereas for the first six years he had served accounts exclusively, the more recent trend in Houston was toward the splitting of accounts. His testimony in this respect is corroborated by that of some of the other Houston witnesses.

The fact that Shamrock sold its business is one which cannot be overlooked. However, the examiner cannot automatically infer from this fact that the engagement by respondents in the complaint practices

was a significant factor in Shamrock's decision to sell out. Nor can the examiner find this to be a fact merely because of Shamrock's generally stated accusations. The facts which he related do not legally support his broadly stated assertions. One of the most significant facts allegedly involved in the case of most of the accounts was price competition. Yet the complaint does not charge this to be illegal, as such, but only where used to induce exclusive dealing. There is no evidence that this was the purpose or effect of such price concessions.

The examiner is not obliged to make any finding as to why Shamrock went out of business, but only to eliminate the fact that the complaint practices were a significant factor therein. However, it may be noted that while selling out as Shamrock, the former owner of the company has remained in the selfsame market where he allegedly could not compete, as the assistant sales manager of Oak Farms Dairy, under a long-term contract and at a salary equalling that which he drew from his own ocmpany. This appears to suggest that the former owner preferred the security of working for another, larger company to bearing the brunt of the management of his own company with all of the responsibility which the latter entails in the rough and tumble of the competitive struggle.

Another competitor witness was the representative of Lone Star Creamery, which is in both milk and ice cream. Its annual ice cream sales were stated to be in the $200,000 to $300,000 bracket, and it was claimed that they had declined by approximately $50,000 during the past five years. The Lone Star witness testified that the worst competitive practice which his company had to face was that of supplying customers with extra cabinets which were used for storing frozen foods other than ice cream. However, he indicated that he had not encountered much of that type of competition from respondents Carnation, Foremost or Borden. The bulk of the witness' testimony was directed at respondent Arden (Camellia).

The Lone Star witness referred to six accounts which his company had allegedly lost because of competitive difficulties. One account involved a drug store which he claimed to have lost to Camellia primarily because of a 10-cent a gallon discount. There is no reliable evidence (other than the witness' hearsay testimony as to what the owner told him) to establish that the account had in fact received a discount from Camellia, nor is there any evidence that such discount was off list or was conditioned on any exclusive dealing arrangement. While the witness also referred to two cabinets which the account had received and some lettering worth approximately $75, no claim was made that these had motivated the account in switching. There

appears to be little likelihood that this was the case since the cabinets were merely a replacement for two which Lone Star had supplied to the account and the lettering was apparently a replacement for a neon sign with a privilege panel which Lone Star had furnished to the account. The witness also referred to another drug store account which he claimed had been lost to Camellia because of the supplying of a frozen food cabinet free of charge. No finding can be made, based on the witness' hearsay and conclusional testimony, that Camellia furnished a frozen food cabinet without charge to the account in question. Reference was also made by the witness to a Camellia account which he tried to obtain and was allegedly advised that Camellia had supplied the account with two cabinets and a sign. Despite these reported facts, Lone Star was permitted to install one of its own cabinets and to split into the account. It would appear from this incident that the supplying of cabinets and signs by Camellia is not tied to any exclusive dealing arrangement. The fourth account involving Camellia was one which Lone Star had been unsuccessful in obtaining because, as the account advised him, Camellia had moved some of the dealer's equipment from another location and had promised to service it. There is no reliable evidence to support the witness' hearsay testimony regarding this incident, nor does the evidence establish that this was the reason Lone Star could not obtain the account.

Of the remaining accounts referred to by the Lone Star witness, one involved respondent Carnation and the other respondent Borden. The witness claimed that he had lost a drive-in market to respondent Carnation because the latter had sold the account a cabinet for frozen foods. There is no reliable evidence in the record with respect to the alleged sale and, moreover, Lone Star was able to regain the account in question within a month thereafter. The incident involving respondent Borden pertained to a chain of stores to which Lone Star had sold ice cream cabinets with the understanding that they would be paid for out of the gallonage rebates. However, when the ice cream sales were not sufficient to meet the installments on the cabinets the account asked Lone Star to repurchase them, but the latter declined. The chain made arrangements later to have Borden serve a number of the stores and the latter supplied them with cabinets. The record is lacking in reliable evidence that the supplying of ice cream cabinets by Borden was the reason the account switched. The Lone Star witness indicated that he did not regard the supplying of cabinets for ice cream as an objectionable practice, although he did where they were supplied for other frozen foods. There was nothing unusual about Borden's supplying the account with ice cream storage

cabinets, in accordance with the prevailing custom in the area. The Lone Star witness himself conceded that it was not the usual practice of Borden to use cabinets as a selling weapon. If Lone Star is having any competitive difficulties, the record fails to establish that such difficulties are due substantially to the engagement by any of respondents in the complaint practices.

Another competitor represented at the Houston hearings was from Sun Up Ice Cream Company, which ranks fourth or fifth in volume in the market, according to the testimony of its president. Sun Up has an annual volume of approximately 600,000 gallons, with sales amounting to approximately $778,000. The Sun Up witness' testimony consisted mainly of a recital of the facts with respect to his company's loss of eight accounts, six of which were lost to respondent Arden (Camellia), one to Foremost and one split with Borden.

The loss of most of the accounts involving Camellia was attributed primarily to the furnishing of equipment, including cabinets which could be used for storing frozen foods and, in one instance, a sign alleged to cost $3,000. The witness made no claim that he was advised by the accounts in question that they had switched because of the furnishing of the equipment in question, but his testimony appears to have been based primarily on his own conclusions as to the accounts' motivation in switching. In no instance was any reliable evidence offered as to what equipment, if any, had been supplied to the accounts in question. Most of the establishments referred to were grocery stores affiliated with a buying group known as the Lucky Seven Stores. The witness conceded that in at least several instances the store owners had advised him they thought they should give their business to Camellia because the latter had agreed to spend substantial amounts in cooperative advertising with the group.

The testimony of a Camellia official who testified in the defense hearings indicates that the Lucky Seven group had invited bids from a number of ice cream manufacturers and that his company had submitted a bid calling for a discount of 15 percent off the list price and an agreement to spend a certain amount for cooperative advertising on television and in newspapers. The 15 percent discount was arrived at after Arden had learned that the price offered by its competitor, Swift, was lower than its own. It would therefore appear that the account was lost mainly on a price basis and not because of equipment. Not only is there no evidence of any exclusive dealing arrangement connected with Arden's bid, but the Arden official testified that his company only supplied 70 percent of the volume of the

stores, the balance being split with competitors who are in 40 percent of the stores.

The one account involving respondent Borden was also a member of the Lucky Seven group. The store was being supplied by Sun Up on an exclusive basis and had received two new automatic self-defrosting cabinets from Sun Up. The witness claimed that Borden was able to split into the account after selling the proprietor three cabinets similar to his own, his own cabinets being returned to him, and that the account stored his ice cream in Borden's cabinets and asked him for a refrigeration allowance. There is no reliable evidence in the record that respondent Borden did, in fact, sell any cabinets to the account or that this was the reason why the account switched. It may be noted that Sun Up's criticism is directly contrary to Lone Star's. The latter complained because Borden had furnished cabinets rent-free to an account to which it had sold cabinets, whereas Sun Up criticized it for doing the exact opposite, viz., selling cabinets to an account to which Sum Up had supplied cabinets rent-free. Apparently nothing Borden did would satisfy both of these competitors. In any event, both Sun Up and Borden were soon terminated as suppliers when the account switched to Camellia, for reasons not appearing in the record.

The final complaint of the Sun Up witness involved two of the Minimax stores, to which reference has already been made above in connection with the Lone Star witness. The Sun Up representative claimed that these stores had switched to Foremost because of a discount on milk and ice cream, and that the latter paid the balance due on several cabinets which Sun Up had recently sold the account. There is no reliable evidence in the record, aside from the witness' hearsay testimony, as to what, if any, discount the account had received from Foremost, nor is there any evidence that the transaction involved any exclusive dealing arrangement. In any event, by the time of the Houston hearings, the stores in question were handling Camellia and had ceased handling Foremost and also Borden, which had apparently later split into the account.

Despite Sun Up's alleged loss of accounts, the witness conceded that his company's sales in 1955, amounting to $778,000, and its gallonage of 600,000 gallons, represented an increase over the past five-year period. He also conceded that the company had had a gradual increase in business since 1946. However, he claimed that the company's rate of profit had declined about 25 per cent from what it had been prior to 1947 or 1948. There is no reliable evidence in the record that this alleged decline in profit rate is due to the complaint prac-

tices. In fact, the witness conceded that his profits had been affected, to a large extent, by increases in the cost of manufacturing ice cream, including paper, labor and ingredients. He also conceded that profits in the ice cream industry as a whole had dropped after 1946 or 1947.

Another competitor witness, the former owner of Smith Ice Cream Company, testified briefly that his company had sold out in 1954 to Lily Ice Cream Company. The owner is now employed in a nearby community by another competitor, Oak Farms Dairy of Dallas. He claimed that he had sold out because "conditions got to where it was impossible for me to make money out of [the business]." The "conditions" were described by the witness as "finance deal[s] and the frozen food cabinets and the things like that that customers demand to have their business". No reference was made to any of the respondents as being responsible for any of these conditions nor for Smith's loss of or inability to acquire any specific account. No claim was made that Smith had lost any considerable number of accounts, or that it had sustained any substantial loss of gallonage prior to the time it sold out. On the contrary, it was at its peak gallonage (approximately 100,000) when it sold its business, having entered the ice cream business in 1941. The testimony of the witness has no substantial evidentiary value.

As above indicated, counsel supporting the complaint called representatives of five retail dealers in Houston. Three have already been discussed above in connection with the testimony of the Shamrock and Lone Star witnesses. The fourth witness was a former customer of Klein Ice Cream Company which had switched to respondent Camellia. While the testimony of this witness indicates that one of the three cabinets which had been supplied to him by Camellia was being used for the storing of frozen foods, it also appears that he had three cabinets from Klein, one of which was likewise being used for the storing of frozen foods. The principal reason given by the witness for his change to Camellia was that he wanted a more modern display cabinet for his ice cream and that Klein had refused to supply one. Following the change to Camellia and the installation of the display cabinet, the account's ice cream sales increased substantially. There is no evidence that the supplying of this equipment by Arden was in any way connected with an exclusive dealing arrangement. Assuming that Arden did supply the account with one cabinet to be used for storing frozen foods, its action was obviously calculated to meet the competition of Klein which had supplied a cabinet for a similar purpose.

The fifth dealer witness was connected with a drive-in grocery chain having 42 stores, the chain being the largest in the area. The chain handles at least two brands of ice cream in each of its stores, including Sanitary, Sun Up, Oak Farms, Carnation and Camellia. It receives a volume rebate from each of these suppliers. According to the witness, a salesman representing one of Arden's competitors had informed him that a competing supermarket chain was getting a better discount from Arden, and, after the witness had communicated with an Arden representative, the latter agreed to give him a discount in the same amount. However, according to an Arden official who testified during the defense hearings, the granting of the additional discount was due to a bookkeeping error and was later rescinded. This entire transaction would appear to have no relevance to the issues in these proceedings since there is no evidence that either the original discount or the increased amount was based on any exclusive dealing arrangement. The testimony of the witness does, however, serve to emphasize the tendency toward the splitting of accounts in the Houston area. It may also be noted that despite the Arden discount, its price to the chain was higher than that of two of its local competitors, Oak Farms and Sun Up. Furthermore, its sales to the chain represented only 2.75 per cent of the chain's ice cream purchases, compared with the 39.15 per cent share of its local competitor Sanitary.

Not only does the evidence concerning the Houston market fail to indicate any substantial injury to competition in the area or to any competitor, but it also fails to indicate any startling changes in market position in favor of respondents. Respondent Foremost's market share has actually declined substantially from 11.9 per cent in 1950 to 5.3 per cent in 1955. Respondent Carnation's share has declined from 16.3 per cent to 14.8 per cent during the same period. Respondent Borden's share has also declined during the same period from 14.2 per cent to 13.5 per cent. Only respondent Arden has shown any increase, viz., from 7.1 per cent in 1950 to 10.0 per cent in 1955. Its increase of 2.9 per cent is substantially less than the aggregate decline of 8.8 per cent of its fellow respondents. Presumably other competitors in the Houston market have been increasing their share of the market, while three out of the four respondents have been declining.

b. The Beaumont-Port Arthur Area

Beaumont is located approximately 90 miles east of Houston, and Port Arthur is approximately twenty miles east of Beaumont. Many of the companies operating in the area do business in both communities, although there are somewhat fewer companies in the Port Arthur

area. Counsel supporting the complaint called two competitor witnesses from the area, a representative of Dairy Maid Ice Cream Company of Beaumont and a representative of Townsend Dairy of Port Arthur. No dealer witnesses from the area were called.

The respondents doing business in the Beaumont area are Carnation, Foremost, Borden and Arden (Camellia), the latter operating only on the fringes of the area. The other principal competitors include Swift, Bergen, Consumers, Sun Up, Oak Farms, Townsend and Dairy Maid. Dairy Maid Ice Cream Company of Beaumont is one of the largest companies in the area. Its gallonage had grown from approximately 200,000 gallons in 1947 to approximately 300,000 at the time of the Houston hearings in 1956. The Dairy Maid witness testified that its present gallonage represented a decline of approximately 10,000 gallons from its previous peak, but indicated that he did not regard this as a significant decline. He attributed the decrease mainly to the entry of new competitors into the market, naming specifically the non-respondents Swift, Sun Up and Oak Farms. The Dairy Maid witness testified that while his company's sales had increased substantially since 1947, its rate of profits in 1955 was one of the poorest it had experienced. The extent of such decline in profit ratio and the over-all profit position of the company was not, however, indicated. He attributed such decline to the "increased activity that came into our area." Such increased competition caused the company, according to the testimony of its representative, "to do things that normally we didn't need to, such as advertising", to increase its sales personnel and to change from the conventional type of cabinets to the glass-top and self-defrosting type cabinets.

The Dairy Maid witness attributed the bulk of his company's trouble to the non-respondent Swift and indicated that most of the business it had lost during the past year had been to Swift. He claimed that Swift had been able to obtain accounts "on a price deal" and by permitting customers to pick out their own slide-top cabinets from an assortment of cabinets transported on a Swift delivery truck to the dealers' premises. It is unnecessary for the examiner to make any findings with respect to the reliability of the witness' general assertions with respect to Swift since that company is not a respondent in these proceedings. However, it seems clear that the recent decline in sales and profit ratio which Dairy Maid has experienced cannot be attributed to the respondents, to any significant degree, in view of the fact that the witness himself attributed his company's losses to Swift "rather than to these other people."

The Dairy Maid witness did refer, in the course of his testimony, to several accounts lost to some of the respondents. Aside from the fact that such losses, by the witness' own admission, were of no significance, there is no reliable evidence that any of them was due to the complaint practices. Thus, the witness attributed the loss of a good account to respondent Foremost because the latter had supplied the account with a sign, but conceded that he had no personal knowledge as to whether such a sign had ever been supplied. In any event, it appears that Dairy Maid was later able to split back into the account with Foremost, despite the alleged supplying of a sign. Since Dairy Maid was able to split into the account, there was presumably no exclusive dealing arrangement involved in the account's dealings with Foremost. The witness also attributed the loss of a drive-in grocery account to respondent Foremost because of the latter's lower price. No reliable evidence as to Foremost's price was offered, nor does it appear that any such price was connected with an exclusive dealing arrangement. Furthermore, it appears that the loss of the account occurred shortly after Dairy Maid had raised its price to the account and that the putative lower price of Foremost was exactly the same as Dairy Maid's price before the increase. It would appear more likely therefore that the account was lost due to Dairy Maid's raising its price, rather than to any undercutting by respondent Foremost. The Dairy Maid witness attributed the loss of another grocery account to respondent Foremost because of the non-complaint reason that the wholesale grocery house which was supplying the account had put pressure on it. The witness conceded that his testimony concerning this incident was based "more or less [on] rumors along the same line" as the other two accounts described above. Moreover, he conceded on cross-examination that he actually had not lost the account but merely split it with Foremost and that when he later put into effect a 5 percent volume rebate he regained the account completely.

Prior to instituting the 5 percent volume rebate, Dairy Maid was on a single price schedule, although it did give a few of its volume accounts a lower price. The witness attributed the institution of the sliding scale type of price schedule in the area to respondent Carnation. However, he expressed the opinion that Carnation was to be "commended" because "it costs you just as much * * * to service a small account, as it does a large account and therefore when you bring more merchandise into a store why that man's entitled to a little better price." No reference was made by the witness to the loss of any accounts to respondent Carnation because of the latter's alleged quantity discounts, or for any other reason; nor was respondent Borden cited as

being responsible for the loss of any accounts. In the case of respondent Arden (Camellia), the witness indicated that his company competed with it only on the fringes of their territory and that he had had no competitive difficulties with that company.

The other competitor witness from the area was a representative of Townsend's Dairy of Port Arthur, which does business both in Port Arthur and Beaumont, as well as in the surrounding counties. The Townsend witness testified regarding competitive difficulties with the non-respondent Swift, which he characterized as "possibly the most damaging competition we have had." The only respondent referred to by the witness was Foremost, to which the loss of two accounts was attributed, one of which was a school district which was lost on the basis of a lower bid. When the witness declined to disclose to counsel for Foremost certain memoranda which he had used in testifying, most of his direct examination was stricken except for a portion which was not based on such memorandum.[96] The record fails to establish any injury to competition in the Beaumont-Port Arthur area as a result of the use of the complaint practices by any of the respondents.

c. Denton Area

Denton is located approximately 38 miles from Dallas and Fort Worth. The only witness called from this area was a representative of Brooks Dairy. The respondents who operate in the area are Borden, Carnation and Foremost. There are also four other Texas companies doing business in the area, in addition to Brooks Dairy, viz., Boswell, Vandervoor, Oak Farms and Cabell, the first two having their plants in Fort Worth and the latter two in Dallas. Swift & Company is also active in the Denton area.

The testimony of the Brooks Dairy witness fails to disclose that there has been any injury to competition due to the respondents use of the complaint practices or otherwise. Brooks has a volume of approximately 100,000 gallons and is the largest supplier in the area. Its volume has been increasing each year and its profits have been stable. While the witness indicated that the company's costs had increased due to the necessity of furnishing customers with more expensive equipment, he made no effort to attribute this to any of the respondents. His testimony indicated that Swift had been a leader in supplying customers with neon signs and refrigeration equipment and in granting rebates.

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[96] The witness was later given an opportunity to have his testimony reinstated, after he had indicated that he might have understood the examiner's ruling as to what he was required to exhibit to counsel for Foremost, but again declined, with the concurrence of counsel supporting the complaint, to permit any examination of memoranda used to aid him in testifying.

The only respondent to whom the Brooks witness attributed the loss of any account was Carnation, which he claimed acquired one of his accounts after agreeing to purchase an old ice cream freezer from the owner of the establishment. Not only is there no reliable evidence (aside from the witness' hearsay testimony as to what the owner told him) that Carnation purchased the freezer or to indicate that the price which it paid was not commensurate with the value of the freezer, but the reason assigned by the witness for the alleged loss of the account does not fall within the scope of the complaints. The Brooks witness testified that his company had had no competitive difficulties with respondent Borden in recent years, characterizing that company's policies as very conservative. The only reference made to respondent Foremost was that it had taken one unnamed account from Brooks and had been troublesome to some extent in making Brooks meet its discounts. No specific accounts were mentioned and there is no indication that the prices being charged by Foremost were other than its regular list prices or that they were in any way connected with an exclusive dealing arrangement.

Insofar as the supplying of equipment is concerned, the Brooks witness indicated that it had always been the practice for ice cream manufacturers in the area to supply a cabinet without making any rental charge. The only problem that had arisen, in this connection, was that the cost of such cabinets had gone up sharply as the more modern display cabinets had come into vogue. The cost of signs has likewise increased. However, none of these increases can be attributed to any of respondents, and the witness made no claim that they had used cabinets or signs as a competitive weapon.

d. San Antonio-Austin Areas

The only witness called from this area was a representative of Jersey Land Creamery of San Antonio who had previously been connected with Polar Ice Cream Company of Austin. San Antonio and Austin are approximately 75 miles apart and there appear to be a number of different competitors in each area. However, in view of the fact that the sole witness' testimony related to both areas and there is some overlap in competition, the evidence with respect to these areas is discussed together below.

The respondents doing business in the San Antonio area are Borden, Foremost and Carnation. The local competitors, in addition to Jersey Land Creamery, include Knowlton, Metzger, Tiner and Gyer. Swift & Company is also active in the area. Jersey Land Creamery has approximately 380 accounts with a sales volume of approximately

$250,000. The number of its accounts has been increasing and its volume has also increased. The company's rate of profit has been stable during the past few years.

All of the competitors in the area supply their customers with cabinets without making a rental charge therefor, and a number supply them with signs. Jersey Land is one of the companies which supplies its customers with signs, the witness expressing the opinion that such signs were worth the cost thereof because of their advertising value. The company supplies cabinets to all but 35 of its customers. It also sells cabinets to some accounts on a conditional sales basis. Customers who own their own refrigeration equipment receive a five-cent a gallon discount, that being Jersey Land's estimate of the cost per gallon of furnishing a cabinet. While Jersey Land does not supply cabinets specifically for frozen foods, the witness indicated that it was not uncommon to find customers storing such products in the ice cream cabinet, although the company endeavors to discourage the practice. Jersey Land, along with its competitors, grants its customers a quantity discount on a sliding scale basis. The supplying of cabinets and signs and the granting of quantity discounts do not appear to be connected with any exclusive dealing arrangement since the majority of stores in both San Antonio and Austin handle more than one brand of ice cream.

The Jersey Land witness spoke in broad-brush fashion about "a vicious price circle * * * amongst some of the majors", indicating that the prices of these "majors" (not otherwise identified) were quite "fluid." The only specific testimony about so-called fluid prices pertained to two accounts in which respondent Carnation was involved. One of the accounts was the Post Exchange at Randolph Field, where the witness cited the alleged price of Carnation as reported to him by someone at the Exchange. Not only is there no reliable evidence of Carnation's price in this instance, but there is not a scintilla of evidence of any exclusive dealing arrangement with the exchange. The other price incident involved a grocery account which had allegedly been granted a 10 percent discount by Carnation. Here again there is no evidence in the record, other than the witness' unreliable hearsay testimony, as to what discount, if any, the account received from Carnation. There is likewise no evidence that the alleged discount represented a departure from Carnation's price schedule or was in any way tied to an exclusive dealing arrangement.[97] On the contrary, despite the impression given by the witness that he had been unable to acquire

[97] As above noted, Jersey Land likewise grants quantity discounts to its customers on a sliding scale arrangement.

the account because of the alleged discount, it developed on cross-examination that his company had been able to split into the account despite the alleged discount and that, in addition to Carnation and his company, another local company (Knowlton) was also serving the establishment.

In addition to the above two incidents, allegedly involving price considerations, the witness also cited two other instances of competitive difficulties with Carnation involving the furnishing of equipment. Neither involved the loss of any accounts but pertained to accounts which Carnation was already serving and which Jersey Land was seeking to take away. Both involved the alleged supplying of cabinets (one allegedly for frozen foods) and signs by Carnation. There is no reliable evidence in the record, other than the witness' hearsay testimony, as to what Carnation supplied these accounts or to indicate that the furnishing of the alleged equipment was the reason the accounts chose Carnation as a supplier, or that the furnishing thereof was connected with any exclusive dealing arrangement.[98] The lack of any exclusive dealing arrangement being involved in these transactions is apparent from the fact that in one of the instances cited, Jersey Land was able to split into the account despite the alleged supplying of the cabinets and sign by Carnation.

The witness' testimony concerning the Austin area indicates that only two of the respondents, Borden and Carnation, do business in that area. Swift also is active in the area. The local companies include the witness' former connection, Polar Ice Cream Company, and Lily Ice Cream Company, Austin Maid, Superior and Oak Farms. The only account to which reference was made by the witness as having been lost by his former company involved the non-respondent Swift & Company. The witness also referred to a Carnation account which his company had sought to acquire, but was allegedly unable to obtain because Carnation had supplied the account with a number of cabinets, including several for frozen foods. There is no reliable evidence in the record to substantiate the witness' hearsay testimony concerning this account. In any event, despite this alleged competitive difficulty with Carnation, Polar has been able to maintain its position as the second largest ice cream manufacturer in the Austin area with an estimated gallonage of 400,000 gallons, as compared to an estimated gallonage of 80,000 gallons

[98] While the witness did claim that he had seen frozen food in some of the cabinets, this does not establish that Carnation had supplied the equipment for that purpose, since the witness himself conceded that customers put frozen food in his company's ice cream cabinets without permission. He also conceded that he had the experience of customers reporting things to him which turned out to be untrue.

for respondent Carnation. The largest company in the area is the local Texas company, Superior.

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The evidence fails to show any injury to competition or to any competitor as a result of the engagement by any of the respondents in any of the complaint practices in any area in Texas. The evidence likewise fails to indicate any significant improvement in the competitive position of respondents due to the complaint practices. On the contrary it appears that Borden's share of state production in Texas has declined from 17.5 percent in 1947 to 13.3 percent in 1955. Carnation's share increased slightly from 2.6 percent in 1947 to 3.9 percent in 1950 and thereafter, following its acquisition of four local companies in 1951, 1953 and 1955, its share rose to 7.5 percent by 1955. Arden's share increased almost imperceptively from a minimal 1.1 percent in 1950, when it entered the state, to 1.6 percent in 1955. The record contains no separate information with respect to respondent Foremost's production share in Texas. However, it does appear that its share of production in Texas and Louisiana combined has increased only slightly from 7.11 percent in 1950 to 7.38 percent in 1955.

### 12. *Phoenix, Arizona*

The hearings in Phoenix involve evidence with respect to both the Phoenix and Tucson areas. The respondents involved are Carnation, Arden and Borden, which do business in both areas. Borden is a relatively recent entrant into the Arizona market. Swift & Company also operates in both areas. One of the local competitors, Lily Ice Cream Company, also does business in both Phoenix and Tucson. Other local competitors are Bratt, Frigid Products, Brik O' Gold and Star, which operate primarily in the Phoenix area. The local companies in Tucson include Sunset and Tucker. Representatives of Lily and Tucker testified at the Phoenix hearing. Representatives of Bratt and Brik O' Gold were subpoenaed, but were subsequently excused at the request of counsel supporting the complaint. No dealer witnesses were called.

The testimony of Lily Ice Cream Company relates mainly to the Phoenix area. The evidence indicates that it has been customary for manufacturers in the area to supply their customers with ice cream cabinets. Prior to 1948 such cabinets were supplied without a rental charge. Beginning in 1948, and apparently following the lead of the companies doing business in California where a rental

charge was being made, ice cream manufacturers in Phoenix began to make a rental charge for supplying cabinets. However, this practice was abandoned early in 1955. There is no evidence that any of the respondents, who apparently were instrumental in instituting the practice of charging a rental, had had anything to do with its abandonment. On the contrary, the testimony of the Lily witness indicates that his local competitor, Bratt, was one of the first to discontinue the charging of a rental and was the cause for his own company's discontinuance of the practice.

The record fails to establish that the respondents have been responsible for any significant competitive difficulties by Lily, arising out of the complaint practices. The only evidence offered of any competitive difficulties with the respondents involved four accounts in which Arden was a supplier and one where Carnation was the supplier. The four accounts involving Arden included only one which had actually been lost to Arden, the other three being accounts which Lily sought unsuccessfully to acquire. The witness sought to attribute the loss of the single account and the inability to acquire the other accounts to the making of loans by Arden. Unlike most similar testimony there is corroboration in the record of the witness' hearsay testimony, with respect to the making of loans by Arden to three of the four accounts referred to.[99] However, there is no reliable evidence that the making of the loans was the reason why the accounts had chosen Arden as a supplier. The witness' testimony concerning these transactions was based on information received from his salesman which, aside from being hearsay, did not even purport to reflect any advice from the dealers concerning their motive for dealing with Arden, but merely represented the witness' own conclusion or surmise concerning the accounts' motivation. The fact that in no case, including the single account which it lost, was Lily requested to make a loan suggests that the making of a loan by Arden was not a controlling consideration in the choice of suppliers. Not only is there no evidence of any exclusive dealing arrangement in connection with any of these transactions, but the fact that when one of the accounts later changed hands the new owner switched to Lily and nevertheless continued to pay Arden on the balance of the loan, would appear to be affirmative evidence of the absence of any exclusive agreement. The lack of probability that any exclusive arrangements were involved is further buttressed by the evidence concerning another account (not referred to by the Lily wit-

[99] Such corroboration appears in an extract from recordings appearing in the county recorder's office, which was read into the record by agreement of counsel.

ness) which despite a loan from Arden decided to purchase a portion of its requirements from the local competitor, Bratt. Despite the apparent criticism of Arden for the making of loans, the Lily witness conceded that his company also made loans to customers. No claim was made that Arden was the initiator or leader in the practice.

The single account involving respondent Carnation was one which the Lily witness claimed his company could not acquire because Carnation had given the account a guaranteed rebate which brought the price below that of Lily. Not only is there no reliable evidence as to Carnation's discount or rebate to the account in question (other than the witness' hearsay testimony as to what his salesman told him), but there is no evidence that the alleged rebate was connected with any exclusive dealing arrangement.

The few instances related by the witness, only one of which involves the actual loss of an account, had had no significant effect on Lily's fortunes. Despite the witness' reluctance to reveal his gallonage figures, he conceded that his company's sales amounted to "something like" 300,000 to 400,000 gallons a year. The company's production has steadily increased, albeit the witness claimed that the increase had not kept pace with the increase in population. The company is admittedly a substantial factor in the market and its products are well received by the retail stores and the public in the area. It has had to remodel its Phoenix plant several times in order to keep pace with its increased sales. It has recently acquired a competitor in the Tucson area and is building a new plant there. These facts hardly bespeak the existence of any serious competitive problems for Lily Maid.

The respondents involved in Lily's testimony have not fared nearly as well in the Phoenix market. Respondent Arden, which in 1950 had 40.4 percent of the Phoenix Metropolitan market, experienced a very substantial decline by 1955 to 19.7 percent. Respondent Carnation's share has declined from 24.2 percent in 1950 to 21.8 percent in 1955. No comparable figures are available for respondent Borden which has only recently come into the market and was not referred to by either of the two witnesses in Phoenix.

The evidence offered through the owner of Tucker Ice Cream Company of competitive conditions in the Tucson area is almost wholly without probative value. The Tucker witness was an elderly, semi-retired gentleman who had not called on any accounts for almost ten years and had turned over the operation of his business to a young man who made deliveries for him. While claiming that his gallonage had decreased by approximately one-third since 1951, the witness had no idea what his gallonage was.

The Tucker witness made the broad claim that he was unable to compete because competitors offered better equipment and because their products were "better advertised, nationally known, and we are local", but was unable to give any reliable testimony upon which a finding could be based that any of the respondents have been responsible for his competitive difficulties. One of the few specific accounts to which the witness made reference was lost to the nonrespondent Swift, for reasons not appearing in the record. While he also referred to respondent Arden as possibly being one of two competitors involved in some painting for another account which he had lost, he later recalled that the competitor involved was Swift, rather than Arden. After further inability to recall any accounts which his company had lost or been unable to acquire, the Tucker witness agreed that all he knew about the accounts "would be hearsay,—what my driver tells me", and suggested that the latter "would make a better witness than me because he has his fingers right on the pulse of everything." The Tucker witness indicated that his company had never done much advertising and that in recent years it did none whatsoever.

That the Tucker Ice Cream Company is in a moribund condition would appear to be strongly suggested by the evidence. However, there is not a scintilla of evidence that this has been due to any action on the part of the respondents. While not material to these proceedings, it seems apparent that the root of its difficulties is in the inactive role of its ownership due to age and state of health, and the lack of aggressive selling, merchandising and advertising programs.

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The record is barren of any competitive injury due to the engagement by any of the respondents operating in the State of Arizona in any of the complaint practices. The only evidence offered outside of the testimony of the two competitor witnesses was a list of loans and sales of equipment under conditional sales contracts made by respondent Arden in various portions of the State of Arizona. However, no competitors were called from any of the areas involved, outside of Phoenix and Tucson, and there is no evidence that the making of such loans or the sales of equipment by respondent Arden has even produced a competitive ripple. Of the transactions appearing in such list, most involved the sale of cabinets to customers and, in a number of instances, the sale of trucks and equipment to non-retail ice cream distributors, who purchase respondent's ice cream for resale to retail customers. There were only 16 transactions from 1947 to 1955 in the entire State of Arizona involving loans to retailers and only 13 involving sales of soda fountain equipment to retailers. In no case was

evidence of exclusivity offered and, so far as appears from the record, all accounts involved may have been Arden's existing accounts rather than accounts acquired from others.

In any event, the making of such loans and the sales of such equipment do not appear to have resulted in any significant improvement in Arden's competitive position in the state, since its share of state production declined drastically from 45.0 percent in 1947 to 21.2 percent in 1955. This hardly suggests that respondent Arden is overwhelming its competitors in the State of Arizona. Respondent Carnation did not begin manufacturing in Arizona until 1951. In its first full year of production in the State, 1952, its share of production was 18.4 percent. By 1955 this had increased to 21.3 percent. Carnation's increase does not begin to offset Arden's substantial decline. Presumably other, nonrespondent competitors were increasing their share during this period.

13. *Los Angeles, California*

The only witness called at the Los Angeles hearings was a representative of Christensen Ice Cream Company, which is located in San Bernardino, approximately 60 miles east of Los Angeles. The respondents operating in the area are Arden, Foremost (Golden State), Carnation and Beatrice. Other competitors are Challenge, Big Bear, Balian, Kranila and Swift. The testimony offered through the sole witness called was substantially to the effect that (a) the California law requiring a one-third down-payment on the sale of equipment and the balance in eighteen months was working out satisfactorily; (b) some ice cream competitors in the area are in the wholesale grocery business and are liberal in extending credit to customers on their grocery purchases; and (c) some competitors own stock in retail outlets. The witness suggested that the practice of extending credit through grocery affiliates of ice cream companies constituted an avenue for evasion of the provisions of the California law limiting the extension of credit on ice cream purchases. The witness cited the existence of a subsidiary of respondent Arden, known as Market Wholesalers, which is in the wholesale grocery business and which he claimed some of his customers had told him had extended to grocers "greater credit than they could otherwise get" on their purchase of *groceries*. The witness acknowledged that he was not in a position to say whether such claims were true.

It appearing that such extension of credit involved the wholesale grocery business, and not the frozen foods business, and was therefore outside the scope of the complaints, objection to further interrogation

of the witness along these lines was sustained. Also sustained was an objection to testimony by the witness concerning the alleged ownership by respondents Arden and Foremost of stock in retail grocery stores, as being outside the scope of the complaints. Upon the sustaining of these objections, the witness was withdrawn and all other witnesses were excused by counsel supporting the complaint. No evidence was offered with respect to the use of the complaint practices in southern California, or as to the effect thereof on competition. There is, of course, no basis in the record for any finding of injury to competition in the San Bernardino area or elsewhere in southern California, as a result of the engagement by any of the respondents in any of the complaint practices.

### 14. *New York, New York*

The respondents doing business in the New York Metropolitan area are National, Borden, Beatrice and Foremost. The witnesses at the New York hearings consisted of sixteen retail dealers and sales representatives of respondents National, Borden and Beatrice. Although there are a considerable number of ice cream manufacturers in the New York area, counsel supporting the complaint failed to call a single representative of a competing ice cream manufacturer.

Of the sixteen dealer witnesses who were called, seven testified with respect to assistance from respondent National, and seven with respect to respondent Borden; two testified concerning both Borden and National, having done business with both at different times; and only two testified concerning respondent Beatrice. Most of the dealers were owners of small confectionery and candy stores or luncheonettes. Of the dealers who testified with respect to respondents National and Borden, thirteen had received loans from one or the other and, in two instances, from both. Most of the loans involved relatively small amounts of money ranging from $100.00 to $500.00. The loans were made mainly for remodeling purposes and, in some instances, meant the difference between a small dealer's staying in business and closing up. In only a few instances did the testimony reveal that the making of a loan or other assistance from a respondent was a factor in the account's decision to deal with the respondent. In three or four instances the loan was made to an account which was already being served by the particular respondent, and there was no indication that anyone else had sought to acquire it. In none of the latter instances did the witness testify that the loan had anything to do with his continuing to deal with the respondent. On the contrary,

in the case of one of Borden's accounts, when it became dissatisfied with Borden it switched to a non-respondent supplier which assumed the balance of the Borden loan.

The evidence indicates that there is a very considerable switching around of accounts in the New York area and the fact that there is an outstanding loan does not appear to be an impediment to the acquisition of such accounts by local competitors since the latter also make loans to customers. In fact five of the loans about which dealer witnesses testified, involved merely the assumption by respondent Borden or National of the unpaid balance of a pre-existing loan received from a local competitor. In only one of these did the witness indicate that the making of the loan had anything to do with the account's switching. The decision to change suppliers in the other cases was precipitated by some other circumstance, such as dissatisfaction with the service or product of the other supplier or complaints from customers. In the one instance in which the witness testified that a loan from respondent National (which enabled him to pay off the balance of a loan from a local supplier) was "a very small factor" in his choice of suppliers, he also indicated that he had been seeking for sometime to obtain National's brand but had been unable to do so as long as another store in the neighborhood was carrying it.

In only five instances did the loan transaction involve an initial loan by National or Borden. However, here again, with possibly two exceptions, there was either no evidence that the loan was an inducement for switching, or it appeared affirmatively that other circumstances were responsible for the change of suppliers, such as dissatisfaction with the other supplier or a preference for the products of the particular respondent. Thus, one of the dealers (the operator of a drug store) whose testimony suggests that possibly a loan from respondent National for remodeling purposes may have been a factor in his decision to change suppliers, also indicated that when his local supplier learned of this he too agreed to make the loan, as did several other companies, but that he preferred respondent National's product because of its quality. Another dealer who testified that a willingness to loan him $800 by respondent National was one of the factors which he took into consideration at the time he switched from a local supplier, also indicated that the local company's brand had been in the store when he recently purchased it and that because of his satisfaction with Breyer's (National) at his previous location he continued to handle the local company's brand "just as long as to make a transfer to Breyer's." However, when the dealer later had a personal difference with a Breyer salesman, he switched back to the local supplier, which assumed

the amount of the balance of the National loan plus an additional sum. Thereafter, when his sales of the local brand began to fall off he switched to respondent Borden, which merely assumed the balance due to the local supplier. Although the balance had since been paid off, the dealer continued to trade with Borden because of his satisfaction with that company.

There is no indication that the policy and practice of respondents in the making of loans is more liberal than that of competitors generally. On the contrary, the testimony of the dealer witnesses indicates that some of the respondents are more conservative than some of their competitors. Thus it appears that one of the dealers who had been dealing with respondent Borden sought a loan which the latter declined. He then switched to a local competitor, who loaned him $1,200 with the understanding that it would not have to be repaid until the store was sold. When his sales began to fall off he sought to return to Borden and finally induced the latter to assume the competitor's loan. However, Borden did so only on condition that the dealer start repaying the loan on a regular installment basis. In another instance where the dealer had received a small loan of $150 at the time of switching to respondent National from a local supplier, the respondent declined to later make another loan of $500, and the dealer switched back to his old supplier which made the loan.

Most of the loan transactions involved conventional loans, secured by chattel mortgages, which had to be paid off. However, in three instances the dealers had received advance rebates which were treated as loans, but which did not have to be repaid if the account purchased a certain amount of ice cream or dealt with the respondent for a given period, usually a year. In only one of these instances, that involving respondent Beatrice, did the dealer indicate that the advance rebate was an inducement for his change of suppliers. In the second instance, also involving respondent Beatrice, there is no evidence as to whether the payment acted as an inducement since the agreement had been made by the witness' father and she had no personal knowledge regarding the transaction. In the third instance, involving respondent Borden, the so-called advance rebate actually was a price concession intended to equalize the difference in price between Borden and a local supplier's lower price.[100]

Of the remaining dealers, one testified that respondent National had supplied him with a compressor for his fountain and had serviced it,

[100] Borden's price was 20¢ a gallon higher than the competitor's. It agreed to pay the dealer $500 on condition that the dealer purchase 2,500 gallons. 2,500 gallons multiplied by 20¢ equals $500.

but indicated that this was a common practice by most manufacturers in the New York area. There was no indication given that the supplying of the compressor or the servicing thereof had anything to do with the witness' choice of suppliers. Another dealer testified that he had received no loans or advance rebates or anything else from respondent National, other than the regular schedule rebate, which was paid at the end of the year based on the witness' volume.

The dealer testimony fails to establish, except in a few instances, that financial assistance by any of the respondents or the payment of advance rebates was a factor in the choice of suppliers. The testimony does disclose that local competitors engage in the identical practices and that, in a number of instances, the assistance given by respondents was merely a defensive measure to meet the competition of local competitors. The amounts of the loans and rebates involved were, for the most part, so small that it cannot be assumed that local competitors were automatically precluded from obtaining or keeping the accounts. On the contrary, in at least five instances where a loan had been made by a respondent, a nonrespondent competitor was later able to acquire the account.[101]

The testimony of the retail dealers called actually added little to the documentary evidence previously produced by respondents, which indicated that respondents have engaged in these practices in the New York area. In the absence of testimony by respondents' competitors in the New York area indicating the effect or probable effect of these practices upon them, the examiner cannot assume that the practices have had or are likely to have an adverse effect. The testimony of the dealer witnesses, by itself, does not furnish the basis for any such inference. In fact, if the testimony of the dealer witnesses establishes anything, it establishes the widespread use of the identical practices by respondents' local competitors in the New York area and the fact that they have had no difficulty in acquiring accounts because of these practices.

As above indicated, counsel supporting the complaint also called sales representatives of three of the respondents. The testimony of these witnesses fails to add anything significant to that of the dealers who were called. While indicating that some of the complaint practices are utilized by the respondents in securing or retaining accounts, a fact which is not seriously in dispute, the testimony indicates that

[101] In four instances the nonrespondent competitors assumed the balance of a respondent's loan, even increasing the loan in one case. In the fifth instance the dealer himself paid off the $357 balance of a respondent's loan when he became dissatisfied and decided to change suppliers.

such practices are utilized only to a minor extent and are used to meet competition.

The first of the sales witnesses called by counsel supporting the complaint was the former sales manager of respondent Beatrice in the New York Metropolitan area. The witness had left Beatrice's employ six months prior to the New York hearings and there appeared to be a complete absence of any motivation for coloring his testimony. The witness indicated that the primary sales approach of the company's salesmen was to emphasize the merits of their product and of their company. However, in some instances, dealers sought to obtain something additional, such as a loan or some other form of financial assistance. Although having no records available to assist him and indicating that his testimony was based only on a "guess", the witness estimated that the number of new accounts where it was necessary to give the dealer something extra to obtain the account would not exceed 15 per cent of such new accounts. However, he also indicated that such accounts were mainly of the smaller variety, having a relatively small gallonage, so that in terms of new gallonage acquired (as distinguished from the percentage of accounts acquired), the percentage would be less than 15 per cent. He further indicated that the making of such loans or other forms of assistance were recognized industry practices in the New York area and were utilized by large and small companies alike, the latter having in fact initiated some of the more recent refinements of some of the practices, such as the payment of advance rebates.

The witness described advance rebates as involving the making of a payment to the dealer based on an estimate of his gallonage over a given period, such as a year or a year and a half, and applying the regular volume rebate percentage to such gallonage. Such payments were made in the form of a loan which the dealer was not required to repay if he remained with the supplier for a stipulated period necessary to earn the rebate. The Beatrice witness testified that during the period of his employment he could recall using this practice in only three or four instances out of "well over a thousand accounts."

The testimony of the National Dairy sales representative likewise fails to indicate any widespread or aggressive use of the complaint practices. The witness indicated that new customers were approached on the basis of National's quality and the advantages of carrying their merchandise, and that they preferred to "let sleeping dogs lie", as far as suggesting a loan or some other form of assistance to the customer. The only exception to this was in the case of accounts where the salesman felt that the gallonage could be increased by the installation of

a soda fountain which would enable the account to increase its bulk sales of ice cream. However, any suggestions emanating from the salesman in such instances were restricted primarily to the company's existing accounts. The witness could recall only one instance in the past three years where he had suggested the sale of a soda fountain to an account, the cost of such fountain being approximately $800.00.

The National Dairy witness also confirmed the testimony of the Beatrice witness concerning the existence of the practice of prepaying rebates, but it does not appear that the practice has been used to any extent by his company. He also referred to a refinement of the practice, known as a "performance contract", where a stipulated sum is advanced to the dealer in the form of a loan, the repayment of which is subject to being cancelled upon the dealer's purchasing a given gallonage or remaining with the company for a stated period. However, unlike the prepaid rebate, under a performance contract the dealer may also receive his regular gallonage rebate if his sales warrant it. This practice, in effect, involves a double rebate, one paid in advance and one as it is earned. However, the National Dairy witness indicated that he had utilized such a contract in only a single instance and that it did not involve a new account, but an existing account which one of the local competitors had sought to acquire on the basis of such a contract and whose offer National Dairy met in order to retain the account. The National Dairy witness indicated that in his experience customers who had signed performance contracts or received advance rebates or loans switched just as readily as accounts who had not.

The testimony of the Borden sales representative was limited to a single account which he had acquired in 1952 on the basis of a two-year "performance contract" in return for the payment of $150.00. The witness indicated that it was his understanding that a dealer receiving such a payment did not receive any further rebate in addition to such payment and that the payment was, in effect, an advance rebate. He further indicated that this was the only account in the past three years which he had acquired by the use of such a contract.

If the evidence of the New York hearings establishes anything, it establishes the volatility of the dealer-supplier relationship and the frequent switches of dealers from supplier to supplier, both national and local and between national and local companies, despite loans, advance rebates, performance contracts or any other form of supplier assistance. The evidence indicates that the complaint practices are utilized only to a limited extent, that they are used by local companies as well as by the respondents and that the respondents do not use them

to any significant extent in an aggressive manner in order to acquire accounts from competitors.

The record is wholly barren of any evidence of injury to competition or the likelihood of such injury, in the New York area, by reason of the use of any of the complaint practices by any of the respondents. On the contrary, it appears affirmatively that such practices, to the extent they are utilized by respondent, have not had any significant effect insofar as improving the market positions of these companies. Thus, it appears that respondent Borden's market share in the New York Metropolitan area actually declined from 19.6 per cent in 1950 to 14.9 per cent in 1955, while respondent National's share declined from 17.8 per cent to 16.6 per cent. Only the market share of respondent Beatrice has shown any increase and that a modest rise from 2.4 per cent in 1950 to 3.5 per cent in 1955. Respondents National and Borden have both sustained a decline in their share of production for the state as a whole between 1947 and 1955. National's share has declined from 25.8 per cent to 23.8 per cent, while Borden's declined from 18.5 to 14.6 per cent. Respondent Beatrice's small 1947 share of 2.1 per cent increased to 3.6 per cent by 1955.

### 15. *Pittsburgh, Pennsylvania*

The respondents doing business in the Pittsburgh area are National (Rieck Division), Borden, Foremost and Fairmont. Among the nonrespondent companies operating in the area are North Pole Ice Cream Company, Penguin Ice Cream Company, I. N. Hagen, Country Bell, Green Valley Co-op, Meyer & Powell, Forbes, and Taylor Ice Cream Company. Another local company, William Penn Ice Cream Company, was acquired by Green Valley Co-op in 1955. There is also a large chain of retail stores, Isaly's, which manufactures its own ice cream. Counsel supporting the complaint called as witnesses four dealers from the Pittsburgh area and one from West Virginia.[102] He also called a representative of one of the Pittsburgh ice cream manufacturers, North Pole Ice Cream Company.[103]

North Pole is in both the cold storage and ice cream business. The company sells to retail stores and also manufactures ice cream novel-

[102] Two other dealers called in Pittsburgh had previously dealt with two Cumberland ice cream manufacturers who testified at the Washington, D.C., hearings. The testimony of these two dealers has already been considered in connection with the discussion of the testimony of these two manufacturers at the Washington hearings.

[103] The North Pole witness was called with some apparent degree of reluctance, after the examiner had indicated that the calling of dealer witnesses only in a market did not afford a sufficient basis for a finding of competitive impact.

ties for sale to other ice cream manufacturers. Its total sales in 1955 were approximately 550,000 gallons. The company had as many retail accounts in 1955 as it had in 1954. However, the North Pole witness claimed that the company's sales per account had declined in 1955, resulting in a decline of approximately 7 per cent in its sales to retail accounts. On the other hand, its sales of novelities to other manufacturers have increased, resulting in an overall increase in ice cream sales. Despite this overall increase, the North Pole witness claimed that 1955 was the least profitable year that the company had had since 1942. The extent of such decline was not indicated by the witness. However, the fact that the decline was not limited to the ice cream end of the business, but was distributed equally between the company's cold storage and ice cream business suggests that overall business conditions in the community were affecting the company's operations.

The North Pole witness made no effort to attribute the 1955 decline in retail sales and in profits to the respondents or to the complaint practices. On the contrary, he testified that the decline was the result of the fact that the retail chains with their lower prices and, to some extent, the soft ice cream stands, had taken away business from the corner grocer and drug store to which his company sold. North Pole apparently does not serve many chain stores. The witness made no effort to attribute its lack of sales to chain stores to any competition from the respondents. On the contrary, he testified that his company had not gone after the chain stores because it would entail a considerable gearing up of its equipment for increased production and the buying of additional delivery equipment. He expressed the opinion that the small unit of profit involved in such sales was not worth the risk of possibly being cut off after the company had expanded its business. The record does not show that the respondents are dominant in the chain store market in the Pittsburgh area. The A & P chain is served by the local competitor, Penguin Ice Cream Company. The Isaly chain makes its own ice cream. Respondent National at one time served a local chain known as the Thoroughfare stores, but lost the account to respondent Foremost. There is no evidence in the record that the latter chain received a special price from either respondent or that the price paid was in any way tied to an exclusive dealing arrangement.

The record indicates that North Pole furnishes its customers with cabinets and signs, and assists them financially through money loans or financing the purchase of equipment. The witness gave no indication that the furnishing of cabinets has represented any problem

to his company, although he expressed the opinion that he thought there were more cabinets in the field than were warranted by gallonage. He also questioned whether some of the signs were worth the advertising value involved. In the case of loans and financing, he appeared to have no objection if they were limited to the ice cream department of a store and to ice cream equipment, such as a soda fountain, which would result in increased ice cream sales.

Although the North Pole witness expressed some general conclusions and opinions regarding some of the complaint practices, he made no effort to attribute the leadership in these practices to any of the respondents nor did he attribute to them the loss of any accounts or inability to acquire accounts. In fact he made no reference to his company's loss of, or inability to acquire, any accounts. As above indicated, his company did experience a 7 per cent decline in dealer sales in 1955 as a result of a decline in sales per account, but there is no indication that the complaint practices were in any way involved. Furthermore, the witness indicated that his company's business had begun to improve in the last three months of 1955 and was continuing at the same rate in 1956. The company has expressed its confidence in the future by recently completing the construction of a new plant which will give it greater productive capacity.

Three of the five dealer witnesses called in Pittsburgh were or had been customers of North Pole. One was the operator of a drug store in suburban Pittsburgh. The dealer had purchased the equipment of a bankrupt store which had been served by North Pole. The latter held a chattel mortgage in the amount of $6,700 on a soda fountain and equipment which the dealer purchased from the former owner. After a period of eight months the dealer switched to respondent National, which supplied him with a cabinet and sign (the latter advertising Sealtest ice cream and containing a privilege panel for the dealer's name). Respondent National also assumed the balance of the North Pole loan and increased it back to the original amount to enable the owner to do some remodeling work. There was no indication from the witness that the loan from respondent National or the supplying of a sign had anything to do with his change of suppliers. On the contrary, he testified that he had been handling National's products at other locations for many years and sought out the company with the expectation of increasing his gallonage. However, since the store was located in an area where North Pole was favored by customers, the store's ice cream sales began to decline after the switch to National. Within six months the dealer switched back to North Pole, which supplied him with a sign and took over the balance of the National loan,

increasing it to $8,000. The dealer gave no indication that the increase of the loan by North Pole had anything to do with his decision to return to his former supplier.

The second dealer was also a pharmacist who had dealt with North Pole. The latter had supplied the dealer with neon tubing, costing about $300, to illuminate the store. It had also paid the dealer approximately $400 to cover the cost of transporting a Rexall sign, the dealer having recently become a Rexall store. However, the dealer, who had previously dealt with respondent National at other locations for some fifteen years, decided to change to that company hoping to increase his sales. The latter, which had been sought out by the dealer, agreed to supply neon tubing in place of that supplied by North Pole and to advance the dealer the transportation cost of the Rexall sign, which the dealer expected to have to repay to North Pole. There is nothing in the testimony of the witness to indicate that respondent National acted in an aggressive manner to acquire the account. On the contrary, the dealer had sought out respondent National, which merely met the assistance which the dealer had received from North Pole.

The third dealer was the owner of a retail dairy store in suburban Pittsburgh who had originally dealt with North Pole, later switched to respondent National and then switched back to North Pole. While dealing with respondent National, the latter furnished the dealer with a sign and with $50.00 worth of ice cream in the new cabinet which it supplied to the dealer. However, when the dealer's customers began to demand North Pole ice cream and it appeared that National's price was higher despite an alleged rebate, the dealer returned to his former supplier. The latter furnished him with a wooden sign in place of the metal National sign. If the testimony of this dealer demonstrates anything, it demonstrates the importance of price and consumer preference to a dealer. When respondent National's price turned out to be higher than North Pole's and his sales declined, the sign and new cabinet furnished by National (neither of which were indicated by the dealer to have been in the nature of an inducement), were unable to hold him.

A fourth dealer was the owner of a drug store who had dealt in turn with respondents National and Borden. No other competitor was involved. The dealer at various times had handled National's and Borden's products, and had received loans from each. The testimony of this witness indicates that there is keen competition among the respondents for accounts, and tends to negate the impression left by much of the argument of counsel supporting the complaint suggesting that the respondents act as an organized group, which concentrates on

obtaining the accounts of independent producers and have a gentleman's agreement not to solicit each other's accounts. The latest loan received by the dealer was from National, with whom the account was then dealing. The dealer's store had burned down completely and a loan from National enabled him to reopen.

The fifth dealer was the operator of a restaurant in nearby West Virginia, who had been handling Fairmont's Imperial brand for many years. He switched to the competitor, Hagen, because of a dispute with the Fairmont delivery man. According to the dealer's testimony, Hagen promised him some "fancy signs" and told him he would "save money" on their ice cream. However, within two months, he decided to return to respondent Fairmont because the latter had a better volume rebate. While the latter furnished him with a better back bar for the cabinet, its cabinet was inferior to Hagen's. So far as appears from the witness' testimony, neither this nor a highway sign worth about $50.00 had anything to do with his switching back to Fairmont, the controlling consideration being price. There is nothing to indicate that the Fairmont price was other than its regular list price or that it was tied in any way to an exclusive dealing arrangement.

The record is wholly barren of any evidence of injury or of probable injury to competition in the Pittsburgh area. There is no indication of any significant decline in the number of competitors in the area. While it does appear that National increased its market share, by four per cent, from 11.5 per cent in 1950 to 15.5 per cent in 1955, its sales in 1955 were actually 210,000 gallons below its sales in 1947. Similarly, while Borden's market share increased slightly from 5.4 per cent to 6.0 per cent in 1955, its 1955 frozen products sales were actually 460,000 gallons below 1947. No comparable data appears for Fairmont or Foremost. However, the former was referred to as being involved in competition for only a single account, and no reference was made to the latter by any witness.

### 16. *Philadelphia, Pennsylvania*

The respondents operating in the Philadelphia area include Borden and National (Supplee-Wills-Jones and Breyer divisions). While respondent Fairmont was present at the Philadelphia hearing because of its operations in the Scranton area, no evidence was offered with respect to it. Respondent Foremost has acquired Philadelphia Dairies since the date of the complaint, but it was not noticed for the hearing and was not involved in any of the testimony.

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There are a number of regional companies which operate in the Philadelphia area. Among these is Abbott's, which is not only active in Philadelphia but operates as far north as New York City and as far south as Baltimore and Washington, D.C. Another large competitor in the area is Richman, which operates in Delaware, Maryland, eastern Pennsylvania, New Jersey and parts of New York. Other substantial regional competitors are Penn Dairies (Penn Supreme) and Hershey, which operate in the eastern Pennsylvania, south Jersey and Maryland areas. Additional substantial competitors in the Philadelphia Metropolitan area are Yuengling and Betsy Ross, the latter being owned by the Philadelphia Association of Retail Druggists. Other competitors in the suburban areas are Shearer, Nelson Ice Cream Company (of Royersford, Pennsylvania), Reading Ice Cream Company and Miller's (both of Reading, Pennsylvania), Brofhoff (of Pottsville, Pennsylvania) and Windsor Farms (of Hamburg, Pennsylvania). There are also a substantial number of soft ice cream establishments such as Carvel and Dairy Queen and a number of retail establishments which manufacture their own ice cream such as Howard Johnson, High's and the Hot Shoppes.

Counsel supporting the complaint called three competitor witnesses from the area. Two were from the suburban area, Nelson Ice Cream Company and Windsor Farms. The third was a representative of the regional company, Richman Ice Cream Company. A representative of Shearer Ice Cream Company was subpoenaed but was excused at the request of counsel supporting the complaint. Six dealer witnesses were also called to testify, three of whom had been customers of Richman.

Richman Ice Cream Company has its main plant in Sharptown, New Jersey. As above indicated, it operates in a wide area from New York on the north to Maryland on the south. The company sells to both retail establishments and to wholesale distributors, who in turn resell to retailers. Richman supplies its customers with cabinets on a rent-free basis, with signs containing privilege panels and with compressors for fountains. It also assists customers financially by loans of money and by the sale of equipment on an installment basis.

The Richman witness, its sales manager since 1954, had no criticism of the practice of supplying cabinets to customers. He particularly defended the furnishing of the more expensive modern glass-front display cabinets on the ground that his company had developed an attractive package and that it helped increase sales to have the package displayed, rather than hidden in an old-fashioned black-top cabinet.

The witness' criticism was directed mainly at the rendering of financial assistance to retail accounts, including loans and the sale of equipment. He conceded that the practice had been going on in the industry for "a long while", indicating that "it probably goes back before my memory of the ice cream business." He claimed that the extent of such assistance had increased since 1950, as the competition began "getting rougher." The Richman witness made no claim that any particular competitor was responsible for the practice or for the alleged increase in the tempo of its use. While he did refer to two accounts which his company had allegedly lost to respondent National (Breyer) because of financial assistance, and one which his company was able to retain despite an alleged offer of assistance from respondent National, there is no reliable evidence in the record to support the witness' hearsay testimony with respect to these accounts.[104] In any event, there was no claim made that respondent National had been a leader or an aggressor in the practice of assisting customers financially.

The Richman witness claimed that his company had lost approximately 500 out of 1500 or 1600 accounts which it had allegedly served in 1950, and that its sales to dealer accounts had declined by approximately 10 percent in 1955. The reliability of the witness' testimony in this respect is, however, open to serious question. In a pamphlet recently distributed by the company to its dealers, the claim is made that the company serves 3,000 retail accounts. The witness, while purporting to testify with respect to a decline which had occurred since 1950, actually did not enter the company's employment until 1953, when he was a salesman in the New York area, and did not occupy a managerial position until 1954. He conceded that the figures he gave were a rough approximation and were based on company records which he did not have with him. A request by counsel for one of the respondents that he produce the records against which the claims of loss of business could be verified was refused by the witness. While the examiner declined to direct the witness to produce the appropriate records, he indicated that he would take the witness' refusal to cooperate into consideration in determining the weight to be given his testimony.

Aside from the fact that there is some reason to question the witness' testimony with respect to the loss of 500 accounts, no claim was

[104] The witness' testimony with respect to one of the accounts did not even purport to be based on the information received from the owner of the establishment, but on second-hand hearsay information obtained from the president of his own company. His testimony with respect to the other two accounts was based on information received from his salesman, it not appearing where the latter had obtained his information.

made that the loss of such accounts was due exclusively or even primarily to the respondents or to the complaint practices. He attributed the decline to three factors, (a) some accounts went out of business, (b) some accounts were dropped by the company voluntarily because they were no longer profitable, and (c) others went to "competitive companies." The witness gave no indication as to the proportion which the latter represented of the overall number of accounts lost, or as to the proportion of such loss which was attributable to the respondents or to the complaint practices. Despite the alleged loss of retail accounts, the witness conceded on cross-examination that the company's overall gallonage had increased from well under a million gallons in 1953 to between one and two million gallons in 1956. He claimed that the increase was due mainly to increases in the company's wholesale, as distinguished from its retail, sales. While claiming that the former were less profitable than the latter, he conceded that the company's net worth had increased each year since 1953.

In view of the recency of the witness' employment in a managerial capacity, his obvious reliance on company records and reports from company officials to substantiate his claims of loss of accounts, his unwillingness to produce appropriate records, and the contradictory evidence in the record, the examiner can give little weight to the witness' claims with respect to the alleged loss of five hundred accounts. In any event, no finding can be made on the basis of witness' testimony that any substantial proportion of such loss of accounts has been to the respondents or that it has been due to any of the complaint practices.

In only one instance out of the three dealer witnesses who had been Richman customers is there any definite indication that one of the complaint practices was a significant factor in the acquisition of the account by a respondent. However, in that instance it appeared that Richman had already used the practice to acquire the account from respondent National and that the latter met fire with fire. The account, which had been dealing with respondent National from which it had previously received a loan, switched to Richman when the latter had agreed to pay off the balance of the National loan and to increase the amount thereof. Respondent National thereupon retaliated by offering the dealer a larger loan. When a Richman representative became apprised of National's offer he agreed to match it, but the dealer declined the offer.

The second account was the owner of a restaurant who had received a loan of $4,200 from respondent National to finance the purchase of equipment in connection with the opening of his establishment, which

was located on a main north-south highway in New Jersey. Respondent National also contributed $125.00 toward a sign costing approximately $600, and $25.00 toward the printing of menus. The dealer testified that he was only interested in handling one of the better advertised brands because the establishment was located on the main highway and that his choice had narrowed down to respondent National's Breyer brand and Richman. As between the two, he preferred Breyer because it was very well accepted in the Philadelphia area and he thought it would help his business. The company acceded to his request for a loan and a contribution toward the sign. In conversations with the Richman representative the latter had also indicated a willingness to cooperate in the furnishing of a sign and the making of a loan, but because of the dealer's preference for the Breyer brand he chose the latter as his supplier. In this instance the testimony indicates that both companies were willing to assist the dealer and that his choice was made on the basis of a preference for the Breyer brand.

The third dealer was the operator of a luncheonette in suburban Germantown who had originally handled Richman, but decided to switch to respondent National when the Richman service became poor. At the time of the change from Richman to respondent National the account owed Richman a balance of $500 on a loan which he had received from the latter. Respondent National declined to assume the balance of the Richman loan, but the account nevertheless switched to the respondent. Richman thereupon threatened to sue the dealer for non-payment on the loan and the latter, after eight months, switched back to Richman. This incident involves one of the few instances in the record (none involving a respondent), where an ice cream manufacturer threatened to sue or brought suit against a dealer for failure to live up to the terms of a loan agreement.

None of these three incidents indicate that respondent National's activities in connection with the making of loans are any different from those of its competitor Richman. In the first instance it acted defensively to reacquire an account which Richman took away by the offer of a loan. In the second instance both companies had made offers of loans to a pioneer establishment, which made a choice of respondent National because of a preference for its products. In the third instance no loan at all was made by respondent National in the acquisition of an account to which Richman had made a loan.

The second competitor witness, the owner of Nelson Ice Cream Company, has his plant at Royersford, which is approximately 28 miles west of Philadelphia. It only operates to a minor extent within the city limits, having about 25 accounts in the outer reaches of the city.

The company sells to retail ice cream dealers and also makes direct sales to the consumer by the home delivery method. In addition, it sells ice cream novelties to other manufacturers. The witness indicated that it was the general practice in the area to supply dealers with cabinets (on a rent-free basis), signs and compressors. He also testified that as competition became more keen manufacturers offered to assist dealers by supplying them with small things such as menus and napkins, painting their stores, making loans of money without interest and cash gifts. The most common of these practices, according to the witnesses, was the loan of money. He claimed that his company did not make outright loans, but that it did endorse bank loans made to its dealers.

The witness made no effort to attribute the use of these practices to any company or group of companies. On the contrary, he indicated that they were pretty generally engaged in by competitors in the area and that he could not single out any company as being more active in this respect than any other company. Among his competitors are not only respondents National and Borden, but Philadelphia Dairy (which was recently acquired by respondent Foremost), Richman, Penn Dairies, Betsy Ross, Shearer and a half dozen other unnamed companies. The witness had no objection to the supplying of cabinets to dealers and the servicing thereof, indicating that the average dealer could not afford to purchase such cabinets or service them. He also agreed that "a certain amount of sign work is necessary." His primary objection appeared to be to the making of loans, since his company did not have the resources to make such loans directly, although it did endorse bank loans made to some customers.

The Nelson witness claimed that his sales to dealers had declined by 5 to 10 per cent over the past three years. However, this involved mainly a decline in sales by his existing accounts rather than a loss of accounts. He attributed such decline in unit sales to the increase in the number of establishments selling ice cream in the area, and particularly to the shift in sales to chain stores. The witness made no effort to attribute his company's inability to acquire chain store business to any of the respondents or to any of the complaint practices, but rather to the fact that such chains prefer to make a contract with a single supplier covering a large group of stores (usually in excess of 100). He also indicated that his company did not have the facilities to serve such a large group of stores.

Despite the alleged decline in sales through retail outlets, Nelson's overall sales have increased from approximately 200,000 gallons in 1954 to 250,000 gallons in 1955. This in turn represents a substantial

increase over the company's gallonage of approximately 125,000 gallons in 1946 when it started business.[105] The more recent increases have reflected an increase in sales directly to the consumer and in the sale of novelties to other manufacturers. No claim was made that such sales were less profitable than those to retailers.

While the Nelson witness claimed that his company had lost some accounts due to the fact that a competitor might have made a loan to the account, he did not refer to any specific accounts or indicate that any substantial number of accounts were involved. He agreed that it was not unusual for a company to lose 8 percent of its accounts per year through normal turnover and estimated that his company might have lost thirty accounts in a five-year period, of which 10 percent might have represented accounts where a loan was involved, but that the company might also have acquired 20 to 25 percent in new accounts. Very little weight can be given to the speculations of the witness with respect to the possible loss of accounts due to the making of loans by unnamed competitors. The witness conceded that he had very little personal knowledge concerning the acquisition or loss of accounts or the reasons therefor, since he was not too closely connected with the selling end of the business and most of his testimony concerning competitive practices used was based on what his sales manager had told him. His own testimony indicates that the decline in retail sales was due mainly to a decline in unit sales, rather than to a loss of accounts. This, in turn, was attributed to an increase in the number of stores handling ice cream and a shift in sales to the food chains. The latter type of establishment is interested mainly in price concessions, rather than loans. The witness conceded that his company does not have the facilities to serve any large chain. The fact that the company does little newspaper advertising and none on radio or TV may also account for its recent inability to expand retail sales.

The record fails to indicate any injury to competition in the area in which Nelson operates. The representative of the Shearer company was excused from testifying and no other witnesses from the area were called. Although it appears from the testimony of the Nelson witness that two small competitors in the area have ceased operating, there is no indication that this was the result of any activity by any of the respondents. One of the companies, Smith Dairy of Doylestown sold out to the local competitor Shearer and the other company, Rickey

[105] The above figures are admittedly rough approximations since the witness testified without the aid of books and records. He indicated that he did not regard his records as confidential and would have been willing to produce them, except that he had not been requested to do so.

(of West Chester) sold out to another Pennsylvania company, Penn Dairies.

The third competitor witness called was the vice president of Windsor Farms of Hamburg, a company formed in 1950 by the merger of Smith's Model Dairy with Windsor Dairy. Windsor competes not only with respondents National and Borden, but with Penn Dairies, Yuengling, Shearer, Reading, Miller, Brohoff and Lehigh Valley (of Allentown). Windsor Farms supplies most of its customers with ice cream cabinets, in accordance with the general practice in the area. Those customers who own their own equipment receive a discount of 10 cents a gallon. Windsor built up a large part of its gallonage by the practice of leasing and rehabilitating stores and then subleasing them to a retail dealer, with the understanding that he would purchase Windsor Farm's ice cream. By 1950 the company had reached its maximum volume of 100,000 gallons and had about 100 accounts. However, the company's gallonage and number of accounts began to decline until, at the time of Philadelphia hearing in May 1956, it had 60 to 70 accounts and a volume of approximately 60,000 gallons.

The Windsor witness named only one account (in Allentown) as having been lost to a respondent, National's Supplee-Wills-Jones division. The account in question was one where Windsor Farms had leased a store and spent $12,000 in remodeling it, and then subleased it to a retail dealer, who later switched to respondent National when the latter allegedly made some further repairs and rendered financial assistance to the dealer. There is no evidence in the record, outside of the witness' unsupported hearsay testimony, to indicate what, if anything, respondent National did for the dealer. In any event, shortly after the account had switched from Windsor to National it changed to another competitor, Abbott Dairies, indicating the lack of holding qualities of respondent National's alleged assistance. The witness conceded that this was the only account which he could recall having lost to respondent National. He made no claim to having lost any other accounts to any other respondent.

According to the witness' own testimony the explanation for the company's decline appears to lie not in the making of loans or furnishing of assistance by competitors, but in the fact that the company has not engaged in any active selling program and made little effort to acquire accounts. It likewise does no advertising to speak of. The witness, whose title was vice president in charge of sales, conceded that he "never was schooled in selling myself, and I never did a whole lot of selling when I had to approach other companies' customers." His efforts have been restricted mainly to following up inquiries re-

ceived from prospective accounts. The witness indicated that because he was "a little bit too timid * * * to go out after business * * * and was afraid to be rejected by somebody when I would try to sell to them," he developed the practice of leasing a vacant store, improving it and then subleasing it to a dealer on condition that the latter would use the witness' ice cream. This practice has now been largely abandoned and the witness conceded that his company's decline in volume might be attributable to the fact that the company had changed its method of acquiring business. He also conceded that the company had "not made a great effort in trying to improve the picture." Despite this, the company's sales have become stabilized in the past six months and the witness expressed the hope that it might increase "of its own accord." The record fails to establish that any of respondents have been responsible, to any significant extent, in the decline in sales of Windsor Farms.

Of the three dealers called in Philadelphia, who were not involved in competition between Richman and one of the respondents, only one had ever done business with a non-respondent company. This was the owner of a drug store in Philadelphia who had originally dealt with respondent National, but had switched to Betsy Ross because respondent National refused to replace the refrigeration equipment in the store when it became dilapidated. Since the Betsy Ross price was considerably lower than that of National the owner decided to purchase his own refrigeration equipment and to pay for it out of the price differential. However, his volume declined significantly due to competition from several well-known brands in the neighborhood, including particularly respondent National's Breyer brand. The owner later decided to sell the store but found that no one wanted to buy it if they had to purchase the refrigeration equipment. After about a year, he prevailed upon respondent National to buy the refrigeration equipment at its depreciated value and to resume selling to him. It can hardly be said that respondent National "induced" the dealer to deal with it in this instance. It had simply failed to supply the dealer with serviceable refrigeration equipment in the original instance, as is customary in the area, and the dealer after an unsuccessful experiment with another supplier simply returned to respondent National who, at the dealer's urging, took over the cabinet which had become a burden to him and paid him the depreciated value.

The other two accounts were dealers who had switched between respondents Borden and National. Both were owners of luncheonettes in Philadelphia. One had originally handled National's Breyer brand but switched to respondent Borden because of the allegedly poor

Breyer service. Sometime after the switch the owner received a loan from Borden, which had nothing to do with his decision to change suppliers. He did, however, receive an advertising allowance of $500 from Borden at the time of the change, which was to enable him to give his customers larger portions of Borden's ice cream. This was paid in order to overcome a customer reluctance to purchase the Borden brand after the store had handled Breyer's for ten years. The second dealer had originally handled Borden, but changed to Breyer's after about five years because business was slackening and he thought Breyer, which is a well-known brand in Philadelphia, would help improve business. At the time of the switch there was an outstanding balance of approximately $350.00 on a loan from Borden which Breyer helped the dealer pay off. When the change to Breyer did not improve sales, the dealer decided to switch back to Borden. The latter gave the dealer an advertising allowance of $150.00 to enable him to give his customers larger portions in order to help encourage Borden's sales. Both transactions involved only the respondents and there is no indication that any competitor sought to obtain any of these accounts or was unable to do so. In neither instance did the dealer indicate that he had been induced to switch because of the advertising allowance or a loan or a cabinet or any other complaint practice.

The evidence regarding the Philadelphia area fails to indicate that respondents have used any of the complaint practices in an aggressive manner to acquire business from competitors or that their engagement in these practices differs from any of their competitors. There is a total absence of evidence that they have injured any competitor, let alone competition in the area, by the use of the complaint practices, or otherwise.

The evidence indicates that both of the respondents involved in the testimony of the witnesses, viz., National and Borden, have sustained a decline in sales and market share in the area. In the Philadelphia Metropolitan area, where respondent National in 1950 had 42.0 per cent of the market, its share had declined by 1955 to 32.7 per cent. Respondent Borden's share of the market declined from 4.3 per cent in 1950 to 3.6 per cent in 1955. In the nearby Allentown area, which was involved to some extent in the testimony of the Windsor Farms witness, respondent National's market share declined from 8.9 per cent in 1950 to 5.9 per cent in 1955 and respondent Borden's share declined from 0.7 per cent to 0.6 per cent in the same period. In addition to the decline in sales on a relative market share basis, respondent National also sustained a substantial decline on an absolute gallonage basis, its gallonage declining from 8.3 mil-

lion in 1950 to 7.8 million in 1955. The sales of the Breyer Philadelphia plant, which comprises the bulk of its sales in the Philadelphia area, declined from 8.3 million in 1947 to 5.2 million in 1955. The number of Breyer customers declined from 8,444 to 7,875 between 1950 and 1956, and average gallonage sales per account declined from 1,309 to 1,016 during the same period. In the nearby Allentown area the gallonage of the Supplee-Wills-Jones Division declined from 549,000 in 1947 to 452,000 in 1955, and the Breyer Division sales declined from 796,000 in 1947 to 460,000 in 1955. The sales of Borden's Philadelphia branch have declined from 880,000 gallons in 1946 to 807,000 in 1955, and those of its Allentown branch from 270,000 to 219,000 gallons during the same period. These figures hardly suggest that either respondent National or Borden is tending to overwhelm the Philadelphia market. There is nothing in these figures to suggest that they are using the complaint practices in an aggressive manner to injure competitors.

### 17. *Knoxville, Tennessee*

The testimony and other evidence adduced at the Knoxville hearings involved primarily the Knoxville market.[106] The respondents doing business in the Knoxville market are Pet and National. Swift & Company is another so-called national company operating in the area. The local companies include Galo, Sani-Seal, French Broad, Broad Acre, Mayfield, Bacon, Kay's and Stoffels. The only competitor witnesses called by counsel supporting the complaint were from Galo and Sani-Seal. Three dealers were also called by him. Respondent Pet called a representative of French Broad as its witness during the defense hearings, as well as a number of dealers. The defense evidence offered by Pet is included only in its record.

[106] A single witness, who had formerly done business in Johnson City in 1946 or 1947, was also called to testify by counsel supporting the complaint. The witness' testimony was included only in the Pet Dairy record since that is the only respondent with whom the witness had competed. His testimony was to the effect that he had called on a number of accounts of his competitors and had been informed that the customers wanted financial assistance in order to agree to switch. The witness decided to sell out his business after five or six months. He conceded that none of the Pet accounts upon which he had called had advised him that they could not do business with him because of a loan from Pet. There is no evidence whatsoever in the record as to the making of any loans or rendering of other forms of financial assistance to customers by Pet in 1946 or 1947. Since there is no indication that Pet was involved in any of the accounts upon whom the witness called, it must be assumed that the accounts where loans were requested were customers of the witness' other competitor, Southern Maid Ice Cream Company, which was acquired by Foremost in 1952 but was then an independent company. The testimony of this witness has no probative value in any of these proceedings since none of the respondents appears to have been involved in his alleged competitive difficulties.

According to the testimony of the Sani-Seal Ice Cream Company witness, the company's gallonage declined from a peak of 220,000 gallons in 1946 to approximately 130,000 gallons in 1955, and the number of its customers declined during the same period from approximately 450 to about 300. The basic question for consideration is whether this was due, in any substantial degree to respondents' use of the complaint practices. When initially asked as to the reason for the decline, the witness answered: "More competition." The evidence in the record does support this testimony since it appears that between 1949 and 1953 there was a substantial augmentation in the number of companies in the area, including Pet, French Broad, Bacon, Stoffels, Broad Acre, and Mayfield. After further prodding and leading by counsel supporting the complaint the witness attributed his company's decline "in some respects" to the fact that he could not supply customers with sufficient cabinets because he did not have enough capital. However, further interrogation as to the reasons for his company's loss of accounts produced the response that it was due to "electrical signs, advertisements, television programs, newspaper advertisements, billboard advertising" and because he could not afford to "paint signs on all of the buildings." To such methods of advertising by unidentified competitors he attributed 80 or 90 per cent of his loss. Since the complaint does not charge the use of advertising by respondents to be illegal, the above reasons given by the witness would appear to fall outside the scope of the complaint, except possibly for the electric signs and painting of signs. Even as to the latter, it is clear from the witness' testimony that he was talking primarily about signs advertising the ice cream manufacturer's products, rather than signs supplied to customers containing privilege panels.

Aside from the confusion in the witness' testimony, his opinions and conclusions are of dubious value in view of his admitted lack of personal knowledge concerning the reasons for the loss of accounts since he never called on any of the accounts himself. This responsibility belonged to his former associate who had recently died and to his route salesmen. While some of the latter were present in the hearing room, they were not called to testify. Despite the witness' admitted lack of personal familiarity with reasons why his accounts had ceased dealing with his company, he nevertheless sought to assign reasons for the loss of four accounts to respondent Pet and for the loss of one account to respondent National.

The accounts acquired by Pet were alleged to have been lost because of loans or financing of equipment. The witness' conclusions in this respect were admittedly based on information gained while

listening to testimony given at the hearing. He admitted that none of the accounts had requested a loan from him and that he didn't know whether competitors had made loans or not. His testimony concerning one of the accounts, a drug store operating under the name Todd & Armistead, was contradicted by the owner who was also called as a witness by counsel supporting the complaint. The dealer testified that he had dealt with Pet at another location for a good many years and found National Dairy's ice cream (rather than Sani-Seal's) at a new establishment which he took over. Since he had dealt with Pet for many years at prior locations he had a personal preference for dealing with Pet. While the dealer admittedly had financed the purchase of a refrigerated back bar, fountain and related equipment through respondent Pet costing $10,279, this was not the reason for his choice of Pet. He testified that he had made no effort to request assistance from his former supplier, since "I was going to switch to Pet, regardless of money." The other dealer mentioned by the witness, Medical Arts Drug Company, had purchased a fountain from respondent Pet for $9,055. However, there is no evidence in the record that the sale of the fountain had anything to do with the account's switching. Furthermore, an exhibit covering this transaction, which was offered by counsel supporting the complaint, indicates that the former supplier was respondent National (Southern Dairies) rather than Sani-Seal.

The third account involving respondent Pet was a pharmacy operated by Clear Fork Coal Company of Middlesboro, Kentucky. According to the Sani-Seal witness, his company had lost the account to Pet because the latter had sold the dealer a fountain, after Sani-Seal had been requested to do so and declined. An exhibit offered in evidence by counsel supporting the complaint reveals that respondent Pet did not sell the account a fountain, although it did repair a fountain without charge. The operator of the store (who was called as a witness by respondent Pet and whose testimony appears only in the Pet record) confirmed the fact that Pet had not sold it a fountain. The dealer testified that he had asked Pet to repair the fountain after Sani-Seal had tried unsuccessfully over a two-year period to put the fountain in good running order. The Sani-Seal witness also referred to another drug store account in Knoxville, Smithwood Drug Store, as having purchased a new fountain from Pet. However, there is no evidence in the record to support the witness' hearsay testimony.

The sole account referred to by the witness which involved respondent National was a drug store which Sani-Seal had been serving at one location and which asked for its assistance in moving a counter to a

new location. The counter was apparently too large for Sani-Seal's truck. Later the account switched to respondent National, after the latter had hauled the counter as well as a fountain to the new location. The witness conceded that he did not know whether respondent National had paid for the counter or the fountain, and made no pretense to knowing why the account had switched. Although a representative of the drug store had been subpoenaed and could have shed light on the reasons for the switch, he was excused at the request of counsel supporting the complaint.

The evidence offered with respect to Sani-Seal wholly fails to establish that its decline in gallonage and in the number of its accounts has been due to the complaint practices. Insofar as respondent National is concerned, it has been in the market for a great many years with Sani-Seal and the latter was able to build up its gallonage during most of this period without any apparent difficulty with that respondent. The decline, which occurred mainly in 1950 and 1951, appears to have been due mainly to the entry of new competitors into the market and to Sani-Seal's lack of an aggressive advertising and merchandising program. The witness himself attributed 80 to 90 per cent of his loss to his company's inability to advertise as competitors did. In any event, 1951 represented the company's low water mark and it has since been able to increase its gallonage by approximately 10,000 gallons, despite the competition from respondents and other companies in the market.

The testimony of the second competitor witness called by counsel supporting the complaint, the president of Galo Products Company, indicates that the company apparently made good progress until the winter of 1953 when it allegedly ran into competitive difficulties with respondent Pet. It may be noted, parenthetically, that while the Sani-Seal witness claimed to have had his main competitive difficulties with Pet during 1950 and 1951, Galo apparently went through this period without encountering any noteworthy problems. Galo's period of travail occurred during the winter of 1953 and part of 1954 when respondent Pet allegedly took a number of its larger customers by selling them ice cream cabinets and granting them a 5 percent discount for owning their own refrigeration equipment. Galo's sales fell from approximately $318,000 in 1953 to $290,000 in 1954. In 1955 there was a further decline to $261,000 and at the time of the Knoxville hearings in June 1956 the witness claimed his company's sales were running at the rate of $250,000 annually.

Whatever may have been the cause of Galo's decline in sales between 1953 and 1956 (assuming the reliability of his estimated sales figures),

there is no reliable evidence in the record upon which to base any finding that respondent Pet or any other respondent was responsible therefor. The Galo witness was unable to identify a single account as having been lost to respondent Pet because of the sale of a cabinet. While the witness did have with him a memorandum, prepared from reports received from his driver and sales manager relating to the loss of certain specific accounts, none of these accounts involved the sale of cabinets by respondent Pet.

Aside from the lack of reliable evidence to support the witness' conclusory and hearsay testimony, other testimony by the witness as well as by a dealer witness called by counsel supporting the complaint, points up the lack of inherent probability in his claims. Thus, in connection with a specifically named account, which was allegedly lost to respondent Pet because the latter had granted it a 13 percent discount plus an additional 5 percent for owning his own cabinet, the witness conceded that despite the alleged 18 percent discount granted by Pet his own company's price was still lower than Pet's. The witness also conceded that there were other such instances where accounts had switched to Pet after allegedly receiving a discount, despite the fact that Galo's price was lower than Pet's. Aside from the fact that the uncontradicted testimony of a Pet official called by counsel supporting the complaint and other evidence offered by him establishes that Pet's maximum quantity discount is 10 percent (not 13 percent), the fact that these accounts switched to Pet despite the lower Galo price would appear to indicate that there must have been some other reason for the switch, other than that suggested by the witness' hearsay and conclusory testimony that it was due to Pet's better price. Similarly, since the dealers receive no price advantage from Pet, vis-a-vis Galo, by buying a cabinet in order to obtain a 5 percent refrigeration allowance, it seems obvious that some other factor must have been responsible for the switching of the accounts from Galo to Pet.

It may also be noted, in connection with the witness' testimony regarding the alleged sale of cabinets by Pet to some of his customers, that the basis of his complaint was not so much the sale of the cabinets as such, as it was the fact that the sale allegedly "tied them up for five or six years while they were making the payments." Yet one of the dealer witnesses called by counsel supporting the complaint, to whom Pet had sold a cabinet (who had switched from National not Galo), testified that the cabinet was sold for cash, not on time. An exhibit offered by counsel supporting the complaint covering this transaction corroborates this fact. Furthermore, even where Pet does sell on an installment basis, there is nothing in the

agreement which requires the dealer to purchase only Pet's products.

In addition to the one account referred to above, the witness claimed to have received reports of the loss of several other accounts, including a local school, because of discounts received from Pet. Not only is there no reliable evidence to support the witness' hearsay and conclusory testimony but, as above indicated, it appears highly improbable that the discounts were the reason for the alleged switches since Galo's price was lower than Pet's even with the maximum discount.

While conceding that respondent National was not involved in the loss of accounts due to the sale of cabinets (which allegedly was the factor responsible for the loss of most of the accounts), the Galo witness claimed to have lost two accounts to respondent National for other reasons. One was allegedly lost, according to the hearsay report of his sales manager, when respondent National furnished the account with a large display cabinet and another for frozen food. Not only is there no reliable evidence to support the witness' second-hand hearsay, but a National official testified that the account in question, which was actually being split with another supplier, had been supplied with a special cabinet for ice cream novelties (not for frozen food), and that when the dealer was found putting some frozen foods in the cabinet he was asked to remove them and complied. The other account involving respondent National was actually being split with respondent Pet and with the local competitor, French Broad. The alleged reason for the loss of the account by Galo was the fact that the account had received a 5 per cent discount from National for owning his own cabinet. Aside from the fact that there is no reliable evidence in the record to support the witness' hearsay testimony, the witness' failure to give this account a discount for owning his own cabinet is contrary to the practice of almost every competitor witness who testified in these proceedings. Furthermore, the complaint charges such practice be illegal only when it involves an exclusive dealing arrangement. Since the account in question was split there was obviously no exclusive arrangement involved.

Assuming, arguendo, that Galo lost a number of accounts to Pet because of the alleged sale of cabinets, there is no evidence that the latter was the leader or aggressor in this practice since the witness conceded that this practice, as well as the others about which he testified, were engaged in by competitors generally in the area. The witness named several accounts as having been lost to the local competitor, Broad Acre, because of the latter's alleged supplying of equipment. Galo itself admittedly sells cabinets to customers who wish

to buy them. There is no evidence in the record that Pet's terms to dealers are any more liberal than Galo's.

Only one dealer witness called by counsel supporting the complaint had dealt with Galo. The dealer's testimony indicated that Galo's ice cream was in a grocery store which he had purchased, and that within a short time thereafter he changed to Pet because he thought their ice cream was better. While the cabinet which he received from Pet was more modern than Galo's, the witness testified that there was no discussion about furnishing him with a better cabinet at the time he had arranged to switch. There is no indication that the dealer had asked Galo for a better box and been refused. While the witness testified that occasionally he would put some frozen food in the cabinet if there was room, he conceded that he had received no permission from Pet to do this. The lack of importance of the cabinet as a reason for the switch is indicated by the fact that the account later switched to French Broad when he became dissatisfied with Pet's service.

Despite the alleged competitive difficulties of the local competitors, Sani-Seal and Galo, during the period 1950–1951 and 1953–1954, respectively, another local competitor, French Broad (which had previously been only in the milk business), entered the ice cream business in April 1950 and was able to build up a substantial sales volume. Beginning with sales of approximately $160,000 in the first year of operation, it increased to $308,000 by the fiscal year ending June 1956. During the three-month period from July to September 1957, French Broad's sales were running in excess of $175,000 which, on an annual basis, would result in an increase in sales over the year 1956. It thus appears that a new competitor, operating in the same market as Galo and Sani-Seal and competing with the same respondents, was able to double his sales volume during the period when those two companies were having alleged competitive difficulties. Several other competitors were able to enter the same market after French Broad, including Mayfield, Bacon and Stoffels, and no competitors have gone out of business. According to the French Broad witness, his company's sales were second or third in the market and Mayfield, which had entered after his company, was close to French Broad's volume. The French Broad witness attributed his company's progress to hard work, advertising and the development of an attractive package as a merchandising device. He referred to Sani-Seal and Galo and one or two other competitors as companies which did not advertise or send out salesmen and as not being "hard competitors." While he re-

ferred to respondent Pet as a "hard competitor", he also characterized them as "very fair."

The evidence with respect to respondent National's and respondent Pet's position in the market fails to show any such change in position during the period referred to by the complaining witnesses as to suggest the use of any unusual competitive devices by them. The sales of National's Knoxville plant have actually suffered a very substantial decline from 516,000 gallons in 1945 to 325,000 gallons in 1955. Its share of production in the State of Tennessee has declined from 20.4 per cent in 1947 to 15.2 per cent in 1955. While there are no figures on Pet's sales in the Knoxville area in the record, it does appear that its share of production in the State of Tennessee, which was 12.5 per cent in 1947, increased gradually to 15.3 per cent by 1950, and thereafter began to decline until it reached 12.2 per cent in 1955. There is nothing in any of the evidence involving the Knoxville area to suggest any injury to competition by the respondents or to indicate that the respondents are overwhelming the market.

### 18. *Chicago, Illinois*

The hearings in Chicago involved the testimony of three competitor witnesses and seven dealers operating in the Chicago Metropolitan area, and a single competitor witness from DeKalb, Illinois. Since the testimony of these two groups of witnesses involves different market areas, each is considered separately below.

a. Chicago Area

The number of companies manufacturing and selling ice cream in the Chicago area is almost legion. Respondents Borden and National (Hydrox division) are the only two respondents which operate within the city. Respondent Beatrice operates only in the suburban area. Among the larger local competitors in the area are Hawthorn-Mellody, Dean, Bowman, Bresler, Legion, Central-Highlander, Columbia, Goodman-American, DeLuxe, National Ice Cream Company (not to be confused with National Dairy), Goldenrod, Roney, and Drexel. The so-called national company, Swift & Company, also operates in the Chicago area. Representatives of three competitors, Columbia, Goodman and DeLuxe were called as witnesses by counsel supporting the complaint.

The testimony of the three competitor witnesses indicates that it is customary for most companies in the Chicago area to supply their customers with cabinets and signs, to assist customers financially by making loans or otherwise assisting them in the purchase of equipment,

and to pay rebates to prospective customers, including the advancing of rebates in the form of a loan based on an estimate of the customer's gallonage with the understanding that the amount advanced will be liquidated after the customer has remained with the supplier for a given period of time or has purchased a given quantity of ice cream. Many of the local companies operating in the area advertise the fact that they are willing to assist customers financially. As in other parts of the country, there has been a marked shift in the sale of ice cream from drug stores and other bulk stops to food stores and, within the latter category, from local grocery stores to the chain stores. There has also been a marked increase in the number of soft ice cream establishments in the area. A substantial number of companies have entered the Chicago market in the post-war period, including some which formerly were in the milk business alone.

The three competitor witnesses complained generally about the decline in sales or profits or their inability to increase sales after the peak achieved in 1946 or 1947. However, an analysis of their testimony fails to support any finding that the problems allegedly confronting these companies are due primarily, or even in substantial measure, to the activities of the three respondents operating within the Chicago area and, more specifically, to the engagement in the complaint practices by such respondents.

The principal stress of the Columbia Ice Cream Company witness was on the fact that the company had not been able to grow since 1947 in proportion to the increase in population. He indicated that its sales had probably decreased slightly, from approximately 400,000 in 1947 to somewhere between 350,000 and 400,000 gallons at the time of the hearing, and that the number of its accounts had likewise declined from approximately 750 to approximately 650. The Columbia witness sought to attribute his company's inability to grow to the fact that it had insufficient capital to spend in the acquisition of new accounts or the holding of existing accounts. He emphasized particularly the amounts which were involved in the making of loans and in the advancing of rebates to customers, although he indicated that the latter practice had become less prevalent than it had been in the immediate postwar period. However, the witness made no effort to attribute these two practices to the respondents or to any group of competitors. On the contrary, he indicated that competitors generally in the area engaged in such practices, including his own company, which has an advertisement in the Chicago telephone directory to the effect that it furnishes customers with "Fountains & Cabinets" and engages in "Financial and Store Planning." He conceded that his

company had even brought suit against one of its customers to which it had advanced $1,000, in the form of an advance rebate on an exclusive dealing contract, when the customer stopped purchasing its product. This is the only instance in the record of such a suit being brought in the Chicago area.

The Columbia witness not only made no effort to attribute the practices in question to the respondents, but made no claim that his company had lost any accounts to the respondents. While he indicated that his decline in gallonage involved the switching of accounts to other manufacturers, as well as the fact that some accounts had gone out of business, no claim was made that any of his accounts had been acquired by any of the respondents through the use of any of the complaint practices. Although the witness did indicate that some of his competitors had increased their share of the market, he referred specifically to the local nonrespondent competitors Hawthorn-Mellody, Dean, and Bresler, and conceded that there had been a general decline in ice cream sales in the area since 1947.

The witness from DeLuxe Ice Cream Company likewise claimed that his company had sustained a loss in gallonage between 1947 and 1955, from 302,000 gallons to 248,000 gallons. However, in his case the decline was not accompanied by any decline in the number of accounts, it appearing that at the time of the Chicago hearing in June 1956 DeLuxe had a greater number of accounts than it had in 1947. The decline in gallonage was attributed to a decline in sales per account. This, in turn, was attributed to "increased competition" from chain stores and soft ice cream establishments, and only partly to the loss of some of the company's better accounts due to "advance rebates" and other forms of financial assistance by competitors. The latter practices were not attributed by the witness to the respondents or to any other group of competitors. On the contrary, the witness' original estimate that they were engaged in by "90 percent of the companies in the Chicago area since 1946", was later amended to read "100 percent" or "every company in this area." The witness conceded that his own company was among those which engaged in the practice and that during the year 1955 a single salesman of his company had acquired 25 "fairly good accounts" by giving them money "in the form of advance rebates" on condition that they would remain with the company for one to three years. The witness claimed that he later decided to discontinue the practice because of the expense involved.

Only three specific accounts were referred to by the DeLuxe witness as having been lost to competitors because of some form of financial assistance, one to the local competitor Bresler, and two to the respond-

ent Borden. In the case of the latter two accounts the witness conceded that both had originally been acquired from Borden by his company and that he had no personal knowledge as to what, if anything, the accounts had received when they switched back to Borden.[107] Despite the return of these two accounts to respondent Borden, the witness conceded that he had acquired twice as many accounts from respondent Borden as the latter had acquired from his company during the past three years. He described Borden as "clean-cut competition", and singled out two local companies, Hawthorn-Mellody and Bresler, as being his "toughest" competition. No reference was made to Beatrice since DeLuxe does not compete with it.

While it may be that the respondents have made loans or paid advance rebates in the Chicago area, it seems clear that they are by no means the instigators or leaders in such practices. On the contrary, according to the DeLuxe witness, respondent National had ceased the practice of making advance rebates several years previously, but the practice nevertheless continued. He expressed the opinion that the practice could not be brought to an end merely by stopping respondents Borden and National since the others would continue, as they had in fact despite respondent National's discontinuance.

Insofar as the decline in DeLuxe sales is attributable to the shift in business to the chain stores, there is no evidence in the record to establish that the two respondents doing business in Chicago have been able to corner the chain store market by virtue of using any of the complaint practices or have precluded DeLuxe from obtaining such business by the use of these practices. On the contrary, the evidence indicates that most of the chains in the Chicago area are served by other manufacturers. One of the largest grocery chains, National Tea Company, is served by Hawthorn-Mellody, which also serves Stineway Drugs, reputedly one of the largest drug store chains in the Chicago area. Dean Milk Company serves the Jewell Grocery chain; Bowman serves the Kroger stores; and Roney Ice Cream Company serves the Hi-Lo chain. The IGA chain is split between Dean and Central-Highlander. The latter also has the largest share of the Grocerland chain. National Ice Cream Company (not respondent National Dairy) serves the Centrella chain, which has about 180 stores. Of the respondents, only Borden serves a large chain, viz., the A & P chain. Respondent National, so far as appears from the record serves only Del-Farms, a relatively small chain.

[107] The witness indicated that he knew he had lost the accounts but "whether Borden had financed them or given any assistance, I don't know." He agreed that the best way to find out why the accounts had switched would be to call them as witnesses.

While bemoaning the shift from the smaller stores to the chains, the DeLuxe witness conceded that his company had not made any effort to acquire such accounts. He attributed this to the fact that his product was not nationally advertised and to the fact that the "price structure which exists today in the chain stores is a hard factor to meet." While suggesting that some companies did not publish a price list or adhere to one, he made no effort to attribute this to any of the respondents or to indicate that such pricing involved any exclusive dealing arrangements.

The third competitor witness, the general manager of Goodman American Ice Cream Company, was even more vague and less convincing in his testimony than his two predecessors, insofar as establishing any connection between the company's alleged difficulties and any of the respondents. The witness claimed that his company's gallonage had declined from between 500,000 and 600,000 gallons in 1946 or 1947 to approximately 300,000 gallons. This, however, was not accompanied by any decline in the number of its accounts, which are now at a peak, viz., 800 to 1,000. The decline in gallonage was attributed primarily to a decline in sales per accounts, resulting from the fact that the company has traditionally served the smaller merchants who have suffered a loss in sales to the chain stores. The witness claimed that his company could not sell to the chain stores or cooperative buying groups because they would not buy "from a local person." He also claimed that his company had lost some large accounts because of loans and the furnishing of new cabinets.

As above indicated, most of the chain stores in the Chicago area are served by nonrespondent local companies. The witness' explanation for the fact that such local competitors were successful in obtaining chain store accounts and were increasing in size despite their relatively recent entry into the market, was the fact that they were receiving financial assistance from "the same source" as respondents National and Borden. According to the witness these companies are part of a "trust", which has some sort of esoteric connection with the stockyards. The witness named most of the leading nonrespondent companies as being members of the mysterious "trust." He was uncertain as to who was not part of the trust, except for his own company. The witness' basic test for whether someone was or was not in the trust was whether they sought to acquire one another's customers.

In connection with the second reason for Goodman's decline in gallonage, viz., the loss of some of its better accounts due to loans and other assistance from competitors, the witness referred to only two specific accounts, one allegedly lost to respondent National and one to

respondent Borden. The loss to respondent National involved an unnamed account which had allegedly received a $20,000 loan. There is, of course, no evidence in the record to support the witness' hearsay and speculative testimony regarding any such loss to respondent National. The loss to respondent Borden involved the concession at Soldiers' Field in Chicago which had switched to respondent Borden following a change in the management of the concession. The Goodman witness expressed the opinion that the account had switched because Borden had supplied it with modern cabinets to replace his own, which had been there for "many years." There is no reliable evidence in the record to support the witness' conclusions. A tender by respondent Borden of the official of the Soldiers' Field concession responsible for the change of suppliers was declined by counsel supporting the complaint. Since none of the other competitors referred to cabinets as a competitive problem in the Chicago area and there is no indication that Goodman had ever been requested to supply the account with better cabinets, it appears highly unlikely that the change of suppliers was brought about because of the furnishing of better cabinets. Outside of this single account, which had been acquired by Borden six years earlier, the witness was unable to recall a single other account lost to that respondent.

None of the dealer witnesses from the Chicago area had ever been accounts of any of the three competitor witnesses, nor is there any evidence that any of them were solicited by these competitors. One dealer was the owner of a small delicatessen who had received a $75.00 payment in the nature of an advance rebate from respondent National, on condition that he would remain with the company for two years. The two-year period had already expired several years previously but the account was still dealing with respondent National, although under no apparent obligation to do so. There is no evidence in the record that this account had ever been served by another supplier, it appearing that the dealer had taken over a store which was already being served by respondent National.

The second dealer witness was the owner of two drug stores which had been handling the products of both Flint Dairy (a local competitor) and respondent Beatrice. The dealer had switched to respondent National after receiving a loan of $10,000. Both Flint and Beatrice had declined to make a loan. While the dealer claimed that he had been considering changing to respondent National prior to receiving the loan, in order to get a better quality ice cream, and that certain financial difficulties had merely precipitated an early decision on his part to change, it seems reasonable to infer that the

making of a loan by National was a significant factor in the account's decision to change suppliers. However, the only companies which were affected by the change were another respondent, Beatrice, and a local competitor, Flint Dairy, which was not referred to in any other testimony involving the Chicago area. Although the loan had been paid off five years previously, the account was still dealing with respondent National.

The third dealer was the operator of a grocery store who had, in succession, handled the ice cream of three other members of the mysterious "trust", viz., Dean, Central, and Swift, who according to the Goodman witness' testimony were not supposed to solicit one another's accounts. The dealer testified that he had wanted to change to National for some time, but had been unable to do so until a nearby store which had been handling National's brand was sold. At that time he sent for the National salesman and induced the latter to make a payment of $500 in the nature of a rental for the space allocated to the ice cream cabinet, similar to advances received from the dealer's bread company supplier for granting it a certain amount of shelf space. There was no testimony by the dealer that the payment in question constituted the reason or inducement for his change of suppliers.

The fourth dealer was the owner of a confectionery store which had been handling the products of Central Ice Cream Company and had changed to respondent National after the latter had sold it a second-hand fountain in place of a leaky 31-year-old fountain which the dealer had in his premises. It does not appear whether the account had requested Central to supply him with a fountain and the witness did not indicate that the fountain was the reason for his changing suppliers. While the witness signed a contract for the fountain, he had no recollection of its provisions.

Two other dealer witnesses called by counsel supporting the complaint were from Evanston, Illinois. Their testimony did not involve any of the Chicago competitors and no competitors from the Evanston area were called. One of the dealers was the owner of three restaurants which had switched from a local competitor Badger Ice Cream Company to respondent Beatrice, after Badger had declined to manufacture the dealer's ice cream under a private label. Respondent Beatrice took over the $4,000 balance on two loans of $15,000 and $25,000 which the account had received from Badger, and loaned the account an additional $1,000. The reason for the change from Badger to Meadowgold, according to the witness' uncontradicted testimony, was that he wanted a private label ice cream which Badger

declined to make for him. Despite a two-year exclusive dealing contract, the dealer decided to switch back to Badger within a year when the latter agreed to make its ice cream under a private label, and the dealer had become dissatisfied with Beatrice's ice cream. The dealer had no apparent difficulty in repaying the balance due on the Beatrice loan, and the latter made no effort to hold the dealer to the two-year contract.

The other Evanston dealer had been split between Dean Milk Company and respondent National and changed from the latter to respondent Beatrice, but continued to deal with Dean. While the dealer testified that he did not know why he had changed from respondent National to respondent Beatrice, an advance rebate of $575.00 apparently was a consideration for the change. However, despite the fact that an agreement with respondent Beatrice required the dealer to purchase his frozen products requirements from Beatrice exclusively for a period of two years, he continued to deal with his other supplier, Dean Milk Company.

Another dealer called was a former grocer from Gary, Indiana, who had switched from the local competitor, U-Joy, to respondent Borden because of a "better price" (not otherwise identified in the record). While the latter also loaned the dealer $158.00, this merely permitted repayment of the balance of a loan in that amount which was due to the local competitor U-Joy, and was not referred to as a reason for switching.

The above testimony serves to emphasize the volatility of the dealer-supplier relationship and the inability of a supplier to hold a dealer when the latter is dissatisfied. In only a few of the above instances does the testimony clearly establish that a loan or other assistance was a factor in the change of suppliers. Even the presence of an exclusive dealing clause did not prevent the recipient of an advance rebate from splitting his business with another supplier. When one of the dealers was dissatisfied with his supplier's product, as in the case of the Evanston restaurant owner, no contract could hold him. When the dealer was satisfied with his supplier's product he continued to purchase from the supplier even though a loan had long since been paid off.

Assuming that the evidence does establish that the making of loans or rendering of other assistance does motivate some dealers in changing suppliers or influences them in their original choice of a supplier, the evidence is wholly deficient insofar as establishing that the respondents have been responsible for instituting such practices or have been the leaders in the use of such practices in the Chicago area. The evidence

likewise fails to establish that there has been any injury to competition, or even to any competitors, as a result of respondents' utilization of any of such practices in the Chicago area. The evidence indicates that there are a large number of local competitors in the area, some of whom are substantial in size and several of whom are relatively recent entrants into the market. There is no evidence of any substantial casualties among competitors in the market. The few local companies which have ceased operating since 1947 have done so mainly by selling out to other local competitors and not to the respondents.

The respondents have not notably improved their position in the Chicago market. On the contrary, the Chicago area sales of both respondents National and Borden have declined substantially between 1947 and 1955. The former's sales from its Chicago plant in 1955 were 1,500,000 gallons as compared with 2,600,000 gallons in 1947. The sales of Borden's Chicago branch were 2,760,000 gallons in 1955 compared to 3,445,000 gallons in 1947.

b. DeKalb, Illinois

DeKalb is located approximately fifty miles west of Chicago. The respondents operating in the area are National, Borden, and Beatrice. Swift & Company also sells in the area. The local competitors include Illinois Valley, Valley Maid, Colonial, Shurtloeff, Badger, Holiday, and Hey Bros. The only competitor witness from the area called was a representative of Hey Bros. No dealer witnesses testified.

Hey Bros. operates two plants, one in DeKlab and another in Quincy. The testimony of the Hey Bros. witness apparently related only to the DeKlab operation. The witness, testifying without records, could not give his company's 1947 sales, but estimated its 1949 gallonage as being between 90,000 and 100,000. He indicated that there had been a gradual increase during the period of the Korean War to approximately 110,000 gallons in 1953, and that thereafter the gallonage declined to the 1949 volume. The company had about the same number of accounts in 1956 as it did in 1949, which the witness estimated roughly as between 150 and 200.

The Hey Bros. witness indicated that there was a certain amount of switching of accounts which went on at all times, most of which had nothing to do with any of the complaint practices. However, he claimed that the company had lost some accounts to respondents Borden, National and Beatrice due to some of the complaint practices. He indicated that the practices which he regarded as most troublesome were the making of loans and the supplying of equipment not related to the ice cream business.

The Hey witness referred to a number of accounts which his company had lost or been unable to acquire as a result of the alleged making of loans or the furnishing of equipment or the granting of a better price by respondents Borden, Beatrice and National. In most instances the witness' testimony did not even purport to be based on information received from the dealer in question, but on the witness' own surmise or on rumor or information received from his predecessor as manager. His testimony concerning the reasons for the loss of these accounts is so unreliable that no findings can be based thereon. Indicative of the lack of reliability of such testimony is that relating to a restaurant in Dundee, Illinois, to which Hey Bros. had allegedly declined to make an additional loan and which switched to respondent Beatrice because, according to the witness' "understanding", it had given the account such additional financial assistance. However, it was later stipulated between counsel that the only financial assistance received by the account in question from respondent Beatrice was a loan covering the exact amount necessary to pay off the balance due on the outstanding Hey Bros. loan. It seems obvious, therefore, that the reason for the account's switching could not have been the refusal by Hey Bros. to grant an additional loan and the willingness by respondent Beatrice to render such assistance.

Another account allegedly lost was a college which respondent National had allegedly acquired by giving a gratuity to the purchasing agent. This testimony was based on information allegedly received by the witness from certain unidentified persons at the college. Yet an exhibit offered by counsel supporting the complaint indicates that the account had been served by respondent National (not Hey Bros.) from 1944 to 1954, and that respondent National lost the account in October 1954 to its local competitor, Illinois Valley Ice Cream Company, on the basis of the latter's lower bid. Several other accounts were allegedly lost to respondent Borden because of reported special prices or the making of ice cream under a private label, none of which is supported by any reliable evidence in the record. The latter reason, viz., manufacturing under a private label, is not even a practice charged to be illegal under the complaint.

Despite the witness' complaints about the making of loans by competitors, he conceded that his company also made loans to worthy customers to help improve their sales. In fact, he indicated that the loans cost his company "very little" because most of the loans were discounted at the bank. Presumably there have been no substantial defaults on the loan payments so as to require the bank to seek recourse against Hey Bros.

Whatever may have been the cause of Hey Bros. alleged problems, there is no reliable evidence on which to base any finding that they are attributable, to any substantial degree, to the engagement by respondents in any of the complaint practices. In fact the witness conceded that most of his decline since 1949 was due to reasons having no connection with the complaint practices. The company's alleged competitive problems apparently have not interfered with its buying out at least two other competitors.

* * * * * * *

The evidence offered at the Chicago hearings, involving either the Chicago market or any other area in Illinois, fails to establish that the respondents have been responsible for any injury to competition or that their engagement in the complaint practices is likely to lead to such a result. The figures offered by respondents involving the state as a whole fail to indicate that any of them is gaining market position in the state. Respondent Beatrice's share of state production has remained almost constant between 1947 and 1955, being 7.5 per cent in the earlier year and 7.7 per cent in the later year. Respondent Borden's share has declined slightly from 10.1 per cent in 1947 to 9.4 per cent in 1955. Respondent National's share has declined significantly from 14.4 per cent in 1947 to 9.6 per cent in 1955.

19. *Des Moines, Iowa*

The evidence adduced at Des Moines involves three separate areas in Iowa, the Burlington area which is located in southeastern Iowa on the Mississippi River directly across from Illinois; Davenport and the Tri-City area, including Rock Island and Moline in Illinois; and several communities in western Iowa. Each appears to be a separate market area and each is discussed separately below. Competitor witnesses from each area were called, but no dealer witnesses testified.

a. Burlington Area

The respondents doing business in the Burlington area are National (Roszell division), Borden and Beatrice. Swift & Company also operates in the area. The main local competitors are Whitehouse Dairy, and Lagomarcino-Grupe Company, both of Burlington. Another competitor, Corso, operates on a small scale in the area. Representatives of both Whitehouse and Lagomarcino were called as witnesses.

There is no evidence of anything but a healthy competitive situation in the Burlington market. Both local competitors are vying for

first place in the area. The Whitehouse witness claimed that his company was first in the market and Lagomarcino-Grupe second, while the witness from the latter made the reverse claim. Actually, if the figures given by the witnesses are accurate, Lagomarcino has the greater number of accounts, while Whitehouse has the greater gallonage.

It is customary for manufacturers in the area to supply their customers with cabinets and with signs. While it was the practice prior to 1936 to charge a rental in connection with the supplying of cabinets, this practice has long since ceased. The cessation of the charging of a rental was not attributed by the witness to any competitor. Customers who own their own equipment receive a 10-cent a gallon discount. No complaints were made about the practice of supplying signs, with privilege panel. In fact, the Whitehouse witness indicated that he considered the practice to be "good ethics" and that his company considered it "good business—good advertising" to supply such signs.

The Whitehouse witness singled out the granting of "excessive discounts" and the supplying of "extra cabinets" as being two practices which he regarded as involving "bad ethics." However, no reliable evidence was offered to establish that any of the respondents have engaged in these practices in the Burlington area. The Whitehouse witness conceded that customers would frequently put meat and other products in his cabinets without permission. While claiming that his salesmen had told him of extra cabinets being offered, he conceded that he could not "remember where, or who it was." The witness' testimony was equally vague in connection with the matter of "excessive discounts." He could not recall a single account which he had lost on a price basis and conceded that his company granted quantity discounts ranging as high as 18 cents a gallon. While asserting that he had the "impression" that the "out-of-town people" were "more lenient" in the matter of discounts, the only specific reference to such leniency involved two accounts which his company had solicited, but which were acquired by the nonrespondent Swift. The only specific accounts referred to by the witness involving any of respondents were two accounts which Whitehouse had allegedly lost to respondent National and where the witness had been "told" that the latter had done some painting. No evidence was offered to support the witness' hearsay and conclusory testimony. It may also be noted that by the time of the hearing, Whitehouse had regained one of the accounts and Lagomarcino had acquired the other.

Despite some apparent minor annoyances, the Whitehouse witness agreed that his company had been able to maintain its position in the Burlington market. While its gallonage of 150,000 gallons was down from the 1946–1947 gallonage of approximately 200,000, he apparently did not regard this as significant since he indicated the earlier years were considered "banner years in the ice cream industry." Whitehouse is actually serving as many accounts as it did in the immediate postwar period, viz., 125 to 150. Despite some loss of accounts each year, the company has been able to gain at least as many accounts as it has lost and the witness regarded such turnover as normal.

The witness representing Lagomarcino-Grupe complained that his company had been unable to acquire any chain store accounts because the chains prefer a national brand name and because of price. No evidence was offered, however, to establish what prices the respondents were offering to the chains or to indicate that the prices were tied to any exclusive dealing arrangement. In fact, except for one instance, it does not even appear that the chains are being served by the respondents. The only chain referred to as being served by a respondent is a grocery chain which is actually being served on a split basis by the two local competitors along with respondent Borden, the latter making a private label brand for the account. Another chain mentioned by the witness is Walgreen, to which his company was selling ice cream under a private label, but which was allegedly acquired by the nonrespondent Swift on the basis of a lower price. Lagomarcino serves at least one other chain in Burlington, Kresge's.

The Lagomarcino witness also referred to the supplying of cabinets for frozen foods as a troublesome practice, but the only account which he cited involved the nonrespondent Swift. One of the accounts which he mentioned had been served on a split basis by both Lagomarcino and respondent National, and both allegedly had lost the account to Swift. The witness also cited an account which his company had lost three years previously to respondent Borden because of a "deal" that he had been told was "too good * * * to pass up", the nature of which was not otherwise identified for the record; and he attributed to respondent National his company's loss of a single account involving the alleged furnishing of equipment, based on a report which the witness himself conceded was "strictly hearsay." [108] As far as respondent Beatrice

[108] It may be noted that the witness was employed by the company as manager for only a year and ten months at the time of the hearing. Much of his testimony related to events that had occurred as much as three years or more prior thereto.

was concerned, the witness agreed that "[t]hey were fair competition, we get along pretty good."

Despite some alleged competitive problems Lagomarcino has been able to substantially maintain its gallonage and its position as one of the top two companies in the market. The witness estimated his gallonage as approximately 125,000, which he thought might be down by about 6,000 gallons from the previous year. While the company had lost about seventeen accounts during the year, thirteen of these represented accounts which had gone out of business, and only three or four involved accounts which had switched to competitors.

The record fails to indicate that competition in the Burlington area has been injured by reason of respondents engagement in the complaint practices. The two main local competitors appear to be in a healthy condition. No evidence was offered of any mortality among competitors in the area. The area is a fairly static one, population-wise.

b. Davenport (Tri-City) Area

The respondents operating in the Tri-City area include National, Borden and Beatrice. Swift & Company and Bowman of Chicago also operate in the area. Local competitors include Peerless, Illinois-Iowa Dairy, Baker, Downing and Model. Some of these companies operate from the Iowa side of the river and some from the Illinois side. The only witness from the area called to testify was a representative of Illinois-Iowa Dairy of Davenport, which is a farmers' cooperative. The company is primarily in the milk business and went into the ice cream business only recently. The reason given for its entry into the ice cream business was that it wished to have an outlet for its excess milk production and to take care of some of its milk accounts desiring to purchase ice cream.

Illinois-Iowa Dairy's volume in 1956 was approximately 40,000 to 50,000 gallons, which was the largest volume the company had ever achieved. It makes little effort to acquire new accounts since its plant capacity is limited and, according to the testimony of its representative, it does not care for additional business. Its sales are limited to accounts which sell its milk. The company supplies its customers with cabinets and grants a volume discount to large users. The Illinois-Iowa Dairy witness claimed that the biggest ice cream competitors in the area are Swift and respondent Borden. The only testimony by the witness which might be considered in the nature of a complaint related to a single account which his driver had reported respondent Beatrice had sought to acquire by offering it a lower price on both milk

and ice cream, and a newer cabinet. The witness had no idea what the Beatrice price offer was, nor whether it was less than its regular list price. He also conceded that the cabinet which he had supplied to the account was a "little agey." In any event, he was able to retain the account by giving it a five-cent a gallon discount on ice cream and supplying it with a newer cabinet. Outside of this single account there is nothing in the witness' testimony to indicate any competitive difficulties with any of the respondents.

The evidence concerning the Tri-City area wholly fails to establish any injury to competition or the likelihood of such injury. While the witness indicated that two local competitors in the area had sold out to respondent Borden and one to Fairmont, no evidence was offered to indicate that these companies had experienced any competitive difficulties with the respondents arising out of the complaint practices.

c. Western Iowa

The respondents operating in the western Iowa area include Borden, Beatrice, National (Harding Division) and Fairmont. Among the numerous local companies in the area are Sac City Creamery, Manning Creamery, Bluebunny Ice Cream, Rosedale Dairy, Boone Dairy, Jeffersonville Creamery, Audubon Ice Cream, Fort George Creamery and Nelson Ice Cream Company. Representatives of Sac City Creamery and Manning Creamery were called as witnesses by counsel supporting the complaint.[109]

The furnishing of cabinets and signs to customers appears to be customary practices in the area. Cabinets have been furnished on a rent-free basis for at least twenty years. Customers owning their own cabinets receive a 10-cent a gallon discount. Neither of the competitor witnesses had any criticism of the practice of supplying cabinets or that of furnishing signs or claimed that they were being used as competitive weapons. The Sac City witness indicated that the furnishing of signs was of advantage to both the ice cream manufacturer and the dealer, to the former because it advertised its product and to the latter because it called attention to his store. The witness could not recall a single account which had requested a sign under circumstances where he felt the sign was not justified and where a competitor had supplied one.[110] While at first estimating the cost of supplying signs as approximately three cents per gallon (computed

[109] The Manning Creamery witness testified at the hearing in Omaha, Nebraska, rather than in Des Moines.

[110] The witness referred to one account where he had agreed to contribute one-half of the cost of a sign, but which decided to purchase its ice cream from respondent National. The witness indicated that he had no knowledge of what, if anything, National had done for the account.

by dividing the company's annual gallonage by its anual expenditure for signs), the witness later conceded that this estimate was too high since it assumed that the life of a sign was only one year. No reference to the furnishing of signs as a competitive problem was made by the Manning witness.

The principal complaint of the two western Iowa witnesses was directed at their alleged inability to acquire chain store accounts, through which an increasing proportion of the ice cream sales in the area are being made. However, these complaints were not directed at the respondents nor at the complaint practices. The Sac City witness' explanation for not being able to acquire chain store accounts was that "we just don't know the right people." The witness referred to respondent Borden as serving one chain and respondent Beatrice another, but did not know whether respondents National or Fairmont served any chains in the area. At least one of the chains referred to by the Sac City witness is being served on a split basis in some areas by a number of local competitors, as well as by respondent Borden. Particular stress was placed by the witness upon the practice of supplying some chain stores with ice cream under a private label. The witness indicated that if this practice continued to grow it would increase the costs of the smaller manufacturer for cartons and refrigeration space. However, this practice is beyond the scope of the complaint, except possibly insofar as it may involve quantity discounts, as to which no evidence was offered with respect to the western Iowa area. The Manning witness likewise stressed his company's inability to obtain chain store business. He attributed this to the fact that such chains operated over a wider area than that in which his company distributed its products, and that therefore he was unable to submit a bid in response to invitations which provided for service on an over-all area basis.

The Sac City witness made no reference to any account which the company had lost or had been unable to acquire by reason of the use of the complaint practices by any of the respondents. The Manning witness could recall only three accounts as being involved in competitive situations, none involving the complaint practices. One was allegedly lost to respondent National because, as reported by the store's manager, the account had gotten "a better deal", the nature of which the witness did not know. The second account was lost to the local competitor, Sac City Creamery, for unknown reasons. The third account was a chain store which was being served by respondent Borden and which Manning's salesman solicited but was unable to acquire for reasons not appearing in the record.

Neither of the two competitor witnesses claimed that his company was losing market position or was in any serious difficulty. Sac City Creamery operates several plants in western Iowa. It has built up its gallonage from an estimated 130,000–140,000 gallons in 1947 to approximately 200,000 gallons in 1955, and the number of its accounts has increased from about 200 to 300 during the same period. It now employs three full-time salesmen, compared to the earlier period when two members of the family operating the company did the selling. Counsel supporting the complaint conceded, in effect, at the Des Moines hearing that the company had not sustained any competitive injury, indicating that his purpose in calling the witness was to demonstrate that the absence of any financing practices such as those existing in Chicago makes it possible for smaller manufacturers to prosper. Presumably this would mean that the furnishing of cabinets and signs does not prevent successful operation by smaller manufacturers.

Manning Creamery has been able to maintain at least the same number of accounts over the past few years. However, the witness indicated that his company's gallonage had declined gradually over a five-year period from about 115,000 gallons to approximately 100,000 gallons. This was alleged to be due to a decline in the company's sales to cafes and a loss of several good accounts. While the Manning witness did not specify the reason for the company's decline in cafe sales, which represent a good proportion of its sales, the testimony of the Sac City witness indicates that there has been a trend away from sales to cafes and restaurants toward the food stores. The good accounts lost by Manning were (1) the Safeway account to whom the company had sold in excess of 3,000 gallons a year and which began to manufacture its own ice cream and (2) an unnamed "food account in Carroll", the reason for whose loss and the competitor to whom it was lost, if any, do not appear in the record.

* * * * * * *

There is a complete failure of proof, insofar as establishing that respondents have been responsible for any injury to competition in Iowa, whether due to the complaint practices or otherwise. The production share information which is in the record fails to indicate any significant improvement in market position on the part of respondents. Respondent Beatrice's share of production in the State of Iowa has declined from 15.6 percent in 1947 to 13.2 percent in 1955. Respondent Borden's share has declined from 24.2 percent in 1947 to 20.9 percent in 1955. Information with respect to respondent National's share does not appear in the record since it apparently does not have a plant in Iowa. However, it does appear that its sales in the Des Moines area,

which it entered during 1951, have declined from 19,000 gallons in 1952 to 13,000 in 1955.

20. *Omaha, Nebraska*

Although a hearing was held in Omaha, no witnesses were called from that area. Counsel supporting the complaint called a competitor witness from Lincoln and another from Superior, Nebraska. Three dealer witnesses were also called from the Lincoln area. An official of respondent Fairmont testified in Omaha, but his testimony involved the company's operations generally and did not relate to any specific trade territory. The evidence with respect to the Lincoln and Superior areas is discussed separately below.

a. Lincoln, Nebraska

The respondents doing business in the Lincoln area are Beatrice, Fairmont and National. Respondents Beatrice and Fairmont have manufacturing plants in Lincoln, and respondent National has a distribution plant in the city. Swift & Company also operates in Lincoln. The local competitors are Lincoln Dairy & Ice Cream Company, Smith's Home Dairy and Roberts Dairy. The only competitor witness called from the area was the owner of Lincoln Dairy. A representative of Smith's Home Dairy appeared, but was excused at the request of counsel supporting the complaint.

The Lincoln Dairy witness' testimony involved mainly a recital of the facts concerning approximately six accounts which his company had either lost or been unable to acquire as an alleged result of the competitive activities of Beatrice or Fairmont, mainly in 1954 and 1955. No reference was made to National as being responsible for any of his competitive difficulties. The witness' testimony was a maze of conjecture, surmise and hearsay, and except for one account, there is no reliable evidence to support his testimony.

Indicative of the lack of reliability of the Lincoln witness' testimony is that concerning an account operating a restaurant at the airport, which the witness claimed he was unable to obtain because of respondent Fairmont. Lincoln Dairy had previously served the owner at another location, and the witness claimed that the owner had requested a loan from him before opening the new restaurant, but that he was unable to oblige. Fairmont later obtained the account. Not only is there no reliable evidence in the record of any loan to the account by Fairmont, but the owner of the restaurant, who was also called as a witness by counsel supporting the complaint, denied that respondent Fairmont had not made him any loans and, in fact, had no recollection of having requested Lincoln Dairy to render any financial

assistance. No financing of equipment was required since all of the furniture and equipment in the establishment were supplied to the account by the City of Lincoln. The only thing the owner had received from respondent Fairmont was an old storage cabinet, which was used for the storing of excess quantities of ice cream, and a sign on the highway, the value of which does not appear. The Lincoln Dairy witness also claimed to have lost two other accounts to respondent Fairmont because of loans of money and equipment, but was unable to identify such accounts and there is not a scintilla of reliable evidence in the record to support the witness' testimony with respect to the two unnamed accounts.

Of the five accounts involving respondent Beatrice, only one involved an account which had been lost to that respondent, the remainder being accounts which Lincoln sought unsuccessfully to acquire. The Lincoln witness claimed that the making of loans or furnishing of equipment by respondent Beatrice were responsible for his lack of success in these instances. Indicative of the lack of reliability of such testimony is that involving two eating establishments owned by the same individual, which the Lincoln witness claimed he had sought unsuccessfully to acquire during 1954 or 1955, because Beatrice had financed the equipment in one establishment and made a loan to the other. A list of loans and equipment financed by respondent Beatrice to all customers in the Lincoln area during 1954–1955, which was offered in evidence by counsel supporting the complaint, fails to reveal any financial assistance to either of these accounts. The owner of both establishments, who had been subpoenaed as a witness by counsel supporting the complaint and could have shed light on these transactions, was excused from testifying at counsel's request. In the case of another account, a cafe which had allegedly received some unnamed form of assistance from respondent Beatrice, not only does the exhibit above referred to fail to reveal any assistance to the account, but the owner who was called as a witness by counsel supporting the complaint specifically denied that he had received any loans from respondent Beatrice or any other form of assistance in connection with his ice cream operations. The dealer had, however, purchased a milk dispenser from respondent Beatrice in connection with his milk business, but this had nothing to do with its choice of Beatrice as an ice cream supplier since he had been handling the latter's ice cream for six years. The dealer also denied having asked the Lincoln witness for any assistance.

The only account referred to by the witness where there is any evidence of a loan was a cafe, to which respondent Beatrice made a

loan of $1,500 in March 1954 and which had been fully repaid by December 1954. There is no evidence, other than the Lincoln witness' opinion, that the making of such loan induced the account to deal with respondent Beatrice. Counsel supporting the complaint called as a witness, not the dealer who had received the loan from respondent Beatrice, but an individual who had since purchased the business. The present owner had received no loan or ice cream equipment from respondent Beatrice, but was nevertheless purchasing its ice cream.

Despite Lincoln Dairy's alleged competitive difficulties with respondents Beatrice and Fairmont, it has managed to maintain its gallonage of approximately 50,000 to 60,000 gallons over the past five-year period. The company limits its sales primarily to restaurants. In view of the testimony by competitor witnesses in various sections of the country of a trend away from bulk sales in restaurants and similar eating establishments in favor of food stores, this could readily account for Lincoln Dairy's static condition. In any event, there is no reliable evidence in the record to establish that the use of the complaint practices by respondents Fairmont or Beatrice has been responsible for Lincoln Dairy's inability to grow. There is no evidence in the record that the Lincoln area is an expanding area, so as to justify any expectation of growth on the part of the company. The evidence discloses that respondent Beatrice, which was the respondent most frequently involved in the testimony of the Lincoln Dairy witness, likewise has not improved its position in the Lincoln market. In fact, Beatrice's sales in Lincoln have declined from 397,000 gallons in 1946 to 289,000 in 1955. The evidence wholly fails to sustain a charge of injury to competition by respondents through the use of the complaint practices in the Lincoln market.

b. Superior Area

Superior is located on the Nebraska-Kansas state line. The only witness from the area called was a representative of Superior Ice Cream Company, which operates both in Kansas and in Nebraska. The respondents competing with Superior in both Nebraska and Kansas are Fairmont and Beatrice. Competing in Kansas only is respondent National. Local competitors in Nebraska are Holdredge (Nebraska Dairy Products Association) and Hunt Ice Cream Company. Additional local companies competing in Kansas are Belleville and Ideal. Respondent Foremost entered the Kansas territory approximately six months prior to the hearings by purchase of a local competitor, Decoursey Ice Cream Company. Outside of this

one situation no other companies have either gone out of business or entered business in the area since 1947.

The principal complaint of the Superior Ice Cream Company witness was directed at the fact that as an ice cream company selling only ice cream, it was difficult to compete with companies that sell both milk and ice cream because of the entree which the sale of milk gives to some companies to try to sell their ice cream. The fact that some of the respondents may have a competitive advantage by being in both milk and ice cream in some areas is not, of course, charged as an unfair method of competition. The only account referred to by the witness as having been involved in any competitive situation with a respondent was a food store to which Superior was selling ice cream, and respondent Fairmont was selling milk and frozen foods (the latter being in the frozen foods business as well as in milk and ice cream), and the owner allegedly advised Superior that he was going to switch to Fairmont's ice cream because the latter did not feel justified in coming into town unless it got the account's ice cream business as well. Assuming that the incident reported by the witness did occur, it is entirely outside the scope of the complaint.

The witness also expressed regret that he was unable to charge a cabinet rental to defray the cost thereof. He conceded, however, that it had always been customary in the area to furnish a cabinet without a rental charge. The witness claimed that as a result of the lower prices of ice cream due to pressure from wholesale grocers, the profit margin on ice cream had become too small to justify the supplying of cabinets without a rental. Since there is no evidence that the respondents are responsible for this condition (in fact, the witness conceded that they were not), this testimony has no probative value. In response to the leading and suggestive question of counsel supporting the complaint as to whether he was "able to get your share of the chain store business" in the territory, the witness answered in the negative. However, there is no showing that respondents operating in the territory have acquired more than their share of the chain store business or, in fact, that they serve any chain store accounts in the territory.

Superior Ice Cream Company has the same number of accounts as it had five years ago. While claiming that there had been some decline in his company's gallonage, the witness was reluctant to reveal his gallonage and would merely state that it was presently "below 100,000." There is no indication that the area is an expanding one. No finding of injury to competition by reason of the use of any of the complaint practices by respondents in the Superior

area can be made, based on the largely desultory and irrelevant testimony of the Superior Ice Cream witness.

* * * * * * *

The evidence with respect to the State of Nebraska wholly fails to establish any injury to competition within the state by reason of the use by the respondents of any of the complaint practices. There is nothing in the production share information pertaining to the respondent companies to indicate any significant improvement in their position. Thus, it appears that respondent Beatrice's production share has remained almost constant between 1947 and 1955, being 8.9 per cent in the former and 8.8 per cent in the latter year. Respondent National's share has increased slightly from 13.9 per cent in 1947 to 15.6 per cent in 1955.

### 21. *Cincinnati, Ohio*

The hearing in Cincinnati, Ohio, involved competitor witnesses from Cincinnati, Ohio; Toledo, Ohio; Louisville, Kentucky; and Lawrenceburg, Indiana. A single witness was called from each area. These areas appear to be separate market areas and the evidence concerning each is discussed separately below.

a. The Cincinnati Area

The respondents operating in the Cincinnati area include National, Beatrice and Borden, the latter selling in the suburban area and the balance of Hamilton County, but not within the city itself. Local companies engaged in the ice cream business in the area include French Bauer, Niser, Equity, Washington Courthouse, Mayfair, J. J. Schmidt, Cupid, Schmeising, Willson, and MacGregor. One of the local companies which had previously operated in the area, Lindner, was purchased by respondent Beatrice approximately one month prior to the hearing. Other regional or national companies selling in the area are Swift & Company and Cudahy Packing Company. A recent entrant into the market is Wayne Co-op of Richmond, Indiana. Another competitor, United Dairy Farmers, operates a number of retail establishments which it supplies itself. There are also a considerable number of soft ice cream establishments in the area. The only witness to testify from the Cincinnati area was an individual who is active in the management of both Willson Dairy and MacGregor Ice Cream Company. A representative of Niser was subpoenaed to testify but was excused at the request of counsel supporting the complaint.

Willson Dairy has been in the milk business for a great many years, but did not enter the ice cream business until October 1952. It does business mainly with hotels and institutions in downtown Cincinnati.

The company entered the ice cream business to enable it to make better use of its plant facilities and because it was felt it would be more advantageous to its milk business to be able to offer its customers ice cream. The individual who testified for the company is a partner and general manager, who had bought into the company several years previously. Prior to his joining forces with Willson he had purchased two defunct ice cream companies and, after building up their volume he joined Willson as a partner. The same individual is the general manager and a majority stockholder in MacGregor Ice Cream Company of Hamilton, Ohio, which is located in Butler County directly north of Hamilton County in which Cincinnati is located. Willson confines its operation to Hamilton County and MacGregor to Butler County. Most competitors operate in both counties, except for Cudahy and Equity (which operate only in Hamilton County).

The testimony of the Willson-MacGregor witness concerning competitive conditions in the area was of a loose and general nature, consisting of broad conclusions and hearsay information reported to him by salesmen. He complained generally about such practices as loans, the furnishing of extra equipment and the granting of low prices. In the case of loans he at first made the general charge that he couldn't acquire drug stores and similar accounts due to large loans of money. However, the only account he could cite, which he had been unable to acquire due to the making of a loan, involved the nonrespondent, Swift & Company. He was unable to recall any other accounts which he had lost or been unable to acquire because of loans and conceded that the account referred to was a "more or less" isolated instance. With respect to his charge of furnishing too much equipment, some of which was allegedly used for the storing of frozen foods, he claimed this was a general situation but was unable to name a single account where this practice had presented a competitive problem. He conceded that no one company was different from any other company in the market in the respect of furnishing such equipment.

The principal complaint of the witness appeared to be directed to the matter of price, particularly low prices and off-list prices. While making the general charge that "many large accounts" were purchasing bulk ice cream off-list, the witness conceded that he could not "name any one where they are cheap, because I don't know the price." Since the witness' charge involved the sale of bulk ice cream, it seems apparent that his primary complaint did not involve the largest users of ice cream, the food chains and supermarkets who handle only package ice cream, as to which the witness indicated there was "hardly any ice cream sold at other than list, less the schedule discount." Even

with respect to bulk sales, the witness did not refer to any particular supplier or group of suppliers as being involved in off-list selling, but indicated that every one was involved including his own company. Combined with the witness' claim regarding off-list pricing, was the assertion that, following a general price cut in the area which had occurred the year previously, prices generally were too low to permit the making of a profit. While at first attributing the leadership in the price cut to respondent National, the witness later acknowledged that the latter had acted to meet the competition of Wayne Co-op which had come into Hamilton County from Richmond, Indiana, selling ice cream at 69 cents a half gallon, which resulted in the Co-op's achieving a "tremendous volume" before other competitors met its price.

The testimony of the Willson-MacGregor witness wholly fails to establish that respondents' engagement in the complaint practices in Cincinnati has resulted in any substantial injury to his companies, let alone to competition in the area. The practices about which the witness testified are operative generally in the area. There is no reliable evidence that respondents are the leaders in the practices or have used them, to any substantial extent, to injure Willson or MacGregor or to injure competition in the area. The only evidence in the record concerning the extent of respondents' use of any of the complaint practices in the Cincinnati area involves respondent Beatrice. From this it appears that Beatrice's assistance to customers in the form of loans or financing of equipment involved only 1.28 per cent of its customers in 1954 and 1.11 per cent in 1955. In connection with the matter of off-list pricing and low prices, to which the bulk of the witness' complaints were directed, there was no showing that exclusive dealing arrangements were involved in connection with such pricing.

In any event, despite the problems referred to, both Willson and MacGregor appeared to have fared well in their respective areas. The witness representing those companies had entered the ice cream business five years previously with 14 or 15 accounts which he had purchased from two defunct companies. When he joined forces with Willson two years later, he had some 200 accounts. Since that time at least one hundred additional accounts have been acquired. No claim was made that Willson's gallonage had declined, the witness conceding that the company had had a "very good increase continuously" in volume and that his gallonage was at least twelve times that of the concerns he had purchased. He agreed that in the MacGregor operation they were "holding their own." While he asserted that it was

difficult to make a profit in MacGregor, this was attributed mainly to the price decrease which had been precipitated by Wayne Co-op when it came into the market.

There is no indication that any of the other competitors have been experiencing competitive difficulties due to any of the complaint practices. The witness conceded that the local competitor, French Bauer, a farmer co-op, was one of the largest, if not the largest competitor in the area. The United Dairy Farmers which sells through its own stores was described by the witness as a significant factor in the market. The position of respondents has not notably improved in the Cincinnati area. In the Cincinnati market, which covers two Kentucky counties in which Willson and MacGregor do not operate, respondent National's share of the market has increased only slightly from 14.6 per cent in 1951 to 15.1 per cent in 1955. Respondent Beatrice's share has declined from 5.3 per cent in 1950 to 4.2 per cent in 1955. Borden's share of the same market is almost infinitesimal, being only 1/10 of one per cent in 1955. In the area which conforms more closely to Willson's and MacGregor's trading areas, respondent National's sales dropped 14.7 per cent from 1947 to 1955, and respondent Borden's sales have dropped 4.1 per cent between 1946 and 1955.

b. Southeastern Indiana Area

The only witness to testify from the southeastern Indiana area was a representative of Ritzmann Ice Cream Company of Lawrenceburg, Indiana, which operates in 17 counties in southeastern Indiana. A representative of Daum Dairy of Connorsville was also subpoenaed, but was excused by counsel supporting the complaint. The respondents competing with Richmond are National, Beatrice and Borden, the latter only competing in a fringe of the territory around Greensburg, Indiana. Also operating in the area are French Bauer and other unnamed Cincinnati companies, and Blue Ribbon Ice Cream Company of Indianapolis.

The Ritzmann witness, testifying without the aid of records, at first claimed that his company's sales had declined from about 60,000 gallons at the end of World War II to 40,000 gallons, and he devoted most of his testimony to explaining how this "decline" had come about. However, on cross-examination, it developed that the 60,000 gallon peak volume had been achieved prior to 1932, "in the prohibition era." The witness did not know what his company's gallonage was in 1946 or 1947 but "presume[d] it was somewhat more than what we have got now", although he conceded that if it was more than 40,000 gallons it was not very much more.

The Ritzmann witness conceded that his company had as many accounts as it ever had, but claimed that its sales per account had declined. His explanation for this decline was that it was "somewhat due to competitive conditions on price." This was explained to mean that one of the ice cream distributors in the area, which is supplied by the nonrespondent Blue Ribbon Ice Cream Company of Indianapolis, was marketing ice cream at so low a price as to have taken away business from Ritzmann's accounts. Another factor to which the decline was attributed was the increase in the sale of novelties to youngsters, which had resulted in a "rapid decline in the sale of bulk ice cream", the latter having therefore been a large factor in Ritzmann's sales.

The Ritzmann witness referred to the loss of a single account to each of the three respondents operating in the area. One was allegedly lost to respondent National after the latter had put in a display-type cabinet which Ritzmann had declined to furnish; another was lost to respondent Borden which allegedly paid off some debt in the amount of $100.00 owing by the dealer to Ritzmann; and the third was lost to respondent Beatrice which had allegedly furnished the account with a display-type cabinet. No claim was made that Ritzmann had been requested and refused to supply the last-named account with the cabinet. Aside from the fact that there is no reliable evidence in the record to establish the reason for the alleged switching of these accounts, the Ritzmann witness conceded that the basic cause of his difficulties as a small manufacturer was not the supplying of cabinets, but the national advertising of the larger companies on television, radio and in magazines, which built up consumer demand for advertised products.

Viewing the Ritzmann testimony as a whole, it seems apparent that his main competitive difficulty is his company's inability to compete on price, which condition has resulted from the activity of a nonrespondent competitor. In addition, the advertising program of his larger competitors has apparently created a consumer demand which is lacking in the case of his product. The matter of cabinets, if it is a problem, is not one of major significance. Even here it was not the furnishing of cabinets, as such, which was the heart of the problem but the demand of dealers for the more modern display-type cabinets to replace older equipment, based on the reputation of such cabinets for increasing sales. Ritzmann himself conceded that most companies were replacing the older cabinets with more modern equipment because "it helps the sale of ice cream." In fact he admitted that his

company had replaced two old cabinets in a former National account, which he had acquired, with a more modern type fountainette.

There is no basis in the record for attributing Ritzmann's difficulties primarily or in any significant degree to the complaint practices. Certainly there is no evidence of injury to competition in the area as a result of the engagement by any of the respondents in any of the complaint practices.

c. Louisville Area

The respondents doing business in the Louisville area are National, Borden, and Beatrice. The Louisville companies include Cream Top Creamery, Shively Dairy, and Blue Grass Ice Cream Company. Directly across the Ohio River in New Albany, Indiana, is Purity Maid Ice Cream Company, which is very active in the Louisville market. A recent entrant into the market is Dean Milk Company of Chicago. Another large competitor in the area is Swift & Company. The only witness from the area was a partner of Cream Top Creamery.

Although Cream Top has been in the milk business for many years, it did not enter the ice cream business until around 1950. Its sales increased gradually from $173,000 in 1951 to $194,000 in 1953. In 1954 its sales declined to $173,000 and in 1955 to $165,000.[111] The witness attributed the decline in 1954 and 1955 to a loss of customers which, in turn, he attributed to his company's inability "to meet the competition", including such alleged practices as "the loaning of cabinets, equipment, mortgaging, black-topping driveways" The witness enumerated 12 accounts which he had lost to competitors, allegedly because the latter had supplied cabinets to these accounts. Of these, five involved respondent National, four involved respondent Beatrice, two involved respondent Borden, and one involved the nonrespondet Swift. Reference was also made to four accounts which Cream Top sought to acquire, but was allegedly unsuccessful because of competitors, one account involving Purity Maid, another involving respondent Borden, and two involving respondent National.

With one exception, the witness' testimony was not based on personal contact with the dealers in question, but on discussions with his company's driver-salesman about a week prior to the hearing concerning competitive situations which had occurred a year or two earlier. It does not even appear whether the information received from the driver was based on conversations with the dealers concerning their reasons for changing or retaining suppliers, or was based on the

[111] Unlike many of the figures of competitor witnesses appearing in the record, these figures appear to be reasonably accurate, having been taken from the company's profit and loss statements by the witness.

driver's own opinion or surmise of as to why he had lost or been unable to acquire the account. The single account where the witness had actually talked to the dealer personally involved the overhearing of a conversation in which the dealer allegedly advised the National Dairy driver that he was going to use one of that respondent's cabinets to store meat. With this one exception, no finding can be made with respect to any of the accounts involved in the Cream Top witness' testimony, which was based at best on double hearsay, and at worst on the opinion and surmise of a third person. The unreliability of such testimony is pointed up by the fact that other evidence offered by counsel supporting the complaint, concerning one of the accounts which the Cream Top witness claimed his company could not acquire because of the furnishing of a display cabinet by respondent National, establishes that the dealer had in fact received no cabinet from that respondent since he had his own equipment in the store.[112]

Aside from the unreliability of most of testimony concerning the loss of accounts, it may be noted that in almost all instances the alleged reason for the loss of the account was solely the supplying of the cabinet by a competitor. No reference was made to the supplying of such cabinets on an exclusive basis, but simply to the supplying of the cabinets as such. In fact, one of the accounts about which the witness complained was one which was split between his company and Borden. Unlike most competitors in the Louisville area and in most sections of the country, where the supplying of cabinets by ice cream manufacturers is standard operating procedure, Cream Top has refused to supply its customers with cabinets. When it first entered the business six years previously it supplied about 15 or 16 cabinets to customers in accordance with the prevailing practice, but thereafter changed its policy and decided to sell cabinets to customers. Its policy in this respect was admittedly out of step with most of the industry, including Cream Top's local competitor, Purity Maid, which in one of the instances referred to by the witness had supplied the account not only with a cabinet but with a fountain. The Cream Top witness conceded that his local competitor, Purity Maid, was a substantial factor in the Louisville market, having about twice his own company's volume.

Despite the fact that it had only recently entered the ice cream business, Cream Top was able within a year to build up a sales volume of $173,000 and to augment that for several years. The evidence in the record does not support a finding that the company's decline to

[112] CX 398, pp. 33 and 36, in the National Dairy record indicates that the account, Hale's Market, received no cabinet.

$165,000 in sales during the past two years has been due in any substantial degree to the engagement by respondents in the complaint practices. Moreover, the evidence does not support a finding that there has been any injury to competition in the Louisville area. While two local companies sold out to Borden (for reasons not appearing in the record), two local companies have entered the ice cream business in recent years.

Of the three respondents doing business in the Louisville market only National has had a substantial increase in market share in recent years, its market share having increased from 24.2 percent in 1950 to 30.5 percent in 1955. However, for the State of Kentucky as a whole, its production share actually declined, from 22.1 percent in 1947 to 17.4 percent in 1955. Borden's share of the Louisville market has increased modestly from 15.4 percent in 1950 to 15.8 percent in 1955, while Beatrice's share has increased from 3.2 percent to 4.0 percent in the same period. For the state as a whole, Borden's production share has remained constant at 7.1 percent between 1950 (when it entered the state by acquisition of several other companies) and 1955.

d. Northwestern Ohio, Northeastern Indiana and Southern Michigan Areas

The only competitor witness called from these areas was the president of Page Dairy, which has its main manufacturing plant in Toledo, Ohio, and has four distributing branches in the territory. The company operates in a radius of approximately 50,000 square miles and its territory includes a number of different marketing areas, with different groups of competitors. Respondents National and Borden compete with Page throughout most of its territory. Respondent Beatrice competes in the Ohio and Indiana areas. Competition with respondent Fairmont is limited to the suburban Detroit area and area outside of Cleveland. Among Page's competitors in various portions of the Ohio territory are Driggs Dairy, Swift & Company, Esmond Dairy, San-a-Pure, Tiffin Pure Milk, Superior Dairy, Hubach Ice Cream Company, Dairymen's Ohio Farmers, Miller Goldseal Dairy (which has recently been purchased by Hawthorn-Mellody of Chicago), and Franklin Ice Cream Company. Competitors in the Michigan area include Ira Wilson & Sons, H. A. McDonald Creamery, Swift & Company, and Driggs. Among the Indiana competitors are Swift and Puritan Ice Cream Company.

Page Dairies is one of the largest companies represented at the hearings, outside of the respondent companies, having a gallonage of approximately two million gallons a year. The Page witness claimed

that his company had been losing between 35 to 50 accounts a year during the four-year period prior to the hearings in July 1956, allegedly due to his company's unwillingness to engage in such competitive practices as the making of loans, financing of soda fountains and furnishing excess equipment. He claimed that the most troublesome practice in recent years had been the supplying of cabinets which were permitted to be used, entirely or in part, for the storing of frozen foods other than ice cream.

The witness' testimony, in large part, involved an enumeration of 16 accounts which had allegedly been lost to the respondents, nine to respondent National, five to respondent Borden, and one each to respondents Beatrice and Fairmont. Except for two instances, the witness' testimony as to why he thought his company had lost these accounts was based on information received from his salesmen, rather than on personal contact with the dealer. It does not appear whether the salesmen's information was based on advice received from the dealers, as to their reasons for changing suppliers, or was based on their own conclusions and opinions as to why the accounts had switched. None of the salesmen or dealers was called to testify. In most instances, the witness attributed the loss of these accounts to the furnishing of a cabinet which could be used wholly or in part for the storing of frozen foods. The witness' testimony with regard to these accounts is a combination of unreliable hearsay and uncorroborated surmise and opinion, both as to the fact of whether the respondents had furnished the alleged equipment for the alleged purpose, and as to the fact of whether the furnishing of the alleged equipment was the reason for the change of suppliers. The witness himself, in some instances, was admittedly uncertain as to what the equipment had been supplied for or what assistance had been rendered by a respondent.

The two accounts as to which the witness had any personal knowledge both appeared to involve factors outside the scope of the complaint. One involved the operator of cafeterias in two industrial plants who had allegedly switched to respondent Borden because of a lower price and a promise not to raise prices for one year. There is no reliable evidence in the record as to what price Borden gave the account, nor anything to indicate that any exclusive dealing arrangement was involved. So far as appears from the record, this account involved a simple matter of price competition. It may be noted, in this connection, that the loss of the account occurred a month after Page had raised its price.

The second, and apparently the major account lost by Page, was the A & P chain, of which Page had served 58 stores. This loss occurred

because Page had decided not to submit a bid for the manufacture of A & P's ice cream under a private label, after that account decided to have its ice cream put up under a private label. While Page had no objection to making an offer based on the supplying of its own brand in a special package, it was not willing to make a private label ice cream in accordance with the A & P specifications, because the A & P requisites were "quite stringent" and Page did not think that a capital outlay of approximately $30,000 would be justified from its own point of view. According to the witness, respondent National was the successful bidder, receiving an award on approximately 200 to 250 A & P stores in the Ohio, Michigan and Indiana areas. While Page claimed that his company could not make a bid covering all these stores because it did not have distribution throughout the whole area, he conceded that the invitation did not require a bid for the entire group of stores, and that he could have submitted a bid on the 58 stores which he had been serving. This loss, while unfortunate from the point of view of Page, has nothing to do with the complaint. There is no evidence that the National Dairy price to A & P represented a deviation from its price schedule. Assuming, arguendo, that price deviations were involved in the loss of the two accounts above discussed, such matters are not covered by the present complaints, although conceivably they might fall within the proscription of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

While at first complaining that his company had been losing 35 to 50 accounts a year during the past four years, the Page witness conceded on cross-examination that his company had actually gained more accounts than it had lost each year. The company increased the number of its accounts from approximately 596 in 1946 or 1947 to approximately 1,600 accounts in 1956, of which about 200 were split with other manufacturers. However, the witness claimed that his company's gallonage had not increased in the same proportion and, in fact, had declined recently. Page's gallonage in 1947 was approximately 1,200,000 gallons and by 1950 had allegedly declined to 960,000 gallons. At that time the company started an aggressive selling and merchandising program which involved a lowering of the price on its popular half-gallon package by 20 cents a gallon and a plan for featuring various flavors each month, with an even lower price for the flavor of the month. As a result of this aggressive program Page's gallonage increased in four years to 2,815,000 gallons. However, at the end of 1955 Page's gallonage had dropped down to 2,065,000 gallons, and in 1956 its gallonage was running at the rate of 1,700,000.

There is no reliable evidence in the record upon which a finding can be based that the more recent decline was due, in any substantial degree, to the complaint practices. The evidence suggests that the decline in 1955 resulted largely from the fact that Page's competitors had met its lower prices and that the campaign begun in 1951 had lost some of its steam. The continuing decline in 1956 was attributed by the witness himself largely to the loss of the 58 A & P stores. Despite this decline, the witness conceded that the company was making a greater profit than it had during the previous year.

Page has shown its faith in the future and in its ability to survive and grow by developing a newer and more expensive type of package. Despite the downward trend of prices it has recently raised its own price by 15 cents a gallon. Despite the fact that most competitors supply refrigeration equipment without charge, Page has undertaken during the month prior to the hearing to induce his dealers to own their own equipment by paying the dealer a rental for the use of space in the dealer's cabinet. Within a 15-day period, approximately 45 dealers were induced to join the new plan. In an article published in a trade paper, the company claimed that the newer methods had increased sales substantially during February 1956 over the comparable period in 1955. Despite some alleged competitive difficulties, Page ranks first or very close to first in the Toledo market. It has gradually expanded its trade territory, having entered the Detroit market most recently. There is no reliable evidence to establish that it has sustained competitive injury as a result of the use of the complaint practices by the respondents, or that competition in the areas where it operates has been injured.

While no evidence is available as to respondents' over-all position in the entire area where Page operates, such evidence as is available for representative sections of the territory fails to indicate any unusual improvement in the position of respondents in recent years. Respondent National's share of the Toledo market has increased only slightly from 11.9 per cent in 1950 to 12.8 per cent in 1955. In Canton, Ohio, its market share has declined from 15.1 per cent to 8.0 per cent in the same period. In the Youngstown area its share of the market has declined from 15.6 per cent to 13.6 per cent. Respondent Borden's share of the Toledo market has increased from 9.8 per cent to 13.4 per cent, but its share of the Canton market has declined from 28.1 per cent to 20.3 per cent. In the Youngstown area Borden's share has increased slightly from 10.1 per cent to 11.7 per cent. Respondent Beatrice, which was referred to in connection with only one of the

accounts lost by Page, has increased its share of the Toledo market from 1.1 per cent in 1950 to 2.0 per cent in 1955.

There is no evidence that the three respondents involved in the testimony of the Toledo witness are about to dominate the markets in the three states in which the witness operates. Except for a modest increase in the share of respondent National in Indiana, the production share of each of respondents in the three states has generally declined between 1947 and 1955, as shown by the following table:

| | National | | Borden | | Beatrice | |
|---|---|---|---|---|---|---|
| | 1947 | 1955 | 1947 | 1955 | 1947 | 1955 |
| Ohio | 17.8 | 10.9 | 17.5 | 13.8 | 2.3 | 1.8 |
| Michigan | 20.2 | 15.4 | 7.1 | 6.7 | 0.2 | 0.9 |
| Indiana | 6.1 | 10.0 | 21.6 | 16.6 | 7.7 | 8.2 |

22. *Kansas City, Missouri*

The hearings in Kansas City involved testimony by competitor witnesses from three different areas: Atchison, Kansas; Columbia, Missouri; and several overlapping areas in central Kansas. No dealers were called. Each area is discussed separately below. It may be noted in passing that although the hearings were held in Kansas City and some of the respondents were noticed for the hearings because they did business in the Kansas City area and several produced statistical information covering their operations in the area, not a single witness from Kansas City was called. The record does disclose, however, that there are a number of nonrespondent ice cream manufacturers operating in Kansas City, some of which appear to be sizeable operations. Thus it appears that Southern Ice Cream Company (not to be confused with Southern Dairies), which entered the Kansas City market in 1950, had grown by 1955 to an estimated volume of over a half million gallons. Several, at least, of the Kansas City manufacturers serve the major grocery chains, including Arctic Ice Cream Company which serves the A & P chain, and Adams Ice Cream Company which serves the Safeway stores.

a. Atchison, Kansas, Area

Atchison is located in northeastern Kansas about 50 miles from Kansas City. A single witness from the area testified, the manager of Velvet Ice Cream Company. The respondents operating in the area are National (Franklin Division), Beatrice, Borden and Fairmont. Respondent Foremost had entered the area shortly prior to

the hearing by the acquisition of a local company. Other competitors in the area are Adams Ice Cream Company and Arctic Ice Cream Company, both of Kansas City, and Western Dairy Company and Beatty Dairy, both of St. Joseph, Missouri.

The Velvet witness claimed that his company's sales had not increased since 1947 and had possibly decreased. Testifying without the aid of any records, he estimated his 1946 or 1947 gallonage as approximately 75,000 gallons, and his more recent gallonage variously as, "around 50,000," "between 50,000 and 75,000", "62,000", and "50,000 to 55,000 gallons." While at first claiming that the company's recent decline in gallonage was due both to a loss of accounts and to a decline in sales per account, he later conceded that it had gained at least as many accounts as it had lost and that the principal reason for the decline in gallonage was a decline in sales per account. No effort was made, however, to attribute this decline to any competitor or group of competitors or to any competitive practices.

The witness indicated that it was customary for manufacturers in the area to supply cabinets without a rental charge. While he claimed that it had been the practice up to 1950 to make a rental charge and that this practice had gradually ceased, he made no effort to attribute the cessation of the charging of rentals to any competitor, indicating that it was simply an industry-wide development. The Velvet witness referred to the fact that his company had ceased serving chain store accounts during the past few years. However, there is no evidence that the respondents or the complaint practices are responsible for this. One of the accounts which his company had lost was Safeway. Safeway is now manufacturing its own ice cream and also purchases some of its requirements from the nonrespondent, Adams Ice Cream Company of Kansas City. The A & P chain, which the Velvet witness claimed his company had lost, is being served by the nonrespondent Arctic Ice Cream Company of Kansas City. Another account referred to was a single I.G.A. store, which was allegedly lost to respondent National. In no instance did the Velvet witness attribute the loss of any of the chain store accounts to the complaint practices. While testifying that some retail stores were selling ice cream as low as 39¢ a half gallon, he did not claim that he had lost any of the chain accounts because of this. Furthermore, he did not attribute the low prices to any of the respondents. The only attempt to assign responsibility for such prices was to a nonrespondent, Beatty Dairy of St. Joseph. While claiming to have lost all its chain store accounts, the witness conceded that the company was still serving the Woolworth store in Atchison.

Population in the Atchison area has remained static, which may well account for Velvet's lack of growth. The fact that 1946 and 1947 were admittedly the best years for all companies in the area suggests that Velvet's position is no different from that of its other competitors. It is still the number one company in Atchison. While it is possible that it has lost some business because of its inability to compete with the low prices of competitors, there is nothing in the record to suggest that the respondents have had any significant responsibility for this and, more importantly, there is no evidence that such low prices involved exclusive dealing-quantity discount arrangements of the type covered by the complaint.

The market share information in the record with respect to the Kansas City market area discloses that respondent National's sales have been almost static between 1951 and 1955, and that its market share has declined from 13.4 per cent to 11.7 per cent during this period. Respondent Borden's sales have declined by about 100,000 gallons between 1946 and 1955. Its market share has declined from 8.5 per cent in 1950 to 5.0 per cent in 1955.

b. Columbia, Missouri, Area

The principal Columbia companies are Central Dairy Company and State Dairy Products Company. The former operates within a radius of approximately fifty miles of Columbia. The latter is a larger company and operates in a broader area in central and northeastern Missouri and in part of western Illinois. The respondents operating generally in this area are National and Beatrice. There is also some slight competition in parts of State Dairy's territory with respondents Borden and Foremost. Other competitors in various parts of the area are Adams of Kansas City, Pevely Dairy of St. Louis, Swift & Company, and a number of smaller local companies.

Of the two Columbia companies called, only Central Dairy appears to have sustained any serious loss of business. After experiencing a peak gallonage of approximately 100,000 gallons in 1946, the company declined to 80,000 gallons in 1948 and by 1955 had reached a low of 40,000 gallons. Even allowing for the fact that 1946 was not a typical year, since it was admittedly one of the best in the industry, Central's continued substantial decline after 1948 suggests that factors other than a "return to normalcy" have been responsible for the company's present predicament. It has also sustained a loss in the number of its accounts from approximately 100 to between 50 and 75. While the loss of volume and accounts are not facts to be controverted, the reason therefor is a horse of another color. The

witness himself conceded that he didn't "know for sure" why his company had lost accounts, and attributed its decline in volume to an increase in the number of competitors which had entered the market. He referred to the fact that the company had lost some of its chain store accounts and that ice cream was being sold in the market at prices below his. However, the record fails to afford any basis for attributing Central's difficulty to the respondents and, more particularly, to respondents' engagement in any of the complaint practices.

Kroger, the main chain store account which Central had served, was lost to the nonrespondent local competitor, State Dairy Products, for reasons not appearing in the record, except that such loss occurred at or about the time when Kroger had moved to a new location. While Kroger was later split between State Dairy and respondent National, there is no evidence that such ex post facto splitting had anything to do with Central's loss of the account or that it was due to any of the complaint practices. On the contrary, the splitting of the account is the direct opposite of the exclusivity allegation of the complaint. The other chain account lost by Central was A & P, which is now being served by respondent Beatrice. The record fails to establish when Beatrice acquired the account or that Central lost the account to Beatrice or that such loss was due to any of the complaint practices. Central also lost the State University account with a volume of approximately 5,000 gallons a year, but this was lost to the nonrespondent local company, State Dairy, allegedly on the basis of a lower price bid.

In addition to a loss of accounts, the Central witness also complained about his company's inability to obtain several chain accounts which it solicited, including Woolworth and Newberry, both of which were being served by respondent Beatrice. No reason was suggested by the witness for his company's inability to acquire these accounts, except that possibly his price was not low enough. There was no evidence presented as to Beatrice's price or as to any exclusive dealing arrangement with these stores. No claim was even made that the matter of price was referred to by a representative of any of the accounts, the witness merely testifying in connection with the Woolworth account that the manager had informed him that the decision as to a choice of supplier was made by the company's headquarters. The Central witness also referred to his company's inability to obtain the I.G.A. account because the account wanted a brand name and wanted distribution throughout the State of Missouri, neither of which Central could supply and neither of which involves the complaint practices.

In connection with the witness' reference to low prices in the territory, not only was there no effort made to connect this with the complaint practices (in fact it appears that a number of the accounts are actually being split), but the witness pointed the finger of accusation not at the respondents but at the nonrespondent company, Adams of Kansas City, which he claimed had brought low-priced ice cream into the territory when it began selling to Safeway and "broke the ice cream market in town." The only reference made by the witness to the price of a respondent's ice cream was to the fact that respondent National's ice cream was being sold in the Kroger chain for the same price as his own company's brand was selling.

The major reason for Central's decline would appear to lie in a decline in sales through its existing accounts, plus its loss of, or inability to acquire, chain store accounts. The witness himself confirmed the trend away from the drug stores and other bulk accounts which he had formerly served, and stated that three food markets in town had 75 to 80 per cent of the food business, including ice cream. These stores were not further identified, but assuming that they include Kroger (which is split between respondent National and State Dairy), the A & P account served by respondent Beatrice, and the I.G.A. account served by Swift, there is no evidence that the complaint practices were involved in any of these accounts. The record wholly fails to establish that Central Dairy's difficulties are due to respondents' use of any of the complaint practices.

The other competitor witness from Columbia, State Dairy Products, has also sustained a decline in gallonage between 1947 and 1955, from 460,000 gallons to 302,000. However, most of this occurred around 1948, during which year a loss of about 30 per cent was experienced, due to a return of the market to a more normal condition than that which had prevailed during the immediate postwar years, 1946 and 1947. The witness attributed most of his company's decline since 1948 to the entry into the market of a number of new companies, many of which were small dairies that had formerly not handled ice cream. State Dairy, unlike its local competitor Central, serves a number of chain accounts, mostly on a split basis, including Kroger, Safeway and I.G.A. The company maintains a graduated scale of quantity discounts, except to the Kroger store to which it sells at a flat negotiated price.

While the State Dairy witness indicated that his company's profit ratio was not as large as it had been formerly, he attributed this largely to the change from bulk ice cream to package ice cream. The latter involves additional packaging costs not present in the case of

the former. Another factor referred to by the witness as affecting his company's profits was the relatively low price of package ice cream. He did not attribute this to the respondents, but to the small dairies which had entered the ice cream business in recent years and were selling lesser-known brands of ice cream. This has caused State to put out a cheaper brand of ice cream to compete with the lesser-known brands of the smaller dairies.

The evidence concerning the Columbia areas is wholly deficient insofar as establishing that the use of the complaint practices by the respondents has been responsible for any injury to any competitor or to competition in the area. The record fails to establish any decline in the number of competitors. On the contrary, the number has increased. There is no information in the record with respect to respondents' market shares in the Columbia area. However, for the State of Missouri as a whole it appears that they have not substantially improved their position. Respondent National's share of state production has declined from 16.4 per cent in 1947 to 11.8 per cent in 1955. Respondent Borden's share has declined from 8.6 per cent to 7.7 per cent during the same period. Respondent Beatrice has had a modest increase of 3.1 per cent from 8.9 per cent in 1947 to 12.0 per cent in 1955.

c. Central Kansas Area

Counsel supporting the complaint called four competitor witnesses operating in central Kansas: Jo-Mar Dairies of Salina, Jackson Ice Cream Company of Hutchinson, Sterling Ice Cream Company of Sterling, and Armstrong Creamery of Wichita. The territories of these companies are not precisely coextensive, but they operate in an overlapping area of about 200 miles in the central part of the State. The respondents operating in various portions of the area include National, Borden, Beatrice, Fairmont and Foremost. Respondent Carnation operates in Oklahoma, where it competes to a small extent in the northern counties with Armstrong Creamery of Wichita. Swift & Company also sells in the central Kansas territory. There are a considerable number of local companies operating in the area, including Steffen Dairy, Strahan, Bogaart's, Artesian Valley, Hyde Park, Gardner, Russell, Bennett, and Schluer.

The only one of the four competitor witnesses to have sustained any substantial decline in gallonage was Jo-Mar Dairies of Salina. That company's gallonage has declined from approximately 300,000 gallons in 1947 to 200,000 gallons, as of the time of the Kansas City hearings in July 1956. This decline has not been due to any loss of

accounts since the company has a greater number of accounts than it ever had, but rather to a decline in sales through the company's existing accounts. According to the Jo-Mar witness, 65 to 70 per cent of the company's sales had been to drug stores, confectionery stores, restaurants and institutions whose purchases consisted largely of bulk ice cream, and the sales to some of these accounts had declined in recent years by as much as 75 per cent as a result of the shift in ice cream distribution to the food stores and particularly to the large supermarkets.

The Jo-Mar witness complained that his company had not been able to get into the supermarkets. His testimony suggested that low prices or off-list prices by his competitors were preventing him from selling to these accounts. He referred particularly to a reduction in price by respondent National, which was later restored, and to a "rumor" that respondent National was granting certain discounts or rebates, as to which he admittedly had no definite knowledge. Despite the insinuations in the witness' testimony, which was largely based on hearsay and surmise, as to respondent National's possible leadership in the charging of lower prices, he conceded on cross-examination that it was a local company, Bogaart, which had actually been the leader in low prices in the Salina market and that it had been followed by another local company in this practice, Strahan.

Irrespective of who was the leader or whether respondent National participated in the lowering of prices, there is not a scintilla of evidence that this price competition involved any exclusive dealing type of arrangement, such as is challenged by the complaints. On the contrary, according to the Jo-Mar witness' own testimony and that of other competitor witnesses in the area, most of the large supermarket accounts are being served on a split basis. Thus the Dillon stores to which the witness claimed he was unsuccessful in selling ice cream, handles not only respondent National's ice cream but as many as three and four other brands in some of the stores, including respondent Fairmont and the local competitors, Jackson and Sterling. The Mammel chain to which Jo-Mar does sell (despite the witness' assertion that he could not sell to chains) [113] is split with respondent Fairmont and with the local competitor Strahan. Of the chains which are not split, Minimax (having about eighty stores) is served by the nonrespondent local company, Bogaart, and Safeway is served by the nonrespondent, Swift.

[113] In addition to selling to the Mammel chain, Jo-Mar also sells to some of the I.G.A. stores and to a regional chain of 5 and 10¢ stores.

The Jo-Mar witness also was somewhat critical of the practice of supplying cabinets to customers, claiming that the dealers could afford to purchase their own cabinets. However, he later conceded that the larger accounts, which are actually the ones able to purchase their own cabinets, do in fact, own their own equipment in order to take advantage of the 10-cent a gallon equipment discount, and that the supplying of cabinets was limited mainly to the smaller accounts which, in many instances, are not able to afford a cabinet. The Jo-Mar witness had no criticism of the practice of allowing customers to put frozen foods in ice cream cabinets since his company sells frozen foods and permits its customers to do this. He conceded that the supplying of signs was not a factor in his company's loss of or inability to acquire business. The witness spoke vaguely of loans and of the sale of equipment, but did not refer to any account where this had been a competitive problem or identify any competitor as being active in these practices. The witness also critized the practice of granting price concessions to grocery chains affiliated in a cooperative buying group, but identified no accounts or any respondent as being involved in this problem. The apparent root of Jo-Mar's difficulty appears to be the matter of price competition, and there is no evidence in the record that this is based on any exclusive dealing arrangement such as is attacked by the complaints.

The smallest of the four competitor witnesses, Sterling, has apparently fared better than Jo-Mar in making the transition from bulk to package sales and from the drug and confectionery account to the food stores. In 1946 Sterling had a gallonage of only 86,000 and was serving mainly fountain accounts. When the change in the channel of distribution to the food stores began, Sterling acquired a number of trucks and began to sell to the food stores. It was able to get into the Dillon chain, to which Jo-Mar claimed it could not sell because of respondent National. It also was able to serve the Mammel chain on a split basis with respondent Beatrice and later with respondent Fairmont. While there is evidence of price competition in Sterling's area, the record does not establish that it involves the quantity discount-exclusive dealing type of arrangements to which the complaints are directed. Despite such price competition Sterling appears to have made reasonably good progress. It is selling to approximately 150 accounts, which is the largest number of accounts it has ever served. Its gallonage gradually increased from 86,000 in 1946 to 100,000 gallons in 1954. While it experienced a slight decline in 1955 to 96,000 gallons, this trend was reversed during the first six months of 1956 when it was running at a rate in excess of 100,000 gallons. So far as

appears from the record, Sterling is prospering and is holding its own in the competitive struggle in its area.

An even better record of performance is that of Jackson Ice Cream Company of Hutchinson. That company has increased its gallonage from 100,000 in 1950 to between 250,000 and 275,000 gallons in 1956. The company sells to the Dillon chain, some of whose stores it splits with respondent National, some with respondent Fairmont and some with respondent Beatrice. In certain of the stores it splits with both respondents, National and Beatrice, but admittedly gets the bigger end of the space. Despite the claim that the company lowered its price to the Dillon stores in order to meet respondent National's price and the fact that its profit ratio per gallon is allegedly lower than it was formerly, the company's overall profits are greater because of the increase in total sales. The only thing that is preventing Jackson from expanding further is the fact that the age of its owner has disinclined him from increasing his capacity. There is not a scintilla of evidence of injury to competition in Jackson's area due to any of the complaint practices.

The largest of the competitor witnesses called was Armstrong Creamery of Wichita, which sells not only in central and southern Kansas, but also in the Joplin, Missouri, area and in northern Oklahoma (where it competes with respondent Carnation). Armstrong sells to a number of chain stores in its area, including Safeway, Kroger, Farha Brothers, Mammel, Food Town, and a number of the I.G.A. stores. Its sales increased from 553,000 gallons in 1947 (which the witness agreed was one of the best years in the ice cream industry) to 820,000 gallons in 1954. Its 1955 gallonage had declined by approximately two per cent, which the witness attributed to the widespread sale of "undergrade ice cream" at lower prices than the regular grades. However, he made no effort to attribute this to any competitor or group of competitors, but indicated that practically all of the companies were selling a second grade of ice cream, including his own company and other local competitors such as Schluer, Jackson, Hyde Park and Steffen. No evidence was offered to indicate that any of such sales by any of the respondents involve exclusive dealing-quantity discount type of arrangements, such as those challenged by the complaints. The sale of such "undergrade ice cream", of presumably lower butterfat content, appears to involve simply a matter of price competition, which the present complaints do not cover. In any event, despite an alleged small decline of 2 per cent in gallonage in 1955, Armstrong's sales for the first six months of 1956 were running at a rate above that of the previous year.

Viewing the evidence of the Kansas area as a whole, it wholly fails to sustain any of the allegations of the complaint. The competition primarily involved in the area was price competition, not falling within any of the allegations of the complaint. Moreover, there is no evidence of any injury to competition in the area or the reasonable likelihood thereof. While one of the competitors has experienced a substantial loss in gallonage, the other three have improved their position (two of them quite substantially). In contrast to this, respondent National, which was the only respondent referred to to any substantial extent, has actually experienced a marked decline in its sales in the Kansas area covered by the testimony of the witnesses who appeared. The gallonage of its Franklin Division has declined from 2,100,000 in 1947 to 1,500,000 in 1955. The only respondent for which the record contains production share data is respondent Beatrice, it apparently being the only one with a plant in Kansas. Such data reveal that its share of state production has declined from 18.2 per cent in 1947 to 15.3 per cent in 1955.

### 23. *New England Area*

Hearings were held in two New England cities, Portland, Maine, and Hartford, Connecticut. No competitor witnesses were called from either of the hearing cities. At the Portland hearing a single competitor witness was called, respectively, from Barre, Vermont, and Ellsworth, Maine. At the Hartford hearing a single competitor witness was called from Danbury, Connecticut. No dealer witnesses testified. The evidence with respect to each of the above areas, which appear to be a separate market area, is discussed below.

a. Barre-Montpelier Area

The respondents doing business in the area are National (General Ice Cream Division), Borden and Hood. The largest local competitor is Granite City Cooperative Creamery Association of Barre. There are also two or three other competitors who sell in portions of the territory. A representative of Granite City Co-op testified at the hearing. Granite City Co-op has the largest sales of any of the competitors in the area, having approximately 475 customers and a gallonage of approximately 216,000. The company's witness had no criticism of the practice of furnishing cabinets, expressing the opinion that it is desirable for the ice cream supplier to furnish a cabinet because it is the only proper way to insure the product's reaching the consumer in good condition. He indicated that the cost of the cabinet was figured into the price of the ice cream.

The Granite City witness claimed that he had lost to respondent Hood several retail grocery accounts, which were affiliated with a voluntary buying group known as the Red and White Stores. The witness' testimony was somewhat confused as to whether the loss of the stores was due to price or to the furnishing of equipment. His testimony with respect to one of the accounts suggests that the reason for the switch was "pressure" from the buying group itself which, of course, is outside the issues in these proceedings. In any event, there is no reliable evidence in the record to support the witness' hearsay testimony with respect to what assistance, if any, these accounts received from Hood.[114] The witness also referred to two accounts which had been lost to respondents National and Hood, respectively, because of the alleged financing of soda fountain equipment. There is no reliable evidence in the record to support the witness' hearsay testimony concerning the assistance of these two accounts by the two respondents in question.

The record fails to establish that Granite City Cooperative is experiencing any serious competitive difficulties or that such problems as it is encountering are due to the complaint practices. The company's gallonage as of August 31, 1955, was 216,000 gallons, which was 26,000 gallons higher than its gallonage in 1953. While it has lost some accounts, it has also gained at least as many, including some from the two respondents to which it allegedly had lost several accounts. Its representative's main complaint was that the company was not expanding as fast as it thought it should. However, there is no indication that the respondents are expanding in the area. The sales of National's plant in nearby Burlington and in its other branches in the state have declined from 890,700 gallons in 1947 to 642,700 gallons in 1955. While it is still a dominant factor in the State of Vermont, National's share of state production has declined from 53.8 per cent in 1947 to 46.3 per cent in 1955.[115] The sales of Borden's Burlington, Vermont branch declined from 103,000 gallons in 1946 to 77,000 gallons in 1955. The record contains no separate figures for Hood's Vermont operation. However, the figures for its northern region, which includes Maine and Vermont, show a decline in sales of 134,150 gallons between 1950 and 1955.

[114] The witness conceded that he did not have any firsthand knowledge of the actual prices being charged by competitors.

[115] It may be noted that National's 1947 production share was only two per cent above its 1932 production share.

b. Ellsworth, Maine

Although hearings were held in Portland, Maine, no witnesses from that area were called. A competitor witness from Fairfield, Maine was subpoenaed, but was excused at the request of counsel supporting the complaint. The only witness called from the State of Maine was a representative of Hancock Creamery of Ellsworth. Another local competitor in the area is Edwards of Rockland, Maine. The only respondents operating in the area are Hood and National. Borden does not sell in the territory.

The Hancock witness claimed that his company had lost several grocery stores, affiliated with the IGA and Associated Grocers groups, to respondent Hood. The witness thought these accounts had received a better price due to some sort of special arrangement between Hood and the groups. However, the witness, who had only been with the company for about five months at the time of the hearing, conceded that he had no personal knowledge as to what prices his competitors were charging. In fact, most of his testimony related to accounts which had been lost prior to his coming with the company. No finding with respect to the loss of these accounts or the reason therefor can be based on the unsatisfactory testimony of the witness.

The record discloses that Hancock's sales increased steadily from approximately $165,000 in 1947 to $189,000 in 1953. During 1954 the company experienced a decline to approximately $150,000 but the following year its sales increased to $172,000 and this improvement continued into 1956. There is no evidence that either of the two respondents has experienced any improvement in its sales in the area. The sales of National's branches in nearby Bangor and Machias have declined by approximately 50,000 gallons between 1947 and 1955. As indicated above, the sales of Hood's northern region, which includes Maine, have also declined substantially between 1950 and 1955.

c. Danbury, Connecticut, Area

Although hearings were held in Hartford, the only witness called from Connecticut was a representative of Rider Dairy Company of Danbury, which operates in portions of southern Connecticut and several counties in the adjacent sections of eastern New York. The respondents operating in the area include National, Borden, Hood and Foremost. There are also a number of other local and regional companies selling in the territory.

The Rider witness indicated that the supplying of cabinets and signs was a general practice of almost all companies in the area. He had very little criticism of the furnishing of this type of equipment, except

for one instance where National had furnished a sign, valued at about $100.00, to an account on a U. S. highway which the witness did not feel was warranted by the account's gallonage. Most of his criticism was directed at the alleged loaning of money or financing of equipment for dealers. The Rider witness' testimony regarding the alleged financial assistance of several dealers by Borden and National was largely based on unreliable hearsay. He conceded that his own company also assisted customers in the purchase of soda fountain equipment and that the loaning of money in the territory by competitors went back as far as the 1920's. While somewhat critical of the financing of dealers, the Rider witness conceded that the smaller independent stores needed financial assistance in order to obtain necessary equipment. In addition to the matter of financing, the witness also alluded to the granting of off-list prices and of price cutting in the territory. However, he conceded that he had no personal knowledge of this and was unable to identify any respondent as being involved in this practice.

Rider's gallonage in 1955 was approximately 130,000 and its dollar sales about $250,000. The witness claimed that his company's volume had remained static during most of the postwar period. He conceded, however, that this was due largely to a shift in business away from the old-line soda fountain and restaurant bulk-type establishment (which his company had traditionally served) to the supermarket food outlets. The witness indicated that competition for the latter type of establishment centered mainly about price. No evidence was offered to show that pricing practices of the type alleged in the complaint were involved in the acquisition of these accounts. In fact, no evidence of any kind was offered as to who served the supermarket accounts in the area or as to what prices were being charged.

The record fails to establish that respondents have significantly improved their position in the area in which Rider operates. The sales of respondent Borden's branch in Stamford, Connecticut, which serves a considerable part of the area, have declined by 115,000 gallons between 1946 and 1955. The sales of its Poughkeepsie, New York branch, which serves areas of eastern New York State adjacent to Connecticut, have declined by 90,000 gallons during the same period. Its share of production in the State of Connecticut has declined from 16.0 per cent in 1947 to 10.7 per cent in 1955. Respondent National's share of the state production in Connecticut has declined from 35.7 per cent in 1947 to 22.5 per cent in 1955.[116] The sales of respondent Hood's

[116] It may be noted that respondent National's share of production in the State of Connecticut in 1932 was 52.4 per cent.

southern region, which includes Connecticut, have declined by approximately 285,000 gallons between 1950 and 1954. For New England as a whole, respondent Hood's share of the wholesale production of ice cream has declined from 30.2 per cent to 24.03 per cent between 1947 and 1954. Its share of production of all frozen dairy products for New England has declined from 26.5 per cent in 1947 to 19.9 per cent in 1955.

### 24. *Rapid City, South Dakota*

The only respondent doing business in Rapid City and the Black Hills area is Fairmont. Respondents National and Beatrice have sold in the territory for brief periods in the postwar era, but have withdrawn from the area for reasons not appearing in the record. The same is true of the large nonrespondent company Swift. The local companies operating in various portions of the territory include LaBelle Creamery, Gate City Sunshine Cooperative, Langenfeld Ice Cream Company, Mitchell Dairy, and Hot Springs Milk Company. Representatives of LaBelle, Gate City Sunshine and Hot Springs Milk testified at the hearing held in Rapid City in July 1956. Fairmont, LaBelle and Gate City are the three largest companies in the area with Fairmont having a volume of approximately 121,000 gallons, while LaBelle's gallonage is approximately 126,000 gallons and Gate City Sunshine's is approximately 100,000 gallons.

The testimony of the LaBelle witness centered about the alleged supplying of better cabinets than he thought warranted and the manufacture of private label ice cream at reduced prices. The LaBelle witness indicated that it had been customary to charge a rental on cabinets until about six or seven years previously. He made no effort to attribute the cessation of the charging of rentals to any particular competitor, testifying that he had stopped when "everyone else stopped." He also indicated that it had been customary to sell cabinets to customers until six or seven years ago, but that this practice had also declined, so that only three per cent of his company's accounts now owned their own cabinets, as compared to 20 to 25 percent in former years.

The criticism of the LaBelle witness with respect to the supplying of cabinets revolved about the supplying of larger or better cabinets than he thought justified, and permitting the storage of other frozen foods in the cabinets. No claim was made that his company had lost any accounts or had been prevented from acquiring any by reason of the supplying of cabinets by a competitor. At least two of

the three accounts which the witness mentioned as having received bigger cabinets from Fairmont than he thought proper were being served on a split basis by both LaBelle and Fairmont. Fairmont sells other frozen foods in the area, as well as ice cream, which may well account for it permitting the storage of such food in its cabinets. The witness also conceded that it is sometimes "hard" for an ice cream manufacturer to prevent a dealer from storing frozen food in the cabinet. Insofar as the size and type of cabinet is concerned, there is no showing of any abuse of discretion by Fairmont in supplying cabinets which were not appropriate to the volume and type of establishment involved. The LaBelle witness admitted that his own company had supplied cabinets to dealers where Fairmont had refused to do so.

Most of the witness' testimony was directed to the fact that his company had lost several stores of a chain, which it had previously served, when Fairmont began manufacturing ice cream for the chain under a private label. According to the witness, the Fairmont manager had told him that the private label brand was being sold at 15¢ a gallon less than the regular brand. While both brands have the same butterfat content, the private label brand has a higher overrun (i.e. more air), which may account for its allegedly lower price. The LaBelle witness indicated that his company also made a second brand, which at times sold below Fairmont's private label brand. As heretofore indicated, there is nothing in the complaint which challenges the right of a manufacturer to manufacture private label ice cream at a lower price than its regular brand.

According to the figures given by the LaBelle witness, his company's present gallonage of approximately 126,000 gallons is about 16,000 gallons below its 1952 peak of 142,000 gallons. However, about three-forths of this decline is represented by the loss of the nearby U.S. air base account (which went to Fairmont on the basis of a lower bid) and by the loss of the Safeway account (which is now manufacturing its own ice cream). There is no reliable evidence in the record to establish that any substantial portion of the LaBelle decline is due to Fairmont's use of any of the complaint practices. There was no evidence introduced of the use of any exclusive dealing arrangements in the area. In fact, the testimony indicates that there is a wide splitting of accounts in the area, with some of the stores serving two or three different manufacturers' ice cream.

Gate City Sunshine Cooperative is a consolidation of two companies, one of which was formerly only in the milk business. Unlike the experience of LaBelle Creamery, Gate City Sunshine's sales have been

on the increase. Starting with a volume of about 65,000 gallons in 1953, the company's sales increased to 75,000 gallons in 1954, then to 87,000 gallons in 1955, and in 1956 the company's sales were running at the rate of 100,000 gallons a year.

A representative of Gate City complained that Fairmont was selling below list, but conceded that he had no personal knowledge of this. No evidence of off-list prices charged in the area was offered by counsel supporting the complaint. Another witness from the Gate City Company conceded that the dropping of prices in the market was started by Swift, rather than Fairmont, when the former came into the market area for a brief period and later withdrew. Gate City has had no apparent difficulties in meeting price competition in the area. It lowered its own prices when other competitors did, and it now serves a number of the larger stores in the area, some on a split basis with Fairmont and LaBelle.

The third company to be represented at the hearing, Hot Springs Milk Company, sells in only a portion of the territory around Hot Springs. It did not enter the ice cream business until 1949. Its gallonage in 1956 was around 10,000 gallons, which represented an increase over its gallonage in previous years. The principal complaint of the witness from the company was that Fairmont had advertised on TV and given away premiums to customers who received a certain number of coupons in the purchase of Fairmont products. This, of course, involves matters not covered by the complaint. The witness also referred to another local competitor who was allegedly "worse than Fairmont when it comes to giving stuff away."

The record fails to establish any injury to competition in the Black Hills area due to the use of the complaint practices. The record does not establish any substantial mortality among competitors. While one small company has gone out of business due to the retirement of its owner, a new company, Langenfeld, has come in from Mitchell, South Dakota to do business in the market. There is no indication in the record that respondent Fairmont has experienced any increase in sales in the area during the postwar period.

DISSENTING OPINION, DOCKET 6425

By MacIntyre, *Commissioner:*

My consideration of this case has been and is based upon evidence in the record relating to this respondent. Scrupulously I have endeavored to keep my sights on that record relating to this respondent to the exclusion of what is involved in the records or otherwise relating to other cases. During the course of the hearing before the Commis-

sion (Transcript pages 32–33) it appeared that counsel for the respondent was injecting matters from the record relating to other respondents into his presentation of this case. To this I objected, and have been hopeful that we would not become confused thereby.

The decision of the majority to dismiss the complaint in this case is based upon its finding that the record in the case relating to practices used by the respondent in connection with its frozen dairy products "will not support a finding that these practices have produced the requisite degree of competitive injury to support an order to cease and desist."

With the conclusion of the majority I disagree, and from its action dismissing the complaint, I dissent.

ORDERS DISMISSING COMPLAINTS*

These matters having been heard by the Commission upon the appeal of counsel supporting the complaints from the hearing examiner's initial decision dismissing the complaints and the Commission having considered said appeal and the opposition thereto presented by respondents; and

It appearing that the complaints charge respondents have engaged in unfair methods of competition and unfair acts and practices in commerce in that they granted or offered certain material considerations to customers and prospective customers to induce them to purchase or continue purchasing frozen dairy products from respondents with the result and effect of lessening, hindering and eliminating competition and of creating a tendency toward monopoly in the sale and distribution of frozen dairy products; and

The Commission, upon review of all evidence adduced in support of said complaints, having concluded that the record will not support a finding that the complaints practices shown to have been engaged in by respondents have resulted in substantial injury to competition or are likely to effect a monopoly in the sale and distribution of frozen dairy products, and that, therefore, insofar as the initial decision of the hearing examiner is based upon this failure of proof, it must be affirmed and adopted as the decision of the Commission; and

[1] It further appearing that respondents Carnation Company, The Borden Company, Beatrice Foods Company (Delaware), National Dairy Products Corporation, Arden Farms Co., Foremost Dairies,

*As to all nine respondents named in the combined amended complaints.

[1] It should be noted that while respondents cited in all nine dockets are subject to the dismissal order, Pet Milk Company et al. and Fairmont Foods Company et al. are omitted from the following paragraph as explained in the initial decision.

Inc., H. P. Hood & Sons, Inc., directly or through their subsidiaries, have engaged in the practice of granting loans or sums of money to frozen dairy products retailers upon the condition that the recipients will deal exclusively with said respondents, or their subsidiaries, and while, as aforesaid, this record will not support a finding that these practices have produced the requisite degree of competitive injury to support an order to cease and desist, nevertheless, the Commission, under such circumstances, should safeguard the public interest by continuing close scrutiny of respondents' operations with a view toward reopening or taking such other action as may be warranted.

*It is ordered*, That the appeal of counsel supporting the complaints be, and it hereby is, denied.

*It is further ordered*, That the complaints be, and they hereby are, dismissed.

Commissioner Kern not participating and Commissioner MacIntyre dissenting in H. P. Hood & Sons, Inc., docket 6425, not participating in the other cases.

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IN THE MATTER OF

## R. C. MYRICK ET AL. TRADING AS CAREY SURGICAL APPLIANCE CO., ETC.

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

*Docket 7806. Complaint, Mar. 3, 1960—Decision, May 24, 1962*

Order requiring an individual with offices in Los Angeles and San Francisco, Calif., engaged in selling hernia trusses both in his offices and on the road, to cease making a variety of false claims for his said devices in advertising in newspapers, as in the order below set forth.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that R. C. Myrick, an individual trading as Carey Surgical Appliance Co. and Allied Surgical Appliance Co., and Dorothy M. Myrick, an individual, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect