(a) Correctly showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939;

(b) Setting forth the common generic name of fibers in the required information on labels, tags or other means of identification attached to wool products.

*It is further ordered,* That respondent Spinnerin Yarn Co., Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any wool product is not falsely or deceptively stamped, tagged, labeled, or otherwise identified when respondent has reason to believe that such wool product may be introduced, sold, transported or distributed in commerce.

*It is further ordered,* That respondent Spinnerin Yarn Co., Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yarn or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in yarn or any other textile products on invoices or shipping memoranda applicable thereto or in any other manner.

*It is further ordered,* That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

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IN THE MATTER OF

## NATIONAL TEA CO.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 7453. Complaint, March 26, 1959—Decision, March 4, 1966*

The Commission, having set aside the initial decision of its hearing examiner, makes new findings of fact and conclusions of law on the record, and or-

ders the National Tea Co., the Nation's fifth largest retail food chain, not to acquire any stock or assets of any retail food store for a period of 10 years without prior Commission approval.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, National Tea Co. (hereinafter referred to as respondent), is a corporation organized in 1902 under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 1000 N. Crosby Street, Chicago 10, Illinois.

PAR. 2. Respondent is controlled by Loblaw Groceterias Co., Limited, Loblaw Companies, Limited, and George Weston, Limited, all of which are Canadian corporations.

PAR. 3. Respondent is engaged in the business of operating a chain of approximately 883 retail food stores in 16 States of the United States and sells a wide variety of merchandise, including a substantial number of items manufactured, processed and packaged under trademarks or brands owned or controlled by the respondent. Respondent operates its own bread and cake bakeries in Chicago, Illinois, Hopkins, Minnesota, Milwaukee, Wisconsin, Detroit, Michigan, and Denver, Colorado. In addition, the respondent manufactures or processes coffee, peanut butter, salad oils, preserves, extracts and soft drinks. Meat packing plants are operated by respondent at Fergus Falls, Minnesota, Denver, Colorado, and Port Huron, Michigan. Respondent is engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 4. The three Canadian corporations referred to in Paragraph Two hereof also control or own outright many corporations and concerns engaged in the manufacture, processing, sale and distribution of merchandise in the United States, and a substantial volume of such merchandise is sold through respondent's stores.

Certain members of the board of directors of the respondent and the Canadian corporations heretofore mentioned also own or control an interest in corporations or businesses other than the respondent, and some of these corporations and businesses sell a substantial volume of merchandise to the respondent for sale through the respondent's retail outlets.

PAR. 5. Respondent is one of the largest retail food chains in the United States and, as of July 23, 1957, ranked fifth in total sales volume among the food chains of this country. Respondent's net sales increased from approximately 270 million dollars in 1948 to 681 million dollars in 1957, an increase of approximately 411 million dollars, or over 250 percent.

PAR. 6. The food industry is the largest segment of the American economy. According to the 1954 Census of Business, there were 385,000 food stores of all types in the United States. As of 1954, 6,334 grocery stores had individual sales of one million dollars or more, and 16,466 stores reported sales figures ranging from $300,000 to one million dollars each.

Concentration of grocery store sales in large corporate chains has been intensified in the United States through sustained programs of corporate acquisitions. Twenty percent of the grocery stores in the United States accounts for over seventy-two percent of the total grocery store sales in the country. From 1954 to 1957 some thirty-six corporations absorbed eighty-eight grocery chains and thereby acquired during this period over one and a half billion dollars in total sales.

PAR. 7. Beginning in 1921, the respondent initiated a policy of expansion by acquiring a large number of food retailers and other concerns engaged in the manufacture, processing and distribution of food products.

As a result of its policy of expansion by acquisition, the respondent has purchased, in selected localities, more than 1,300 retail grocery stores, numerous warehouse facilities, packing and processing plants, as well as other interests.

All of the acquired corporations, prior to and at the time of the acquisitions, were engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. Respondent's acquisitions include, among others, all or part of the stock or assets of the following corporations:

*1952*

C. F. Smith Company, Detroit, Michigan, including 211 stores.
Northwest Piggly-Wiggly Co., Duluth, Minnesota, including 6 stores.

George T. Smith's Market Baskets, Inc., Lansing, Michigan, including 6 stores.

Dole Super Markets, Inc., Battle Creek, Michigan, and Kalamazoo, Michigan, including 6 stores.

*1953*

Food Center Stores, St. Louis, Missouri, including 28 stores.

*1954*

Capitol Stores, Inc., Baton Rouge, Louisiana, including 28 stores.

*1955*

H. A. Smith Markets, Inc., Detroit, Michigan, including 9 supermarkets and a meat packing plant.

*1957*

Miller Supermarkets, Inc., Denver, Colorado, including 27 supermarkets.
Tolerton & Warfield Co., Sioux City, Iowa, including 85 stores.
Logan's Super Markets, Inc., Nashville, Tennessee, including 9 stores.
DeVan Horner, Inc., Mobile, Alabama, including 7 stores.

*1958*

Illinois Valley Stores Co., Peoria, Illinois, including 7 stores.
Del Farm Stores, Chicago, Illinois, including 12 stores.

PAR. 8. The effect of the aforesaid acquisitions by the respondent, individually and collectively, through increased concentration and otherwise, may be substantially to lessen competition or to tend to create a monopoly in the processing, manufacturing, purchasing and distributing of products sold in grocery stores and in the sale of merchandise in retail grocery stores within the meaning of Section 7 of the Clayton Act.

PAR. 9. The foregoing acquisitions alleged and set forth in Paragraph Seven hereof constitute a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended and approved December 29, 1950.

PAR. 10. The acquisitions hereinbefore described tending substantially to lessen competition or to create monopoly are to the prejudice and injury of the public and constitute an unfair method of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 11. The foregoing acquisitions, acts and practices, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45).

*Mr. John T. Walker* supporting the complaint.

*Kirkland, Ellis, Hodson, Chaffetz & Masters* by *Mr. Hammond E. Chaffetz, Mr. William R. Jentes, Mr. William J. Lederer* and

*Mr. Karl F. Nygren*, Chicago, Ill., and *Mr. Frederick M. Rowe*, Washington, D.C., for respondent.

## INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

APRIL 5, 1963

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This proceeding is based upon a complaint charging the respondent, National Tea Co., a corporation, with violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended and approved December 29, 1950, by reason

of certain acquisitions made by respondent subsequent to December 29, 1950.

This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence and proposed findings as to the facts and conclusions, together with briefs and reply briefs presented by counsel. The hearing examiner has given consideration to the proposed findings submitted by both parties and briefs in support thereof, and all findings, conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein and being duly advised in the premises, makes the following findings of fact and conclusions drawn therefrom and order.

## I

## *NATIONAL TEA CO.*

1. Respondent, National Tea Co., is a corporation organized in 1902, under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 1000 North Crosby Street, Chicago 10, Illinois.

2. Respondent is engaged in operating a chain of retail, self-service, cash and carry, food stores dealing in groceries, fresh fruits, vegetables, bakery and dairy products, frozen foods, meats, poultry, fish and other items. Generally the products that respondent sold included nationally and locally known and distributed merchandise, as well as items manufactured, processed or packaged and sold under trade names or brands owned or controlled by the respondent.[1]

3. In 1955, Loblaw Groceterias Co., Limited, a Canadian corporation and subsidiary of George Weston, Ltd. of Canada, purchased a substantial portion of the common stock of National Tea Co., and as of June 1, 1957, said Loblaw Groceterias Co., Limited, owned 724,857 shares of the common stock of National Tea Co., amounting to 34.17% of the common stock of National Tea Co. The officers and directors of National Tea Co., owned 1.77% of said common stock and the remaining 64.6% was distributed

[1] Prospectus dated June 18, 1951, shows that private brand merchandise amounted to approximately 10% of total business (CX 38, p. 4). Prospectus dated November 14, 1955, shows private brand merchandise accounted for 20% of total business (CX 39, p. 5). H. V. McNamara testifying on September 8, 1960, in this proceeding stated that for the past 15 years National Tea has been known for its policy of stocking nationally known brands. (Tr. 787.)

among nearly 6,000 stockholders. Loblaw Groceterias Co., Limited, in addition to operating a number of food stores in Canada, also controlled a New York corporation, Loblaw, Inc., which operated over 180 food stores in western New York, Pennsylvania, Ohio, and West Virginia, with annual sales of over $240,000,000 in 1957. In June 1962, National Tea Co., acquired 115 supermarkets with annual sales of $115,000,000, which had been operated by Loblaw, Inc., in the Youngstown and Pittsburgh areas. The purchase price of $23,000,000 was payable by delivery of 1,362,963 shares of National Tea common stock. This transaction increased ownership of the Canadian Loblaw organization in National Tea Co., from approximately 35% to 45%.[2]

4. At the time of the issuance of the complaint, on March 26, 1959, respondent operated a chain of approximately 932 retail food stores in 18 states, located in the Middle West, West and lower Mississippi Valley. As of January 3, 1959, respondent ranked fifth in sales volume among the food chains of the country. Respondent's gross sales for the 53 weeks ending January 3, 1959, was $794,162,135.[3] The operations of the respondent have been decentralized and are handled through twelve separate territorial branches, each of which is under a branch manager who reports directly to the president and each of which is a substantially complete and integrated unit with its own warehouse facilities to serve the stores under its jurisdiction. The headquarters of such territorial branches are located in Chicago, Minneapolis, Milwaukee, Indianapolis, Detroit, Kalamazoo, St. Louis, New Orleans, Memphis, Davenport, Denver and Sioux City, Iowa. As of January 3, 1959, the 932 stores operated by respondent were distributed among the territorial branches and located in the various states as follows:

[2] CX 681.

[3] CX 43 A, p. 7.

*Location of Stores and Warehouses as of January 3, 1959* [4]

| States | Chicago | Minne-apolis | Mil-waukee | Indian-apolis | Detroit | Kala-mazoo | St. Louis | New Orleans | Mem-phis | Daven-port | Denver | Sioux City | Tot. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Alabama | | | | | | | | 7 | 1 | | | | 8 |
| Arkansas | | | | | | | | | 3 | | | | 3 |
| Colorado | | | | | | | | | | | 31 | | 31 |
| Illinois | 230 | | | | | | 17 | | | 26 | | | 273 |
| Indiana | 15 | | | 71 | | 11 | | | | | | | 97 |
| Iowa | | | | | | | | | | 16 | | 34 | 50 |
| Louisiana | | | | | | | | 41 | | | | | 41 |
| Michigan | | 1 | 3 | | 72 | 28 | | | | | | | 104 |
| Minnesota | | 120 | | | | | | | | | | 5 | 125 |
| Mississippi | | | | | | | | 7 | 3 | | | | 10 |
| Missouri | | | | | | | 37 | | 1 | | | | 38 |
| Nebraska | | | | | | | | | | | | 21 | 21 |
| N. Dakota | | 10 | | | | | | | | | | | 10 |
| Ohio | | | | | 4 | | | | | | | | 4 |
| S. Dakota | | 1 | | | | | | | | | | 15 | 16 |
| Tennessee | | | | | | | | | 24 | | | | 24 |
| Wisconsin | | 11 | 64 | | | | | | | | | | 75 |
| Wyoming | | | | | | | | | | | 2 | | 2 |
| Total | 245 | 143 | 67 | 71 | 76 | 39 | 54 | 55 | 32 | 42 | 33 | 75 | 932 |

[4] CX 43(A).

5. At the time the complaint was issued, respondent operated its own bread and cake bakeries in Chicago, Illinois; Hopkins, Minnesota; Milwaukee, Wisconsin; Detroit, Michigan and Denver, Colorado. In addition, respondent manufactured or processed coffee, peanut butter, salad dressing, preserves, extracts and soft drinks. Meat packing plants were operated by respondent at Fergus Falls, Minnesota; Denver, Colorado and Port Huron, Michigan.[5]

6. Respondent is now and at all times mentioned herein has been engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.[6]

7. For a number of years both prior to December 1950 and subsequent thereto, respondent has followed a policy of expansion involving in part, acquisition of various existing chain stores. As part of its policy of expansion, it was the plan of the respondent to expand out into new territories by first acquiring a chain store in such territory. When such chain was so acquired, the respondent would close those stores of the chain which were unprofitable and relocate, expand or improve the other stores. This policy was clearly expressed in respondent's report to shareholders for 1957, in which the following statement appears:

> The year of 1957 has been another year of expansion as your company moved into the states of Colorado, Nebraska, and Wyoming and strengthened its position in other states. Major acquisitions added chains in Denver, Colorado; Sioux City, Iowa; Nashville, Tennessee; Mobile, Alabama, and (in January 1958) Peoria, Illinois to the ever-increasing territory of "National Land". This expansion, which occurred largely in the last half of 1957, together with normal growth from new and relocated stores, is being reflected currently in sharply increased sales (up to 23.49% in the first period of 1958 over the previous year) and in greater profits. The improvement in earnings is not experienced so quickly as the increase in sales, because there are many expenses of setting the new acquisitions into operation which first must be absorbed. Nevertheless the profits for 1957 were up a satisfying 15% over 1956, whereas the sales for the year increased 10%. It is expected that the full effect of the expansion will be realized in 1858.[7]

8. H. V. McNamara joined National Tea Co., in 1945 and was made president in 1947. At that time National Tea stores were small neighborhood stores with very few supermarkets, and many stores without meat departments. He began operations by selling out the smaller stores or closing them and began expan-

[5] CX 43 A, p. 8.
[6] Tr. 559–560, 1283–1284.
[7] CX 8, p. 2.

sion by opening new stores in areas where there were none and where it was felt that the type of store would be supported.[8]

9. A summary of the number of stores operated at the close of each year and total sales of respondent for the years 1945 through 1959 is as follows:

| *YEAR* | *SALES* | *NUMBER OF STORES* |
|---|---|---|
| 1959 | $829,518,000 | 910 |
| 1958 | 794,162,000 | 932 |
| 1957 | 681,132,000 | 883 |
| 1956 | 617,636,000 | 761 |
| 1955 | 575,585,000 | 744 |
| 1954 | 520,300,000 | 711 |
| 1953 | 462,281,000 | 688 |
| 1952 | 405,220,000 | 765 |
| 1951 | 361,321,000 | 624 |
| 1950 | 315,218,000 | 634 |
| 1949 | 274,332,000 | 655 |
| 1948 | 270,176,000 | 659 |
| 1947 | 217,915,000 | 702 |
| 1946 | 157,641,000 | 693 |
| 1945 | 106,868,000 | 749 [9] |

## II

## *RELEVANT LINES OF COMMERCE*

10. The parties agreed that the following are the lines of commerce involved in this proceeding:

(a) Groceries and related products, as a class, sold in food stores as defined by census;

(b) Groceries and related products, as a class, sold in grocery stores as defined by census;

(c) Fluid milk and cream as a class, sold in food and grocery stores;

(d) Frozen desserts as a class, sold in food and grocery stores;

(e) Fresh fruits or vegetables as a class, sold in food and grocery stores.

11. Food stores, as defined in Census Standard Industrial Classification, are establishments primarily selling food for home consumption and preparation. Grocery stores are a subclassification of food stores. The remaining lines of commerce, fluid milk and cream, frozen desserts and fresh fruits and vegetables are all sold in food and grocery stores. Consequently, it is the opinion of the hearing examiner that for the purposes of this proceeding, it is

[8] Tr. 685-689.
[9] CX 8, CX 43 B.

not necessary to define the lines of commerce down to the product classification, as suggested. Instead, the line of commerce involved in this proceeding can be considered as groceries and related products normally sold by food and grocery stores.

III

*RELEVANT GEOGRAPHIC MARKET*

12. The relevant geographic market coincides with the area of effective competition in this proceeding. The relevant geographic market is local in nature, but not limited to the extent proposed by respondent to the immediate neighborhood surrounding each store. In determining the effect of the mergers upon competition, it must be recognized as shown in this record, that the chain stores as a rule have a number of locations in the metropolitan area, and consequently the chain as a whole competes with all grocery and food stores within the metropolitan area, and the area of effective competition should not be limited to the immediate neighborhood surrounding each store. As testified to in this record, the respondent generally used newspaper advertising. This advertising was not purchased on a store by store basis, but covered all the stores in the particular area.

IV

*ACQUISITIONS SINCE DECEMBER 29, 1950*

13. The corporate acquisitions of respondent occurring subsequent to December 29, 1950, and which are challenged in this proceeding are as follows:

| | | | |
|---|---|---|---|
| 1. | Gamble-Skogmo, Inc. | Minneapolis, Minn. | 1/1/51 |
| 2. | C. F. Smith Company | Detroit, Mich. | 4/19/52 |
| 3. | Piggly-Wiggly | Duluth, Minn. | 4/24/52 |
| 4. | George T. Smith Market Baskets | Lansing, Mich. | 7/23/52 |
| 5. | Dole Super Markets, Inc. | Detroit, Mich. | 7/30/52 |
| 6. | Food Center Stores of Missouri | St. Louis, Mo. | 5/15/53 |
| 7. | Capitol Stores, Inc. | Baton Rouge, La. | 2/1/54 |
| 8. | H. A. Smith Markets, Inc. | Port Huron, Mich. | 9/21/55 |
| 9. | Fred Montesi, et al. | Memphis, Tenn. | 10/11/55 |
| 10a. | Maker's of Marshall, Inc. | Marshall, Mich. | 4/21/56 |
| 10b. | Maker's of Albion | Albion, Mich. | 4/21/56 |
| 10c. | Tom Maker, Inc. | Charlotte, Mich. | 4/21/56 |
| 11. | Edenton-Lamb Company, Inc. | Jackson, Tenn. | 5/14/56 |

| | *Name of Acquired Company* | *Headquarters (City & State)* | *Effective Date of Acquisition* |
|---|---|---|---|
| 12. | Miller's Super Markets, Inc. | Denver, Colo. | 5/15/57 |
| 13. | Tolerton & Warfield, Corp. | Sioux City, Iowa | 7/22/57 |
| 14. | Logan's Inc. | Nashville, Tenn. | 10/6/57 |
| 15. | De Van-Horner, Inc. | Mobile, Ala. | 10/6/57 |
| 16. | Illinois Valley Stores Co. | Peoria, Ill. | 1/11/58 |
| 17. | Del Farm Foods, Inc. | Chicago, Ill. | 3/14/58 |
| 18. | Kalamazoo Market Baskets Inc. | Kalamazoo, Mich. | 9/2/58 [10] |

14. The corporate acquisitions hereinbefore listed have been separated into two classifications: Horizontal acquisitions in market areas where National Tea was already operating retail stores, and market extension acquisitions where expansion is being made into new market areas where National Tea did not operate stores. Tabulations have been prepared showing information on each of the acquired companies and market share information available. These tabulations have been divided into Table I, Horizontal Acquisitions and Table II, Market Extension Acquisitions as follows:

[10] Respondent's Proposed Finding No. 2.

*CORPORATE "HORIZONTAL"[1] ACQUISITIONS BY NATIONAL TEA*

| | | Acquired company | | | | Communities in which respondent was already operating | | National Tea Sales and percentage of food stores sales[6] | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Market area | | | | | Sales ($1,000) | | Percentage | | | |
| | | | | | | | | | | Metropolitan Area | | Corporate City | |
| Date of acquisition | Acquired company name and headquarters | Sales[2] ($1000) | States[3] | Counties[4] | Stores[5] | Town | States | 1954 | 1958 | 1954 | 1958 | 1954 | 1958 |
| 1-1-51 | Gamble-Skogmo, Inc. | $6,763 | Minn. | 8 | 13 | Minneapolis | Minn. | $30,099 | $19,044 | 13.3 | 10.5 | 19.2 | 13.1 |
| | Minneapolis, Minn. | | S.D. | 4 | 4 | Grand Rapids | Minn. | 1,210 | 944 | — | — | 31.8 | 17.3 |
| | | | N.D. | 2 | 2 | Inter. Falls | Minn. | 1,270 | 1,703 | — | — | 41.5 | 64.1 |
| | | | Wisc. | 1 | 2 | St. Cloud | Minn. | — | — | — | — | — | — |
| | | | 4 | 15 | 21 | Long Prairie | Minn. | — | — | — | — | — | — |
| | | | | | | Hibbing | Minn. | — | — | — | — | — | — |
| | | | | | | Grafton | N.D. | 378 | 289 | — | — | 22.3 | 11.7 |
| | | | | | | Aberdeen | S.D. | 1,434 | 1,037 | — | — | 21.3 | 12.9 |
| | | | | | | Watertown | S.D. | 632 | 896 | — | — | 16.4 | 15.3 |
| 4-24-52 | Piggly-Wiggly North- | 3,651 | Minn. | 1 | 6 | Duluth | Minn. | 5,674 | 5,238 | 17.0 | 13.4 | 17.9 | 15.3 |
| | west, Duluth, Minn. | | | | | | | | | | | | |
| 9-21-55 | H. A. Smith Markets, | 6,625 | Mich. | 3 | 9 | Detroit | Mich. | 9,434 | 14,925 | 2.8 | 3.9 | 1.7 | 2.8 |
| | Inc. Port Huron, Mich. | | | | | Mount Clements | Mich. | 1,471 | 1,220 | — | — | 12.4 | 8.5 |
| 7-22-57 | Tolerton & Warfield | 21,802 | Iowa | 21 | 39 | Worthington | Minn. | 342 | 583 | — | — | 8.1 | 16.5 |
| | Corp. Sioux City, Iowa | | Minn. | 3 | 4 | Watertown | S.D. | 631 | 896 | — | — | 16.4 | 15.3 |
| | | | Neb. | 17 | 28 | Brookings | S.D. | 527 | 804 | — | — | 23.1 | 29.4 |
| | | | S.D. | 11 | 14 | | | | | | | | |
| | | | 4 | 52 | 85 | | | | | | | | |
| 3-14-58 | Del Farm Foods, Inc. | 18,378 | Ill. | 1 | 12 | Chicago | Ill. | 165,913 | 234,047 | 10.7 | 12.3 | 9.6 | 11.1 |
| | Chicago, Ill. | | | | | | | | | | | | |
| 9-2-58 | Kalamazoo Market | 2,158 | Mich. | 1 | 4 | Kalamazoo | Mich. | 1,678 | 3,791 | 4.8 | 7.1 | 7.2 | 9.9 |
| | Baskets, Inc. | | | | | | | | | | | | |
| | Kalamazoo, Mich. | | | | | | | | | | | | |

[1] Horizontal acquisitions are so designated to indicate acquisitions which involved the purchases of one or more stores in the same general community where respondent was already operating retail stores.

[2] Sales for 12 months or fiscal year ended prior to acquisition of acquired stores.

[3] States in which acquired stores were located.

[4] Number of counties in which acquired stores were located.

[5] Number of acquired stores located in each state.

[6] National Tea's Sales in certain Corporate Cities and its percentage of Food Store Sales in certain Standard Metropolitan Statistical Areas and Comparable Corporate cities in 1954 and 1958.

Source: CX 69, CX 70, CX 93, CX 95, CX 173, CX 215, CX 260, CX 395, CX 399, CX 455-J, CX 455-Z-49-50, CX 479, CX 537-B, CX 454.

*CORPORATE ACQUISITIONS BY NATIONAL TEA CO.*

*in communities where it was not operating retail stores at date of acquisition*

| Date of acquisition | Acquired company name and headquarters | Acquired company: Sales [1] ($1,000) | Market area: States [2] | Market area: Counties [3] | Cities [4] | Stores [5] | National Tea sales and percentage of food store sales [7]: Warehouses or other [6] | Sales ($1,000) 1954 | Sales ($1,000) 1958 | Percentage: Metropolitan Area 1954 | Percentage: Metropolitan Area 1958 | Percentage: Corporate City 1954 | Percentage: Corporate City 1958 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 4/19/52 | C. F. Smith Company, Detroit, Mich. | $36,053 | Mich. | 4 | Detroit & Environs | 210 | Ware-house | $27,792 | 44,383 | 2.8 | 3.9 | 1.7 | 2.8 |
| | | | | | | | Bakery | — | — | — | — | — | — |
| 7/23/52 | George T. Smith Market Baskets, Inc., Lansing, Mich. | 6,737 | Mich. | 1 | Lansing | 6 | Ware house | 9,747 | 7,781 | 14.2 | 9.3 | 22.9 | 14.6 |
| | | | | | E. Lansing | | Bakery | — | — | — | — | — | — |
| 7/30/52 | Dole's Super Markets, Inc., Detroit, Mich. | 6,825 | Mich. | 2 | Battle Creek (4) | 6 | — | — | — | — | — | — | — |
| | | | | | Kalamazoo (2) | | | 1,678 | 3,791 | 4.8 | 7.1 | 7.2 | 9.9 |
| 5/16/53 | Food Center Stores of Missouri, St. Louis Mo. | 30,795 | Mo. | 2 | St. Louis | 25 | Ware-house | 33,421 | 47,385 | 6.5 | 7.7 | 8.1 | 7.4 |
| | | | Ill. | 1 | St. Clair Co. | 3 | | | | | | | |
| 2/1/54 | Capitol Stores, Inc., Baton Rouge, La. | 21,403 | La. | 11 | Baton Rouge | 10 | Ware-house | 8,017 | 10,294 | 20.7 | 17.6 | 21.6 | 20.0 |
| | | | | | New Orleans | 6 | Ware-house | 4,916 | 13,842 | 3.2 | 5.4 | 4.2 | 4.5 |
| | | | | | Others | 12 | | | | | | | |
| 10/11/55 | Fred Montesi, et al. Memphis, Tenn. | 11,200 | Tenn. | 2 | Memphis | 6 | Ware-house | — | 8,325 | — | 5.3 | — | 5.8 |
| | | | Miss. | 2 | Jackson | 1 | | | | | | | |
| | | | | | Columbus, Miss. | 1 | | | | | | | |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 4/21/56 | Maker's (3 corporations) Marshall, Albion & Charlotte, Mich. | 3,247 | Mich. | 3 | Marshall | 1 | — | — | — | — | — | — | — |
| | | | | | Albion | 1 | | | | | | | |
| | | | | | Charlotte | 1 | | | | | | | |
| 5/15/56 | Edenton-Lamb Company, Inc., Jackson, Tenn. | 633 | Tenn. | 1 | Dyersburg | 1 | — | | | | | | |
| 5/15/57 | Miller's Super Markets, Inc., Denver, Colo. | 42,499 | Colo. | 5 | Denver | 19 | Warehouse | — | — | — | — | — | — |
| | | | Wyo. | 1 | Others (Colo.) | 6 | Bakery | — | 41,057 | — | 16.5 | — | 21.4 |
| | | | | | Cheyenne, Wyo. | 2 | Meat plant | | — | — | — | — | — |
| 10/6/57 | Logan's Supermarkets, Inc., Nashville, Tenn. | 3,798 | Tenn. | 1 | Nashville & Environs | 9 | — | | — | — | — | — | — |
| 10/6/57 | DeVan-Horner, Inc. Mobile, Ala. | 9,099 | Ala. | 1 | Mobile & Environs | 7 | Warehouse | — | 3,781 | — | 3.1 | — | 4.0 |
| 1/11/58 | Illinois Valley Stores, Inc., Peoria, Ill. | 6,053 | Ill. | 2 | Peoria & Environs | 7 | — | — | 5,666 | — | 7.7 | — | 7.5 |
| | | | | | | | | — | 6,044 | — | 7.4 | — | 9.0 |

[1] Sales for 12 months prior to acquisition of acquired stores.
[2] States in which acquired stores were located.
[3] Number of counties in which acquired stores were located.
[4] Cities or communities in which acquired stores were located.
[5] Number of acquired stores located in each City or community.
[6] Warehouses, Bakeries or Meat Packing Plants acquired.
[7] National Tea's sales in certain corporate cities and its percentage of food store sales in certain Standard Metropolitan Statistical Areas and comparable Corporate Cities in 1954 and 1958.

Source: CX 67, CX 74, CX 97, CX 117, CX 119, CX 130, CX 132, CX 138, CX 151, CX 160, CX 168, CX 184, CX 188-A, CX 202, CX 233, CX 246, 455-J, CX 455-Z-49-50, CX 454.

15. Between January 1, 1951 and September 14, 1958, respondent also acquired assets from the following listed partnerships or individual proprietorships, each of which acquisitions is challenged in this proceeding:

| *Name of Acquired Company* | *Headquarters (City & State)* | *Effective Date of Acquisition* |
|---|---|---|
| Ashton's | Gulfport, Miss. | 3/31/55 |
| Barkett's Super Market | Charleston, Mo. | 5/14/56 |
| Food Banks Stores | Colorado Springs, Colo. | 4/21/58 |
| Guidon & Co. (d/b/a Arlington Market) | Indianapolis, Ind. | 9/1/58 |
| Slim's Sun Market | Fort Dodge, Iowa | 9/14/58 [11] |

16. At the time of the acquisition of the various companies by National Tea, as herein described, said acquired companies were in competition, in their local trading areas, with one or more national chain stores, local chain stores, supermarkets or retail food stores.

17. In substantially all acquisitions herein referred to, respondent obtained a signed covenant that the sellers would not engage in the retail grocery, food or meat business in the cities involved, for a period of five years.

18. Detailed description of the various companies acquired by the respondent is more fully set out as follows:

(A) *Gamble-Skogmo, Inc.*

19. On January 1, 1951, respondent acquired for a cash consideration of $963,780 certain assets of Gamble-Skogmo, Inc., of Minneapolis, Minnesota, consisting of the fixtures, equipment, inventory and leases for 21 stores located in Minnesota, South Dakota, North Dakota and Wisconsin, which stores had sales of $6,762,536 or an average of $322,000 per store, for the 12 month period preceding their acquisition. Two of the stores were located in Minneapolis, and one in each of the 19 other communities in which Gamble-Skogmo operated. By 1959, National Tea had closed or relocated 15 of the Gamble stores while opening only eight stores in acquisition communities outside Minneapolis.[12]

20. The respondent was operating in nine of these communities prior to the acquisition of Gamble-Skogmo as follows: Minneapolis, Grand Rapids, International Falls, St. Cloud, Long Prairie

[11] Respondent's Proposed Finding No. 3, CX 455 J.
[12] Respondent's Proposed Finding No. 41.

and Hibbing, Minnesota, Grafton, North Dakota, and Aberdeen and Watertown, South Dakota. The sales of the acquired stores and respondent's stores in each of these communities for the 12 months preceding the acquisition are shown in the following table:

| *City* | *Sales 12 months Prior to Acquisition* | |
|---|---|---|
| | *Acquired* | *National Tea* |
| Minneapolis, Minn. | $ 854,068 | $16,959,503 |
| St. Cloud, Minn. | 1,024,610 | 934,939 |
| Grand Rapids, Minn. | 271,568 | 986,864 |
| Hibbing, Minn. | 563,200 | 772,210 |
| International Falls, Minn. | 149,477 | 640,958 |
| Long Prairie, Minn. | 106,948 | 149,639 |
| Grafton, N.D. | 173,747 | 316,232 |
| Aberdeen, S.D. | 453,941 | 1,072,066 |
| Watertown, S.D. | 157,900 | 656,935 [13] |

21. The only other market share data of record for any of the above communities shows that in five of the six communities respondent's market share declined between 1954 and 1958. Respondent's sales and its percentage of food store sales in each of the six communities for which data of record is available for the years 1954 and 1958 were as follows:

National Tea Sales
and Percentage of Food Store Sales

| City or Town | *Sales ($1000)* 1954 | *Sales ($1000)* 1958 | *Percentage of Food Store Sales* 1954 | *Percentage of Food Store Sales* 1958 |
|---|---|---|---|---|
| Minneapolis, Minn. | $30,099 | $19,044 | 19.2 | 13.1 |
| Grand Rapids, Minn. | 1,210 | 944 | 38.8 | 17.3 |
| International Falls, Minn. | 1,270 | 1,703 | 41.5 | 64.1 |
| Grafton, N.D. | 378 | 289 | 22.3 | 11.7 |
| Aberdeen, S.D. | 1,434 | 1,037 | 21.3 | 12.9 |
| Watertown, S.D. | 632 | 896 | 16.4 | 15.3 [14] |

22. The record indicates that the decision of Gamble-Skogmo to sell its grocery stores to the respondent was motivated by its desire to give up the food business in order to concentrate its capital, talents and facilities on that company's "more traditional lines," general merchandising.[15]

[13] CX 399W-Z-2, 395-A.

[14] CX 479.

[15] CX 456 A—On May 1, 1953, the Commission commenced an investigation of five acquisitions made by respondent as follows: Gamble-Skogmo Inc., Piggly-Wiggly Northwest Inc., C. F. Smith Co., George T. Smith Market Baskets Inc., and Dole's Super Markets Inc.

(B) *Piggly-Wiggly Northwest, Inc.*

23. On April 24, 1952, respondent acquired the assets of Piggly-Wiggly Northwest, Inc., of Duluth, Minnesota for a cash consideration of $439,865, which assets included six stores located in St. Louis County, Minnesota. The purchase price did not exceed the estimated value of physical assets acquired. In 1951, the acquired company had sales of $3,650,591.[16]

24. At the time of the acquisition, respondent was operating one store in Duluth which it had opened in October 1951. During 1952, this store had sales of $1,495,568. Since the acquisition, respondent has closed two of the acquired stores and replaced three others.[17]

25. Respondent's sales in Duluth decreased from $5,674,000 in 1954 to $5,238,000 in 1958 and its market share of food store sales in that city declined from 17.9% in 1954 to 15.3% in 1958.[18]

(C) *H. A. Smith Markets, Inc.*

26. On September 21, 1955, respondent acquired the assets of H. A. Smith Markets, Inc., of Port Huron, Michigan, in exchange for shares of respondent's stock having a value of approximately $1,860,000. Included in the acquisition were nine stores and a meat packing facility. Four of the stores were located in Port Huron and one in each of the following communities: Algonac, Mt. Clemens, Detroit, Marine City and St. Clair, Michigan.[19] Sales of the acquired company for the 12 months prior to acquisition was $6,625,000.[20]

27. In Port Huron, the only city where more than one store was acquired, respondent's sales decreased from $4,330,000 in 1956 to $3,810,000 in 1959. During the same period, respondent's market share of total food store sales in Port Huron declined from 22.9% to 19.6%. One of the four acquired stores in Port

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This investigation was made to determine whether any of the acquisitions involve possible violation of Section 7 of the Clayton Act. This investigation was closed without prejudice on August 27, 1954. In its closing letter the Commission stated that on the basis of the available facts, it appears that the matter does not warrant further investigation by the Commission. (RX 14, RX 15).

[16] CX 70, Tr. 1861, CX 537 B.

[17] Commission's Proposed Finding 191, RX 10 Table Q.

[18] CX 479—Investigation by Commission closed without prejudice, see Footnote No. 15.

[19] CX 93, 95.

[20] Commission's Proposed Finding, p. 142, CX 455 J.

Huron was closed immediately and respondent has opened no additional stores in this community.[21]

28. Respondent sold the store in Algonac to the store's former manager in June 1959.[22] The store in Mt. Clemens was closed in March 1956 and the Detroit store in August 1957.[23] No new stores have been opened in communities where acquisitions were made, except Detroit.

29. Prior to the acquisition, respondent was already operating stores in Detroit and Mt. Clemens. However, despite the acquisition, respondent's market share of food store sales in Mt. Clemens declined from 12.4% in 1954 to 8.5% in 1958.[24] The H. A. Smith store respondent acquired in Detroit, was closed in August 1957.[25] Respondent's market share of food store sales in Detroit increased from 1.7% in 1954 to 2.8% in 1958.[26]

(D) *Tolerton & Warfield Company*

30. On July 22, 1957, respondent acquired 85 stores, a warehouse and a cookie and cracker manufacturing facility from Tolerton & Warfield Company, an Iowa Corporation, of Sioux City, Iowa, in exchange for respondent's stock valued at $1,875,720.[27] The acquired stores were known as the Council Oak Stores, 40 of which were located in the State of Iowa, 27 in Nebraska, 14 in South Dakota, and 4 in Southern Minnesota.[28]

31. This acquisition was primarily an expansion into new territory and was the basis for the establishment of the Sioux City branch of respondent. Only three of the 85 acquired stores were located in communities where respondent was already operating retail food stores, namely Worthington, Minnesota, Watertown and Brookings, South Dakota,[29] each of which were small towns, with populations of less than 15,000.[30] The total number of food stores operating in these three towns, the total food store sales, and respondent's market share of such sales in these communities, in 1954 and 1958, are shown in the following table:

[21] RX 10, Table M.
[22] CX 400.
[23] CX 67.
[24] CX 479.
[25] RX 10, Table C.
[26] CX 455-Z-49.
[27] CX 215.
[28] CX 215, CX 218 B.
[29] CX 479.
[30] CX 451.

| | Total number of Food Stores | | Total food store sales | | Respondent's market share | |
|---|---|---|---|---|---|---|
| | *1954* | *1958* | *1954* ($1,000) | *1958* | *1954* | *1958* |
| Worthington, Minn. | n.a. | n.a. | $4,244 | $3,544 | 8.1% | 16.5% |
| Watertown, S.D. | 23 | 20 | 3,857 | 5,859 | 16.4% | 15.3% |
| Brookings, S.D. | 11 | 12 | 2,283 | 2,734 | 23.1% | 29.1%[31] |

32. Tolerton's sales had increased from $18,016,150 in 1952[32] to $21,802,000 during the 12 months immediately preceding the acquisition.[33] Subsequent to the acquisition, respondent closed 11 stores in 1957, eight in 1958, nine in 1959 and one in 1960, while opening only one store in a city where a store had been acquired.[34] Sales of the acquired stores had declined to $18,361,096 by 1959, while sales in all communities in which Tolerton had operated stores and which were served by respondent in 1959 had declined by more than $1,000,000, to approximately $20,673,000 in that year.[35]

33. Eleven of the acquired stores were located in Sioux City, Iowa, two of which have since been closed by respondent, while one new store has been opened. Respondent's sales in Sioux City declined from $4,735,000 in 1958 to $4,637,000 in 1959, during which time its market share of total food store sales in that city declined from 16.3% in 1958 to 15.5% in 1959.[36] With the exception of Sioux City, only one Tolerton store was located in each of the towns where a store was acquired.[37]

(E) *Del Farm Foods, Inc.*

34. On March 14, 1958, respondent acquired the stock of Del Farm Foods, Inc., of Chicago, Illinois, for a cash consideration of $2,450,000. Included in this acquisition were twelve supermarkets, a warehouse and a bakery (since closed), all located in the city of Chicago.[38] The acquired corporation was a profitable, rapidly growing local chain whose sales had increased from $11,745,000 in 1954 to $18,378,000 in the 12 months immediately preceding the acquisition.[39] Del Farm's sales were $19,897,000 in 1958, however, in the first full year under respondent's owner-

[31] CX 67, 479.
[32] CX 40, p. 12.
[33] CX 396 A-C.
[34] CX 67, CX 400.
[35] CX 400.
[36] RX 10, Table G.
[37] CX 67.
[38] CX 260.
[39] CX 632 B, 395.

ship, sales declined to $19,696,000 in 1959, and Del Farm's share of the total Chicago food store sales likewise declined from 1.78% to 1.72% between 1958 and 1959.[40]

35. In 1958, total food store sales in the City of Chicago amounted to $1,117,648,000. Respondent's market share of such sales represented 11.1% in 1958, which had increased from 9.6% in 1954. The market share of total Chicago food store sales of the four largest grocery retailers also increased from 35.1% in 1954 to 39.7% in 1958, while the total number of food stores in Chicago declined from 9,312 to 7,739 during the same period of time.[41] In 1954, respondent operated 162 stores in the City of Chicago, which was the largest number of stores operated by any of the other chains in that area. By 1959, the number of stores operated by respondent in Chicago had declined to 137, which number was still larger than the number of stores operated by any of the other chains in that area. Respondent's sales in the Metropolitan area of Chicago, which includes Cook, Du Page, Kane, Lake, McHenry and Will Counties, Illinois, increased from $166 million in 1954, to $234 million in 1958. Such sales represented 10.7% of the total food store sales in that area in 1954 and 12.3% in 1958.[42]

36. In general, Del Farm's stores were located in different competitive areas in Chicago than were respondent's stores.[43] Respondent's president, then manager of the Chicago branch, testified that the only National store in competition with Del Farm was "a little, old, dirty store that we closed."[44] The record indicates that the Del Farm stores were not in direct competition with respondent's then existing stores since they were a different type of operation, geared to a different clientele. In addition, the Del Farm stores carry a different line of products than respondent's stores. For example, in 1958, Del Farm purchased no produce through respondent's procurement offices,[45] purchased no meat from respondent's meat packing plants,[46] and purchased only coffee from among the 18 products available from respondent's manufacturing plant.[47] Finally, as evidence of the different nature of the Del Farm operation, the acquired stores were not included in, and

[40] RX 10, Table D.
[41] CX 67, 448.
[42] CX 455-A-49.
[43] Tr. 979.
[44] Tr. 977.
[45] CX 375A-B, CX 376.
[46] CX 378-81.
[47] CX 282A-B.

made a part of, respondent's Chicago branch, but were used to establish, and have been operated since the acquisition as, respondent's Del Farm branch.[48]

(F) *Kalamazoo Market Baskets, Inc.*

37. On or about September 3, 1958, respondent purchased certain assets of the Kalamazoo Market Baskets, Inc., for $107,238, from the trustee in bankruptcy, which sale was confirmed by the District Court for the Western District of Michigan. The acquired assets included three stores in Kalamazoo, Michigan, (two of which were closed one month later, on October 4, 1958), and the store fixtures and inventory of one closed store. The record indicates that all of the stores were in poor condition and poorly located.[49] Kalamazoo Market Baskets had experienced losses in its operations during the four years preceding its acquisition by respondent.[50]

38. The circumstances surrounding this acquisition clearly demonstrates that the "failing company" doctrine would apply in this case.

(G) *C. F. Smith Company*

39. On April 19, 1952, respondent acquired all of the stock of C. F. Smith Company of Detroit, Michigan, for $1,670,728. Included in this acquisition were 210 food stores located in and around Detroit, as well as a warehouse and a bakery, also located in Detroit. Quite a number of these stores were small service stores, only 66 carried meat, and not over 10 were considered supermarkets. Although the acquired stores had sales of $36,053,000 for the 12 months immediately preceding the acquisition, during the 3½ months preceding the acquisition, C. F. Smith Company lost $636,824 and as of the date of the sale it had earned a surplus deficit of $61,133 and current liabilities exceeded current assets by more than $278,000.[51]

40. The minutes of respondent's board of director's meeting at the time they were considering the purchase indicate they recognized that most of the C. F. Smith stores were obsolete and would have to be closed quickly, and that the purchase was made largely because the price was considered to be less than liquidating value.[52] This acquisition was an expansion into new territory and

[48] CX 31, CX 265, CX 316 and CX 395.
[49] CX 173, CX 177, CX 179 and CX 181.
[50] CX 642–645.
[51] CX 74, CX 78, Tr. 811, CX 455 J, and CX 89.
[52] Respondent's Proposed Finding No. 51.

was the basis for the establishment of a new branch of the National Tea Co., with headquarters in Detroit.

41. Immediately following the acquisition, respondent began a program of closing many of the acquired stores and began replacing them with modern supermarkets. Only nine of the old C. F. Smith stores were still operating by the end of 1955, and only two in September 1960. Meanwhile, respondent had opened 20 new stores in this area.

42. As indicated above, the C. F. Smith Company had sales of $36,053,000 during the 12 months immediately preceding the acquisition. For the fiscal year ended December 31, 1954, respondent's sales in the Detroit Metropolitan area, which included McComb, Oakland, and Wayne Counties, Michigan, were only $27,792,000 which represented a market share of 2.8% of food store sales in that area. By the close of 1958, such sales and market share had increased to $44,383,000 and 3.9% respectively. In the Detroit corporate city limits, respondent's market share was 1.7% in 1954 and 2.8% in 1958.[53]

(H) *George T. Smith Market Baskets, Inc.*

43. On July 23, 1952, respondent acquired the stock of George T. Smith Market Baskets, Inc., of Lansing, Michigan for $725,000. The acquired corporation operated six stores in Lansing and East Lansing, Michigan, which stores had sales of $6,737,000 during the 12 months prior to acquisition. The acquisition also included a bakery and warehouse in Lansing.

44. The acquired company's sales had increased from $4,767,576 in 1948 to $6,141,751 in 1951. This sales increase continued temporarily under respondent's management, with sales (including those of a new store opened by respondent in 1953) reaching a high of $9,748,000 in 1954. Since 1954, however, respondent's sales decreased to $7,781,000 in 1958 and to $7,119,000 in 1959, while its market share of total food store sales in the Lansing area decreased from 22.9% in 1954 to 14.6% in 1958.

45. This acquisition, together with the Dole's Super Markets acquisition on July 30, 1952 (discussed hereunder) was used to establish the Kalamazoo branch of respondent.[54]

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[53] CX 455 Z 49—Investigation of this acquisition by the Commission was closed without prejudice, see Footnote No. 15.

[54] CX 138, CX 455 J, RX 10, Table L, CX 147, p. 6, CX 540 B, CX 454 F, CX 3, and CX 141. Investigation of this acquisition by the Commission was closed without prejudice, see Footnote No. 15.

(I) *Dole's Super Markets, Inc.*

46. On July 30, 1952, respondent purchased for a cash consideration of $296,615 the stock of Dole's Super Markets, Inc., which company operated six stores, four in Battle Creek and two in Kalamazoo, Michigan. In the 12 months prior to the acquisition, these stores had total sales of $6,825,000, the four stores in Battle Creek accounting for $5,079,000 of this amount. Respondent's Battle Creek sales subsequently declined to $3,873,000 in 1959.

47. Both of the Dole stores acquired in Kalamazoo were subsequently closed, however, respondent has since opened four new stores in that community. Its sales in the Kalamazoo Metropolitan area increased from $1,678,000 in 1954 to $3,791,000 in 1958, which sales represented 4.8% and 7.1% of total food store sales in that area in 1954 and 1958, respectively.[55]

(J) *Food Center Stores*

48. On May 16, 1953, respondent purchased the stock of Food Center Stores, a complex of corporations, for a cash consideration of $5,780,600. Included in the acquisition were 28 stores, 10 located in St. Louis County, 15 in the city of St. Louis, 3 in St. Clair County, Illinois, and a warehouse located in St. Louis. This acquisition was an expansion into new territory and was the basis for the establishment of the St. Louis branch of National Tea Co.[56]

49. Prior to the acquisition, Food Center's sales increased from $25,455,322 in the fiscal year ended July 31, 1951 to $30,795,404 during the 12 months immediately preceding the acquisition.[57] Subsequently, however, respondent's sales in localities where stores were purchased declined to $28,410,663 in 1959. In the city of St. Louis, where 15 stores were acquired, 8 have since been closed or relocated and 12 new stores opened.[58]

50. From 1954 up to and including 1959, respondent opened 41 new stores, located in St. Louis and five counties adjacent thereto in Missouri, and six neighboring counties in Illinois.[59]

51. Respondent's sales in the St. Louis Metropolitan area, which consists of the city of St. Louis, Jefferson, St. Charles and St. Louis Counties, Mo., and Madison and St. Clair Counties, Illi-

[55] CX 151, CX 156, CX 455 J, RX 10, Table I, RX 10, Table J, CX 455 Z 49. Investigation of this acquisition by the Commission was closed without prejudice, see Footnote No. 15.

[56] CX 116, p. 13, CX 97, CX 3.

[57] CX 397.

[58] CX 400–Z3–15, RX 10, Table E.

[59] CX 67, CX 400–Z3–5.

nois, in 1954 and 1958 were $33,421,000 and $47,385,000, respectively. Its market share of food store sales in this area increased from 6.5% in 1954 to 7.7% in 1958, while its market share of food store sales in the corporate city of St. Louis declined from 8.1% in 1954 to 7.4% in 1958.[60]

(K) *Capitol Stores, Inc.*

52. On February 1, 1954, respondent acquired the stock of Capitol Stores, Inc., for $3,986,304. The acquired company operated 28 stores and two warehouses in Louisiana. Ten of the stores were located in Baton Rouge, six in New Orleans and twelve in other smaller communities in that state. The two warehouses were located in New Orleans and Baton Rouge.[61] This acquisition was an expansion into new territory and was used to establish the New Orleans branch of National Tea Co.

53. Sales of Capitol Stores increased from $12,005,000 during the fiscal year ended September 30, 1950, to $21,403,000 in the twelve months immediately preceding the acquisition.[62] Respondent's sales in the Baton Rouge Metropolitan area increased from $8,017,000 in 1954 to $10,294,000 in 1958, however its market share of food store sales in that area decreased from 20.7% in 1954 to 17.6% in 1958. During this same period of time, respondent's sales in the New Orleans Metropolitan area, which area included Jefferson, Orleans and St. Bernard Parishes, Louisiana, increased from $4,916,000 in 1954 to $13,842,000 in 1958. These sales represented 3.2% of the total food store sales in this area in 1954 and 5.4% in 1958. In the corporate city of New Orleans alone, respondent's market share of total food store sales was 4.2% in 1954 and 4.5% in 1958.[63]

54. Since the date of the acquisition, respondent has closed eight of the ten stores it acquired in Baton Rouge and opened four new stores. Its market share of food store sales in that city has declined from 21.6% in 1954 to 16.77% in 1959.[64]

55. Respondent's entry into Baton Rouge stimulated competition in that area. Mr. Harrelson, an employee of Capitol Stores, left that company when it was acquired by respondent and founded Food Town, Inc.[65] Food Town's success provides an ex-

[60] CX 455 Z 49—Investigation of this acquisition by the Commission was closed without prejudice, see Footnote No. 15.
[61] CX 184, CX 188 A.
[62] CX 556 Z-10, CX 395 E.
[63] CX 455-Z-49.
[64] RX 10, Table A.
[65] Tr. 1814.

ample of ease of entry and growth by an independent retailer. Starting with a single store in 1954, Food Town has opened six additional stores in Baton Rouge and five stores in outlying towns. All of these stores are supermarkets, some in shopping centers. Mr. Harrelson testified that he is at no competitive disadvantage vis-a-vis large chains since he receives all available discounts and allowances and is able to buy and sell his products at prices comparable to those of National and other large chains.[66] There are at least six or seven other "top notch" independent retailers in the area.[67]

56. Of the six acquired stores in New Orleans, three have been closed. Although National opened four new stores, its market share declined from 4.21% to 3.8% between 1954 and 1959.[68]

57. Among National's many competitors in New Orleans is Schwegmann Brothers Giant Super Markets. This locally, owned, independent operation began in 1946 with a relatively small store. Sales and profits grew steadily and Schwegmann opened four additional supermarkets, one of which, opened in 1957, is the largest supermarket in the world. At present the company's annual sales are about $60,000,000 and Schwegmann estimates his share of New Orleans Metropolitan area grocery business at 20%.[69]

58. Mr. Schwegmann testified that respondent furnishes "no competition" to his stores. His stores buy direct from all national manufacturers in carload quantities and sell to the public at retail prices lower than national chain competitors.[70]

59. Some of the other independent supermarket operators in New Orleans include Nicholson's, Pap's, Puglia's and Economical Foods. Some of these stores are large, modern supermarkets.[71]

60. Most of the foregoing independents buy either from the Consolidated Companies warehouse (which is owned by the former owner of Capitol Stores) or from the P. A. Menard wholesale warehouse. P. A. Menard sponsors a voluntary group of supermarkets, the Bell Stores sponsors another voluntary group of smaller stores, the S & S Markets, and supplies the six Piggly-Wiggly supermarkets. In addition, there is an IGA wholesaler in New Orleans and a cooperative wholesaler, Louisiana Grocers

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[66] Tr. 1815.
[67] Tr. 2189.
[68] RX 10, Table B.
[69] Tr. 1809–10.
[70] Tr. 1810–11.
[71] RX 2G–J.

Cooperative. A & P and Winn-Dixie also compete in New Orleans.[72]

61. With respect to the Capitol Stores respondent acquired outside New Orleans and Baton Rouge, there is little statistical data in the record concerning the communities in which these stores operated.

(L) *Fred Montesi, et al.*

62. On October 11, 1955, respondent acquired eight stores and a warehouse from the Fred Montesi interests for a cash consideration of $2,848,571. The Montesi interests consisted of nine individuals and two corporations. Six of the eight stores were located in Memphis, Tennessee, one in Columbus, Mississippi and one in Jackson, Tennessee.[73] The sales of these eight stores during the 12 months prior to the acquisition was $11,200,000.[74]

63. The acquisition of these stores was for the purpose of expansion into new territory, and was the basis for the establishment of the Memphis branch of respondent. In a press release issued by respondent September 4, 1955, it was stated:

> National has announced that the Memphis operation will not be absorbed by any present branch but will be the foundation of building a new branch of operations for the company and plans are already under way for expanding this new branch to 40 or 50 stores in the Memphis area of Tennessee and the bordering areas of Arkansas and Mississippi.
>
> * * * * * * * *
>
> The Memphis acquisition soldifies the National Tea Co., area of operations from North to South throughout the Central States, now reaching uninterrupted from the Canadian Border to the Gulf of Mexico. With the completion of stores now operating or under lease National will serve a 14 State area running from Minnesota down to Lousisiana and from the Dakotas across to Ohio.[75]

64. The six stores that were located in Memphis had sales of $10,289,000 in the 12 months prior to acquisition. Although respondent opened seven new stores in Memphis and closed only two, its total sales in Memphis declined to $8,911,000 in 1959, and its market share of the total food store sales in that city declined from 7.6% in 1956 to 5.9% in 1959.[76]

65. In connection with the acquisition of the eight stores from the Montesi interests, respondent entered into separate agree-

[72] Tr. 1811-12.
[73] CX 117, CX 119.
[74] CX 455-J.
[75] CX 118 A-B.
[76] RX 10, Table P.

ments with Louis Montesi, Frank Montesi, Joe Montesi, John Montesi and Fred Montesi, whereby respondent agreed to pay each of said individuals $50,000 in payments of $10,000 each year beginning March 15, 1956 and ending March 15, 1960, on condition that said individuals will not compete with respondent during said period in the Memphis area.[77]

66. In 1958, there were 997 food stores in Metropolitan Memphis serving a population of approximately 600,000. Of these stores, 594 were large enough to have paid employees. Only 34 of these 594 stores were operated by the three national chains in Memphis, Kroger, A & P and National.[78]

67. In addition to the chain stores, competition is supplied by numerous independents. Such independents had over 77.9% of Memphis food store sales in 1960.[79] Among the principal independent retailers and supermarkets in the Memphis area are those which are served by Malone and Hyde, a voluntary wholesaler organization. These retailers account for approximately 40% of Memphis food store sales. Malone and Hyde maintains a Memphis warehouse and it provides its members with group buying advantages and with the whole range of services also provided by chains, including group advertising, centralized accounting, assistance in selecting store locations, planning layouts and designing and remodeling stores, acquisition of leases for supermarkets, access to private label products, and management consultation. In contrast to respondent's declining sales in Memphis, Malone and Hyde's sales have risen from $7.6 million in 1945 to $84.5 million in 1962, with a 13.4% increase for the past year.[80]

68. On the question of ease of entry into the food store market, it is material to consider the new Montesi Supermarket. In 1960, Mr. Montesi (from whom National acquired its Memphis stores in 1955), after the expiration of his and the other seller's agreement not to compete with respondent in the Memphis area, re-entered the retail food business in Memphis by opening a large supermarket. With 26 check-out counters and sales of approximately $200,000 a week, this is the largest supermarket in Memphis and one of the largest in the South. It is open 24 hours a day.[81] In 1961, Montesi's one store placed about 75% as much advertising in the Memphis newspapers measured by Media Rec-

[77] CX 124 A–B, CX 125 A–B, CX 126 A–B, CX 127 A–B, and CX 128 A–B.
[78] RX 7, Table F.
[79] RX 7, Table F.
[80] Tr. 1803–1805.
[81] Tr. 1806–07.

ords, as did National with eleven stores.[82] More important, Montesi's sales in this one store are greater than those of all of National's Memphis outlets put together.[83]

(M) *The Maker's Acquisition*

69. On April 21, 1956, respondent acquired for a cash consideration of $217,463 the stock of Tom Maker, Inc., Maker's of Marshall, Inc., and Maker's of Albion, Inc. These acquisitions were primarily an expansion into new territory. Each of these three corporations operated a single store located in Charlotte, Marshall and Albion, Michigan, respectively. During a period of approximately eleven months immediately prior to acquisition, the three Maker's Stores had a combined loss of more than $51,000 and as of the date of acquisition, they had a net working capital deficit in excess of $168,000. The sales of these three stores in the 12 months prior to acquisition were $3,247,000. Respondent's sales in the three towns in which these stores were located decreased to $3,033,782 in 1959.[84]

(N) *Edenton-Lamb Company, Inc.*

70. On May 14, 1956, respondent acquired under its expansion program, the assets of a single store in Dyersburg, Tennessee for $117,104 from Edenton-Lamb Company, Inc., of Jackson, Tennessee, which company was primarily engaged in the wholesale grocery business. In the twelve months prior to acquisition, this store had sales of approximately $633,000. By 1959, sales of this store had increased to $655,000.[85]

(O) *Miller's Super Markets, Inc.*

71. On May 15, 1957, respondent acquired the stock of Miller's Super Markets, Inc., of Denver, Colorado for $7,578,150. Included in this acquisition were 25 supermarkets located in Colorado and two in Wyoming; a warehouse, a frozen food distributing commissary, a meat processing facility and a bakery, the latter named facilities located in Denver County, Colorado. Of the 25 stores acquired in Colorado, 18 were located in Denver, 3 in Arapahoe County, 2 in Jefferson County, 1 in Adams County and 1 in Weld County. The other two acquired stores were located in Cheyenne, Laramie County, Wyoming. One additional store in Denver was in the course of construction at the date of acquisition, which was opened shortly thereafter.[86]

[82] CX 422 M.
[83] Tr. 1859.
[84] CX 160-168, CX 395 A-E, CX 400.
[85] CX 130, CX 395, CX 400.
[86] CX 233, CX 237.

72. Prior to the acquisition, Miller's sales had increased from $24,397,000 in 1952 to $42,499,000 during the 12 months immediately preceding the acquisition, and its net income had increased from $405,709 in 1954 to $583,654 in 1956. Subsequent to the acquisition, respondent's sales in Denver, where the majority of the stores were located, decreased to $28,123,000 in 1959, from the pre-acquisition level of $29,391,000, although respondent had opened two new stores in Denver during that time. From 1958 to 1959, respondent's market share of total food store sales in Denver declined from 21.4% to 19.2%.[87]

73. This acquisition was primarily an expansion into new territory and was the basis for the establishment of respondent's Denver branch, the eleventh of its retail branches. Respondent had been negotiating with the owner for the purchase of the Miller facilities for about five years prior to the acquisition. This was respondent's first entry in the retail store business this far west, however, it had been operating a modern meat packing plant in Denver for some years, which plant supplied fresh beef to most of the respondent's stores throughout its territory. The addition of the Denver area stores brought respondent's total number of stores in operation to 788.[88]

(P) *Logan's Supermarkets, Inc.*

74. On October 6, 1957, respondent acquired the assets of Logan's Supermarkets, Inc., of Nashville, Tennessee, for a cash consideration of $745,280. At the time of the acquisition, Logan's operated nine stores in Davidson County, Tennessee, seven of which were located in Nashville and one each in Donelson and Madison, Tennessee. The purchase price did not exceed the estimated value of the inventories, store fixtures, and other physical properties acquired.[89]

75. The sales of Logan's Supermarkets fluctuated between $4.33 million and $4.86 million from 1951 to 1957, and in 1957 its sales amounted to $4.7 million. Of the seven stores acquired in Nashville, respondent has since closed two, and has opened no new stores in that city. Respondent's sales in Nashville declined from $2,966,000 in 1958, the first full year of operation after the acquisition, to $2,831,000 in 1959, and its market share of total

[87] CX 40, p. 7, CX 395 D, CX 236, RX 10, Table F.
[88] CX 237.
[89] CX 132, CX 67, Tr. 1861.

food store sales in that city declined from 3.98% to 3.57% during the same period.[90]

76. The acquired Logan stores were included in respondent's Memphis branch. This branch has suffered a net taxable loss in each year from 1956, with a loss of $263,779 to and including 1959, in which year it had a loss of $979,702. During this period of time respondent acquired eleven stores, including the nine Logan stores, and built 19 new stores in the Memphis warehouse area.[91]

(Q) *DeVan-Horner, Inc.*

77. On October 6, 1957, respondent acquired the assets of DeVan-Horner, Inc., of Mobile, Alabama, in exchange for shares of respondent's common stock valued at $624,853. Included in the assets were seven stores and a warehouse located in Mobile County, Alabama.[92] Five of the stores were located in the city of Mobile and one each in Chickasaw and Citronell. DeVan-Horner's sales had increased from $3,915,000 in 1954 to $7,032,000 in 1956 and to $7,878,000 in the ten months immediately preceding the acquisition.[93] However, at the time of the acquisition, the acquired company was in dire need of working capital, with insufficient funds available to pay its current bank loans in the amount of $217,220; as of October 6, 1957, it had current liabilities of $586,594 and current assets of only $567,648. In short, the company was in financial difficulty and had to "raise cash or sell out." [94]

78. Subsequent to the acquisition, respondent's sales in the area served by DeVan-Horner declined to approximately $4,805,000 in 1959 from the pre-acquisition level of $7,878,000 for the ten months immediately preceding the acquisition.[95] One of the five acquired stores located in Mobile has since been closed and one new store has been opened, nevertheless, respondent's sales in that city declined from $4,247,000 in 1958 to $3,573,000 in 1959 and its market share of total Mobile food store sales decreased from 7.51% to 5.88% during that same period.[96]

79. One of respondent's leading competitors in the Mobile area is Delchamps, Inc., a local family controlled corporation which

[90] CX 611–617, RX 10, Table O.
[91] CX 67, 400–Z–10, CX 357, CX 503, CX 510, CX 528.
[92] CX 202.
[93] CX 607–10.
[94] CX 207, CX 203.
[95] CX 67, CX 400–Z 6–8, CX 207.
[96] RX 10, Table H.

operates 39 stores, 19 of which are located in the city of Mobile. Delchamps estimates its share of the Mobile retail grocery business at 35%, more than any other retailer in town, including National Tea, A & P and Winn-Dixie. This corporation operates its own warehouse and ice cream plant. The warehouse handles dry groceries, produce and frozen foods. In addition, Delchamps has certain other private label products packed for it.[97]

80. Mr. O. H. Delchamps, Sr., testified that his stores are at no competitive disadvantage in relation to respondent or any other large chain operating in Mobile, and that Delchamps' prices are "as low as any one in town," and that it does more advertising than the chains. He also testified that other successful local retailers include Mr. Campbell, who operates ten supermarkets under the name "Food Town," and Mr. Greer, who operates a small string of supermarkets under his own name. In addition, there are ten or twelve IGA sponsored stores and about a dozen "convenience" stores operated by Pak-A-Sak.[98]

(R) *Illinois Valley Stores Company*

81. On January 11, 1958, respondent acquired the assets of Illinois Valley Stores Company, of Peoria, Illinois, in exchange for shares of respondent's common stock valued at $713,835. The acquired company operated seven stores in Peoria and Tazewell Counties, Illinois, four of which were located in the city of Peoria and one each in Peoria Heights, East Peoria and Pekin, Illinois. The lease on a warehouse in Peoria was also acquired but was allowed to expire six to nine months later and was not renewed.[99] The sales of Illinois Valley Stores increased from $4,546,000 in 1954 to $6,053,000 in the twelve months immediately preceding the acquisition.[100] Respondent closed two of the acquired stores, relocated another, and opened one new store in Peoria, nevertheless its sales declined to $4,250,000 in 1959 and its market share of total food store sales in the area served by Illinois Valley declined from 8.62% in 1958 to 7.63% in 1959.[101]

(S) *Ashton Store*

82. On March 31, 1955, respondent acquired the assets of the Ashton Store, located in Gulfport, Mississippi, from the estate of Charles F. Ashton, the deceased former owner, for a cash con-

[97] Tr. 1812-13.
[98] Tr. 1813-14.
[99] CX 246.
[100] CX 625 B, CX 395 C.
[101] RX 10, Table N.

sideration of $100,978. This acquisition was primarily an expansion and was respondent's initial entry into the State of Mississippi.[102]

(T) *Barkett's Super Market*

83. On May 14, 1956, respondent acquired the assets of Barkett's Super Market, located in Charlestown, Missouri, from Phillip J. Barkett and his wife, for a cash consideration of $69,045. In the 12 months immediately preceding the acquisition, Barkett's had sales of $908,000. By 1959, respondent's sales had declined to $665,000.[103]

(U) *Food Bank Stores*

84. On April 21, 1958, respondent acquired the assets of the former Food Bank Inc., and Audubon Food Bank Company from the former principal stockholders of these two corporations, for a cash consideration of $720,378. These corporations were dissolved prior to the acquisition with ownership of assets reverting to the stockholders. The assets included three supermarkets located in Colorado Springs, Colorado. This acquisition was primarily an expansion into new territory and it was respondent's initial entry into Colorado Springs.[104] During the 12 months immediately preceding the acquisition, these three stores had total sales of $4,285,000. Since the acquisition, one store has been closed and two stores (both in the planning stage at the time of acquisition) have been opened. During 1959, respondent's sales in Colorado Springs amounted to $5,216,000.[105]

(V) *Guidone and Company, d/b/a Arlington Market*

85. On September 1, 1958, respondent acquired the assets of Guidone and Company, a partnership, which operated one store, known as Arlington Market, in Indianapolis, Indiana, for a cash consideration of $857,035. Sales of this store during the 12 months prior to acquisition were $5,200,000. In 1959, such sales had declined to $4,536,000. Respondent's 28 stores in the Indianapolis area had combined sales of $40,935,000, in 1957. In 1958, its sales had declined to $34,590,000, excluding the sales of Arlington Market, which sales represented 20.8% of the total Indianapolis food store sales.[106]

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[102] CX 192, CX 193, RX 195.
[103] CX 196, CX 395 A–E, p. 3, CX 400.
[104] CX 239, CX 244.
[105] CX 455 J, CX 244, RX 10, Table K, CX 400–Z–16.
[106] CX 268, CX 395 A, CX 400, CX 479.

86. In 1958, respondent operated 28 supermarkets in Indianapolis, which were more than any of its competitors; during this period A & P operated 12 stores, Kroger 19, Colonial 17 and Marsh 4. Among the independent competitors in Indianapolis are Galyan's 7–11, Moore's, Food Fair, Stop & Shop, Walt's, Preston's, State Road Supermarket, Big Ten, the A & G stores, Richard's and the Regan Stores.[107]

### (W) *Slim's Sun Mart*

87. On September 14, 1958, respondent acquired the assets of Slim's Sun Mart of Fort Dodge, Iowa, from the proprietor of such store, for a cash consideration of $189,942. Limited data is available for comparison of pre-and post-acquisition performance, however, the record does disclose that the acquired store had sales of $316,000 for a four month period in 1958, preceding its acquisition. Annualizing this figure would indicate annual sales of approximately $945,000. In 1959, the first full calendar year after its acquisition, this store had sales of $891,000.[108] Respondent had one store in Fort Dodge at the time of the acquisition, the sales of which declined from $1,040,000 in 1954 to $811,000 in 1958. During this same period respondent's market share of total food store sales in Fort Dodge declined from 10.6% to 7.5%.[109]

## CONCLUSIONS

(1) The line of commerce relevant to this proceeding involves groceries and related products, normally sold by food and grocery stores, and the relevant geographic market or area of effective competition is local in nature and is generally confined to the metropolitan area in which the acquired company operated its store or stores.

(2) In the course of this proceeding, the parties agreed to include fluid milk and cream, frozen desserts and fresh fruits and vegetables as lines of commerce. These items cannot be considered as separate lines of commerce, as there is no testimony or other evidence in this record which would support a finding that these items have any practical or economic significance in determining the competitive effect of any of the acquisitions involved in this proceeding.

(3) There are 23 acquisitions involved in this proceeding, none of which has been shown to be in violation of Section 7 of the

[107] CX 416 A, Tr. 1750, Tr. 714.
[108] CX 244, CX 455 J, CX 479.
[109] CX 67, CX 479.

Clayton Act. Furthermore the record does not establish that the cumulative effect of these mergers is such as to require corrective action under Section 7. In fact, the Commission in its opinion in Foremost Dairies Inc., Docket 6495 at page 52 [60 F.T.C. 944, 1091], has disposed of this contention:

> We have previously rejected the argument under Section 7 that certain acquisitions in a series of acquisitions, none of which can be shown to have the adverse effect on competition required by Section 7, become illegal and may be ordered divested for the reason that the cumulative effect on competition of these prior mergers may be such as to make any future acquisition illegal.

(4) The Commission is foreclosed from proceeding under Section 7 of the Clayton Act as to five of the twenty-three acquisitions involved. On May 1, 1953, the Federal Trade Commission commenced an investigation of acquisitions made by National Tea of Gamble-Skogmo, Inc., Piggly-Wiggly Northwest, Inc., C. F. Smith Company, George T. Smith Market Baskets, Inc., and Dole's Super Markets, Inc. These investigations were closed without prejudice August 27, 1954. There is no evidence in this record of any change in fact or subsequent predatory or other acts by respondent, which would warrant the Commission in vacating its action of August 27, 1954. Insofar as violation of Section 7 of the Clayton Act is concerned, these particular acquisitions must be disregarded.

(5) The jurisdiction of the Commission over acquisitions under Section 7 of the Clayton Act is limited to corporations. The acquisitions challenged in this proceeding include Ashton Stores, Barkett's Super Market, Food Bank Stores, Guidone and Company, d/b/a Arlington Market, and Slim's Sun Mart, all of which were operated as individual partnerships or proprietorships. Therefore these acquisitions do not come within the jurisdiction of Section 7 of the Clayton Act.

(6) The Kalamazoo Market Baskets, Inc., was acquired from the trustee in bankruptcy, and this acquisition clearly comes within the "failing company" doctrine and cannot be considered as a violation of Section 7.

(7) The deletion of the foregoing acquisitions leave for consideration three acquisitions listed as horizontal: H. A. Smith Markets Inc., Tolerton & Warfield Corp., and Del Farm Foods, Inc., and nine expansion acquisitions into geographic markets not previously occupied by the respondent: Food Center Stores of Missouri, Capitol Stores, Inc., Fred Montesi, Maker's, Edenton-Lamb

Company, Inc., Miller's Super Markets, Inc., Logan's Supermarkets, Inc., DeVan-Horner, Inc., and Illinois Valley Stores Inc.

(8) The acquisition of the H. A. Smith Markets Inc., while listed as a horizontal merger, was in fact an acquisition for expansion purposes. With the exception of one store each in Detroit and Mt. Clemens, the remaining seven acquired stores were located in geographic markets where respondent did not operate retail stores. Four of these stores were located in Port Huron and one each in Algonac, Marine City and St. Clair, Michigan. Each of these localities constituted a separate and distinct geographic market area. In Port Huron respondent's sales decreased in the first four years of operation from $4,330,000 in 1956 to $3,910,000 in 1959. During the same period, respondent's market share of food store sales in Port Huron decreased from 22.9% to 19.6%. No finding or inference can be made that this acquisition has had, or may have, any adverse effect upon competition in the market areas involved.

(9) The Tolerton & Warfield acquisition likewise is an expansion acquisition, primarily made for the purpose of establishing a Sioux City branch. The 85 stores acquired from Tolerton & Warfield were distributed through Iowa, Nebraska, South Dakota and Southern Minnesota. There was an over-lapping of respondent's stores and the acquired stores in only three small towns where each had one store, Worthington, Minnesota; Watertown, South Dakota; and Brookings, South Dakota. The remaining 82 acquired stores were expansion acquisitions. During the 12 months prior to the acquisition, July 22, 1957, Tolerton & Warfield sales were $21,802,000. These sales declined to $18,361,000 in 1959.

(10) The acquisition of the Del Farm Foods, Inc., consisting of twelve stores was a horizontal merger to the extent that respondent's stores and the acquired stores were located in the Chicago Metropolitan area. Respondent contends that these stores cater to a different clientele and do not compete with respondent's stores in the Chicago area. The acquired stores were not included in, or made a part of, respondent's Chicago branch, but were used to establish, and have been operated since the acquisition as, respondent's Del Farm branch. The record does not support any inference or finding that this acquisition has had, or may have, any adverse effect upon competition in the relevant geographic market area.

(11) Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competi-

tors and its desire to restrain mergers only to the extent that such combination may tend to lessen competition. (*Brown Shoe Co.*, v. *United States,* 370, U.S. 294) Ordinarily, where the arrangement constitutes a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. (*Brown Shoe Co.*, v. *United States, supra.*) However, in the present case, nine of the remaining acquisitions were made for expansion into geographic markets not previously occupied by the respondent. In so doing, the respondent has not eliminated competition in the geographic market occupied by the acquired company. It is a substitution of respondent for the acquired company with little or no impact upon competition in the market area involved.

(12) In discussing this feature of expansion or conglomerate mergers, the Commission in its opinion in Foremost Dairies, Inc., Docket 6495 [60 F.T.C. 944, 1084], stated:

> Amended Section 7 is designed to prevent the development of monopoly in its incipiency. The test is not intended to be mergers *resulting* in substantial market power and actual elimination of competition but rather mergers which *may* tend to lead to this end result. This distinction between proof as to *actual* injury required under the Sherman Act, and *potential* injury under Section 7 is well documented in decisions involving horizontal and vertical mergers. Applying this distinction to market extension mergers leads to logical inference that under Section 7, the necessary proof of violation of the statute consists of types of evidence showing that the acquiring firm possesses significant power in some markets or that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals.

(13) The present proceeding can be distinguished from the Foremost case. No logical inference can be drawn from this record that the respondent possesses significant power in any geographic area or that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals. The market shares of the respondent in any of the geographic markets involved in each of these acquisitions, was not sufficient, to establish any decisive advantage over its smaller rivals. In fact, in substantially all of the geographic markets, the market share of respondent has declined after the acquisition. This is true whether it be a horizontal or an expansion acquisition. It was stated in Foremost Dairies, Inc., Docket 6495, *supra,* that:

> * * * The evidence shows that it is commonplace for the market share of merging companies to decline for a time after the merger for reasons not re-

lated to the ultimate effect of the merger. One such reason as reflected in this record is that if an acquiring company discontinues the brand of the acquired company, it may lose those customers having strong loyalty to the discontinued brand. Respondent's president testified as to this normal decline after an acquisition. Respondent's board chairman also testified to this fact but stated that he believed that such postacquisitional declines would last for only six months or less. While the timing and magnitude of such declines may be debatable, it is obvious that such declines do occur for reasons which have little relationship to the long-run effect of mergers on the state of competition. (Commission Opinion, p. 38) [60 F.T.C. 1079]

(14) The above described loss of customers because of the acquisitions is not necessarily applicable to the facts in this proceeding. In a number of the acquisitions, the respondent continued the name and identity of the store which had been acquired for the purpose of making an orderly change-over without too great a loss of customers. Furthermore, the declining sales and market shares were more than commonplace since this decline continued not for six months or less, but for several years and in some instances, had not recovered at the time of introduction of testimony in this proceeding.

(15) One of the criteria for determining or evaluating the legality of a merger is the ease of entry into the competitive market. In the present case, no foreclosure of competitors is involved. The area of effective competition is local in nature. The ease of entry may be established by reference to the Capitol Stores and Montesi acquisitions. In the acquisition of the Capitol Stores, Harrelson, an employee of Capitol Stores, left the company at the time of the acquisition and founded Food Town, Inc., starting with a single store in 1954 and ending up with six additional stores in Baton Rouge and five stores in outlying towns, all supermarkets. Harrelson testified that he is at no competitive disadvantage and is able to buy and sell his products at prices comparable to those of respondent and other large chains. In the Montesi situation, respondent acquired eight stores operated by the Montesi interests, with an agreement that the individuals would not re-enter the retail store business in Memphis for a period of five years. At the end of this five year period, said Montesi re-entered the retail food business by opening a large supermarket, the sales of which were greater than all of respondent's Memphis outlets put together.

(16) When the complaint was issued in this proceeding, it contained a charge of violation of Section 5 of the Federal Trade Commission Act. During the trial of this case, no testimony or other evidence was introduced bearing directly upon violation of

Section 5. In the proposed findings submitted by counsel supporting the complaint, no proposed finding of violation of Section 5 was submitted and the proposed order submitted was limited to the Section 7 charges. From this, it must be concluded that the charge of Section 5 violation has been abandoned. In any event, the cumulative effect of all the acquisitions is not sufficient to warrant an order to cease and desist from making any further acquisitions.

(17) In accordance with the foregoing decision the following order is entered.

ORDER

*It is ordered,* That the complaint herein be dismissed.

OPINION OF THE COMMISSION, MARCH 4, 1966

By DIXON, *Commissioner:*

The complaint in this case alleged that certain acquisitions by respondent National Tea Co. violated Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act, 15 U.S.C. 18,[1] and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.[2] Evidence was presented that, in the period 1951–1958, National Tea acquired 26 companies or groups of companies[3] owning a total of 485 retail grocery stores, plus a number of warehouses, bakeries, and food manufacturing or processing plants. The 26 acquired companies, in the 12 months prior to their respective acquisition, had total retail food sales of $251 million. They would have ranked—if combined into a single chain—14th in the country in 1958.[4] National Tea itself emerged in that year as the 5th largest food chain in the nation,[5] with more than 900 stores having aggregate sales of $794 million in some 500 cities and towns.

[1] This provision prohibits corporations engaged in commerce from acquiring the stock or assets of other corporations engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly."

[2] "Unfair methods of competition in commerce, and unfair . . . acts or practices in commerce, are hereby declared unlawful."

[3] See the accompanying Findings of Fact, p. 315, for a list of these firms and a summary description of each. Only 24 of these acquisitions are challenged here, however. Kalamazoo Market Basket was an adjudged bankrupt at the time of its acquisition and Pick-N-Save, of Park Forest, Illinois, was later sold by respondent. In addition, three of the other acquired corporations—Makers of Marshall, Makers of Albion, and Tom Makers—are referred to in certain of the exhibits as the "Makers" group. This grouping would reduce the number of acquisitions at issue here to 22.

[4] See Findings, p. 313, for a list of the 20 largest chains of 1960 and a summary of their respective sales volume, market shares, geographical scope of operations, and number of stores operated.

[5] *Ibid.*

I

The amount of competition affected by these acquisitions is substantial by any standard. The 485 acquired stores were located in some 188 cities in 16 States. According to our count, 8 of these acquisitions—involving some 36 stores located in 17 cities and towns—were wholly or partially "horizontal" in character, *i.e.*, the acquired firms operated one or more stores in towns where National Tea was already doing business.[6] The rest of these acquisitions—involving some 450 stores located in more than 150 cities in which respondent had *not* previously operated—were of the so-called "market extension" variety. Precise market share data is not available for all of the relevant city and county markets, particularly for the smaller towns not included in the Census reports of community food store sales. In a number of these markets, however, it has been possible to compare the sales of the acquired stores in the 12 months prior to their acquisition with the total food store sales in the relevant cities and counties, thus providing what would appear to be a reasonable estimate of the market shares held by these acquired stores at the time of their acquisition. These are tabulated in Appendices B, C, and D of the accompanying Findings. It appears, for example, that the acquired stores held, in the 12 months prior to their acquisition, *county* market shares ranging from .42% of total food store sales (held by one of the acquired firms in Hennepin County, Minnesota) to a high of more than 35% (held by the acquired Capitol Stores in West Baton Rouge, Louisiana). Somewhat higher shares were held by the acquired firms in the narrower *city* markets within those counties.[7] The accompanying table on the following page lists the acquisitions in issue here according to the number of stores owned, together with their respective sales volume in the 12 months prior to acquisition and both our own and respondent's [8] estimate of their market position at that time in at least one of the cities in which they operated.

II

Respondent began its acquisition program shortly after a change in ownership in 1945. In that year a Mr. John F. Cuneo, Chicago financier, bought a substantial share of the company's stock and brought in as its executive vice president and general

[6] Findings, pp. 329–330; and Appendix D.

[7] See Findings, Appendix C.

[8] RX 10.

manager a former Kroger executive, Harvey V. McNamara. Shortly thereafter, McNamara became president, replacing Robert V. Rasmussen, son of the company's founder. At that time, National was a regional chain operating in 8 States, primarily in only 3—Illinois, Wisconsin, and Minnesota. Total sales for the year 1945 were $107 million. As the new president of the company, McNamara promptly began a "plan" of expansion designed to cover all of the then 48 States—a "plan to cover the United States like a book." [9] By the end of 1958, sales had grown to $794 million and McNamara was thus able to report to his stockholders that "sales have increased approximately 700 percent since 1944." [10] The acquisitions challenged here gave him approximately $250 million of that increased sales volume directly, doubtless much more indirectly.[11]

| Acquisitions | Number Stores Owned by Acq. Firm | Acquired Firm's Total Sales | Acquired Firm's Share of Total Food Store Sales in Selected Cities | | |
|---|---|---|---|---|---|
| | | | City | Comm.'s Est. | Nat.'s Est. |
| Edenton-Lamb | 1 | $ 633,000 | Dyersburg, Tenn. | 14.82% | —% |
| Ashton's | 1 | 802,000 | Gulfport, Miss. | 8.13 | — |
| Barkett's | 1 | 908,000 | Charleston, Mo. | 18.5 | — |
| Slim's | 1 | 945,000 | Fort Dodge, Iowa | 8.7 | — |
| Guidone (Arl. Mkt.) | 1 | 5,200,000 | Indianapolis, Ind. | 2.98 | — |
| Makers' | 3 | 3,247,000 | Marshall, Mich.<br>Albion, Mich.<br>Charlotte, Mich. | 33.75 | — |
| Food Bank | 3 | 4,285,000 | Colorado Spgs., Colo. | 18.07 | 13.98 |
| Piggly-Wiggly NW | 6 | 2,927,000 | Duluth, Minn. | 9.25 | 8.27 |
| G. T. Smith | 6 | 6,737,000 | Lansing, Mich. | 16.5 | 20.26 |
| Dole's | 6 | 6,825,000 | Battle Creek, Mich. | 22.56 | 19.91 |
| Ill. Val. Stores | 7 | 6,053,000 | Peoria, Ill. | 11.51 | 8.62 |
| De Van-Horner | 7 | 9,099,000 | Mobile, Ala. | 12.33 | 7.51 |
| Montesi | 8 | 11,200,000 | Memphis, Tenn. | 7.11 | 6.40 |
| | | | Columbus, Miss. | 10.46 | — |
| Logan's | 9 | 3,798,000 | Nashville, Tenn. | 3.11 | 3.98 |
| H. A. Smith | 9 | 6,625,000 | Port Huron, Mich. | — | 22.94 |
| Del Farm | 12 | 17,650,000 | Chicago, Ill. | 1.64 | 1.78 |
| Gamble-Skogmo | 21 | 8,362,000 | Minneapolis, Minn. | .54 | — |
| | | | Hibbing, Minn. | 8.08 | — |

[9] Findings, p. 318.
[10] Findings, p. 321.
[11] See tr. 1712–1713.

| Acquisitions | Number Stores Owned by Acq. Firm | Acquired Firm's Total Sales | Acquired Firm's Share of Total Food Store Sales in Selected Cities | | |
|---|---|---|---|---|---|
| | | | City | Comm.'s Est. | Nat.'s Est. |
| Miller's | 27 | 42,499,000 | Denver, Colo. | 20.58 | 20.13 |
| | | | Englewood, Colo. | 13.05 | — |
| Capitol Stores | 28 | 22,980,000 | Baton Rouge, La. | 23.38 | 20.14 |
| | | | New Orleans, La. | 4.14 | 4.21 |
| Food Center | 28 | 30,467,000 | St. Louis, Mo. | 8.59 | 6.08 |
| | | | St. Ann, Mo. | 41.47 | — |
| Tolerton & Warfield | 85 | 21,802,000 | Sioux City, Iowa | 13.8 | 16.33 |
| | | | Carroll County, Iowa | 2.57 | — |
| C. F. Smith | 210 | 26,362,000 | Detroit, Mich. | — | .41 |

National's largest competitors, with the exception of A & P and, for a while, two others, responded with similar merger programs of their own. During the period 1949–1958, the 20 largest chains of 1960 [12] made 147 acquisitions (including more than 40 other "chains," or firms with 11 or more stores), acquiring 1,676 stores having aggregate sales of $1.49 billion.[13] National Tea remained the leader of this merger movement; the 485 stores it acquired in the period 1949–1958 amounted to 28.9% of the aggregate number of stores acquired by the 20 largest chains during those years, and the $251 million sales volume it acquired from those stores amounted to 16.8% of the total sales volume acquired by the 20 largest chains as a group.[14]

This merger movement led by National Tea portends a drastic restructuring of the national food market as a whole and of the individual markets in which these acquisitions occurred. Nationally, the period 1948–1958 witnessed an enormous shift of sales volume from the "independent" to the "chain" sector of the industry, and from the smaller to the larger "chains." [15] While total food store sales increased by some 60%—from an estimated $30 billion in 1948 to $49 billion in 1958—the total number of grocery stores (which account for about 90% of all food store sales) *declined* by approximately 100,000, or nearly 30%. Similarly, the

[12] N. 4, *supra*.

[13] Findings, p. 326. In the following 3-year period, 1959–1961, additional acquisitions by these firms brought the total sales volume acquired by them between 1948 and 1961 to approximately $2.2 billion.

[14] Findings, p. 326.

[15] While a "chain" is sometimes referred to as a firm operating 4 or more stores, the more common definition in the industry, and the one accepted here, is an organization operating 11 or more stores. An "independent" is a non-chain, *i.e.*, a firm operating less than 11 (1–10) stores.

"chains" themselves—the firms with 11 or more stores—declined in number, dropping from 210 in 1948 to an estimated 180 in 1958. But their share of all food store sales *increased* by an estimated 9.6%—from approximately 30.4% in 1948 to 40% in 1958.[16] In terms of dollars, this shift from the independents to the chains totaled approximately $4 billion (9.6% of $49 billion), a loss that is nearly twice the total sales volume of, for example, the entire retail shoe industry.

Even more significant, however, is the increasing concentration within the already concentrated "chain" sector itself. As noted, the number of such firms decreased from 210 to 180 between 1948 and 1958.[17] But the 9.6% gain was not evenly distributed among the entire 180; the 20 firms that were later to emerge as the 20 largest retail grocery chains in 1960 gained 9%—bringing their share of all United States food store sales up from an estimated 21.1% in 1948, to 30.1% in 1958—while the remaining members of the "chain" group, some 160 in number, gained only .6%, that is, from 9.3% of all food store sales in 1948, to 9.9% in 1958.[18] In short, even the "medium-size chains" are merely holding their own; the 20 largest have gotten virtually everything lost by the "independents."[19]

This industrywide movement was particularly pronounced after 1954. Dr. Willard F. Mueller, Director of the Federal Trade Commission's Bureau of Economics, gave the following expert opinion as to the significance of this increasing trend toward concentration in food retailing: "If the top 20 chains of 1960 and all other chains with 11 or more stores were to continue to expand their market shares at the respective rates which they experienced between 1954 and 1958 (CX 455–Z–28), *by about 1984*

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[16] Findings, p. 324.

[17] *Economic Inquiry Into Food Marketing*, Part I (Staff Report to the Federal Trade Commission, January 1960), p. 146. While there was some non-acquisition movement into and out of this classification, the fact remains "that, in the absence of mergers and acquisitions, there would now be 49 more chains in operation—at least if we assume that none of the 49 would have dropped below 11 stores or liquidated completely in the interim." *Ibid.*

[18] Findings, pp. 323–325.

[19] Respondent attributes the decline in the number and sales volume of the smaller independents to what it calls the "supermarket revolution." This term refers to the recent trend toward large, self-service establishments (supermarkets), and away from the small, clerk-service type of store. For example, it is pointed out that a single supermarket with annual sales of, say, $500,000 can and does frequently replace *10* smaller, older stores having annual sales of $50,000 each. But this technological change to larger stores does not explain why, when the conversion from the small to the large store occurs, *ownership* of the new supermarket (and thus the sales volume) ends up in the hands of a chain that ranks among the nation's 20 largest rather than an independent. See Findings, p. 323, n. 59.

*chains of 11 or more stores* [*about 180 of them*] *would be doing all of the grocery store business, with the top 20 of 1960 doing 84 percent* and all others 16 percent." [20]

An even sharper pattern of chain dominance is already emerging in many of the *local* retail food markets involved here. As these largest chains pursue their parallel policies of geographical expansion, they inevitably meet each other in a number of cities. The result is frequently a market completely dominated by 3 or 4 chains. For example, one of the acquisitions challenged here is National's acquisition of Miller's, a 27-store chain with more than 20% of the Denver, Colorado, market. Safeway was already in Denver, having entered by acquisition in 1931. Immediately after National's acquisition of Miller's in 1957, Dillon acquired the 8-store King Soopers chain. At that point, 3 chains—National Tea, Safeway, and Dillon—had 64.1% of all food store sales in Denver.

This record shows a similar pattern in numerous other cities in which these acquisitions occurred. In Sioux City, Iowa, respondent and 3 other chains had 31.8% of the market in 1958; in Chicago, National and 3 other chains had 38%; in Lansing, respondent and 3 other chains had 47.3%; in Baton Rouge, Louisiana, National Tea and 2 other chains had 50.1%; in Indianapolis, Indiana, respondent and 4 other chains had 58.8%; in Peoria, Illinois, National and 3 other chains had 59%; in Englewood, Colorado, respondent and 2 other chains had 60%; in Port Huron, Michigan, National and 3 other chains had 60.8%; in Colorado Springs, Colorado, respondent and 2 other chains had 62.8%; and in the three Michigan towns of Albion, Marshall, and Charlotte, respondent and 3 other chains had 82.4%. [21]

## III

It was precisely this kind of market arrangement Congress was concerned with in the merger law. "That '[c]ompetition is likely to be greatest where there are *many sellers, none of which has any significant market share,*'. . . is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963), (footnote omitted; emphasis added). That premise is fully established on this record. Respondent recognizes two distinct kinds of competition—"hard" and "soft." [22] Hard competition comes from "regional chains";

[20] Tr. 1941–1942 (emphasis added); Findings, p. 327.

[21] CX 416–A (Price-Waterhouse compilation), and CX 454.

[22] When about to enter a market, National sizes up the "competition, as to whether it is *hard or soft.*" Tr. 430 (emphasis added); Findings, p. 320.

soft competition comes from (a) "interstate chains" and (b) "mom and pop" stores. The latter are too weak to engage in serious competition with their larger rivals; the large "interstate chains" are said to "share" a certain "opinion" about price competition. One of respondent's officials described his competition this way:

Q. Now, would you say that the greatest competition . . . was coming from mom and pop grocery stores, or from the so-called interstate retail chains?

A. *No, I can't say it was coming from interstate chains. I believe they pretty well shared our opinion.* Certainly it didn't come from the mom and pop grocery stores.

Q. I see.

A. *It came from local competition which operated more than one store.* Let's say it that way. [23]

There is more here, however, than the mere inference that competiton becomes less vigorous as a community's food market falls into fewer and fewer hands. National Tea stipulated that it varies its prices from city to city, and even sometimes from store to store within a particular city, "depending on local competitive conditions."[24] In respondent's accounting records, these price differences are reflected in the "gross profit" or "markup" each store is able to take, and in the "contribution," [25] it is therefore able to make to overall operating costs and net profits. A store that encounters particularly intense competition has to lower its prices to meet that competition [26] and thus take a smaller markup than stores located in areas where the competition is less pressing. Hence respondent's records of the "gross profits" or markups of its individual stores [27] give a reasonably accurate measure of the intensity of competition in the various cities in which those stores are located. These show city-to-city variations ranging as

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[23] CX 481 (sitpulated testimony), pp. 253–254 (emphasis added); Findings, p. 321.

[24] Tr. 1949; Findings, p. 357.

[25] "Sales less cost of goods-gross profit. Gross profit less direct store expenses-store contribution." CX 365–A; Findings, p. 352, n. 189. The store's "contribution," less its proportionate share of "overhead" (warehouse and home office expenses, including advertising), equals net profit, before taxes. *Ibid.*

[26] "Intensified competition in several trading areas forced us to sacrifice profit margins in order to maintain traffic and hold customers in our stores." Findings, p. 354, n. 195. Respondent's economist-witness testified that intense competition makes it "more difficult to earn a satisfactory profit." Findings, pp. 357–358. Another of respondent's witnesses equated "more competition price-wise" with "reduced gross margin." Another testified that National's "consistently higher" "gross profit" in Dyersburg, Tennessee, was proof that it was not "charging lower prices" there. And another of respondent's witnesses testified that a "price war" affects "your mark-up." Findings, p. 358, n. 209.

[27] CX 400–A through 400–Z–21 (*in camera*) indicates the 1959 sales of each of respondent's stores and its "gross profit" or markup as a percent of sales.

high as 9%—from a "gross profit" margin of less than 11% in one city to a high of more than 20% in another city.[28]

As might be expected, respondent's "gross profit" or markup tends to be higher in the chain-dominated cities, lower in those communities "where there are many sellers, none of which has any significant market share." Respondent's Memphis branch, for example, has operated at a *net loss* since it entered that market by acquisition in 1955, reaching a high of $1,149,598 in 1959, or a net loss of approximately 5¢ on each dollar of sales.[29] Its Denver branch, on the other hand, enjoyed before-tax profits of $1,604,887 that year,[30] or nearly 3.2¢ profit on each dollar of sales. And respondent's Indianapolis branch earned before-tax profits of $4,085,248 in 1959 [31] more than 4.8¢ per dollar of sales. The principal factor in these differences lies in the different markups National is able to take in these areas. In the Memphis branch, the "gross profit" margin or markup was approximately 14.5% in 1959, compared with more than 18% in both the Denver and Indianapolis branches.[32] These margins, in turn, are obviously related to the different market structures prevailing in those cities: in Memphis, respondent and the other chains had only 24.1% of the market; in Indianapolis and Denver they had 58.8% and 64.1%, respectively. If competition is to retain its meaning as the price-regulating "invisible hand" of traditional economic theory, then we are constrained to find that National's acquisitions in Indianapolis [33] and Denver have substantially lessened competition in those cities.

## IV

The numerous acquisitions involved here portend still more, however, than a substantial lessening of competition. The statute recognizes that the effect of an acquisition may be even more drastic—that it may also "tend to create a monopoly." Competition, as the Supreme Court noted in *Philadelphia Nat'l Bank, supra,* is likely to be greatest not merely when "there are many sellers" but where, in addition, no single one of those sellers "has

[28] Findings, p. 354.

[29] CX 357 (*in camera*).

[30] CX 362 (*in camera*).

[31] CX 361 (*in camera*).

[32] CX 357, 361, 362 (*in camera*). For the gross margins of the individual stores in Memphis, Denver, and Indianapolis, see CX 400-Z-9, 400-Z-15, 400-J (*in camera*).

[33] Respondent's Indianapolis acquisition was one of the "horizontal" acquisitions. The acquired firm, Guidone (Arlington Markets), operated only 1 store but that single establishment was a giant supermarket with annual sales of $5.2 million—some 14 times the sales volume of the minimum-size "supermarket" ($375,000)—with an estimated 2.98% of the large Indianapolis retail food market. Its acquisition brought respondent's share of that market to 20.8% in 1958.

any significant market share." National Tea has a "significant" market share in scores of these local markets. Available data permitted an analysis of its market share in 399 of the 514 cities in which it operated retail stores in 1958. In 258 of these 399 cities, respondent had 10% or more of the market; in 175 of them, 15% or more; in 120, 20% or more; in 73, 25% or more; and in 29 cities, more than 35% of the market.[34]

The "significance" of these market shares is demonstrated by the *use* it makes of them. It uses its market power in these communities to (1) charge higher prices to consumers than in other areas; (2) exact discriminatory price concessions and promotional allowances from suppliers; and (3) subsidize its below-cost operations, particularly its high-cost building and advertising programs, in the more than 100 cities where competition is still vigorous enough to limit its pricing power.

It should be noted at the outset that National Tea makes no pretense of superior economic "efficiency." Indeed, it readily concedes that the various economies of scale involved in food retailing are realizable in a single store of optimum size and that its own operation of more than 900 stores in 18 states, with yearly sales of $794 million, gives it no advantage in efficiency over its largest one-store competitors. For example, National introduced into the record here a 1962 statement by one of its independent competitors in Memphis, a Mr. Montesi, operator of one of the largest supermarkets in the country,[35] to the effect that he takes a gross markup of 15% (over cost of goods sold), incurs direct and indirect expenses of 10%, and thus realizes a net profit of 5%.[36] National Tea operated 11 stores in Memphis in 1959, with total sales of $8 million (as compared with $12 million for Montesi's single store). Respondent's stores took approximately the same markup as Montesi's—an average of some 14.34% as compared with his 15%. But whereas Montesi's low costs enabled him to earn a 5% profit, National's higher costs left it, as noted above, with a *net loss* of more than 5%, or a 5¢ loss for each dollar of goods sold.

As noted above, an analysis was made here of National's market share in 399 of the 514 cities in which it operated retail stores in 1958. An analysis was also made of the gross margins taken by

[34] CX 463; Findings, p. 351.

[35] National bought Montesi out in 1955, paying each of the 5 members of the Montesi family $10,000 per year for their agreement not to compete in Memphis or within 250 miles of Memphis for a period of 5 years. Findings, p. 321. At the end of that period, Montesi re-entered Memphis, building the store referred to here.

[36] RX 6; Findings, p. 360.

its stores in those different cities and of the "contributions" [37] received from each. The results are tabulated below: [38]

| *Market Share (percent)* | *Number of Cities* | *Average "Gross Profit" Ratio* | *Average "Contribution" Ratio* |
|---|---|---|---|
| 35.0% and over | 29 | 17.3% | 6.5% |
| 25.0% to 34.9% | 44 | 17.5% | 5.5% |
| 20.0% to 24.9% | 47 | 17.5% | 5.7% |
| 15.0% to 19.9% | 55 | 17.0% | 4.0% |
| 10.0% to 14.9% | 83 | 17.0% | 3.7% |
| 5.0% to 9.9% | 93 | 16.4% | 1.6% |
| 4.9% and under | 48 | 14.9% | (-2.3%) |

"These comparisons reveal," as the Commission's Chief Economist testified, "a very striking relationship between National Tea's market share in cities and the magnitude of its average gross profit and its average contribution" to overhead and profits. "For example, in the 48 cities in which National Tea enjoys a market share of less than five per cent, the average contribution to overhead of stores from those cities is a negative 2.3 per cent . . . . At the other extreme, in cities in which National Tea enjoys a market share of 35 percent and above, and there are 29 such cities, National Tea has an average contribution to overhead of *six and a half per cent,* or approximately *eight cents higher than in the first group of cities* I mentioned." [39]

This striking correlation between market position and profitability is independent of respondent's *dollar* sales volumes in the respective cities—that is, a 35% market share yields a sharply higher rate of profit than a 5% share, notwithstanding the fact that the 35% market share might represent sales of, say, only $5 million in a small town and the 5% market share a sales volume of, say, as much as $25 million in a much larger town. [40] In short, the correlation shown here is between profitability and market power, not profitability and economies of scale.

Another significant feature of respondent's operation is shown in this table. Since its "overhead" expenses are not less than 2%

[37] As noted above, gross margin (or "gross profit") is defined by respondent as total sales less cost of goods sold. Deducting all direct *store* expenses (rent, payroll, and the like) from that gross margin gives the "contribution" of each store to (a) "overhead" (expenses of the branch warehouse and home office, including advertising), and (b) net profits. In 1958, "overhead" ranged from 2% in the acquired Del Farm (Chicago) branch to 4.7% in the acquired Memphis (Montesi) branch. Findings, p. 352.

[38] CX 463; Findings, p. 355.

[39] Tr. 1756 (emphasis added); Findings, pp. 355-356.

[40] CX 464-A, B.

of sales in any of its branches,[41] National is *operating at a net loss in at least the 141 of these cities where it holds less than 10% of the local food market,* subsidizing its expansion in those cities out of the higher profits it earns in the other cities where it has a larger market share. The National Tea Company is not, however, an eleemosynary institution; it seems reasonable to suppose that it expects to recover, in time, its losses in those 141 cities. And on the basis of the record before us, we can only conclude that this will be done not by efficiencies and economies in food retailing, but by a steady enlargement of its market shares in those cities until it acquires the same kind of pricing power it now enjoys in those other cities where it is already the dominant seller. And we need not speculate on either its capacity or willingness to pay the price this kind of growth requires: its year-after-year losses in Memphis, reaching a high point of $1.17 million in 1959, is a persuasive demonstration of both power and will.

Respondent's growth technique does *not* include, however, such crudities as predatory undercutting of its competitors' prices. On the contrary, it has, as noted, a distinct aversion to even normal price competition; its preferred competitive weapons are acquisition, the receipt of special price concessions and promotional allowances from suppliers, and massive store-building and advertising campaigns. National's announced "policy" had been to enter new markets by acquiring, where possible, the larger and more vigorous "regional" chains—the ones that would have been most likely to prove formidable competitors if not removed at the outset. New stores are then built around this acquired nucleus, both within the city where the acquired firm was located and in surrounding cities close enough to be served by the acquired warehousing facilities. If the market is still competitive, respondent begins an intensive advertising campaign in lieu of cutting prices. For example, respondent's net advertising expenditures per dollar of sales were approximately 5 times as large in Memphis as in Denver in 1959.[42] Even in absolute terms, the Memphis expenditures were more than double those in Denver ($237,639 as compared with $105,581), although sales in the Memphis branch were less than one-half those in the Denver branch.

National Tea does not have to carry the whole burden of these expansion costs, however. Much of it can be and is shifted to its suppliers. For example, its Denver branch received total price

[41] See Findings, pp. 352, 353.

[42] CX 528-D; Findings, pp. 348-349.

concessions and promotional allowances of $27,308 from Beatrice Foods in the single month of December 1961, or 12.5% of its total purchases from Beatrice in that month.[43] That supplier's next largest customer, King Soopers, received only 4.6% in such discounts and allowances. On an annual basis, those concessions from that single supplier would total more than $300,000. In Chicago, National's newly acquired Del Farm branch received 1959 advertising allowances from suppliers that not only covered its entire advertising expenditure, but an excess or net gain of $42,876.[44] Respondent's buying power is probably even more effective against its smaller suppliers. One of its officials testified, for example, that only the "extremely small packers" give discounts or advertising allowances on meat products. Respondent does not like "dealing with the big packers" and their "department heads," preferring, instead, "to build connections with our smaller independent packers, because we always felt we got a better deal of handling their products." [45] "In Memphis alone," this witness said, "we do business with 32 packers." [46]

V

A number of these acquired firms held very substantial shares of one or more local markets. But, more importantly, each was a part of a "cumulative series" of acquisitions that make up a larger whole. As noted above, these firms—ranging in size from several one-store organizations with annual sales of less than $1 million each to a 27-store chain with sales of more than $40 million—operated an aggregate of 485 stores with total sales of some $250 million, a volume that would have made them the 14th largest in the nation if combined into a single "chain." And while the acquisition of a single enterprise with annual sales of $250 million may appear more significant than a series of acquisitions involving 25 firms with sales of $10 million each, the ultimate effect is the same. Indeed, it was the inability of the older Sherman Act to cope with "individually minute" lessenings of competition that led to the enactment of the merger law: "Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them . . . ."

[43] Findings, p. 347.
[44] Findings, p. 349.
[45] Tr. 531; Findings, p. 364, n. 234.
[46] Tr. 530; Findings, p. 364, n. 234.

*S. Rep.* No. 1775, 81st Cong., 2d Sess. 5; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, at 333–334 (1962). The significance of such power in the aggregate, of the relationship between each part and the whole, is here graphically illustrated by this respondent's below-cost operations in more than 100 cities throughout the country and the obvious fact that its power to maintain them stems not from the structure of or anything that has occurred in those particular markets, but from its capacity to exact noncompetitive prices from consumers in scores of *other* cities.

Similarly, this series of acquisitions by National Tea is itself a part of a larger whole—the moving force that triggered, as noted, a merger movement of enormous proportions in the giant food industry. "Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply." *Ibid.* Here we have already noted the economic testimony that, if the 1954–1958 trend toward concentration in the food industry continues, by about 1984 the 20 largest chains would be doing 84% of the country's retail grocery business.[47] This result would hardly be compatible with the "mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time . . . ." *Brown Shoe, supra*, at 346.

The remedy in such cases is always a difficult and delicate matter. We are, of necessity, required to engage in a certain amount of economic forecasting. The proper object of an order is of course to dissipate any restraints on competition that may have already resulted from the challenged acquisitions and to halt any future tendencies toward monopoly they may have set in motion. In many cases, only divestiture can reasonably be expected to restore competition and make the affected markets whole again. Here, however, we believe a lesser remedy will suffice. Certainly it is clear that "this is," as the Supreme Court said in *Brown Shoe*, "an appropriate place at which to call a halt." *Ibid.* But that can be accomplished in this case, we feel, by prohibiting further acquisitions, without requiring divestiture. While there is evidence in this record that existing competition has to some extent already been lessened in a number of these markets, we believe the

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[47] N. 20, *supra*.

various dynamic features of the industry itself—particularly the relative ease of entry into it—will in time, if no further acquisitions are permitted, effectively dissipate those not yet insuperable restraints. At least we think it appropriate, in the circumstances of this case, to give those natural forces of competition a chance to correct the imbalances in those markets before turning to the more stringent remedy of divestiture.

An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner Jones concurred and has filed a concurring opinion.

## DISSENTING OPINION

MARCH 4, 1966

BY ELMAN, *Commissioner:*

The Commission finds that all but two of the 26 acquisitions challenged here are unlawful.[1] These acquisitions involved some 188 city markets, more than 150 of which are markets where National Tea, prior to making its acquisitions, had not been a competitor. No two acquisitions occurred in the same market. In making its finding of illegality, the Commission makes no analysis of the structure of any of the markets involved;[2] it gives no reasons why any particular acquisition is unlawful;[3] nor does it make any distinction between large or small acquisitions. Some were miniscule: six separate acquisitions in Michigan whose combined market share in their counties of operation totalled 3.26%; a single store in Indianapolis having 2.98% of that market; Del Farm, having 1.6% of the Chicago market; two Gamble-Skogmo

[1] One acquisition held not unlawful involved a firm which National Tea has disposed of; the other was a bankrupt firm.

[2] The Commission need not have analyzed all 188 city markets; but it should at least have analyzed a representative sample for each acquisition. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 340–41. In two cases the Commission pretends to make a market analysis. These relate to the acquistions of Del Farm in Chicago and Miller's in Denver. Del Farm was a horizontal acquisition of 12 stores holding 1.6% of the Chicago market at the time; National Tea had 9%; National and 3 other chains held 38% of the market. These few market share statistics hardly constitute an adequate market analysis or a basis for a finding of illegality. In Denver, National Tea made a market extension acquisition of Miller's, then holding about 20% of that market. Subsequently 2 other chains entered the market and the 3 chains together then held 64.1% of the market. The recitation of these statistics is certainly not an adequate market analysis. Compare *Beatrice Foods Co.*, Docket No. 6653 (decided April 26, 1965) [67 F.T.C. 473]; *cf. Procter & Gamble Co.*, Docket No. 6901 (decided November 26, 1963) [63 F.T.C., 1465].

[3] The hearing examiner analyzed the individual acquisitions and found that none was illegal.

stores in Minneapolis holding .54% of that market; six Piggly-Wiggly stores having a 4.99% share of the market; Ashton's in Gulfport, Mississippi, involving a single store having a 3.24% market share; Logan's, a single store with little more than 3% of the Nashville market.

The Commission's blanket findings of illegality are thus unexplained in the terms required by Section 7—that the effect of a challenged acquisition "may be substantially to lessen competition, or to tend to create a monopoly" in a properly defined "economically significant market" (*Brown Shoe Co.* v. *United States*, *supra* at 332, 335). In this case the "economically significant" markets are the local markets in which the mergers occurred and to which retail food competition is limited. But if the holding on the merits is unexplained, it seems to be directly refuted by the Commission's reasoning supporting its choice of relief.

Where the effect of an acquisition may be to substantially lessen competition in the relevent economic market, the normal remedy required to protect the public interest in the maintenance of competition in that market is to simply undo the harmful effect of the acquisition by restoring the independence of the acquiring and acquired firms through divestiture.[4] Here, however, the majority finds that divestiture is unnecessary because "the various dynamic features of the industry itself—particularly the relative ease of entry into it" will "effectively dissipate" the restraints resulting from the acquisitions. (Opinion, p. 278.)

But the Commission cannot have it one way in determining the merits and another in determining the appropriate relief. If National Tea's past acquisitions were unlawful because their likely effect, individually or cumulatively, was to lessen competition in any market, the public interest requires that divestiture be ordered—and I do not know why the Commission should hesitate to issue such an order if it has any confidence in the correctness of its decision on the merits.

On the other hand, if this series of acquisitions by National Tea—which, according to the majority opinion (p. 277), was "the moving force that triggered * * * a merger movement of enormous proportions in the giant food industry"—has not impaired the "dynamic features" of the market and the "natural forces of competition"; if, after all these acquisitions, entry into the indus-

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[4] *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326–31; *Beatrice Foods Co.*, Docket No. 6653 (Opinion Accompanying Final Order, issued December 10, 1965) [68 F.T.C. 1003]; *Foremost Dairies, Inc.*, Docket No. 6495 (decided April 30, 1962), p. 53 [60 F.T.C. 944, 1092].

try remains easy; and if competition in the markets in which they occurred is so strong and so effective as to be able to overcome the bad effects of the acquisitions, what is the basis for the conclusion that their probable effect is to "substantially lessen competition"? The majority refers in general terms to "competitive restraints" resulting from these acquisitions which market forces will "effectively dissipate"; but exactly what "competitive restraints" does the Commission have in mind? The market-extension acquisitions did not reduce the number of the sellers in local markets. Did they eliminate any local competitors whose existence was necessary to the maintenance of competition in any market? If so, why does not the Commission require that such local competitors be restored? Did the elimination of National Tea as a potential competitor in any of these local markets have any real competitive significance? If so, why does not the majority required divestiture in order to restore National Tea as a potential competitor? Did these acquisitions by National Tea in these local markets raise substantial barriers to entry by others? Certainly not, for the majority asserts that entry remains easy. Did National Tea's entry dampen the competitive vigor of the firms it encountered in local markets? Certainly not, for the majority recognizes that competition is still "dynamic." Surely, if the acquisitions had any of these harmful probable effects, the Commission would not be reluctant to protect the public interest by issuing the normal and appropriate remedial order of divestiture. (See generally *Beatrice Foods Co.*, Docket No. 6653 (Opinion Accompanying Final Order, issued December 10, 1965).) [68 F.T.C. 1003]

When one turns to the terms of the order issued here, more questions arise. The Commission enters a 10-year injunction against any future acquisitions. On what basis does the Commission assume that *future* acquisitions will have an injurious effect upon competition in entirely distinct geographic markets, when the Commission finds that the challenged acquisitions did not have such effect in the 188 markets involved here? Why will the "dynamic features of the industry" and the "natural forces of competition," which render divestiture unnecessary here, not also operate in any new market that respondent enters in the future? How will a future merger in an entirely new market "snuff out" competition in this industry when it is found here that the challenged acquisitions did not do so in the 188 markets where they occurred?

The order provides, to be sure, for possible Commission approval of future mergers. But, in view of the Commission's disposition of this case, one must ask: What standards will be applied in passing on future proposed acquisitions? Since every one of the 26 acquisitions challenged here has been allowed to stand, on what basis will the Commission find that number 27 must fall? If number 27 is allowed, at what point will the Commission say "No more"? Will the Commission examine a particular proposed merger according to the standards of Section 7 to determine its probable effects upon competition in the market in which it occurs? If so, it would have to make the kind of examination of local market conditions which the Commission has not made here and which, according to the concurring opinion, need not and cannot be made. In view of the Commission's broadside finding of illegality as to the mergers involved here, without regard to either the size or significance of any particular acquisition, and irrespective of the structure and competitive conditions of the market in which the acquisition took place, every future proposed acquisition will be no less illegal. How, then, can the Commission approve *any* acquisition presented to it in the future by respondent or by any other large food chain?

The far-reaching scope of the Commission's decision here thus emerges clearly. The essence of the Commission's action today in this case is to announce—on the basis of the record in a single case where not a single one of the 26 challenged acquisitions has been ordered to be undone—a general rule that, from this day forward, all acquisitions of any kind by large retail food chains are illegal because they increase "national concentration," even though they may have no effect whatsoever on competition in the local markets where they occur. This is, in effect, a general rule of *per se* illegality—a rule which, it seems to me, cannot be justified by the record of this particular adjudicative proceeding. If a rule so drastic in scope is to be established, it should be by act of Congress and not by a decision of the Federal Trade Commission in this case.

By eliminating a large and important market for assets in this industry, an important stimulus for new entry and successful entrepreneurial effort may be seriously impaired.[5] Some acquisitions by national chains may stimulate competition in local markets dominated by regional independents or chains by replacing a

[5] See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1317 (1965).

weak or ineffective competitor with a stronger, more vigorous one; some of the acquisitions held unlawful here may have had that effect.[6] Mergers may often be a desirable route for expansion and growth.[7] Congress did not prohibit all mergers, but only those found, upon careful examination, to be likely to injure competition or produce monopoly. It imposed upon the Commission and the courts a duty to assess the legality of mergers by a realistic and pragmatic standard, and to make an informed judgment, not an intuitive hunch or guess, as to the merger's probable, not merely theoretically possible, effects upon competition.[8] In my view, the Commission has here ignored the Congressional mandate.

I

The Commission's decision, stripped to its essentials, is based on two hypotheses. The first is that the sharp reduction of the number of food retailers operating nationally is sufficient reason to prohibit future acquisitions regardless of the structure of the particular local markets in which the mergers occur, the ease of entry into the market, the vigor and success of local competitors, or other dynamic characteristics of the market.

Reliance on "national concentration" statistics and upon the reduction in the number of sellers operating nationally is wholly inappropriate here for a variety of reasons.

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[6] For example, at the time National Tea acquired the more-than-200 store operations of C. F. Smith in Michigan, that firm had suffered a drastic decline. After National Tea acquired it, most of the acquired stores were closed and National Tea replaced some of them with more modern facilities.

[7] Of particular relevance here is the recent statement to the National Food Marketing Commission made by Henry Bison, Jr., Esq., General Counsel to the National Association of Retail Grocers, an organization representing mainly the relatively small and middle-sized retail grocers in the United States. Mr. Bison warned against the dangerous effects upon competition in the retail food industry which might result from any flat prohibition upon mergers, saying:

"One of our concerns with respect to Section 7 is that it be applied in retail food distribution only after a careful analysis of the competitive effects in each case.

. . . . . . .

"The law should not discourage mergers and consolidations by firms which are aimed at strengthening their effectiveness as a competitor. It should never be applied to foreclose growth not only by internal means but also by acquisitions which build up effective competitors.

. . . . . . .

"The presence of numerous significant competitors requires that room for growth be kept open so that meaningful competition is preserved. Where there is a reasonable probability that an acquisition will have the condemned effects of substantially lessening competition or tending to create a monopoly, the law should certainly apply. A flexible guide is desirable in applying the law against mergers, for then the focus is placed on a realistic appraisal of their competitive effects, rather than merely relying on over simplified assumptions and broad generalizations. The former approach will assist in promoting decentralized and deconcentrated markets in food distribution, while the latter frustrates the purpose of the antitrust laws by stifling stronger competitive factors."

Statement before National Commission on Food Marketing, November 8, 1965, pp. 13–15.

[8] S. Rep. No. 1775, 81st Cong., 2d Sess. (1950), p. 6; Turner, *supra*, note 5, at 1316–18.

The economically relevant markets in food retailing are local, not national. The great bulk of the acquisitions made by National Tea occurred in local markets in which National Tea was not previously a competitor—and hence were so-called market-extension mergers. Although these mergers reduced the number of food retailers in the United States, they did not in themselves reduce the number of sellers or affect concentration in the economically relevant local markets. Even in the case of horizontal acquisitions where every merger automatically increases concentration and reduces the number of sellers in the economically relevant market, an acquisition of a substantial competitor is, at worst, only *presumptively* unlawful (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 364–65). Here, since the acquisitions (most of which could hardly be considered substantial) did not in themselves reduce the number of sellers in the relevant economic markets, and did not increase concentration, it is essential that other aspects of market structure—*e.g.,* barriers to entry, potential competition—be analyzed, and that the impact of the acquisitions upon them be assessed.[9]

It is a truism that a series of "small bites" affects market structure in the case of horizontal acquisitions (by reducing the number of sellers) or, though less simply, vertical acquisitions (presumably by obstructing the nonintegrated firm's access to the market). But the issue here is how, and whether, a series of "small bites" into the number of nationally operating food retailers can or will be translated into changes in the structure of the economically relevant local food retailing markets where no "bite" (but only a substitution) occurs.[10] The answer to that question will not be found in the simple notion that a large number of market-extension acquisitions has already taken place and may take place in the future. Nor will it be found in the language from court decisions, so studiously collected in the majority and concurring opinions, dealing with horizontal and vertical acquisitions.

Despite the fact that the Commission has in previous decisions made a careful elaboration of the unique problems involved in

[9] *Beatrice Foods Co.,* Docket No. 6653 (decided April 26, 1965) [67 F.T.C. 473]; *Foremost Dairies, Inc.,* Docket No. 6495 (decided April 30, 1962) [60 F.T.C. 944]; *cf. Procter & Gamble Co.,* Docket No. 6901 (decided November 26, 1963), pp. 52–53 [63 F.T.C. 1465, 1570, 1571].

[10] The majority does suggest that this case also involves vertical effects. But the extent of National Tea's integration is so limited, its sales to its own stores so insignificant, and its share of the "national" food market so small—1.6%—that these alleged vertical effects cannot seriously be considered a basis for a finding of illegality.

market-extension acquisitions and the distinctive analytical tools which they require (*Beatrice Foods Co., supra; Foremost Dairies, Inc., supra*), there seems to be a good deal of confusion on this point. I think a simple illustration is in order even at the risk of belaboring the obvious. Suppose that the United States were divided into 10 separate geographically relevant markets, that there were 100 sellers in each market, and hence, 1000 in the entire United States. Then suppose that 20 of these sellers embarked on a program of systematic geographical expansion through acquisition and that each of the 20 purchased 5 separate firms, no one of which being in a market in which the acquiring firm had previously operated. The total number of firms operating in the United States is reduced from 1000 to 900, and there is an increase in the share of national sales held by the 20 firms. To be sure, "national concentration" is thereby increased; but that would be cause for concern only if there is a national market whose competitive structure is thereby affected. If there is no national market, and if the only economically relevant markets are local, it is necessary to determine whether the increase in "national concentration" is causally related to a probable lessening of competition in the local markets.

The fact is that the mergers in our illustration, as in the case before us, did not reduce the number of sellers in any economically relevant market, nor did they increase concentration in those markets. Without more information, we have absolutely no indication that the acquisitions affected the economic structure of these local markets in any way. Nor do we have a basis for predicting that if this series of "small bites" should continue on the same pattern (through geographical expansion into new markets rather than horizontal elimination of direct competition in the same market), the structure of any local markets will be significantly affected or a substantial threat of oligopoly created.

This is not to say that a trend of increased market-extension mergers could not have an effect on the structure of the local markets. If the acquiring firms have adequate market power in a sufficient number of markets, they may be able to bring that power to bear in the new markets into which they expand, or they may be able to bring market power acquired in the new markets to bear in the markets in which they previously operated. The result might be to eliminate or discipline existing competitors in these markets, and to discourage potential new entrants. Whether this will occur, or is likely to occur, depends first of all

upon whether the acquiring firms do have adequate market power to achieve these results. A firm finding itself engaged in vigorous competition across a broad number of markets, and even in many cases in a struggle for survival, is unable to withdraw its resources from those markets for the purpose of disciplining competitors in other markets. Conversely, even a firm with market power in one area may find, because of conditions of entry, the existence of potential competitors, the nature of the industry itself, the vigor and great number of local competitors, and the insignificance of the market share it acquired, that it is unable to exploit to advantage in the newly entered area the market power it has elsewhere.

Conceivably, the character of the industry may be such that a geographically diverse scale may confer unique advantages. But, on the other hand, it may be that such advantages do not exist or that sellers who are less geographically diversified operate at a more efficient and effective scale of organization and have the advantage over the more geographically far-flung organizations. Furthermore, our simple illustration is static. The fact may be that the industry is dynamic. Technological or social changes may dictate a lessening in number and a correlative increase in the scale of enterprises with no necessary corresponding diminution in competition. To the contrary, such a change, insofar as it reflects innovation and efficiencies and more even distribution of power, may mean increased competition. Further, while some firms may leave through failure or acquisition, other new and more vigorous competitors may be continually entering.

These considerations by no means exhaust the economic inquiry which is essential if we are to answer, in dealing with the kind of acquisitions involved in this case, the question posed by Section 7 —will the probable effect of these acquisitions be to substantially lessen competition or create a monopoly? To a more detailed analysis of the relevant considerations involved in this case, I will turn presently. For the moment the illustration should serve to demonstrate that (a) the reduction in the number of food retailers nationally can in itself be no more than a danger signal inviting closer scrutiny, and (b) even further reduction in the number of sellers nationally through market-extension mergers, while conceivably the basis for a guess as to a possible trend toward oligopoly, does not in itself furnish the basis for a solid

judgment of the *probable* effects of the acquisitions in the local markets in which the retailers do business.

At all events, the statistics in this record regarding "national concentration" are, for the purpose of predicting trends to oligopoly, highly equivocal to say the least. Part of the decline in numbers of retailers is simply attributable to economic and social changes. The "Mom and Pop" grocery store, with its limited number of food lines, and its ability to service a limited area, and the single line food store such as the bakery, the butcher shop, or the vegetable market, have in large numbers become obsolete. The automobile and the growth of the suburbs have caused a revolution in food retailing. The supermarket which can service a wide geographical area and offer the consumer a choice of all his food needs in a single stop has become the predominant form of enterprise in food retailing.

In addition, while acquisitions have no doubt contributed considerably to the decline in numbers, and some of the statistics would indicate that a substantial part of the shift in national market share has gone to the 20 leading chains, the majority itself points to the dangers and impracticality of attempting to extrapolate trends from the available statistics.[11] Thus the Commission bases its dire predictions about likely concentration by 1984 on statistics for the years 1954 and 1958; but if one uses instead figures for the years 1958 and 1964, the indication is that the trend toward concentration of national food sales in the hands of the leading chains has slowed considerably. On these latter figures, the 180 chains owning 11 or more stores increased their share by 3% while the 20 largest chains increased their share by only 1.9%; the 10 largest by only .8%; and the 5 largest by only .3%. Indeed, these figures exclude the growth lag of A & P, by far the most dominant chain.[12] If A & P were included, it would be shown that the 20 largest chains lost market share. Accordingly, while supermarket chains are generally increasing their national share, it would appear that the greater part of the increase is falling to a large number of chains (presumably the local or regional chains) and that the dominance of the leading chains is being eroded. Indeed, even in the period between 1948 and 1958, in which the share of the 20 largest chains increased at its most rapid rate, the share of food chain store sales held by the six largest chains declined by 10%. Meanwhile, during that pe-

[11] Findings, p. 343, n. 154.

[12] In 1958, A & P had 9.7% of the national market, Safeway, its nearest competitor, only 4%; National Tea, only 1.6%.

riod 69 chains increased their sales by more than 200%.[13] These, and other figures in the record, might indicate that there is a growing equalization of power among a greater number of chains.

Furthermore, the statistics used by the majority do not meaningfully reflect the relative distribution of the shift from the single-unit "Mom and Pop" stores. A chain as defined by the majority, and in the statistics it relies upon, is a multi-unit firm having 11 or more stores. However, there is evidence in the record demonstrating the competitive importance and vitality of multi-unit retail food chains in the 2-10 unit category. This group has experienced a dramatic and dynamic growth rate.[14] At the same time, it appears likely that the greatest decline was suffered by the obsolete one-unit "Mom and Pop" stores. Nevertheless, the statistics upon which the majority relies lump the latter group together with the 2–10 unit firms. By thus averaging the trends in the one-store and 2–10 store categories, the majority masks the important growth and vigor in the 2–10 unit category.

In the majority's view, increases in "national concentration" reflect an increase in the chains' leverage vis-a-vis suppliers. According to the majority, this fact supports a finding of illegality under Section 7 for two reasons: it provides the national chains with increased power to obtain price advantages from their suppliers, and it poses a threat to competition at the supplier level. I disagree with these conclusions.

First, regardless whether there is theoretically a "national market" on the buying side, the fact shown by this record is that each National Tea branch purchases locally. Consequently, the discounts it receives do not appear to be substantially different from those received by the local firm which it replaced. Second, the record also shows that many retailers affiliate with voluntary or cooperative wholesale groups, and thus qualify for suppliers' volume discounts which substantially reduce or eliminate any advantages the national chains may have in this regard. Consequently, it has not been demonstrated that the acquisition by National Tea of any of the local firms involved here created any new threat to competition because of unfair or discriminatory price advantages. To hold that the substitution of a national chain for a local firm automatically poses such a threat to competition is simply to condemn geographic diversification or "bigness" itself. Nor does the majority opinion explain how, and at what point, a re-

[13] F.T.C. Staff Report, *Economic Inquiry Into Food Marketing*, Part I ("Food Inquiry"), pp. 13–14.

[14] RX 7, Table N; RX 9A.

duction in the number of national buyers becomes injurious to competition at the supplier level. Does the majority mean that every market-extension merger, which necessarily reduces the total number of buyers in the "national" market, is illegal because it "may" lessen competition among their suppliers? There is, in this record at least, no support for the conclusion that a mere increase in the size or growth of the food chains has impaired competition at the supplier level. The majority's "findings" as to such possible effects of these acquisitions on competition among suppliers are sheer speculation.[15]

## II

The majority's second hypothesis is even more questionable. The majority's antennae detect that the expansion of national chains will ultimately result in the triumph of inefficiency and "soft" competition, again regardless of any dynamic market forces at work in the industry. In this view, chains are in themselves anti-competitive and every enlargement of their domain through mergers in new markets is unlawful. To be sure, the fact that National Tea operates in many markets is not looked upon as a potential source of subsidized predatory behavior.[16] Rather, in the Commission's view, it is the condition which will enable National Tea and other chains simply to endure despite their relative inefficiency, and eventually, no matter how dynamic the industry is, and no matter how vigorous and superior local competition may be, to impose their purported philosophy of "soft" competition upon all sellers in the local markets.

This theory is, at least in the present state of our knowledge, simply too speculative to be accepted as a valid basis for the far-

[15] "[B]ased solely on the relative degree of market concentration in grocery buying and selling, economic theory suggests that in most industries the balance of bargaining power would rest with manufacturers, but that in the less concentrated industries the largest chains would be able to induce supplier to grant them discriminatory prices—in the absence of effective enforcement of the Robinson-Patman Act. But if such price discrimination were extended to more and more buyers, it would soon become so commonplace that it would force a readjustment in prices quoted to all buyers. Hence, in the less concentrated manufacturing industries large retailers might have little market advantage in their dealings with grocery manufacturers.

"Unfortunately, available empirical evidence is too scanty to permit generalization as to the precise nature, extent, and impact of price discrimination. But insofar as price discrimination in favor of particular retailers is persistent rather than temporary, it places other retailers at a competitive disadvantage, and therefore ultimately influences the effectiveness of industrial performance. This is therefore an area which warrants further study and continuing public concern."

Mueller & Garoian, *Changes in the Market Structure of Grocery Retailing* 144–45 (1961).

[16] As the Commission recognizes, there is no evidence that National Tea has ever used profits in any of its markets to subsidize predatory behavior. In view of the losses it has sustained in many markets, any subsidization has been solely for the purpose of enabling National Tea to survive.

reaching decision which the Commission is here making. It is indeed in conflict with the record. Under the Commission's theory, a national chain can and will subsidize, for prolonged periods, losing operations in particular markets through high advertising expenditures. Eventually the losing branch, without having to match local competitors' efficient operations, will expand its market share to the point where it begins to profit. The expansion of its market share in this way will be at the expense of the local competitors, who will perish despite their efficiency. The difficult and questionable assumptions underlying this theory are best illustrated by the single purported example of successful "subsidization" discussed by the majority. In its Davenport branch, National Tea sustained losses for a number of years. In 1959, it finally showed a profit. But, notably, in that year its absolute sales (and almost certainly its market share) declined from the preceding year in which it showed a substantial loss.[17] The only conclusion that can be drawn from this example is that National Tea, operating like any other rational business firm, finally succeeded in making this operation profitable by increasing its efficiency, not by expanding its market share at the expense of local competitors.

The Commission's second hypothesis seems to rest ultimately on statements made by National Tea's executives, purportedly reflecting its philosophy of "soft" competition and preference for the "quiet life." But surely no agency knows better than this Commission that a longing for "soft" competition is not limited to chains or other large companies. As Chairman Dixon recently observed, "Many people, both large and small, like to talk about competition, but don't like to be exposed to it." [18] The purpose of Section 7, however, is not to punish the expression of this widely held desire to succeed in business without really trying. Whether the expansion of National Tea or other chains into local markets creates a substantial danger of lessening competition in those markets does not turn upon National Tea's "live-and-let-live" philosophy or the fact that it is "big" or "conglomerate." The answer can only be found in a careful and detailed analysis of the nature and economic condition of the industry, the structure of

[17] Findings, p. 349; CX 356. Equally significant, National Tea's market share in Memphis, which the majority alleges is the prime example of "subsidization," had been cut in half since the date of acquisition and National Tea appeared to have been steadily losing ground to more efficient local competitors.

[18] Hearings before House Subcommittee No. 4 on Distribution Problems, House Select Committee on Small Business, 89th Cong., 1st. Sess., vol. 1, p. 10.

the relevant geographic markets, and the overall market power of the national chain and its capacity to bring it to bear in particular local markets.[19] A chain may yearn for and believe in soft competition, but unless both industry and local market conditions, and its own overall market position permit, its "belief" will remain nothing more than that. The fact is that the record contains no evidence that National Tea or other chains do lead a "quiet life." To the contrary, there is every indication that their competitors, local and regional as well as national, are making them run hard.

When one turns away from the Commission's two broad theoretical hypotheses and attempts instead the kind of inquiry into actual market conditions which until now, in cases of this sort, had been deemed essential,[20] it soon becomes apparent that the record before us, despite its 2,200 pages, contains no support for the Commission's determination that "this is the time to call a halt" to acquisitions by the large chains. It is not the number of pages in the record that should be determinative, but what is contained in those pages.

III

Conceivably, a flat prohibition on all mergers by the leading firms in an industry may in some circumstances be warranted; but surely a more adequate factual basis would be required than we now have in respect to the retail food industry. Conceivably, a wave of market-extension mergers by leading firms in the industry might so increase the barriers to new entry, so intimidate remaining competitors, so effectively eliminate or threaten to eliminate substantial and vigorous middle-sized competitors, and so completely dry up the sources of potential competition that any further mergers by the largest firms might be looked upon with the greatest suspicion no matter how small or weak the acquired firm might be. Indeed, in such circumstances, the series of market-extensions might be condemned as a group, either as an attempt to monpolize, or because its cumulative effect threatens to transform industry structure anticompetitively, irrespective of whether every individual acquisition, viewed separately, is unlawful. (*Beatrice Foods Co., supra,* p. 42 [67 F.T.C. 726–727].)

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[19] Compare Edwards, *Conglomerate Bigness as a Source of Power,* in National Bureau of Economic Research, Business Concentration and Price Policy 331 (1955), with Professor Stocking's critical review, *id.* at 352. This is not to say that I would interpret Professor Edwards' position as advocating the application of a *per se* prohibition upon conglomerate mergers. Quite the contrary. See p. 296, n. 32, *infra.*

[20] See, *e.g., Beatrice Foods Co., supra.*

Conditions of this kind did in fact prevail in the dairy industry and the Commission, proceeding evenhandedly against the leading firms, not only ordered considerable divestiture to restore competition but entered orders barring future acquisitions against each of these leading firms.[21] But in the dairy cases the Commission had solid evidence justifying a finding that specific acquisitions were illegal [22] and had accumulated the type of detailed information relating to industry-wide conditions which is essential to the assessment of the likely competitive impact of the market-extension mergers involved. It had been demonstrated beyond question that competition in the dairy industry had already been seriously impaired: There was extremely high concentration nationally and in local markets, including those in which the challenged acquisitions were made. As a result of the combined effects of widespread acquisitions by the leading firms and technological changes, there were few remaining local, middle-sized competitors capable of furnishing effective competition. Prospects for entry of such competitors grew increasingly dim as the leading firms entrenched themselves through substantial acquisitions (such as Beatrice's acquisition of the regional giant, Creameries of America) in one concentrated market after another and the acquisitions were removing what competition did remain. Already the picture of most local markets which had emerged following the wave of acquisitions was one of exceedingly high concentration of market power in the hands of the same few dominant national firms and the fragmentation of the remainder of the market in the hands of small, insignificant firms clearly incapable of challenging or checking the national firms' dominance.

On the basis of these facts, the Commission not only made a prediction as to the probable effect of the acquisitions challenged, but also was in a position to lay down some guidelines to businessmen contemplating future acquisitions in the industry.[23]

The picture here is strikingly different. As the Commission re-

[21] *Beatrice Foods Co.*, Docket No. 6653 (decided April 26, 1965) [67 F.T.C. 473] and Opinion Accompanying Final Order (issued December 10, 1965) [68 F.T.C. 1003]; *Foremost Dairies, Inc.*, Docket No. 6495 (Modified Order, issued March 5, 1965) [67 F.T.C. 282]; *Borden Co.*, Docket No. 6652 (Order Accepting Agreement Containing Order to Cease and Desist, issued April 15, 1964) [65 F.T.C. 296]; *National Dairy Products Corp.*, Docket No. 6651 (Order Waiving Notice and Accepting Agreement Containing Order to Cease and Desist, issued January 30, 1963) [62 F.T.C. 120].

[22] In *Beatrice* the Commission affirmed the hearing examiner's detailed findings respecting the structure of individual markets involved in the individual acquisitions and his analysis of their anticompetitive impact. Here, in contrast, the hearing examiner found no anticompetitive effects in any relevant market and dismissed the complaint. The findings and opinion of the Commission made no attempt to fill the gap.

[23] *Beatrice Foods Co.*, Docket No. 6653 (decided April 26, 1965) pp. 44–46 [67 F.T.C. 473, 728–730].

cognizes, this is an industry which is "dynamic" and intensely competitive. This industry is marked by an extraordinary degree of growth, innovation, and responsiveness to market conditions. New entry by local or regional competitors has not been discouraged. Nor does it appear that acquisitions by national chains are drying up, or threaten to dry up, the sources of local competition. In some areas the evidence indicates that local competitors are more efficient than national chains, can outcompete them, and may be more profitable and faster growing ventures. For example, it is clear that Memphis, one of the markets in which National Tea made an acquisition, is "a stronghold of independents," [24] and National Tea has apparently been thus far unable to meet their competition. In 141 of its city markets, National Tea had apparently been pressed to the wall by local competition and had been sustaining prolonged, and sometimes heavy, losses.

There is evidence that independent retailers affiliated with cooperative groups which own wholesale facilities, or with wholesaler-sponsored voluntary groups, can, and do, compete aggressively and effectively with national chains. New forms of retail food marketing, such as the "bantam supermarkets" and "convenience" stores giving services not made available by supermarket chains, are also apparently experiencing great success.[25] The industry, far from being dead competitively, is bursting with vitality and energy. In general, "current trends in grocery store size are diverse, indicating that food retailers are continuing to display considerable flexibility and a willingness to experiment with new ways to attract the customer." [26] Even in markets where concentration is relatively high, "it is likely that few, if any, consumers lack some choice among individual retail firms in filling their grocery needs." [27]

At the same time, there is little or no evidence that the substitution of National Tea for local or regional firms is likely to have a fear-inspiring psychological impact upon existing firms or potential entrants or that it will in any other way raise, or threaten to raise, barriers to entry. In my view, the record is simply inadequate in furnishing any basis for a finding that national chains enjoy significant advantages over local or regional competitors. Many of the advantages of large scale operation possessed by

[24] Tr. 1933.

[25] *Food Inquiry* 7, 57; *NARGUS* (National Association of Retail Grocers of the U.S.) *Bulletin*, January 1966, p. 26; *Convenience Stores Filling Their Role*, N.Y. Times, January 23, 1966, sec. 3, p. 1, col. 8.

[26] *Food Inquiry* 57.

[27] *Id.* at 249.

national chains appear to be conferred on local independents through affiliation with cooperatives and voluntary groups. Advertising in this industry is done on a local scale so that the substitution of a national chain for a local or regional chain would not appear to make a significant difference. Similarly, while the Commission points to large price discounts received by National Tea, the record appears to indicate that individual National Tea branches purchase locally and separately so that the discounts it receives may not be substantially different from those received by the local firm which it has replaced. Indeed, the majority places heavy emphasis upon the superior efficiency of local and regional competitors. From this one would draw the conclusion that the advantage lies with them, not with the national chains.

Nor does National Tea appear to have the kind of market power which could be used as a club or threat to discipline local firms and discourage new entrants. Generally, in the larger cities, National Tea's market share appears to be relatively small; the areas in which it does have substantial market shares are ordinarily smaller communities and it is questionable whether they are likely to provide sufficient support to a policy of disciplinary or destructive below-cost pricing in other markets.[28] Moreover, a firm which is losing money in 141 markets across the nation hardly appears to be the kind of colossus whose entry will frighten or dampen the competitive vigor of local or regional firms. There is at least some evidence that it has not done so.

Finally, the record furnishes no guidance on the critical question of whether the elimination of National Tea as a potential competitor had any competitive significance. Every firm, existent or possible, is in a sense a "potential" competitor and its entry into the market eliminates "potential" competition. But that does not mean that every entry into a market by acquisition is likely to result in a "substantial" lessening of competition within the meaning of Section 7 merely because it eliminates potential com-

[28] For example, Appendix 8 to Complaint Counsel's Brief shows that in the largest cities National Tea rarely has as much as 10% of the market. In the two biggest city groupings, National Tea has less than 10% of the market in 64 out of 102 cities and a 15% or more share in only 19 of the 102 cities. Moreover, CX 461, relied upon by the Commission (Findings, p. 354), shows an apparent lack of substantial market power which could be brought to bear to intimidate or discipline in selected markets. Comparing National's so-called contribution ratio (sales less cost of goods and direct store expenses) with its average overhead of 3.4%, out of 399 cities, National either had a net loss or just about broke even in a total of 193 cities. Especially since, as Appendix 8 also shows, these 193 cities are mainly the largest cities in which respondent operates, there is surely no basis for concluding that National Tea had, or through its acquisitions acquired, the kind of entrenched power or monopoly profits which would enable it to repel or discipline competitors.

petition. If a market is already competitively structured, market behavior will be regulated by actual, not potential, competition. But we have almost no information about the structure of the local markets entered by National Tea, and hence no way of assessing whether a particular acquisition eliminated any significant potential competition. Equally important, the apparent ease of entry into the market, the actual evidence of considerable new entry, and the lack of any dearth of potential entrants in this industry cast doubt on whether National Tea's entry into any of the markets eliminated significant potential competition.[29]

Furthermore, it would appear that in some instances the contribution to actual competition following National Tea's entry into a new market through acquisition significantly outweighed any elimination of potential competition between National Tea and the acquired company. A number of these acquisitions—*e.g.*, C. F. Smith, DeVan-Horner, Ashton's—involved weak or declining companies with relatively insignificant shares of the market. National Tea, after acquiring them, either closed down a good part of their outmoded facilities and replaced them with new facilities or built additional facilities not only in the acquired firm's market but in adjacent localities in which the acquired firm had not theretofore been a competitor. Consequently, not only was a competitively weak entity replaced by a more viable one, but new competitive facilities were added to the acquired firm's market and neighboring markets through National Tea's internal expansion, a result which Section 7 was designed to encourage. The majority's reasoning that National Tea's pattern of internal growth following an insignificant acquisition is a basis for finding that the probable effect of the *acquisition* was to impair competition is a non sequitur.

## IV

Although, because of the inadequacies of the record, I disagree with the Commission's decision of this case, I am not insensitive to the serious questions it raises. Here we have not one but 26 acquisitions; and we have not one but 188 separate geographic markets. National Tea's acquisitions are a part of a larger pattern of industry activity, in which the 20 leading chains made 147 acqui-

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[29] *Beatrice Foods Co.*, Docket No. 6653 (decided April 26, 1965, pp. 32–36 [67 F.T.C. 473, 719–722]; *cf. United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174–77. See generally Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1362–86 (1965).

sitions in a ten-year period. Such a wave of merger activity is surely cause for serious concern, especially where, as here, there has been a drastic reduction in the number of retailers. The enormous difficulties involved in any attempt to assess the overall impact upon competition of each of these acquisitions is obvious.

But the complexity and difficulty of our task does not authorize us to throw up our hands, and, as the Commission does today, simply declare all mergers by national chains illegal *per se* without an adequate inquiry into the relevant economic conditions of this industry. I have emphasized elsewhere the need for simplifying the process for assessing the legality of mergers.[30] The case for simplification need hardly be elaborated upon: Businessmen require greater certainty, and a limitation of the scope of inquiry is essential to rational decision-making and effective administration of the merger law.[31] But the formulation of simple rules and the simplification of inquiry must be consistent with the statute and in accord with the facts.

Simple rules or guidelines based essentially on market share data can, consistently with the Congressional directive in Section 7, most easily and properly be formulated in the case of horizontal mergers. The acquisition of a direct competitor immediately reduces the number of sellers in the market, while at the same time increasing the market share of the acquiring firm. The assumption that "competition is likely to be greatest when there are many sellers, none of which has any significant market share" is generally consistent with the Congressional policy underlying Section 7 and with economic theory. (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363.)

But market extension mergers such as those involved here do not in and of themselves change the number of sellers in a market; nor does the merger itself automatically increase the market share held by any single competitor in the market. The answer to whether such acquisitions will ultimately result in a lessening of competition will not be found in the mass of market share statistics or concentration ratios so formidably arrayed in the Commission's findings and opinion. A more extensive economic inquiry is

[30] See *Rulemaking Procedures in the FTC's Enforcement of the Merger Law,* 78 Harv. L. Rev. 385 (1964); *The Need for Certainty and Predictability in the Application of the Merger Law,* 40 N.Y.U.L. Rev. 613 (1965).

[31] *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362–63; see generally Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226 (1960); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313, 1318–20 (1965); Edwards, *Tests of Probable Effect Under the Clayton Act,* 9 Antitrust Bull. 369 (1964).

required.[32] Will the substitution of the acquiring firm in the market raise the barriers to new entry? Will its presence frighten or dampen the competitive vigor of existing firms? Does potential competition play an important role as a market regulator and did the entry of the acquiring firm by acquisition constitute the elimination of any meaningful or significant potential competition? Is the industry one in which the national chain has significant advantages over local or regional competitors? Are there any industry conditions which would indicate that a continuation of widescale merger activity will eliminate middle-sized local competitors as an effective source of competition? [33]

But the need to make this economic inquiry does not mean that the only alternative remaining to the Commission is that of trying to deal with so large a problem on a case-by-case adjudicative basis. On the contrary, this case is an illustration of the inadequacy of that approach.

First, it would hardly be in the public interest if the Commission left the determination of the broad economic questions in an area so vital as food marketing to the vagaries of an adversary, adjudicative proceeding. In such a proceeding, the focus must be upon the legality of particular mergers and, inevitably, the strategies of both sides are essentially to "win" the case. Moreover, a test of the thesis advanced by the Commission's staff would turn

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[32] Professor Corwin Edwards, who has been particularly concerned with the effects of conglomerate mergers, nevertheless recognizes the indispensability of such analysis where conglomerate mergers are involved:

"In the merger field, some rules of thumb for the simpler and more numerous cases need to be developed, by interpretation if possible, by amendment of the law if necessary. They could be formulated most readily for horizontal mergers between competitors, where, the underlying issues being clear, gain in speed would involve only loss of precision in establishing the boundary of prohibition. Greater difficulty would be involved in formulating them for vertical mergers, where preclusion of access by competitors is hard to disentangle from sensible self-supply and sensible dove-tailing of processes; but even here, rules of thumb may be possible for the less complex cases. Since conglomerate mergers involve concepts of economic power and competitive effect that are still largely unformulated, cases concerned with such mergers need full investigation and analysis, whatever the cost in delay or immediate ineffectiveness."

Edwards, *Tests of Probable Effect Under the Clayton Act*, 9 Antitrust Bull. 369, 377 (1964).

[33] See generally, *Beatrice Foods Co., supra; Procter & Gamble Co., supra.* The contrast between a horizontal and a market-extension case may be neatly illustrated by a merger case involving the retail food industry, now pending before the Supreme Court. *United States* v. *Von's Grocery Co.*, 233 F. Supp. 976 (S.D. Cal. 1964), probable jurisdiction noted 382 U.S. 806. That case involved a *horizontal* acquisition occurring in the Los Angeles market. The district court dismissed the complaint, basing its decision on some of the dynamic factors in this industry discussed in this opinion. But since that case involved a horizontal acquisition the issue before the Court would appear to be whether, under the principles of *Philadelphia National Bank*, evidence of ease of entry and competitive vigor is sufficient to overcome a presumption of illegality against horizontal mergers which in themselves eliminate direct competitors and significantly increase concentration in local market.

solely on the skill and resources of a single adversary whose interest is necessarily a limited one. In these circumstances, it is inevitable, as has happened here, that the record fails to supply an adequate and complete picture of the industry-wide competitive conditions which is so vital to any prediction of the consequences of wide merger activity, and to the formulation of more general guidelines.

Second, proceeding on a case-by-case basis places the Commission in a very difficult position. The Commission has here made a variety of findings which should apply not only to respondent but to other leading national chains. However, these other chains were not parties to this litigation. It would certainly be embarrassing to the majority if these other firms were able to refute the broad assumptions made here on the basis of this incomplete and inadequate record. The Commission would be caught between the competing claims of evenhanded treatment of all competitors and fair and impartial adjudication of cases before it.

Finally, proceeding on a case-by-case basis would entail an enormous waste of public resources in which the costs to the public would likely outweigh the success, certain to be minimal, in stemming any anticompetitive consequences of this merger movement. Any doubt on this score is dispelled by the sobering reflection that this proceeding was instituted in 1959, and its journey through the courts has not yet begun.[34]

I have suggested elsewhere that a rulemaking proceeding (using the word "rule" in a broad, flexible sense, with no *"per se"* connotations) is especially well adapted to handle the kind of problems involved here.[35] In this industry it is an essential first step. The most important and difficult questions here involve an assessment of general economic facts common to the entire industry. How viable and vigorous are local independents? Does the vigor of local independents vary from market to market? Are they capable of furnishing effective competition to national chains on a long-term basis? What contribution to competition is being made by the voluntary and cooperative wholesale movements? What impact do "convenience" stores and "bantam supermarkets" have upon competition? Do national chains possess the

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[34] *Cf. Pillsbury Co.* v. *F.T.C.*, 354 F. 2d 952 (5th Cir. 1966), remanding to the Commission a merger proceeding instituted in 1952.

[35] *Permanente Cement Co.*, Docket No. 7939 (decided April 24, 1964) [65 F.T.C. 410]; *The need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U.L. Rev. 613 (1965); *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 Harv. L. Rev. 385 (1964).

kinds of advantages which will ultimately assure their success at the expense of local or regional chains? What are the conditions of entry into the market and who are the new entrants? What explains the apparently vigorous competition in food retailing existing at the present time? Does the entry of national chains through acquisition promise to invigorate and stimulate, rather than impair, competition in local markets previously dominated by local indpendents?

A rulemaking proceeding would enable the Commission to obtain a variety of views from members of the industry, economists, and interested members of the public. Such a proceeding might be coordinated with the investigation currently being made by the National Food Marketing Commission. On the basis of such a broad inquiry, the Commission should have an adequate factual context in which to lay down guidelines both for the use of the business community and for assistance in any future adjudications. The factual findings, if appropriate, could serve as rebuttable presumptions of fact in subsequent adjudicative proceedings. While particular respondents would have an opportunity to challenge the factual presumptions based upon the findings made in the rulemaking proceeding, the broad inquiry upon which the findings were based would make variations from case to case most unlikely.

Thereafter, litigation arising out of specific mergers would be simpler, more efficient, and, most importantly, more just. With the industry-wide general economic facts more accurate and complete, and the parties having been largely relieved of the burden of conducting a *de novo* inquiry into them, the focus of case-by-case adjudication could be shifted to the function for which it is most suited: an assessment of the specific effects in relevant economic markets of the particular mergers. Surely, that is more appropriate than allowing a repetition of what the Commission does here today, *i.e.*, using the forms of adjudication to establish a general rule, prospective in application, on a basis which is adequate to support neither legislative nor adjudicative action. What the Commission has said in relation to the merger problem in the cement industry is also applicable here:

> Where a problem involves an entire industry made up of a large number of firms, it may be uneconomical, inefficient, and inequitable to proceed exclusively on the basis of individual adjudicative proceedings. Industry-wide problems require, so far as is practicable, industry-wide solutions. We think a rule-making proceeding is particularly appropriate in dealing with such Sec-

tion 7 problems as are here presented in the cement industry. Such a proceeding affords a better forum than do adjudicative proceedings against individual companies for organizing and appraising the general economic facts involving industry and market structure that are so important under Section 7. (*Permanente Cement Co.*, Docket No. 7939 (decided April 24, 1964), pp. 8–9 [65 F.T.C. 410, 494].)

The Commission's decision to enter an order against National Tea in this case, and on so flimsy and fragmentary a record to establish a general and drastic prohibition on future mergers in the retail food industry, is most unfortunate. In so doing, the Commission has not only taken an action which is legally and economically unsound, it has missed an excellent opportunity to exercise creatively the broad and flexible fact-finding powers which would enable it to make the contribution to effective enforcement of Section 7 which an administrative agency is so uniquely equipped to make.

As to this particular case, there is insufficient evidence to establish that the challenged acquisitions, viewed either separately or cumulatively, violate the statute. I would dismiss the complaint for insufficiency of proof.

## CONCURRING OPINION

MARCH 4, 1966

BY JONES, *Commissioner:*

The dissent in this case points out the complex fact situations which are present in every merger case and which must be carefully weighed in order to determine whether the mergers in question may have the tendency substantially to lessen competition. Four Commissioners have weighed the facts in this case and have concluded that the acquisitions challenged here have the prohibited statutory tendency. The extensive findings of the majority are indicative of the fact that, contrary to the dissent's assertion, no *per se* approach to illegality was taken in this case.

There is no doubt, as the majority pointed out, and as the dissent reiterates, that oligopoly does not yet characterize the retail food industry. But the majority is concerned with the anticompetitive factors in the record which demonstrate that respondent's acquisitions may substantially lessen competition, while the dissent emphasizes the competitive factors which still operate in this market and indulges in some wishful thinking that unchecked they will remain operative and dominant over the anticompetitive

signs which abound in this industry. The dissent agrees that the record here raises "serious questions" and that the type of merger activity in which respondent has engaged is "cause for serious concern" where, as here, it resulted in such "a drastic reduction in the number of retailers." But under the dissent's recommended disposition of this case, respondent would be free to continue in the future to make the same type of market-extension acquisitions as it has in the past without running afoul of Section 7. By the same token, the dissent would seemingly also condone similar acquisition policies on the part of all the other industry members, big or small. Or, at least the dissent would prefer not to adjudicate this question now, but to supplement this "flimsy and fragmentary a record" of 2,200 pages embracing the testimony of 21 witnesses, 2 economic marketing experts and almost 700 documents by holding an industrywide conference to obtain "a variety of views from members of the industry, economists, and interested members of the public." Calling the majority's decision "a throwing up" of hands by the Commission, the dissent would prefer that we sit on them instead and dismiss this case. Thereafter we should hold a general hearing on the basis of which "guidelines" might be issued which hopefully will be followed by the industry in framing their future acquisition programs, and if not, will form the basis of rebuttable presumptions of fact in subsequent adjudications. The dissent would like to search for more "general economic" industrywide facts on the viability of independents and the like, and yet it is precisely the generality of the instant record which the dissent finds the stumbling block to making a determination in this case. Just how the proposed industrywide conference would supply the details respecting each market which the dissent claims is lacking here and is essential in deciding cases of this nature is also not clear.

Information about the concentration trends and competitive activities in this industry abounds. The problem in this industry is not the unavailability of data. The problem is the proper interpretation of such data. I seriously doubt that additional information will change the facts contained in this record or will ever provide the type of certainty which the dissent apparently needs in order to make a judgment as to the competitive impact of the current concentration trends. I believe the issue must be faced now and adjudicated on the merits. I do not believe that decision can be evaded on the pretext of an inadequate record. I very much doubt that in this type of industry consisting of highly localized

markets the evils of concentration will ever show up in individual markets until the entire market structure has been irrevocably altered, and for this reason I do not agree with the dissent that an industrywide hearing and guidelines at this stage are necessary to enable us to face up to the industry's problems as is reflected in the instant record. We must know now whether Section 7 is or is not adequate to cope with concentration when it appears in this type of industry. How guidelines based on the general economic facts which the dissent would search for in the industrywide hearing could help the dissent to reach a judgment and just what effect they would have on the respondent and other industry members in view of the adjudication which the dissent urges we make here is not clear to me. As I understand the dissent's recommendation of guidelines, they would be analogous to a ban on certain types of future acquisitions albeit without the sanction of an order. To make them effective as the dissent recognizes, adjudication would be necessary in all cases where they were not voluntarily followed. Thus, under the dissent's approach, assuming the general hearing will simply provide further documentation of the facts already found in this record, we might be in the position of having to sue respondent again in the future to procure the exact same injunction which the majority believes must be ordered now.

Four Commissioners disagreed that in enacting the Clayton Act Congress intended that its adjudicatory provisions were to be replaced by general fact-finding inquiries. Fact-finding inquiries have a vital purpose, but one of them is not to sidestep making a firm decision in a case in which formal complaint has been filed, lengthy hearings held, a detailed initial decision rendered and oral argument held before the full Commission not once, but twice. Adjudication is a difficult task and is subject to all of the vagaries of fact determination outlined by the dissent, but it cannot be avoided on that account as the dissent would apparently prefer to do.

I do not agree with the dissent that the record in the instant case is too inadequate to constitute a basis for a finding of liability here. The Clayton Act was never intended to prohibit only those mergers taking place after oligopolistic conditions had already been created in a given market. Indeed, in my understanding of the legislative history of the Act and of the case law which has developed under it, the facts presented here by the instant case constitute precisely the type of predictable lessening of com-

petition which the Act was intended to cover and fully justify the imposition of an injunction against respondent from making future acquisitions which is the sole relief ordered here.

I

The legislative history of the amendment to Section 7 of the Clayton Act makes clear that one of the major objectives of Congress in enacting the amendment was to arrest the rising tide of economic concentration by coping with monopolistic tendencies in their incipiency and to prevent the elimination from any given market of substantial independent units. (Senate Report No. 1775, 81st Cong., 2d Sess., pp. 3–5 (1950); H.R. Report No. 1191, 81st Cong., 1st Sess., p. 8.)

Judge Weinfeld summarized the legislative history of Section 7 in one of the earliest opinions handed down under amended Section 7 as follows:

> A fair reading of both the Senate and House Committee Reports leaves no doubt as to its major objectives. As stated in those Reports they were, in some instances, haec verba, (1) to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger. *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576, 583 (D.C.—S.D.N.Y., 1958).

As the meaning of Section 7's stricture against mergers having the tendency substantially to lessen competition has been developed by the courts, an increasing emphasis has been placed by these tribunals on increasing concentration as a significant factor in determining whether there has been a substantial lessening of competition in an industry. Similarly, the courts—as well as Congress—have shown an increasing concern as to the importance of arresting such concentration trends before the maintenance of competition in an industry becomes an economic impossibility. Thus, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315 (1962), the Supreme Court stressed the fact that in its view "the dominant theme pervading congressional consideration . . . was a fear of what was considered to be a rising tide of economic concentration in the American economy." Again, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the Supreme Court stressed the importance of concentration in determining whether Section 7 has been violated:

A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in veiw of the strong trend toward mergers evidence in the area.

Furthermore:

This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

In this same case the Supreme Court noted that it is a basic economic premise that competition is likely to be greatest when there are many sellers, none of which has any significant market share.

In a later decision the Supreme Court reiterated its concern over concentration by repeating language which it had used in *Philadelphia National Bank,* to the effect that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Aluminum Company of America,* 377 U.S. 271 (1963).

The Ninth Circuit, in striking down a merger in the paper industry, relied heavily on increased concentration, saying:

To borrow a phrase from *Universal Camera,* Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in concentration of power in the absorbing concern, is to be prohibited for the reason that such increased opportunity for domination will probably lessen competition or tend to create a monopoly. It is this tendency to concentration of power that condemns this merger. *Crown Zellerbach Corp.* v. *F.T.C.,* 296 F. 2d 800 (9th Cir. 1961).

In *Procter & Gamble Co.,* 63 F.T.C. 1465 (1963), the Commission pointed out, "Market concentration is a variable of market structure, not of market behavior." However, "undue concentration increases the probability that behavior in the market place will be noncompetitive" (at p. 1551).

It is also clear from the legislative history that Congress intended that Section 7 should be invoked to arrest a rising tide of economic concentration by checking these anticompetitive effects

in their incipiency. The Senate report was explicit in this regard: "The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding. . ." S. Rep. No. 1775, *supra,* pp. 4–5.

This preventative philosophy behind Section 7 was recognized by the Supreme Court when it stated in *Philadelphia National Bank, supra,* that:

> . . . [T]he ultimate question under § 7 [is] whether the effect of the merger "may be substantially to lessen competition" in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. *It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency."* (At p. 362, emphasis added).

This same philosophy was followed in *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), where the Court considered its holding that the merger of Continental Can with Hazel-Atlas Glass Co. violated Section 7 as "consonant with the purpose of Section 7 to arrest anticompetitive arrangements, in their incipiency." Thus, it is clear that the Commission's congressional mandate is not to wait until concentration has become undue, but rather to act when a movement towards oligopoly is discernible.

The record in this proceeding presents just such an incipiency situation with which amended Section 7 was designed to cope. The record conclusively establishes that the retail food industry, while still highly fragmented, is rapidly moving, through a series of acquisitions, towards the more concentrated market structure which Congress sought to prevent. While no one company accounts for as much as 10% of total sales and slightly more than half of the top 20 companies in the industry have market shares of less than 1% of nationwide sales, nevertheless the market share accounted for by the 20 largest firms has increased by 9% to a total of 30.1% during the period 1948 through 1958. During this same period the independent and small chain segment of the market lost a similar percentage.

As the dissent has observed, if one were to consider the years 1958 and 1964, rather than 1954 and 1958, the trend of concentration of national food sales in the hands of the leading chains is less dramatic. Nevertheless, whichever way you view these figures there can be no doubt that in the decade from 1948–58 the

larger chains have been growing relatively and absolutely and the smaller chains and independents are suffering ever-declining market shares. The slight drop in 1964 pointed to by respondents cannot dissipate the unmistakable trend in this industry towards ever-increasing concentration regardless of the precise future projection which can be forecast. Most of this market shift was achieved through mergers, and I am able to discern a definite trend of expansion through acquisition in this industry.

Respondent was in the forefront of this merger movement. Respondent's acquisitions accounted for 28.9% of all the food stores acquired during the years 1949–1958 by the top 20 chains and these stores accounted for 16.8% of the total sales of those stores acquired by such chains (Finding 19). Seven of these acquisitions were chains with 11 or more stores, thus placing them among the nation's 200 largest food retailers. Furthermore, many of the acquired companies accounted for significant shares of their respective markets and demonstrated substantial increases in their sales and net income in the years immediately preceding their acquisition (Findings 30 and 32, Appendix B). While in making these acquisitions respondent did not apparently gain a dominant position in any of the markets which it entered, and indeed in some of these markets respondent appears to have lost market share after the acquisition, partially as a consequence of its acquisitions respondent became the fifth largest national chain accounting for 1.6% of nationwide food sales in 1958.

While the record indicates that some barriers to entry exist in this market, they do not yet appear to be insurmountable. The record in this case contains no demonstration of any predatory conduct by respondent nor of any actual anticompetitive effects having developed in the markets in which respondent's acquisitions were made. Yet the record contains evidence that the large chains tend to live the "quiet life" and that the real competitive vigor is only displayed by the regional chains. It is primarily these viable regional locally owned chains that are disappearing through acquisition and which were the companies acquired by the respondent.

In determining whether Section 7 has in fact been violated, we are not required to find that competition has been or is being restrained or that monopoly exists. We must only find that "the effect of such acquisition may be substantially to lessen competition or tend to create monopoly." *A. G. Spalding & Bros.* v. *F.T.C.*, 301 F. 2d 585 (3d Cir. 1962). This quantum of proof was de-

scribed by Judge Weinfeld in *Bethlehem Steel Corp., supra,* as follows:

> The government is not required to establish with certitude that competition in fact will be substantially lessened. Its burden is met if it establishes a reasonable probability that the proposed merger will substantially lessen competition or tend to create a monopoly. A requirement of certainty and actuality of injury to competition is incompatible with an effort to supplement the Sherman Act by reaching incipient restraints (at p. 603).

It is apparent from this language that the determination of adverse competitive effects is, in most instances, based on probabilities rather than certainties. As the Supreme Court stated in this regard in *United States* v. *Philadelphia National Bank, supra:*

> Clearly, this [determination of effects] is not the kind of question which is susceptible to a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future.

It is possible, however, to predict from this record that the food-retailing industry is moving towards a more concentrated and less competitive structure. The fact that this is being accomplished by small bites rather than in large chunks does not immunize the industry from the protections of Section 7. In a similar situation, the Supreme Court condemned the horizontal aspects of a merger, even though the resulting company accounted for only 5% of certain markets, saying:

> In an industry as fragmented as shoe retailing the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition *Brown Shoe Co.* v. *United States, supra.*

The situation here is clearly analogous to that in *Brown Shoe, supra.* If one were to apply the usual market share tests in this industry, no merger, even between the giants, would constitute a violation on a national basis. However, there is an incipient trend towards concentration discernible in this industry and I believe that the Commission is acting within the intent and spirit of the Act in calling a halt to these acquisitions before the present market structure ceases to exist.

The desire to stem this increasing concentration in its incipiency is enhanced by the realization that the mergers challenged in this proceeding are but part of a definite trend towards expansion through acquisition present in the industry as a whole as well as in respondent's business philosophy. Consequently, the probable anticompetitive effects resulting from these acquisitions are increased when viewed as part of a trend. As part of a trend, the movement towards concentration resulting from these acquisitions is clearly accelerated. In *Brown Shoe, supra,* the Supreme Court commented on the effect of a succession of acquisitions, stating:

> A company's history of expansion through merger present a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's product and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce the available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions (footnote 72).

The Commission previously considered the history of acquisitions by a respondent in *Foremost Dairies, Inc.,* 60 F.T.C. 944 (1962), stating:

> It is our opinion that the cumulative effect of a prior series of acquisitions by a respondent is an important element in determining the legality of a particular acquisition under consideration (at p. 1082).

Consequently, when an industry is in the throes of a trend towards concentration, with respondent in the forefront of the movement, even minor increases in concentration must be struck down and the trend halted.

Furthermore, one of the principal considerations cited in support of the amendment to Section 7 was the desirability of retaining local control over industry and the protection of small business. The tribunals in considering acquisitions challenged under this Act have been aware of this express concern of Congress. The Supreme Court in *Brown Shoe Co., supra,* states:

> . . . not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress. Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon load control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve the structure (at p. 333).

This same opinion cites with approval the language of Judge Learned Hand in his opinion in *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 429 (2d Cir. 1946), to the effect that "throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake and in spite of possible cost an organization of industry in small units which can effectively compete with each other." In *Crown Zellerbach* v. *F.T.C.,* 296 F. 2d 800 (9th Cir. 1961), the Court pointed out that "Congress was not concerned about increased efficiency; it was concerned about the competitor,—the small businessman whose little independent units are gobbled up by bigger ones." More recently, the Supreme Court gave effect to this policy in striking down Alcoa's acquisition of Rome Cable Company, saying:

> Preservation of Rome rather than its absorption by one of the giants will keep it "as an important competitive factor," to use the words of S. Rep. No. 1775, p. 3. Rome seems to us the prototype of the small independent that Congress aimed to preserve by Section 7. *United States* v. *Aluminum Company of America,* 377 U.S. 271 (1964).

The companies which have been acquired by respondent and by others in the retail food industry are just the type of independent locally owned businesses which Congress was desirous of preserving. Furthermore, their replacement by the large chains which are more inclined to lead the "quiet life," results in a reduction in the probabilities that competition will be aggressively keen in these markets.

The record in this case contains substantial evidence respecting the anticompetitive impact of this increasing concentration trend in the retail food industry which in my judgment respondent has failed to rebut. On the basis of this record I am convinced that the acquisitions challenged herein, when viewed within the framework of this industry and its discernible trend toward concentration, pose just the incipiency situation with which amended Section 7 was intended to cope.

The prediction of a continuation or lessening of competitive vitality is at best an imperfect science. Economists agree only on the difficulties of making judgments on inevitably incomplete and imperfect data. My appraisal as to the effect on competition of the evidence respecting concentration and its alleged anticompetitive impact in the market must be made within the context of the facts of this industry, an industry which in many respects is unique: an industry which by its inherent nature has no substi-

tutes or alternatives available; an industry which is dominated by the large supermarket enjoying a type of "monopoly" by virtue of its image to the consumer as a low-price store, thus diminishing the effectiveness of the competition which in fact may exist from the smaller chain retailers in the market which do not convey this image; an industry in which the usual entry barriers represented by capital requirements and know-how do not exist to any large extent, but in which such barriers are imposed instead by the preferences of shopping-center promoters and financiers for the large reputable national chain for their supermarket tenants; and finally, an industry in which, for all of those reasons, such small food retailers as may continue to exist cannot be looked to as a source of either actual or potential effective competition to the emerging dominating national chains.

With the number and type of localized markets totaling hundreds of thousands which exist in the retail food industry, direct evidence of anticompetitive impact flowing from increases in concentration in this highly fragmented industry will in all probability not reveal itself until the entire market structure has been altered. By a judicious selection of acquisitions a national chain could bring about the virtual elimination of viable regional chains without any immediate impact being reflected in the individual markets in which the acquired chain was operating. If we must allow respondent, as well as others in this industry, to pave their road to dominance with the elimination of viable regional competitors merely because no single acquisition reaches proportions generally proscribed, then I believe that the Congressional mandate in this regard would be effectively thwarted. Therefore, I find that under the circumstances presented by this record Section 7 has been violated by respondent through its extensive acquisitions.

## II

I am in agreement with the majority that the evidence of record in this proceeding does not require respondent to divest itself of the acquisitions which have been found to violate the statute. I do not agree with the dissent that unless the degree of competitive impairment required to justify divestiture is found, no liability can be found. Rather, the test of remedy in any antitrust suit is to fashion a decree "which will effectively redress proved violation of the antitrust laws," and there is no need to go any further

in the way of relief. *United States* v. *Du Pont,* 366 U.S. 361 (1961).

The majority has found that respondent's acquisitions have violated the statute because they are advancing the trend towards concentration through mergers in the retail food industry and that this concentration trend in this industry carries with it a high and inevitable anticompetitive potential. It is essential that this trend be halted before competition is eliminated totally. The majority has concluded that divestiture is not necessary here in order to remedy the competitive impairment which has resulted from respondent's acquisitions. I believe with the majority that an injunction imposed on respondent from making further acquisitions will be sufficient to ensure that the competitive elements which still survive in this market will not be snuffed out by continued and unchecked acquisitions by respondent in the future.

## FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

MARCH 4, 1966

The Federal Trade Commission issued its complaint in this matter on March 26, 1959, charging that certain of respondent National Tea Co.'s acquisitions violated Section 7 of the Clayton Act, 15 U.S.C. 18, as amended and approved December 29, 1950, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Hearings were held before a hearing examiner of the Commission, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed April 8, 1963, the examiner found that said charges of law violations were not sustained by the evidence and ordered the dismissal of this proceeding.

The Commission, having considered the appeal filed by counsel supporting the complaint and the entire record, and having determined that the initial decision should be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom, and order, the same to be in lieu of those contained in said initial decision.

### FINDINGS AS TO THE FACTS

1. The respondent, National Tea Co. (hereinafter sometimes "National Tea" or "National"), is a corporation organized in 1902, under and by virtue of the laws of the State of Illinois, with

its principal office and place of business located at 1000 North Crosby Street, Chicago 10, Illinois. It is controlled by Loblaw Grocerterias Co., Limited, a Canadian corporation and subsidiary of George Weston, Ltd., of Canada. Loblaw Grocerterias of Canada purchased a substantial portion of National's common stock in 1955. As of June 1, 1957, it held 34.17%, the rest being divided among National's officers and directors (1.77%) and some 6,000 other stockholders (64.6%). In 1962, after the instant complaint was issued, Loblaw of Canada acquired more National stock, bringing the total to approximately 45%. Loblaw of Canada, at the time it acquired its controlling interest in National Tea, also controlled a New York corporation, Loblaw, Inc., which operated over 180 food stores in western New York, Pennsylvania, Ohio, and West Virginia, with annual sales of over $240 million in 1957. One hundred fifteen of those stores located in the Youngstown and Pittsburgh areas, with annual sales of $115 million, were transferred from Loblaw, Inc., of New York to National Tea in 1962. It was this transaction, paid for with National stock, that brought the Loblaw of Canada stock interest in National from approximately 35% to 45%.

2. National Tea operates a chain of retail, self-service, cash and carry food stores dealing in groceries, fresh fruits, vegetables, bakery and dairy products, frozen foods, meats, poultry, fish and other items. It also operates its own meat packing plants in Colorado, Minnesota, and Michigan; a feed lot for finishing cattle in Colorado; a general food plant in Chicago that processes its private brands of coffee, tea, pepper, salad dressing, peanut butter, olives, preserves, vinegar, syrup, jellies, soft drinks and detergents; and bakeries located in Detroit, Chicago, Milwaukee, Minneapolis, and Denver.[1] In 1959, respondent operated 910 retail stores located in 18 states, with sales of $829,518,276 and net income (after taxes) of $9,025,208 (1.09% of sales).[2] The stores purchased from respondent's own manufacturing plants products having a wholesale value of $47,498,153, or 6.9% of the total food products purchased by the stores. It also buys in substantial volume from manufacturers who are owned or controlled by its parent and stockholder interests.[3] In addition, respondent retails

[1] CX 324, p. 2.

[2] CX 10, p. 1

[3] In 1959 respondent purchased dairy products, principally milk, cream, and ice cream, totaling $16,319,000, from Hawthorn-Mellody Farms Dairy, of Chicago, which is controlled by Mr. Cuneo, one of National's principal stockholders. It also purchased bakery products totaling $1,455,000 from Weston Biscuit Company, owned by the Weston interests. CX 43-B, p. 12.

private label products produced by other food manufacturers and processors. In 1958, its purchases of such private label merchandise amounted to $62.608,857, or 9.8% of the $638,588,395 the company paid for the merchandise it sold in its retail stores.[4] Altogether, private brand merchandise accounts for up to 20% of National's total business.[5]

3. The relevant lines of commerce involved in this proceeding are the sale of groceries and related products, as a class, and individual grocery and related products (including fluid milk and cream, frozen desserts, and frozen fruits and vegetables) as a class, at the manufacturing, wholesaling, and retailing level.

4. The relevant geographic areas or sections of the country are, on the *retailing* side, (a) the nation as a whole; (b) the separate states or combinations of states in which National operated stores on January 1, 1959; (c) the separate counties or combinations of counties in which National operated stores on January 1, 1959; and (d) the separate cities and towns, or combinations thereof, in which respondent operated stores on January 1, 1959. On the *buying* side (*i.e.*, at the manufacturing and wholesaling level of competition), the parties stipulated that the relevant geographic markets are national, regional, or local, depending upon the product or products considered. The evidence as to effects was limited by agreement, however, to the national market, with the exception of two individual product lines (fluid milk or cream and frozen desserts) as to which evidence might also be offered as to effects at the buying level in 8 standard metropolitan areas.

5. It was stipulated that both National Tea and the acquired firms were engaged in commerce.[6]

6. National Tea, the 5th largest retail grocery chain in the United States, is approximately 9,000 times the size of the average single-store independent with which it competes. In 1958, it operated 932 retail stores located in nearly 300 counties in 18 states. Its sales of $789,205,000 that year were 1.6% of all food store sales in the United States, 4.6% of all food store sales in the 18 states in which it operated in that year, and 8.6% of all food store sales in the nearly 300 counties in which it operated.[7] (National's 932 stores were located in more than 500 cities and towns; in the 399 cities for which census data was available, re-

[4] CX 322.
[5] CX 39, p. 5.
[6] Tr. 547–561; Answering Brief of Respondent, p. 4, n. 1a.
[7] CX 455–Z–23; CX 455–Z–33; CX 455–Z–34.

| Chain | Sales | No. of stores | No. of states | No. of counties | Percent of U.S. food store sales | Percent of sales in— | |
|---|---|---|---|---|---|---|---|
| | | | | | | states | counties |
| A & P | $ 4,736,397,000 | 4,082 | 37 | 1,132 | 9.7 | 10.2 | 12.6 |
| Safeway | 1,973,351,000 | 1,929 | 25 | 581 | 4.0 | 7.0 | 11.1 |
| Kroger | 1,766,010,000 | 1,428 | 20 | 575 | 3.6 | 7.0 | 11.4 |
| Acme | 862,839,000 | 828 | 7 | 141 | 1.8 | 6.5 | 9.7 |
| National Tea | 789,205,000 | 932 | 18 | 283 | 1.6 | 4.6 | 8.6 |
| Food Fair | 604,358,000 | 359 | 9 | 81 | 1.2 | 3.9 | 6.4 |
| Winn-Dixie | 630,872,000 | 491 | 10 | 166 | 1.3 | 7.9 | 17.2 |
| Grand Union | 514,381,000 | 426 | 11 | 87 | 1.0 | 3.0 | 7.1 |
| First Nat'l. | 534,421,000 | 555 | 8 | 72 | 1.1 | 5.0 | 9.9 |
| Jewel | 367,772,000 | 253 | 3 | 23 | 0.8 | 7.1 | 14.1 |
| Colonial | 437,132,000 | 473 | 11 | 184 | 0.9 | 3.8 | 11.8 |
| ACF-Wrigley | 307,576,000 | 196 | 5 | 36 | 0.6 | 4.6 | 9.3 |
| Loblaw | 273,083,000 | 211 | 4 | 51 | 0.6 | 2.3 | 9.5 |
| Red Owl | 165,662,000 | 154 | 8 | 102 | 0.3 | 2.8 | 10.5 |
| Stop & Shop | 164,071,000 | 101 | 3 | 16 | 0.3 | 6.2 | 7.6 |
| Mayfair | 117,016,000 | 67 | 2 | 15 | 0.2 | 2.2 | 2.9 |
| Lucky | 141,513,000 | 103 | 2 | 20 | 0.3 | 2.4 | 3.4 |
| Von's | 94,485,000 | 27 | 1 | 2 | 0.2 | 1.9 | 4.3 |
| Thriftimart | 93,472,000 | 47 | 2 | 4 | 0.2 | 1.9 | 4.0 |
| Penn Fruit | 161,604,000 | 57 | 5 | 16 | 0.3 | 1.4 | 5.0 |
| TOTALS: | $14,735,220,000 | 12,719 | | | | | |
| Average: | | | 9.6 | 179.4 | | 4.6 | 8.8 |
| Weighted Av.: | | | | | | 5.7 | 10.0 |

spondent's market share averaged some 10.2% in 1958.[8]) The accompanying chart shows respondent's position in 1958 in relation to the other 19 of the country's 20 largest food retailers of 1960.[9] [Page 313.]

7. National Tea's rise from a small regional food chain in 1945 to its present position as the 5th largest in the nation has been accomplished primarily through a series of mergers occurring in the period 1951–1958, all of which are challenged in this proceeding. Respondent's sales for each of the years 1951 through 1958 are shown below, together with the sales volume—in the 12 months prior to the acquisitions challenged here—of the companies it acquired in those years: [10]

| Year | National's Sales | Sales Volume of Companies Acquired During Year |
|---|---|---|
| 1951 | $361,321,000 | $ 8,362,000 |
| 1952 | 405,220,000 | 52,542,000 |
| 1953 | 462,282,000 | 30,467,000 |
| 1954 | 520,300,000 | 22,980,000 |
| 1955 | 575,585,000 | 18,627,000 |
| 1956 | 617,636,000 | 4,788,000 |
| 1957 | 681,132,000 | 77,198,000 |
| 1958 | 794,162,000 | 36,648,000 |
| | TOTAL: | $251,612,000 |

The 26 acquisitions [11] made by respondent during that period, the number of stores acquired from each, the sales of each of the acquired firms in the 12 months prior to its acquisition, and other summary details are shown in the accompanying tabulation.[12]

[8] CX 460.

[9] CX 455–Z–23; CX 455–Z–24; CX 455–Z–26.

[10] CX 9, p. 5; CX 455–L.

[11] Three of the acquired firms—Maker's of Marshall, Maker's of Albion, and Tom Makers —listed in the accompanying chart are frequently treated as a single acquisition in some of the record references and discussions. In addition, another of the acquired firms, Pick-N-Save of Park Forest, Illinois, is no longer challenged (respondent sold the single store acquired, and withdrew from the market). Accordingly, the number of acquisitions involved is sometimes referred to in the record as 23, rather than 26.

[12] CX 455–J. Each of the 26 acquisitions, including particularly the assets acquired, the purchase price, and the location, by county, of the acquired stores, are individually described in CX 69 (Gamble–Skogmo); CX 70 (Piggly–Wiggly); CX 74 (C. F. Smith); CX 93 (H. A. Smith); CX 97 (Food Center); CX 117 (Montesi); CX 130 (Edenton–Lamb); CX 132 (Logan's); CX 138 (George T. Smith); CX 151 (Dole's); CX 160 (Tom Maker, Maker's of Marshall and Maker's of Albion); CX 173 (Kalamazoo Market Baskets); CX 184 (Capitol Stores); CX 192 (Ashton); CX 196 (Barkett's); CX 202 (De Van–Horner); CX 215 (Tolerton & Warfield); CX 224 (Slim's); CX 233 (Miller's); CX 239 (Food Bank); CX 24( (Illinois Valley Stores); CX 257 (Pick–N–Save); CX 260 (Del Farm); and CX 268 (Guidone).

| Acquisition | Date | Purchase Price | Form of organization | No. of stores | Sales of acquired co. in 12 mos. prior to acquisition |
|---|---|---|---|---|---|
| Gamble-Skogmo | 1-1-51 | $ 963,780 | Corporation | 21 | $ 8,362,000 |
| C. F. Smith | 4-19-52 | 1,067,728 | Corporation | 210 | 36,053,000 |
| Piggly-Wiggly NW | 4-24-52 | 439,865 | Corporation | 6 | 2,927,000 |
| George T. Smith | 5-17-52 | 725,000 | Corporation | 6 | 6,737,000 |
| Dole Super. | 7-30-52 | 296,615 | Corporation | 6 | 6,825,000 |
| Food Center | 5-15-53 | 5,078,600 | Corporation | 28 | 30,467,000 |
| Capitol Stores | 1-25-54 | 3,986,304 | Corporation | 28 | 22,980,000 |
| Ashton's | 3-31-55 | 100,978 | Proprietorship | 1 | 802,000 |
| Montesi et al. | 9-17-55 | 2,848,571 | 2 Corporations<br>9 Individuals and Partnerships | 8 | 11,200,000 |
| H. A. Smith | 9-21-55 | 1,860,925 | Corporation | 9 | 6,625,000 |
| Makers of Marshall | 4-21-56 | 217,453 | Corporation | 3 | 3,247,000 |
| Makers of Albion | | | | | |
| Tom Makers | | | | | |
| Barkett's | 5-15-56 | 69,044 | Proprietorship | 1 | 908,000 |
| Edenton-Lamb | 5-15-56 | 117,104 | Corporation | 1 | 633,000 |
| Miller's | 5-15-57 | 7,578,150 | Corporation | 27 | 42,499,000 |
| Tolerton & Warfield | 7-22-57 | 1,875,720 | Corporation | 85 | 21,802,000 |
| Logan's | 10-4-57 | 745,000 | Corporation | 9 | 3,798,000 |
| De Van-Horner | 10-6-57 | 624,853 | Corporation | 7 | 9,099,000 |
| Illinois Valley | 1-12-58 | 713,835 | Corporation | 7 | 6,053,000 |
| Pick-N-Save | 3-9-58 | 56,342 | — | 1 | 357,000 |
| Del Farm | 3-14-58 | 2,450,000 | Corporation | 12 | 17,650,000 |
| Food Bank | 4-21-58 | 720,378 | Partnership | 3 | 4,285,000 |
| Kalamazoo Mkt. Basket | 9-2-58 | 107,238 | Corporation | 4 | 2,158,000 |

| Acquisition | Date | Purchase Price | Form of organ- ization | No. of stores | Sales of acquired co. in 12 mos. prior to acquisition |
|---|---|---|---|---|---|
| Guidone (Arlington Market) | 9–8–58 | 857,034 | Partnership | 1 | 5,200,000 |
| Slim's | 9–13–58 | 189,942 | Proprietorship | 1 | 945,000 |
| TOTAL: | | | | | $251,612,000 |

8. National Tea Co. was founded by Mr. George Rasmussen, who started a single store in Chicago in 1899, incorporating his firm in Illionis in 1902. Numerous acquisitions were made during the 1920's, including an 88-store acquisition in 1921; three acquisitions in 1923, including one 71-store firm and one 98-store company; five acquisitions in 1927, four of which had 92, 160, 60, and 73 stores, respectively; several acquisitions in 1928; and a 28-store acquisition in 1930.[13] By 1929, the company operated a chain of 1600 stores with sales over $90 million. It languished, however, during the 1930's. George Rasmussen died in 1936, and the company lost money the three following years. In 1938, its sales were $55.5 million. By the end of World War II in 1945, the number of stores operated by the company had dwindled to 749, but sales, under the influence of a wartime economy, had reached a new record of $107 million. Profits, however, were only $913,000, about one-third of the 1929 record.[14]

9. National's merger program began with a change of management and control in 1945. Mr. John F. Cuneo, a Chicago financier, bought a substantial share of the company's stock in early 1945. Robert V. Rasmussen, son of National's founder, remained as the company's nominal chief executive until 1947, but Cuneo put the actual management of National in the hands of Harvey V. McNamara, a former Kroger executive for some 30 years, on March 21, 1945. McNamara was made executive vice president and general manager at the time and later, after the resignation of Rasmussen, was made president. "For present day investors, the pertinent history of the National Tea Co. actually began in 1945 when control of the company changed hands and Mr. H. V. McNamara, now its President, was brought in as Executive Vice President and General Manager." [15] Or as the Commission's Chief Economist put it: "Anyone familiar with the growth history of National Tea would understand readily why I chose 1945 as a starting point in my analysis. This was the year in which President Harvey McNamara assumed command at National and planned its merger accelerated growth program." [16] At that time, respondent had stores located in eight states: Michigan, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, and Iowa.[17] However, they were "located primarily in northern Illi-

[13] CX 444-A.
[14] CX 324, p. 2.
[15] *Ibid.*
[16] Tr. 1937.
[17] Tr. 683.

nois, Wisconsin and Minnesota . . . ."[18] The company had three warehouses at the beginning of 1945: one in Chicago, another in Milwaukee, and the third in Minneapolis.

10. Beginning with McNamara's employment in 1945, National began a plan of expansion designed to cover all of the then 48 states. "The first major expansion by the new management of the National Tea Co., under Mr. H. V. McNamara, President, and the first major expansion in many years, was the acquisition of the Standard Grocery Company of Indianapolis, Indiana, in 1947, with this to be followed in quick succession by the acquisition of additional stores and operations as enumerated above, which has given the National Tea Co. the reputation of the fastest growing food chain in America."[19] "While National Tea Co. now operates in only 18 states, we are looking forward to the 48."[20] New "branch" warehouses were to be established in strategic locations, to be followed by expansion "to fill the gaps between branches and stores."[21] "Our future is pin-pointed on the map—it is just a question of how far and how fast we can move—always of course, living within our means for best operating results."[22] "Later National's *Eastern* boundaries will be extended into neighboring states. Eventually, as increased population and sales-volume opportunities in the West make it economically sound, National will move *westward*. Plans are already formulated for such an expansion."[23]

"The possibility of further expansion through the acquisition of other businesses must also be considered, as we are receptive to growth in this manner."[24] "Our expansion plans, other than anticipated entry into Canada and expansion within our present territory, include continued interest in the acquisition of such regional chains that might fit into our present operations in the middle-west."[25] "The Company has been carrying out a policy of expanding its operations by opening new stores when desirable locations become available and by the acquisition of such locations from others. The Company intends to continue this expansion program."[26] "The Memphis acquisition solidifies the Na-

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[18] CX 324, p. 2.
[19] CX 188–C.
[20] Tr. 647.
[21] CX 7, p. 13.
[22] CX 14–B.
[23] CX 7, p. 13 (emphasis added).
[24] *Id.* at 6.
[25] CX 17–A.
[26] CX 41–43.

tional Tea Co. area of operations from North to South throughout the Central States, now reaching uninterrupted from the Canadian Border to the Gulf of Mexico. With the completion of stores now operating or under lease National will serve a 14 State area running from Minnesota down to Louisiana, and from the Dakotas across to Ohio." [27]

"Finally, increased sales can be attributed in part to our new acquisitions, which, although operated by your company only the smaller part of these three quarters, were responsible for our accelerated increase in sales reported for most recent periods." [28] In 1954, a newspaper account of an interview with McNamara quoted him as saying: "This is my aim and the aim of Garfield Weston, our principal stockholder. We plan to cover the United States like a book." [29] After acquiring the 27-store Miller's chain of Denver, Colorado, National announced that the acquisition was "a significant step towards making National what the name implies, a national chain which will eventually spread from coast to coast." [30] Areas not yet entered by respondent are characterized as territories "not previously *invaded* by National Tea Company." [31]

11. The acquisition of other food retailers was pursued systematically. McNamara, the company's president, personally visited many of the areas to be entered and firms to be acquired, and both he and the board of directors passed upon all mergers and all store openings and closings. A former associate of his at Kroger, a Mr. Webster, was brought in as vice president "to carry out the Company's expansion program and operations." [32] Expansion included both "taking over regional chains" [33] and building new stores around those acquired nuclei. It is not National's usual "practice to enter into a retail market on a store by store basis but rather with a group of stores with a warehouse out of which we can operate our retail operation." [34] Areas to be entered, whether the entry is to be by building new stores or acquiring other retailers in the area, are inspected carefully to determine the potential profitability of grocery operations there. Some of the most important factors bearing on the profitability of retail

[27] CX 118, p. 2.
[28] CX 26.
[29] Tr. 656.
[30] CX 237-C.
[31] CX 218-B (emphasis added).
[32] CX 42, p. 12; CX 57.
[33] CX 164.
[34] CX 319.

grocery stores in a given geographical area are: (a) "the number of people within an area";[35] (b) the income of the consumers in the area;[36] and (c) "the competition."[37] Before entering an area, respondent investigates the number "of homes in a given area, the type of homes, the type of income area, how many people are served in the area, what other areas are close by."[38]

Respondent considers "the competition from a standpoint of the size store and things like that," and may weigh the "competition, as to whether it is *hard or soft*."[39] "Well, in a great many stores that have been closed, the information has been because of results in that store and that is largely operators opening up. In other words, competition can be probably the major factor."[40]

12. National planned its geographical expansion and aggressively sought out companies to be acquired in the selected areas. For example, its 1957 acquisition of the 28-store Miller's chain of Denver was the culmination of negotiations with various Denver chains that had been going on since at least 1950. National hired and sent out a Mr. Charles Potter to negotiate the deal.[41] A Denver broker wrote National in 1956 that "as per instructions, the pressure is gradually being applied . . . . [W]e are having lunch with Mr. Miller tomorrow."[42] This broker also reported knowing that National had been negotiating with two other Denver chains, noting that he had "told Mr. Miller that I felt reasonably sure that if National did not come in [into Denver] one way they would probably come some other route."[43]

13. National generally exacted from the former owners of the companies it acquired an agreement that they would not compete in a described area for a specified period of time. For example, the former owner of the 27-store Miller's chain of Denver agreed that he "will not, for a period of five years from the Closing Date, directly or indirectly . . . engage in any business in which the Company [National Tea] is engaged as of the date of this agreement, within an area having a radius of two hundred fifty miles from

[35] Tr. 429–430.
[36] Tr. 709–710, 1012.
[37] Tr. 430, 449.
[38] Tr. 709.
[39] Tr. 430 (emphasis added).
[40] Tr. 445.
[41] Tr. 763; CX 312. According to McNamara, National's president, Potter "works out of Washington, D.C. . . . Maybe he is supposed to be a lobbyist, but we don't have lobbyists work for us." Tr. 760–761.
[42] CX 344.
[43] CX 317.

the City limits of the City and County of Denver, Colorado . . . ." [44]

The owners of one of the acquired retail organizations, the Montesi family of Memphis, Tennessee, similarly agreed not to compete with National for five years "within the City of Memphis or within a radius of two hundred fifty (250) miles of Memphis . . . ." There was special consideration there: "National agrees that it will pay Fred Montesi for not competing as aforesaid Ten Thousand ($10,000.00) Dollars on March 15, 1956 and Ten Thousand ($10,000.00) Dollars on the 15th day of each March thereafter to and including March 15, 1960, providing Fred Montesi does not so compete during any of such years." [45]

14. There is testimony here that vigorous price competition in food retailing does not come from the large, national chains such as National Tea, nor from the small, corner "mom and pop" stores, but comes from an intermediate sector of the industry, the "local" and "regional" chains. One of respondent's officials described his competition as follows:

Q. Now, would you say that the greatest competition . . . was coming from mom and pop grocery stores, or from so-called interstate retail chains?

A. *No, I can't say it was coming from interstate chains. I believe they pretty well shared our opinion.* Certainly it didn't come from the mom and pop grocery stores.

Q. I see.

A. It came from local competition which operated more than one store. Let's say it that way.[46]

In 1959, National's president, McNamara, while ostensibly calling for an end to "below-cost" pricing, issued what was, in effect, a call for his more vigorous competitors to raise their prices: "We are hopeful that after the industry had had an opportunity to analyse earnings for 1958, some offending operators might merchandise with a little more intelligence in 1959 for the general benefit of the industry, as well as the public. This is essential to the improvement of earnings, the protection of investment and the steady growth of the industry. In our opinion, a profit margin of 1½ cents out of the sales dollar would be fair to everybody, operators, shareholders and consumers alike." [47] One of respondent's officials testified here that: "Many times, because of the

[44] CX 236, p. 11.

[45] CX 128. Similar agreements were entered into with Louis Montesi, Frank Montesi, Joe Montesi, and John Montesi. CX 124–127.

[46] CX 481 (stipulated testimony), pp. 253–254 (emphasis added).

[47] CX 332–L.

items that you have on sale and the impression you make on people, they might think you are selling at a cheaper price, and maybe you are not. If you are a good merchant, you don't always have to give things away to make a good salesman. Anybody can give it away . . . . You don't have to be smart to do that." [48]

15. Since the volume of business in any given area is dependent primarily upon the number of consumers in that area and their income, the building of a new store adds to the number of sellers without increasing their aggregate sales, thus tending to reduce per store sales volume and intensify competition for the available business. The acquisition of an existing operator, on the other hand, permits the acquiring company to enter an area without causing this added competitive pressure. The acquisition simply replaces one seller with another, thus causing no increase in competitive rivalry that might force prices downward. Hence the principal "asset" acquired in a retail food merger, whether it is the acquisition of a direct competitor in the same market or a potential competitor in another market, is the acquired firm's existing share of the local food business. One of respondent's officials testified that, in deciding to make one of the major acquisitions involved here, National's "judgment was based on volume of business he did and facilities he had." [49] Or as the Commission's Chief Economist testified here, when a firm makes "a market extension merger" into a new geographical market, "it buys a going concern, *it buys in effect a part of that market.*" [50] Respondent's own economist testified that the "purchasing company acquires an immediate volume of sales" and thus at least a "short-term position in the market." [51]

Thus a series of acquisitions, each by a large interstate chain, ordinarily disinclined to seek vigorous price competition,[52] and each eliminating a local or regional chain possibly less adverse to competing vigorously on the basis of price, may transform a once competitive market into one more characterized by "gentlemanly" behavior and higher prices. National Tea's own documents acknowledge that it has a "policy of taking over regional chains," [53]

[48] Tr. 968-969.

[49] Tr. 467. And: "This latest acquisition of Montesi Stores in Memphis gives National another $15 million in annual sales. . . ." CX 118. "[A]cquisition of the [Tolerton & Warfield] Iowa firm will add approximately $30,000,000 to National Tea's annual sales volume. . . ." CX 218.

[50] Tr. 1715 (emphasis added).

[51] TR. 1860.

[52] CX 481, pp. 253-254.

[53] CX 164.

and this record makes it clear that both it and the other large interstate chains have followed that policy.

16. The retailing of food is by far the largest single industry in the United States. In 1958, the country's expenditures for food totaled $69.1 billion, or $397 for each man, woman and child in the nation, an estimated 22.3% of the consumer's total disposable income.[54] The $49 billion of this sold in "food stores" [55] in 1958 was some three times the total sales of the giant steel industry ($16 billion) [56] and more than 20 times the sales of all retail shoe stores (just over $2 billion).

17. The retail food industry has also been one of the country's most highly fragmented industries. In 1948 there were an estimated 460,913 retail food stores in the United States, and 358,671 "grocery" stores.[57] Moreover, about 90% of all retail grocery stores are owned by single-unit operators, that is, firms that own only one store, as contrasted with those that own two or more stores. Hence there were, in 1948, approximately 338,900 retail grocery *firms*, some 7% of *all* business enterprises in the United States (about 4 million firms in 1950) and about 19% of all *retail* businesses of every kind (1.7 million). [58] By way of comparison, there were less than 180,000 gasoline service stations, 119,000 wearing apparel stores, 85,000 automotive dealers, and 20,000 retail shoe stores.

18. Since 1945, the food industry has experienced an increasing trend toward concentration. The number of retail food stores has decreased from an estimated 460,913 in 1948 to 355,508 in 1958, and the number of retail grocery stores from an estimated 358,671 to 259,796, a decline of some 100,000 [59] or more than 25%.

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[54] *Economic Inquiry Into Food Marketing*, Part I (Staff Report to the Federal Trade Commission, January 1960, hereafter "*Food Inquiry*"), p. 86.

[55] The Census Bureau defines "food stores"—Standard Industrial Classification (SIC) 54—as: "Establishments primarily selling food for home consumption and preparation." Tr. 1708. This does not include the sales of establishments selling prepared foods and drinks for on-the-premises consumption, such as restaurants, bars, and so forth. The sales of "food stores," then, are only a part of the total "food" sales mentioned above. And, as noted below, "grocery store" sales (SIC 541) are a subclassification of "food store" sales (SIC 54). National Tea, a "grocery chain," is thus an operator of both "food stores" and "grocery stores." By stipulation of the parties, both of those Census classifications are relevant markets for the purposes of this proceeding.

[56] Tr. 1690.

[57] CX 455–Z–32. See n. 55, *supra*, for the distinction between "food stores" and "grocery stores."

[58] *Food Inquiry*, p. 47.

[59] CX 455–Z–32; tr. 1691–1692, 1699, 1928–1929, 2157. Respondent argues that this decline in the number of units is due to the so-called "supermarket revolution"—the replacement

Sales have shifted sharply from the one-store "independents" to the "chains" (11-or-more stores).[60] Between 1948 and 1958, the approximately 180 firms in this 11-or-more store class had increased their share of all United States food store sales from an estimated 30.4% in 1948 to 40% in 1958, while the share of the more than 300,000 single-unit operators, and the some 3,000 food retailers with 2-10 stores, declined from an estimated 69.6% in 1948 to 60% in 1958.[61] Further, there is an even sharper trend toward concentration within the 180-firm chain sector itself, with the 20 largest firms enjoying more than three times the sales volume of the other 160 chains:[62]

| *Food Store Firms by Number of Stores Operated* | *Food Store Sales* | |
|---|---|---|
| | *1948* | *1958* |
| 1-10 Stores | $21,551,000,000 | $29,432,000,000 |
| 11-or-more (other than 20 largest) | 2,895,000,000 | 4,856,000,000 |
| 20 largest of 1960 | 6,520,000,000 | 14,734,000,000 |
| | $30,966,000,000 | $49,022,000,000 |

The chart below shows this shift in terms of percentages of all United States food store sales:[63]

| *Food Store Firms by Number of Stores Operated* | *Sales as % of U.S. Food Store Sales* | | |
|---|---|---|---|
| | *1948* | *1958* | *% of Change* |
| 1-10 stores | 69.6% | 60.0% | −9.6% |
| 11-or-more (other than 20 largest) | 9.3 | 9.9 | +0.6 |
| 20 largest of 1960 | 21.1 | 30.1 | +9.0 |

of small, clerk-service stores with large, self-service supermarkets. Since a supermarket, by definition, has sales of $375,000 annually (tr. 1706), compared with annual sales of $69,000 for the average one-store independent (*Food Inquiry*, p. 54), one supermarket can of course replace five such stores. This does not explain, however, why the conversion from small to large stores requires a change of *ownership* from five independents to one of the 20 largest chains.

[60] A "chain" is "variously defined as any unit, any retail firm which has 2 or more stores, four or more stores or 11 or more stores. The most commonly used definition today is 11 or more stores, although some individuals, some trade publications, still refer to 4 or more stores." Tr. 1692. Thus, "chains" are those firms operating 11 or more stores, and "independents" are those firms operating 10 stores or less.

[61] CX 455-Z-22; CX 455-Z-28; CX 455-Z-32; CX 677.

[62] CX 455-Z-28; tr. 1946. "For example, as recently as 1958, all chains [firms with 11 or more stores] other than the top 20 had combined sales smaller than A & P." Tr. 1941.

[63] CX 455-Z-28. The economist-witnesses for the Commission and for respondent differed over the exact magnitude of these changes and numerous exhibits were introduced on the point. But no matter which figures are used, the general trend remains: the 20 largest chains of 1960, in the period 1948-1958, had gained some 8-9 percentage points at the expense of the small independents. See CX 455-Z-32, characterized by the Commission's Chief Economist as "the most precise estimate possible" of this trend toward increased concentration in the industry (tr. 1696). As the Supreme Court said in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 342, n. 69 (1962), "in cases of this type precision in detail is less important than the accuracy of the broad picture presented."

This shift of more than 9% of the national market from the independent sector of the industry to the chain sector represents a loss of some $4 billion [64] in annual sales (9% of $49 billion) by the independents, a loss that is nearly twice the sales volume of the entire retail shoe industry. Thus the one-store grocery retailers, although still numbering some 250,000 firms, now have aggregate sales of only slightly more than the 20 largest chains ($20.5 billion for the 250,000 single-unit firms,[65] $14.7 billion for the 20 largest chains). The table below shows this 1948–1958 sales growth of the 20 largest grocery chains of 1960: [66]

| Rank in 1960 | Chain | Sales in 1948 | Sales in 1958 |
|---|---|---|---|
| 1 | A & P | $2,837,000,000 | $ 5,095,000,000 |
| 2 | Safeway | 1,277,000,000 | 2,225,000,000 |
| 3 | Kroger | 826,000,000 | 1,776,000,000 |
| 4 | American (Acme) | 417,000,000 | 875,000,000 |
| 5 | National Tea | 270,000,000 | 794,000,000 |
| 6 | Food Fair | 142,000,000 | 734,000,000 |
| 7 | Winn-Dixie | 79,000,000 | 666,000,000 |
| 8 | Grand Union | 116,000,000 | 504,000,000 |
| 9 | First Nat'l. | 354,000,000 | 532,000,000 |
| 10 | Jewel | 153,000,000 | 444,000,000 |
| 11 | Colonial | 169,000,000 | 437,000,000 |
| 12 | ACF-Wrigley | n.a. | 363,000,000 |
| 13 | Loblaw | 72,000,000 | 285,000,000 |
| 14 | Red Owl | 60,000,000 | 200,000,000 |
| 15 | Stop & Shop | 50,000,000 | 194,000,000 |
| 16 | Mayfair | 24,000,000 | 117,000,000 |
| 17 | Lucky | 30,000,000 | 142,000,000 |
| 18 | Von's | 22,000,000 | 94,000,000 |
| 19 | Thriftimart | 20,000,000 | 163,000,000 |
| 20 | Penn Fruit | 34,000,000 | 162,000,000 |
| | TOTALS: | $6,952,000,000 | $15,802,000,000 |

19. This shift of the food and grocery market from the single-unit independents to the chains, and from the smaller chains to the 20 largest, has been accomplished in large part by mergers.

[64] Tr. 1694.

[65] CX 455–Z–22.

[66] CX 455–D. The figures here are calendar year sales, rather than fiscal year sales. See CX 455–Z–32.

During the period 1949–1958, the 20 [67] largest chains of 1960 made 147 acquisitions, acquiring 1,676 stores having aggregate sales of $1.49 billion. National Tea Company led this merger movement, acquiring more stores, and stores having more sales volume, than any other chain in the United States. As shown in the tabulation below, National acquired 28.9% of the stores, with 16.8% of the sales volume, of all acquisitions made by these top 20 chains: [68]

| Chain | Stores Acquired 1949–1958 | | Sales Volume Acquired 1949–1958 | |
|---|---|---|---|---|
| | Number | Percent of top 20 store acquisitions | Dollars | Percent of top 20 acquired volume |
| A & P | 0 | 0 | 0 | 0 |
| Safeway | 67 | 4.0 | $ 33,016,000 | 2.2 |
| Kroger | 130 | 7.8 | 174,064,000 | 11.6 |
| American (Acme) | 93 | 5.5 | 34,442,000 | 2.3 |
| National Tea | 485 | 28.9 | 251,612,000 | 16.8 |
| Food Fair | 67 | 4.0 | 107,731,000 | 7.2 |
| Winn-Dixie | 306 | 18.3 | 221,070,000 | 14.7 |
| Grand Union | 128 | 7.6 | 128,417,000 | 8.6 |
| First Nat'l. | 1 | 0.1 | 1,247,000 | 0.1 |
| Jewel | 43 | 2.6 | 55,234,000 | 3.8 |
| Colonial | 99 | 6.0 | 121,906,000 | 8.1 |
| ACF-Wrigley | 101 | 6.0 | 173,854,000 | 11.6 |
| Loblaw | 17 | 1.0 | 17,400,000 | 1.2 |
| Red Owl | 2 | 0.1 | 1,589,000 | 0.1 |
| Stop & Shop | 17 | 1.0 | 20,186,000 | 1.3 |
| Mayfair | 44 | 2.6 | 62,895,000 | 4.2 |
| Lucky | 56 | 3.3 | 72,612,000 | 4.8 |
| Von's | 0 | 0 | 0 | 0 |
| Thriftimart | 20 | 1.2 | 21,250,000 | 1.4 |
| Penn Fruit | 0 | 0 | 0 | 0 |
| TOTALS: | 1,676 | | $1,499,525,000 | |

[67] The largest of the 20, A & P, made no acquisitions during this period. Another, First National Stores, acquired only one store. Von's and Penn Fruit made no acquisitions during the period 1949–1958, but acquired 38 and 9 stores, respectively, in the two following years, 1959–1960. CX 455–S.

[68] CX 455–I; CX 455–S.

In the following 3-year period, 1959–1961, additional acquisitions by these firms brought the total sales volume acquired by them between 1948 and 1961 to approximately $2.2 billion, or "about fifty per cent as great as the total sales of all grocery chains of 11 or more [stores], other than the top 20 chains." [69] Included in the 1948–1958 acquisitions by the 20 largest firms were more than 40 chains with 11 or more stores, thus accounting for a substantial part of the decline in the number of such chains from an estimated 210 in 1948 to about 180 in 1958.[70]

20. Dr. Willard F. Mueller, Director of the Federal Trade Commission's Bureau of Economics, and an economist with particular qualifications in the food industry,[71] gave the following expert opinion as to the significance of this increasing trend toward concentration in food retailing: "If the top 20 chains of 1960 and all other chains with 11 or more stores were to continue to expand their market shares at the respective rates which they experienced between 1954 and 1958 (CX 455–Z–28), *by about 1984 chains of 11 or more stores* [*about 180 of them*] *would be doing all of the grocery store business, with the top 20 of 1960 doing 84 percent and all others 16 percent.*" [72] This would of course mean the complete elimination of the more than 300,000 single-unit independent food retailers still surviving at the present time, as well as the approximately 3,000 small local and regional chains that now operate from 2-to-10 stores each.

21. The sales volume acquired by National Tea during the period 1951–1958, by acquisition and by year of acquisition, was as follows: [73]

[69] Tr. 1718; CX 455–I; CX 455–Z–59.

[70] Tr. 1711. While other firms left this 11-or-more stores classification for other causes, and still others entered that classification and thus replaced some of the acquired and otherwise departing companies, this does not disturb the fact "that, in the absence of mergers and acquisitions, there would now be 49 more food chains in operation—at least if we assume that none of the 49 would have dropped below 11 stores or liquidated completely in the interim." *Food Inquiry*, p. 146.

[71] Dr. Mueller did research work in the economics of the food industry while a professor in the Department of Agricultural Economics at the University of California and is the co-author of a recent book (Mueller & Garoian, *Changes in the Market Structure of Grocery Retailing* (U. of Wis. Press, 1961)), tr. 1616–1619.

[72] Tr. 1941–1942 (emphasis added).

[73] CX 455–J.

| Year | Companies Acquired During Year | Sales Volume of Acquired Companies | Yearly Total |
|---|---|---|---|
| 1951 | Gamble-Skogmo | $ 8,362,000 | $ 8,362,000 |
| 1952 | C. F. Smith | 36,053,000 | |
| | Piggly-Wiggly NW | 2,927,000 | |
| | George T. Smith | 6,737,000 | |
| | Dole Super Markets | 6,825,000 | 52,542,000 |
| 1953 | Food Center | 30,467,000 | 30,467,000 |
| 1954 | Capitol Stores | 22,980,000 | 22,980,000 |
| 1955 | Ashton's | 802,000 | |
| | Montesi | 11,200,000 | |
| | H. A. Smith | 6,625,000 | 18,627,000 |
| 1956 | Maker's (3) | 3,247,000 | |
| | Barkett's | 908,000 | |
| | Edenton-Lamb | 633,000 | 4,788,000 |
| 1957 | Miller's | 42,499,000 | |
| | Tolerton & Warfield | 21,802,000 | |
| | Logan's | 3,798,000 | |
| | De Van-Horner | 9,099,000 | 77,198,000 |
| 1958 | Illinois Valley Stores | 6,053,000 | |
| | Pick-N-Save | 357,000 | |
| | Del Farm | 17,650,000 | |
| | Food Bank | 4,285,000 | |
| | Kalamazoo Mkt. Basket | 2,158,000 | |
| | Guidone (Arlington Market) | 5,200,000 | |
| | Slim's | 945,000 | 36,648,000 |
| | TOTAL: | $251,612,000 | $251,612,000 |

22. Appendix A to these Findings lists the 16 states in which the stores of the acquired companies were located, their respective dollar sales in each state in the 12 months prior to their acquisition, their approximate share of all food store sales in their counties of operation in each state, and National's market share in those county markets in 1958. This data is summarized below: [74]

| *State* | *Acquired Company's Sales as Estimated % of Food Store Sales in Counties of Operation* | *National's Total Sales as % of Food Store Sales in Counties—1958* |
|---|---|---|
| Wisconsin | 0.08% | 5.09% |
| North Dakota | 0.38 | 9.81 |
| Indiana | 0.60 | 11.85 |
| Illinois | 1.12 | 11.10 |

[74] CX 455-Z-47; tr. 1720.

| *State* | *Acquired Company's Sales as Estimated % of Food Store Sales in Counties of Operation* | *National's Total Sales as % of Food Store Sales in Counties—1958* |
|---|---|---|
| Minnesota | 1.15 | 10.59 |
| Mississippi | 1.64 | 5.78 |
| Michigan | 3.26 | 4.69 |
| Louisiana | 4.25 | 9.51 |
| Iowa | 4.30 | 7.41 |
| Tennessee | 4.78 | 4.73 |
| Missouri | 5.75 | 7.96 |
| South Dakota | 7.24 | 8.99 |
| Alabama | 9.30 | 6.60 |
| Nebraska | 13.04 | 11.62 |
| Colorado | 19.61 | 20.75 |
| Wyoming | 20.41 | 21.20 |

23. Appendix B lists the more than 100 counties in which the acquired stores were located, the sales of the acquired stores in those counties in the 12 months prior to their acquisition, and, where available data permits, an estimate of the county market shares held by the acquired stores at the time of acquisition. These county market shares ranged from a low of .42% of the Hennepin County, Minnesota, food store sales acquired from two of the Gamble-Skogmo stores, to a high of 35.86% of the West Baton Rouge Parish, Louisiana, market held by one of the acquired Capitol Stores supermarkets.

24. The 485 acquired stores were located in nearly 200 cities and towns. Appendix C lists the acquisitions chronologically, a number of the cities and towns in which the acquired stores were located (census universe data are not available for many of the smaller towns), the sales of the acquired stores in the 12 months prior to acquisition, and the estimated share of the city markets held by the acquired stores in the 12 months prior to their acquisition. These range from a low of .54% of the Minneapolis, Minnesota, market held by two of the acquired Gamble-Skogmo stores, to a high 41.47% of the St. Ann, Missouri, market held by one of the acquired Food Center stores.

25. Eight (8) of National's 26 acquisitions in the period 1951–1958 were either wholly or partially "horizontal" in character. Respondent was already operating one or more stores in: (a) 5 of the 20 cities involved in the Gamble-Skogmo acquisition; (b) Duluth, the only city involved in the Piggly-Wiggly acquisition; (c) 2 of the 5 cities involved in the H. A. Smith acquisition; (d) 5 of the 74 cities involved in the Tolerton & Warfield acquisition;

(e) Chicago, the only city involved in the Del Farm acquisition; (f) Kalamazoo, the only city involved in the Kalamazoo Market Basket acquisition; (g) Indianapolis, the only city involved in the Guidone (Arlington Market) acquisition; and (h) Fort Dodge, Iowa, the only city involved in the acquisition of Slim's. Appendix D lists those 17 cities and towns, the 8 companies from which the stores were acquired, the number of stores involved, the estimated market share of the acquired companies in those towns, and, where available, National's own estimated market share in 1954 and 1958. For example, National had 8.1% of the Worthington, Minnesota, market in 1954. In 1957, it acquired Tolerton & Warfield, which had one store located in Worthington with an estimated 8.28% or more of the City's food store sales. In 1958, after the acquisition, National had 16.5% of that market. In Chicago, National had 9.6% of the market in 1954. In 1958, after the acquisition of Del Farm (estimated 1.6%), National had 11.1% of that vast market.

26. Each of the "horizontal" acquisitions noted above, including the acquisition of Del Farm, of Chicago, in 1958, involved the elimination of a competitor in a relevant local market. Competition in food retailing is not limited to the "few blocks" between two nearby stores, as suggested by respondent here. This would presumably be the distance consumers are willing to walk in the course of their food shopping. While a particular store's most intense competition may come from the one or more competitive stores that are located within walking distance of his place of business, the automobile has greatly enlarged the consumer's geographical shopping range, and the supermarket has capitalized on that fact. Respondent's own witnesses emphasized that: "[W]hereas the corner grocery store only drew customers in its very immediate vicinity, housewives can now drive to supermarkets, thus bringing more stores into competitive reach of each other." [75] "The supermarket with adequate parking facilities draws its patronage from a wider area than the old-fashioned small grocery store that drew its customers primarily from within easy walking distance." [76] "[T]he modern supermarket is keyed to automobile transportation, adequate parking facilities and so on, with the result that each supermarket draws its patronage from a sizeable area. That is quite in contrast to the old-fashioned grocery store which depended [for] its clientele

[75] Tr. 1829.
[76] Tr. 1845.

[on] the people within easy walking distance of the store." [77] Respondent's president, McNamara, conceded that, in cities and towns with populations of 25,000 or less, the "trading area" he is concerned with is "the city as a whole." [78] In the larger cities, however, he sizes up his "competition" by examining the "neighborhood where we are locating; not in the city as a whole because we don't think we draw the city as a whole . . . ." [79] This is particularly true if "there are natural trade barriers such as a railroad running through an area. That would make it two individual areas, so then you say maybe you should put a store on both sides of the area." [80] Since a city with a population of 25,000 would normally consist of some 1,000 city blocks, respondent's president may be said to have argued for submarkets, in the larger cities, of no more than 1,000 square blocks undivided by any "natural trade barriers such as a railroad running through an area." [81]

27. Since the 12 Del Farm stores acquired in Chicago were all located within a dozen city blocks of one or more stores operated by respondent at the time of the acquisition, [82] subdividing Chi-

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[77] Tr. 2166–2167. A Memphis independent operating one large supermarket, a Mr. Montesi, described the area from which he drew his customers as follows: "In a two-mile radius we can call upon one third the population of Memphis [population 497,524 in 1960]. In addition we're on the main track for many out-of-state customers. We draw traffic from Mississippi and Arkansas. Some of our out-of-town customers give us orders in the $100-and-up class." RX 6–F.

[78] Tr. 724–725.

[79] *Ibid.*

[80] Tr. 725.

[81] See Handler, "Recent Antitrust Developments," 63 *Mich. L. Rev.* 59, 72 (Nov. 1964), facetiously describing a relevant market encompassing only "those food outlets that cater to the wants of the residents in the immediate vicinity of K and 21st Streets," Washington, D.C.

[82] The examiner found that, "In general, Del Farm's stores were located in different competitive areas in Chicago than respondent's stores," citing the testimony (tr. 979) of one of respondent's officials, Initial Decision, p. 247. Respondent explains that: "As the map (CX 480) shows, the Del Farm Stores were located on Chicago's south side, whereas respondent's stores are generally spread over the north side and throughout the suburbs." Answering Brief of Respondent, p. 32. However, CX 480, an enlarged map of Chicago with the location of both the acquired Del Farm stores and Natonal's own stores marked on it, shows clearly that each of the 12 acquired stores are located no more than a few blocks from one or more of respondent's stores. This is confirmed by the street addresses of the Del Farm and National stores. (Compare CX 395–D and CX 67 *(in camera)* and 68.) For example, four of the Del Farm, and four of the National, stores were located as follows:

| *Del Farm Stores* | *National Tea Stores* |
|---|---|
| 1810 S. Blue Island Ave. | 1828 S. Blue Island Ave. |
| 1340 Milwaukee Ave. | 1480 Milwaukee Ave. |
| 2438 W. North Ave. | 2558 W. North Ave. |
| 544 W. 31st St. | 613 W. 31st St. |

Hence, these Del Farm stores were either in the same block, or in the next block, from a National store. Further, two of these addresses (the Milwaukee and W. North Ave. addresses) are on the north side of Chicago, while the other two are on the south side. This is true of the other Del Farm and National stores. As the map (CX 480) indicates, 6 of the Del Farm's entire group of 12 stores are located on the north side, the other 6 on the south side. At least 50 of National's own stores are on the north side, and at least a similar number are on the south side.

cago into "neighborhoods" of 1,000 square blocks would not place those stores in different "markets" from those of National's own pre-acquisition stores. However, this record makes it clear that there are in fact competitive forces operating on a city-wide basis in even the largest cities. It may very well be that a housewife located on Chicago's north side does not, even though she now shops by auto, divide her food purchases between a supermarket on the north side and another supermarket on the city's south side. But this does not mean that the price she pays on the north side is not influenced by prices on the south side. Aside from the question of "barriers" in the city—about which there is no evidence in this record—there is the obvious fact that housewives patronize a number of supermarkets within what they regard as an acceptable driving range. Thus, taking the distance between Chicago's north side and south side as 100 city blocks (some 12 miles), and assuming that there is at least 1 supermarket every 10 blocks,[83] a housewife located between two of those supermarkets, and willing to drive, say, 15 blocks (some 2 miles), could shop at two supermarkets northward or two southward, that is, the first 4 (numbering from north to south) of the 10 stores in our 100-block north-south line. Hence, those 4 stores are competing directly for this particular shopper's patronage; if the two northernmost stores, #1 and #2, should make a substantial cut in prices, #3 and #4 would have to meet it or lose her business. But when those two stores lower their prices to keep their "northern" customers from going to #1 and #2, they will divert "southern" customers from #5 and #6, who will, in turn, have to lower *their* prices. Thus, store #1 on the north side doesn't compete for the same individual customers as store #10 on the south side, but #1 competes with #2, #2 with #3, and so on, until the chain reaction, unless stopped by some "natural barrier," runs the length of the community and reaches #10 itself.

A Commission economist testified that competition in food retailing "is a good deal more complex phenomena than just competing directly for customers. . . . Certainly the most important thing to a particular store is whether there is another store across the street or within the same block. . . . In this sense it is a very personal and direct kind of competition. However . . . [they] in turn are subjected to competitive conditions which are

[83] See CX 480.

pervasive within the entire community." [84] Those "competitive conditions" that are "pervasive within the entire community" are city-wide advertising and relative similarity of price throughout the city. The large daily newspapers in these big metropolitan areas generally permit an advertiser to buy ads in either their city-wide edition, or in their "sectional" editions, *e.g.*, northwest, southeast, etc. National and the other large chains generally limit themselves to city-wide advertising, finding few "neighborhood" variations that require special advertising attention. Respondent stipulated that, while the price of certain individual products might "sometimes" vary within the various neighborhoods in a city, "[w]ithin a particular city or town individual grocery products sold by National Tea stores are generally sold at the same price." [85] A city-wide advertisement of prices naturally affects prices in all sections of the city. Finally, respondent's own officials testified that prices are determined "by town and city, and would depend on the going retail price in the city." [86] "[W]e consider the Peoria trading area a radius of some 30, 35 miles, something like that." [87] When a "price war" occurs in the food industry, it generally occurs on a city-wide basis.[88]

28. The 12 stores acquired from Del Farm in Chicago were also selling the same line of products, to the same class of customers, as respondent's own pre-acquisition Chicago stores. At the time of the acquisition, 1958, National operated more than 100 stores in the city of Chicago, and enjoyed more than 9% of the city's some $1.11 billion food store sales. (National and three other large chains had more than 38% of the market in 1958.) Del Farm's 12 stores had less than 2% of this vast Chicago market, but their sales, both individually and together, could hardly be considered insubstantial. In 1958, they had sales of more than $18 million. Individually, the 12 stores were far larger than the average supermarket or the average of respondent's own stores. In 1958, National's 932 stores had averaged sales per store of $847,000, with 501 of them selling between $1 million and $375,000 and 137 selling less than $375,000,[89] the minimum for the "supermarket" class. The street addresses and sales of the 12 acquired Del Farm

[84] Tr. 1768, 1774.
[85] Tr. 1467.
[86] CX 481, p. 246.
[87] Tr. 435–436. Peoria, in 1960, had a population of 103,162. CX 452–B.
[88] CX 481 (milk price war in Indianapolis); tr. 1558–1559 (bread price war in Peoria).
[89] CX 455–Z–26.

stores in the 12 months prior to their acquisition by respondent were as follows: [90]

| Street Address (Chicago) | Sales of Acquired store in 12 mos. prior to acquisition |
|---|---|
| 1810 S. Blue Island Ave. | $1,146,204 |
| 3749 S. Cottage Grove Ave. | 1,966,525 |
| 6417 W. Higgins Rd. | 1,601,556 |
| 4530 S. Kedzie Ave. | 1,484,082 |
| 1340 Milwaukee Ave. | 1,614,666 |
| 4708 Milwaukee Ave. | 981,574* |
| 800 West North Ave. | 2,047,520 |
| 2438 West North Ave. | 1,217,880 |
| 1536 N. Pulaski Rd. | 1,016,176 |
| 4217 West 16th St. | 1,219,788** |
| 6330 So. Park Ave. | 2,648,160 |
| 544 West 31st St. | 1,433,556 |

*Covers sales only from opening date 7–10–57 to 3–14–58.
**Covers sales only from opening date 8–14–57 to 3–14–58.

The size of these stores and their dynamic growth history [91] squarely contradicts the hearing examiner's finding that they were somehow inferior to the National stores located only a few blocks away (some within the same block) or served a different class of "clientele." The only establishments identified on this record as serving any class of customers other than those buying general lines of food and groceries are the so-called "specialty" stores (meat stores, bake shops, "gourmet" stores, and so forth). Nothing in this record suggests that the 12 Del Farm stores, one of which had sales of $2.6 million annually, served any such limited class of customers. And while respondent's own manufacturing plants supplied only coffee [92] to the Del Farm stores in 1958, a partial list of their 1958 purchases from other suppliers, totaling more than $5 million, includes nearly a dozen of the same product lines handled by respondent's other stores.[93] For example, Del Farm's 1958 purchases of fresh beef, pork, veal and cured smoked pork amounted to $4,459,600; respondent's other branches handled the same products.[94]

29. National later disposed of one of these 26 acquisitions and

[90] CX 395–D.
[91] See finding number 30, *infra*.
[92] CX 382–A–B *(in camera)*. The Del Farm branch also purchased crackers and cookies from Weston, respondent's parent company. CX 377.
[93] Compare CX 384 *(in camera)* with CX 383 and CX 389 *(in camera)*.
[94] *Ibid.*

withdrew from the community altogether. This was Pick-N-Save, a one-store retailer in Park Forest, Illinois. In the 12 months prior to its acquisition in March 1958, its sales were $357,000. Another of these acquired firms, Kalamazoo Market Baskets, of Kalamazoo, Michigan, was bankrupt at the time of the acquisition and was in fact acquired by respondent from a trustee in bankruptcy.

30. The other 24 of the 26 acquisitions challenged here involved thriving concerns, many of which operated the largest and most modern supermarkets in their areas. Seven of them were chains with 11 or more stores, and thus among the country's 200 largest food retailers. For example, Del Farm, a 12-store Chicago chain with sales of $18 million and net income of nearly $1½ million at the time of the acquisition in 1958, had nearly tripled its sales and profits in the preceding 8 years:[95]

*Del Farm Sales and Income*

| *Year* | *Sales* | *Net Income* |
|---|---|---|
| 1950 | $ 6,864,170 | $182,022 |
| 1951 | 8,286,262 | 113,023 |
| 1952 | 9,475,503 | 171,309 |
| 1953 | 11,447,834 | 169,938 |
| 1954 | 11,744,839 | 250,307 |
| 1955 | 12,491,358 | 363,968 |
| 1956 | 14,136,000 | 441,288 |
| 1957 | 17,653,433 | n.a. |

Del Farm's 1956 before-tax income was 3.1% of its sales, compared to National's own before-tax income of 2.4% in that year. Miller's, the 27-store Denver chain acquired in 1957, had increased its sales from $24.4 million in 1952, to $42.5 million in 1957, and its annual net income from $526,011 in 1952, to $1,209,501 in 1956.[96] De Van-Horner, a 7-store chain of Mobile, Alabama, acquired in 1957, had increased its sales from $2,522,498 in 1953, to $7,878,039 in 1957, and its profits from $23,595 to $183,657.[97] Food Center, a 28-store chain, St. Louis, acquired in 1953, had increased its sales from an estimated $21,265,044 in 1950, to $30,467,000 in the 12 months prior to its acquisition by respondent, and was operating profitably.[98] Capitol Stores, of Baton Rouge, Louisiana, acquired by National in 1954, had in-

[95] CX 395-D; CX 628-635.
[96] CX 455-J; CX 596; CX 600.
[97] CX 606-C; CX 610-D.
[98] CX 455-J; CX 545-565.

creased its sales from $12,005,372 in 1950, to $19,002,725 in 1952, and its profits from $381,432 to $597,615 (1952).[99]

31. The "market extension" acquisitions involved here formed the nuclei around which National constructed 8 new "branch" operations. In 1945, the company had 3 warehouses located in Chicago, Milwaukee, and Minneapolis, respectively. Its retail stores, while located in 8 states (Michigan, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, and Iowa), were concentrated primarily in the three warehouse states, northern Illinois, Wisconsin, and Minnesota.[100] Respondent now has 13 warehouse branches, 8 of which were established through 9 of the acquisitions challenged here:

| *New Branch* | *Year* | *Established by Acquisition of:* |
|---|---|---|
| Detroit | 1952 | C. F. Smith |
| Kalamazoo | 1952 | George T. Smith—Dole's |
| St. Louis | 1953 | Food Center |
| New Orleans | 1954 | Capitol Stores |
| Memphis | 1955 | Montesi |
| Denver | 1957 | Miller's |
| Sioux City | 1957 | Tolerton & Warfield |
| Del Farm—Chicago | 1958 | Del Farm |

Most of these acquisitions included the warehousing facilities necessary to the establishment of the new branches. The other acquisitions were used to enlarge operations in these new branches or other branches of the company.

32. The character of the firms acquired by respondent, their facilities, sales volume, future prospects, and their potential contribution to National's future profits and growth are described in a number of documents written by respondent's own officials contemporaneously with the acquisitions, particularly its press releases and annual stockholder reports.

Many of the acquired stores were characterized as "supermarkets." [101] Others were described by National as "large" [102] supermarkets. Still others were characterized as "modern," the "largest," or the "largest and most modern" [103] super-

[99] CX 455-J; CX 566-Z-2; CX 567-B.

[100] See nn. 17 and 18, *supra.*

[101] CX 71 (5 of the 6 Piggly-Wiggly stores); CX 141 (George T. Smith); CX 156, 188 (Dole); CX 188 (Food Center); CX 195 (Ashton's); CX 118 (Montesi); CX 164 (Maker's stores); CX 237 (Miller's); CX 218 (Tolerton & Warfield); CX 213 (De Van-Horner); CX 254 (Illinois Valley); CX 244 (Food Bank); CX 229 (Slim's).

[102] CX 188 (Dole's); CX 118 (Montesi).

[103] CX 195 (Ashton's); CX 4 (Food Center); CX 6 (Montesi); CX 164 (Maker's); CX 237 (Miller's); CX 218 (Tolerton & Warfield); CX 229 (Slim's).

markets in their respective marketing areas. For example, National described the 28-store Food Center chain, of St. Louis, as "the largest regional chain of super markets in the St. Louis area . . .";[104] Capitol Stores (28 stores), of Baton Rouge, as the "second largest in sales volume in the State of Louisiana . . .";[105] Ashton's (1 store) as the "largest in Gulfport, Mississippi . . . the most modern super market in this area . . .";[106] Miller's, as "28 of the largest, most modern supermarkets in the Denver area of Colorado and Wyoming . . ." and as "one of the best in the west, and particularly the most successful in the Denver area";[107] and Slim's (1 store), of Fort Dodge, Iowa, as "one of the largest and most modern super markets in the state of Iowa, which was completed less than a year ago."[108] National's president testified that "George Smith had some good super markets. . . . Very active, good stores. Some were very large."[109] While he thought three of the De Van-Horner stores were "just fair," three others were "very good." Food Center had "some" poor stores, he said, but some of the others were "real good ones."[110] Asked if he considered the 27-store Miller's chain, of Denver, a "top organization," he replied: "I certainly did."[111] And even the C. F. Smith stores in Detroit (210 stores), many of which were small and obsolete, gave National not only $36 million in sales volume that it could gradually transfer to its own supermarkets,[112] but 66 stores that, while ultimately replaced, were then good stores.[113] Tolerton & Warfield was "believed to rank first in dollar sales in about two-

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[104] CX 4.
[105] CX 4.
[106] CX 195.
[107] CX 237.
[108] CX 229.
[109] Tr. 812–813.
[110] Tr. 817.
[111] Tr. 788.
[112] See RX 10, Table C, showing the gradual closing of the Smith stores in Detroit and the transfer of their sales volume to National's own newly built stores. For example, National closed a Smith store located at 20921 Schoolcraft, Detroit, on December 3, 1955, and opened a new store at 22450 Schoolcraft on January 24, 1956. By 1958 (the acquisition was made in 1952), all but 1 of the approximately 150 stores acquired in Detroit had been closed, but the 20 new stores built to take their place had sales of about $15 million. *Id.* The minutes of a National executive committee "Also authorized the entering into a five year contract with George T. Smith for the payment to him of $5,000 annually providing he does not engage in the chain store grocery business in the State of Michigan during that period." CX 65, p. 1.
[113] "Sixty-six of the [Smith] stores are complete food units with meat markets. The Smith Stores have maintained an outstanding reputation for produce merchandising in the Detroit market . . ." CX 78.

thirds of the cities and towns, including Sioux City, and second in the other cities and towns." [114]

Confirming its announced policy of acquiring "regional chains," respondent described Logan's (9 stores), of Nashville, Tennessee, as "another regional chain which will expand the company's operation in the south"; [115] De Van-Horner (7 stores), of Mobile, Alabama, as "the second acquisition of a regional food chain in the South within a week"; [116] Illinois Valley stores (7 stores), of Peoria, Illinois, as "the first acquisition of a regional food chain for the new year"; [117] and Food Bank (3 stores), Colorado Springs, Colorado, as the "second acquisition of a regional food chain in the state of Colorado within a year." [118]

These acquisitions were further described by National in its public statements as (1) beachheads for further expansion, and (2) contributors to sales volume and profits. The C. F. Smith acquisition (210 stores) was announced as the beginning of "a $10,000,000 expansion program for Detroit and Southeast Michigan"; [119] Piggly-Wiggly NW (6 stores), as "one more step in the expansion plans of the National Tea Co. to develop or *acquire* additional stores in the cities and states in which the Company now operates, as well as in further expanded territories as present negotiations materialize"; [120] George T. Smith (6 stores), of Lansing, Michigan, as a base that "will be used to expand their [National's] operations in the Western part of the state"; [121] Food Center (28 stores), St. Louis, as "a desirable base of operations for further expansion into Missouri and downstate Illinois"; [122] Capitol Stores (28 stores), Baton Rouge, Louisiana, as a "great opportunity for expansion into new areas not now occupied"; [123] Ashton's (1 store), of Gulfport, Mississippi, as "the first unit in a planned expansion program for the gulf coast area . . ."; [124] Montesi (8 stores), of Memphis, as "the foundation of building a new branch of operations for the company and plans are already under way for expanding this new branch to 40 or 50 stores in the Memphis area of Tennessee and the bordering states

[114] CX 40, pp. 11–12.
[115] CX 133.
[116] CX 213.
[117] CX 254.
[118] CX 244.
[119] CX 188.
[120] CX 71 (emphasis added).
[121] CX 141.
[122] CX 4.
[123] *Ibid.*
[124] CX 195.

of Arkansas and Mississippi . . ."; [125] Miller's (27 stores), of Denver, as "a new branch of the company, and plans will be developed immediately for expanding this new branch to approximately 60 stores in the Denver territory, which will include in addition to Colorado, the bordering areas of Wyoming, Kansas and Nebraska . . ."; [126] Tolerton & Warfield (85 stores), of Sioux City, Iowa, as an addition of "approximately $30,000,000 to National Tea's annual sales volume," and "a nucleus for a new branch . . . from which the company will expand to the border-line area of its present Minneapolis and Davenport branches northward and eastward as well as into new territory south and west of Sioux City, not previously *invaded* by National Tea Company"; [127] Logan's (9 stores), of Nashville, as a "bolstering" of "the company's Memphis operations in the tri-state area of Tennessee, Arkansas and Mississippi, in line with the company's expansion pattern"; [128] and De Van-Horner (7 stores), of Mobile, Alabama, as "part of the company's pattern for expanding to fill in the gaps between branch headquarter cities." [129]

The acquisitions involved here made immediate additions to National's sales volume and, with certain exceptions noted below, prompt contributions to earnings. "Earnings [of Food Center stores, St. Louis] since acquisition have proven very satisfactory." [130] Capitol Stores "operates 28 stores in the State of Louisiana in a rapidly expanding area and is expected to make a substantial addition to the Company's future earnings." [131] "This latest acquisition of Montesi stores in Memphis gives National another $15 million in annual sales, all of which should give the National Tea Co. total annual sales volume of approximately $600 million pressing close to 4th place position among America's largest Food Chains . . ." [132] "Our newest acquisitions in Port Huron, Michigan [H. A. Smith] . . . and our new Memphis branch [Montesi] . . . should begin to show their real value to overall company results during 1956 as our expansion plans develop in these new areas." [133] "Substantial progress was made in our recent acquisitions during the year. Detroit and Kalamazoo branches

[125] CX 118.
[126] CX 237.
[127] CX 218 (emphasis added).
[128] CX 133.
[129] CX 213.
[130] CX 4.
[131] *Id.*
[132] CX 118.
[133] CX 6.

which we acquired in 1952; St. Louis Branch acquired in 1953; New Orleans branch, acquired in 1954, all contributed substantially to our increased earnings in 1955." [134] This 1955 report to the stockholders noted that the company's "increased sales can be attributed to many factors predominant among which" was, among others, "acquisition of regional food chains in new territories. . . ." [135] The 1956 report, noting "record" sales and profits in the last quarter of the year, declared: "This achievement is particularly rewarding after the earlier 1956 expense of setting new acquisitions into operation . . . and indicates that we have invested wisely and well for the continued growth of National Tea Co." [136] Respondent's 1957 stockholders report, noting its "major acquisitions" during the year (Miller's, 27-store Denver chain; Tolerton & Warfield, 85-store Sioux City chain; Logan's, 9-store Nashville chain; De Van-Horner, 7-store Mobile chain; and Illinois Valley, 7-store Peoria chain) and their contribution to "greater profits," added: "The improvement in earnings is not experienced so quickly as is the increase in sales, because there are many expenses of setting the new acquisitions into operation which first must be absorbed. . . . It is expected that the full effect of the expansion will be realized in 1958. . . . Costs of expansion have been absorbed but benefits will be reaped in the future. . . ." [137] Several of its acquisitions, National reported, "have not had time to contribute to earnings sufficiently to offset initial expenses in setting up our operations. However, these new additions to our company should begin to reflect advantageously to our net income for the balance of the year." [138]

33. National's 1959 report to its stockholders, noting a 16.6% gain in sales and 9.78% gain in profits over the previous year, declared that the year's progress was particularly significant because it had been accomplished "without the benefits realized in previous recent years from expansion through acquisition of other regional food chains or groups of stores." [139] There were no

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[134] CX 6.

[135] *Id.*

[136] CX 7, p. 4.

[137] CX 8, p. 2. "The benefits to our sales and profits from these new acquisitions should begin to show in our third quarter operations." CX 24a. And, "increased sales can be attributed in part to our new acquisitions, which, although operated by your company only the smaller part of these three quarters, were responsible for our accelerated increase in sales reported for most recent periods." CX 26.

[138] CX 19. The Commission's Chief Economist testified that "New stores customarily become profitable within a year after opening," tr. 1948, and that acquired stores generally have temporary sales declines until the acquiring company has "time to consolidate its position" in the market. Tr. 1952.

[139] CX 10, p. 2.

acquisitions in 1959 because "we did not find the opportunities sufficiently attractive to your board of directors for expansion on a profitable basis through the acquisition route. . . ." [140]

34. National's spreading of its geographical areas of operation has not "thinned out" its market position. The increase in its aggregate sales from $270 million in 1948 to $794 million in 1958 increased its *national* market share from 0.9% in 1948 to 1.6% in 1958.[141] Its *state* market share was the same in both 1948 and 1958—4.6% [142] —but the number of states in which it enjoyed that market share had increased from 8 to 18. That is, in 1948, its total sales of $270 million amounted to 4.6% of all food store sales in the 8-state market ($5.7 billion) in which it then operated, whereas its vastly increased sales of $794 million in 1958 amounted to 4.6% of all food store sales in the greatly expanded 18-state market ($17 billion) in which it operated that later year.[143]

National's *county* market shares show substantially the same pattern of growth. The Commission's Chief Economist testified that "National Tea expanded its operations from [143] counties in 1948 to 292 in 1958. Its market share in these counties was about 9 per cent in 1948 and 8.6 percent in 1958." [144] In other words, "National Tea, in 1948 through 1958, has consistently held about eight to nine per cent of the market share of the counties in which it operated." [145] Again, however, as with the state market shares, this figure fails to convey the true size of National's enormous growth. Thus, in 1948, with sales of $270 million, respondent had 9% of a 143-county market ($2.9 billion), whereas in 1958 its total sales had tripled to $794 million, or 8.6% of a 292-county market ($9.2 billion).[146] Respondent argues that, since it had 9% of its 143-county market in 1948 and "only" 8.6% of a 292-county market in 1958, this showed that National was suffering a decline in market position. In fact, if only its "old" counties are considered, respondent definitely increased its over-all county market share. Thus, "if the identical counties are compared . . .

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[140] *Ibid.* National's 1958 report had noted that "we are continuously exploring opportunities for expansion through such acquisitions." CX 9, p. 4. "Future requirements for additional financing, if any, will depend solely on whether *future acquisitions of food chains* will be for cash or stock" (emphasis added). *Ibid.*

[141] CX 455–Z–18; 455–Z–20.

[142] CX 455–Z–33; tr. 1719.

[143] *Ibid.*

[144] Tr. 1719. "This is a weighted average of its share of sales in those counties in which it actually operated in each year." *Ibid.* See CX 455–Z–34; tr. 1947.

[145] Tr. 1720–1721.

[146] CX 455–Z–34.

National's share increased from 8.7% to 9.2% between 1954 and 1958." [147] The real point, however, "is that National has maintained an average county market share of about 9% even though it more than doubled the number of counties in which it operated between 1948 and 1958." [148]

National's position in the various *city* markets has similarly improved. While census universe figures are available for only 399 of the more than 500 cities and towns in which respondent operated stores in 1958, an analysis of this available data shows that its weighted average share of all food store sales in those 399 cities increased from 8% in 1954 to 10.2% in 1958.[149] This 2.2% gain in this vast group of markets represents an increase in respondent's own sales volume in those 399 cities of about $235 million, or 50%—from $469.6 million in 1954 to $704.1 million in 1958. In other words, while National was increasing its own average share of those 399 markets, the markets themselves were growing in size (from $5.8 billion total food store sales in those 399 cities in 1954, to $6.9 billion in 1958).[150]

Limiting the comparison to National's "old" markets—the 267 towns in which it was already operating in 1954 (thus excluding the "new" towns it entered between 1954 and 1958)—respondent's average market share declined slightly, from 10.5% in 1954 to 10.3% in 1958.[151] (Its absolute sales volume in those cities increased, however, from $469.6 million in 1954, to $540.6 million in 1958.) Limiting the comparison still further—to the 103 towns National *entered by acquisition* (and for which, as noted, census universe data is available)—respondent's average market share increased from 7.8% in 1954 to 10.4% in 1958.[152] Again this gain of 2.6% in these 103 cities and towns represents a vast gain in absolute dollar volume for National—from $262.3 million in 1954 to $394.9 million in 1958, an increase of about $132 million, or 50%, over 1954.

Nor has National lost market share in the 17 "horizontal" acquisition towns. In 1954, respondent had total sales of $180.5 million in those towns, or a weighted average market share of 9.2% (of a $1.9 billion market); in 1958, its sales had increased to $211.9 million, or 10% (of a larger $2.1 billion market) [153] —a

[147] Tr. 1947; CX 455-Z-51.
[148] Tr. 1947.
[149] CX 460; tr. 1751-1753.
[150] CX 460.
[151] *Ibid.*
[152] *Ibid.*
[153] CX 479.

gain of .8% in market share, and $31 million, or some 16%, in respondent's own absolute sales volume.

Thus, the examiner's finding that respondent's post-acquisition market share declined in "substantially all" of the acquisition areas is plainly erroneous as a matter of fact. There were declines in some markets, but these were obviously less than the examiner found,[154] and were more than made up by gains in other cities. After a detailed analysis, the Commission's Chief Economist testified flatly that, "for the group of cities in which National made acquisitions it *increased* its sales and market position. . . . The record on this point is perfectly clear." [155] All of this, together with the boast of respondent's president that the company's "sales have increased approximately 700 per cent since 1944," [156] hardly suggests that National has failed to hold on to the fruits of its acquisitions.

35. National Tea's movement into new markets has been paralleled by the other large chains. The 20 largest chains of 1960, the number of states in which each of them operated in 1948 and 1958, and the number of counties in which each of them operated in 1948 and 1958 are shown below: [157]

| Chain | Number of operating states | | Number of operating counties | |
|---|---|---|---|---|
| | 1948 | 1958 | 1948 | 1958 |
| A & P | 37 | 37 | 1,231 | 1,132 |
| Safeway | 23 | 25 | 543 | 581 |
| Kroger | 19 | 20 | 687 | 575 |
| Acme | 7 | 7 | n.a. | 141 |
| National | 8 | 18 | 143 | 283 |
| Food Fair | 7 | 9 | 30 | 81 |
| Winn Dixie | 2 | 10 | 44 | 166 |
| Grand Union | 6 | 11 | 74 | 87 |
| First Nat'l. | 7 | 8 | 67 | 72 |
| Jewel | 1 | 3 | 4 | 23 |
| Colonial | 6 | 11 | 169 | 184 |

[154] The examiner accepted respondent's estimates of its market shares, in a number of hand-picked cities, for 1959, a non-census year. They were based on the so-called "straight-line" extrapolation, *i.e.*, assumed that universe figures for 1959 would be a straight projection of average 1954–1958 growth. Such estimates are not reliable. Thus, food store sales in what Census calls the "North Central" region of the country increased by 2.14% from 1956 to 1957, but by 6.44% from 1957 to 1958. In the "Southern" region, on the other hand, there was an increase of 8.80% from 1956 to 1957, but only 3.37% from 1957 to 1958. See Commission counsel's brief, p. 62.

[155] Tr. 1943 (emphasis added).

[156] CX 332–L.

[157] CX 455–Z–29.

| Chain | Number of operating states | | Number of operating counties | |
|---|---|---|---|---|
| | 1948 | 1958 | 1948 | 1958 |
| ACF-Wrigley | 1 | 5 | 1 | 36 |
| Loblaw | 2 | 4 | 27 | 51 |
| Red Owl | 9 | 8 | 158 | 102 |
| Stop & Shop | 2 | 3 | 9 | 16 |
| Mayfair | 1 | 2 | 5 | 15 |
| Lucky | 1 | 2 | 8 | 20 |
| Von's | 1 | 1 | 1 | 2 |
| Thriftimart | 1 | 2 | 1 | 4 |
| Penn Fruit | 1 | 5 | 2 | 16 |

Between 1954 and 1958, the 16 of these chains that used mergers as a means of growth expanded their average area of operations from 6 to 8 states each, and from 113 to 132 counties. Some expanded much more rapidly than others. National, as noted, led the way, expanding from 187 counties in 1954 to 283 in 1958; Winn-Dixie, from 64 to 166 counties; ACF-Wrigley, from 6 to 36 counties. This geographical expansion has been accompanied by large gains in assets and sales volume. Thus, despite the fact that these chains operated in far more counties in 1958 than in 1954, each of them retained the same average share of all food store sales in their counties of operation in 1958 as in 1954, 8.6%. With each of them averaging 8.6% of all food store sales in the counties in which it operates, only 12 of them would be required to give them, in the aggregate, 100% of the market in any given community.

36. The cities and towns entered by National Tea are also being entered by the other large chains. A study was made in this proceeding of the sales, by cities or groups of cities, of the 14 largest chains (including National Tea itself) operating in the 18 states in which National Tea operated in 1958.[158] Nine of the 14 were among the nation's 20 largest chains; the others were large regional chains.[159] To avoid the disclosure of the sales of individual third-party chains, the data was compiled for only those cities in which 3 or more of those chains reported sales. The study cov-

[158] This data was gathered from the 14 companies by Commission subpoena, and compiled by Price Waterhouse. CX 416-A.

[159] The 14 were:

| | | | |
|---|---|---|---|
| A & P | ACF-Wrigley | National Tea | Consolidated |
| Safeway | Red Owl | Winn-Dixie | Eagle |
| Kroger | Borman | Jewel | Dillon |
| | | Colonial | Marsh |

ered 156 cities (or groups of cities) in which National operated in 1958 and for which complete data could be obtained.[160] Included in this group were 49 of the cities or groups of cities National had entered by one or more of the acquisitions challenged here, and another 37 were cities respondent had entered by building new stores but in which the expansion was a part of a merger-acquired branch. In the entire group of 156 cities studied, the total number of food stores declined by 14%, while the number of stores operated by these 14 chains increased by 14%. National's average market share in those communities increased from 2.9% to 6.3%, and the number of stores it operated in them increased from 295 to 424, a gain of more than 40%.[161] The 14 chains increased their combined market share in those 156 communities from 23.1% in 1954, to 32.1% in 1958.[162]

In the 86 communities National had either entered by merger or serviced from a merger-acquired branch, there were numerous entries by other chains. In 1954, 3 or more chains (including National itself) had been operating in only 31 of the 86 cities (36%); by 1958, 3 or more of them were operating in 71 of those 86 cities (82.6%). In that 4-year period, 44 of those 86 cities had been entered by 1 additional chain; 17 cities, by 2 additional chains; and 2 cities, by 3 additional chains. The number of chains decreased in only 1 of the 86 cities. Sales data were available for both 1954 and 1958 for only 29 of those cities. In 1954, the unweighted market share of the chains in those 29 cities was 45.1%; by 1958, it had grown to 54.6%.

37. All but 1 of the 14 largest chains operating in National's markets in 1958 made one or more acquisitions in those communities since 1950. For example, ACF-Wrigley acquired 2 chains that operated in St. Louis; Borman made an acquisition in Detroit; Colonial acquired 14 stores in Indianapolis; Safeway made an acquisition in Colorado Springs, Colorado, and another in Cheyenne, Wyoming; Red Owl acquired a 17-store chain in Denver; Consolidated made an acquisition in 22 of National's markets, and others in 11 of them; Dillon acquired 7 stores in Denver; Jewel Tea acquired a 41-store chain that operated in 10 of National's markets; Kroger acquired a company that operated in 5 of National's markets; Marsh made acquisitions in 4 cities where Na-

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[160] See CX 416-B for a description of the various classifications of the cities analyzed in CX 416-A, the Price-Waterhouse study.

[161] CX 453, 454, 482.

[162] CX 482.

tional operated; and Winn-Dixie acquired a 39-store chain that operated in 4 of National's markets.[163]

38. Listed below are a number of cities in which National's challenged acquisitions occurred and in which 3 or more of these largest chains had 50% or more of the city market in 1958: [164]

| *City* | *No. of Chains* | *Chains' Market %* |
|---|---|---|
| *COLORADO* | | |
| Colorado Springs | 3 | 62.8 |
| Denver | 3 | 64.1 |
| Englewood | 3 | 60.0 |
| *ILLINOIS* | | |
| E. Peoria | 3 | 72.3 |
| Peoria | 4 | 59.0 |
| *INDIANA* | | |
| Indianapolis | 5 | 58.8 |
| *LOUISIANA* | | |
| Baton Rouge | 3 | 50.1 |
| *MICHIGAN* | | |
| Pontiac | 5 | 50.1 |
| Wyandotte | 4 | 64.5 |
| Ypsilanti | 5 | 75.9 |
| Birmingham | 4 | 62.8 |
| Roseville | 4 | 60.7 |
| Mt. Clemens | 4 | 67.7 |
| Trenton | 4 | 91.6 |
| Port Huron | 4 | 60.8 |
| Albion, Marshall & Charlotte | 4 | 82.4 |
| *MISSOURI* | | |
| University City | 4 | 51.9 |
| Maplewood | 3 | 75.5 |

39. The Denver, Colorado, market provides one of the most striking illustrations of this trend toward oligopoly in food retailing. National Tea had begun negotiations for the acquisition of the 27-store Miller's chain as early as 1950,[165] finally completing the merger on May 15, 1957. This acquisition gave National approximately 20% of the Denver market. At that time, Safeway was the only large chain in Denver, having entered the city in 1931 with the acquisition of the 1,392-store MacMarr chain.[166] In 1957, immediately after National's acquisitions of Miller's, Dillon acquired the 8-store King Soopers chain.[167] Thus, in 1958,

[163] CX 436-447; CX 455-V through CX 455-Z-16; CX 455-Z-57 through CX 455-Z-59.
[164] CX 454. (See CX 416-A for the identity and aggregate sales volume of the chains operating in these markets.)
[165] CX 312.
[166] CX 446-A.
[167] CX 439-A.

those 3 chains—National Tea, Safeway and Dillon—had sales of $92,757,039 in Denver, or 64.1% of all food store sales in the city. Finally, in December 1959, Red Owl entered Denver by acquiring the Marr chain, a company that had annual sales of $40 million.[168] Hence, 4 chains now dominate the Denver market.

40. National Tea, with 1958 sales of $794 million, was, as noted, some 9,000 times larger than the average single-store independent with which it competed and about 20 times larger than the average of the 180-grocery chains with 11 or more stores, excluding the top 20. About 90% of the nation's grocery retailers operate only a single store. And even the 19th and 20th of the 20 largest chains operated only 27 and 47 stores, in 2 and 4 counties, respectively, with sales of less than $100 million, or just over 10% of respondent's own annual sales. National enjoys a number of advantages not available to its smaller competitors. One of those advantages is the fact that it receives from its suppliers price concessions, and promotional and advertising allowances or payments, that are not given to those competitors. For example, the tabulation below shows the purchases of dairy products by National's Denver branch and several of its local competitors from Beatrice Foods in December 1961, together with the various price and other concessions received by each:[169]

| *Retailer* | *Total purchases from Beatrice December 1961* | *Price discounts* | *Total discounts and allowances* | |
|---|---|---|---|---|
| | | | *Dollars* | *Percent* |
| National Tea | $218,102 | $21,786 | $27,308 | 12.5 |
| King Soopers | 82,206 | 3,684 | 3,778 | 4.6 |
| Furr Food | 5,604 | 489 | 504 | 9.0 |
| Castillo Gro. | 692 | 52 | 52 | 7.4 |
| American Way Gro. | 559 | 45 | 45 | 7.9 |
| Blair | 214 | 8 | 8 | 3.7 |
| Dvorak's Gro. | 158 | 4 | 4 | 2.5 |
| F & F Market | 143 | none | none | none |
| J & M Groceteria | 122 | none | none | none |

Thus, while National received concessions totaling 12.5% of its purchases from Beatrice during the month, King Soopers, for example, received concessions of only 4.6% of *its* purchases, a differential of 7.9%. Since before-tax profits in food retailing seldom exceed 3%, it is obvious that supplier-concessions of this

[168] CX 455-Z-57.
[169] CX 648-656. See also CX 289-299.

type place the smaller firms at a serious competitive disadvantage.

41. The concessions from this particular supplier are even more significant, however. They totaled, as noted above, $27,303 for the month of December 1961; on an *annual* basis, they would amount to over $300,000. In 1959, National's total profits on its entire Denver branch operation was $1.35 million.[170] Therefore, while respondent's purchases of *dairy* products in the Denver branch amount to some 6% of all products purchased by that branch, the $300,000 in concessions received on those purchases is equivalent to more than 20% of all *profits* realized by the branch's entire operation.

42. Certain of these dairy products purchased from Beatrice were "private label" merchandise.[171] For example, National bought fluid milk bearing its own private label, rather than Beatrice's label. On this item, National received, on its December 1961 purchases only, price discounts of $6,881.17, or 14% on its purchases. Since none of respondent's competitors in the Denver market bought such private label milk, none of them received that 14% price concession.[172] National also bought private label butter from Beatrice. On this it paid 65¢ a pound, while all but one of its Denver competitors were paying 70¢ a pound for Beatrice's own "Meadow Gold" butter.[173] Moreover, respondent received *an advertising allowance of $1,152, a payment from its supplier for the advertising and promotion of National's own private label butter.*[174] None of its competitors received such an allowance.

43. Respondent supports below-cost operations in many local markets out of earnings derived from other markets where it operates profitably. In particular, it uses earnings from its high-profit areas to finance massive advertising programs, and thus build up sales volume, in those cities and towns where it operates below-cost. For example, National had net profits of $1.35 million in its Denver branch in 1959, but *net losses* of over $1 million in Memphis in 1959. Its net advertising expenditures per dollar of sales was approximately 5 times as large in Memphis as in

[170] CX 528-D.
[171] A number of National's various private label suppliers are listed in CX 321-322.
[172] CX 648-656.
[173] CX 648-A.
[174] CX 648-B.

Denver. The chart below shows the gross sales and net advertising expenditures of 7 of National's branches in 1959: [175]

| Branch | Gross Sales | Net Advertising Expenses | Advertising as Percent of Sales |
|---|---|---|---|
| Memphis | $ 21,755,000 | $237,639 | 1.09% |
| Davenport | 26,703,000 | 152,560 | .57 |
| Minneapolis | 83,203,000 | 319,514 | .38 |
| Indianapolis | 83,821,000 | 298,031 | .36 |
| Chicago | 259,059,000 | 773,925 | .30 |
| Denver | 50,266,000 | 105,581 | .21 |
| Del Farm | 19,696,000 | (42,876) [176] | (.22) |

National's sales and before-tax losses [177] in Memphis for the years 1955 (it entered Memphis by acquiring Montesi in 1955) through 1959 are shown below: [178]

| *Year* | *Memphis Branch Sales* | *Before-tax (Loss)* |
|---|---|---|
| 1955 | $ 2,631,262 | ($ 53,029) |
| 1956 | 12,906,804 | ( 243,355) |
| 1957 | 15,807,290 | ( 389,020) |
| 1958 | 18,535,900 | ( 625,052) |
| 1959 | 21,755,265 | ( 1,149,598) |

44. Losses have also been incurred in respondent's expansion of its other branches. For example, its before-tax losses in its Detroit branch in 1958 and 1959 were $1,806,226 and $1,330,338, respectively.[179] Its sales, however, are increasing. In 1954, that branch had sales of $32 million; in 1958 and 1959, $63 million and $66 million, respectively.

45. National does not have to support unprofitable operations in a particular market indefinitely. In due course its massive advertising, promotions, acquisitions, and the building of new stores brings its market share to a point where its stores in those areas begin to show a profit. For example, National sustained losses in

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[175] CX 528-D; tr. 1952.

[176] Parentheses indicate that advertising allowances received from suppliers exceeded total advertising expenditures.

[177] National is "able to write off this loss against profits earned in other branches." Tr. 1951. In 1959, for example, respondent's profit and loss statement shows a loss in the Memphis branch of $559,598. However, it "wrote off" another $590,000 of losses in that branch against tax liability on earnings in its other branches. "Hence, National's 1959 loss for this branch amounted to $1,149,598 (CX 357, *in camera*). This is a loss which a less diversified firm would have been forced to assume, since it could not have written off over one-half of its losses against profits earned elsewhere." Tr. 1951–1952.

[178] CX 357 *(in camera)*.

[179] CX 355 *(in camera)*.

its Davenport branch for several years. As the chart below indicates, that branch has now emerged from the red: [180]

| *Year* | *Davenport Branch Sales* | *Before-tax Profit or (loss)* |
|---|---|---|
| 1956 | $17,128,595 | ($136,555) |
| 1957 | 20,788,669 | ( 179,774) |
| 1958 | 27,220,199 | ( 173,099) |
| 1959 | 26,702,983 | 76,088 |

46. The per-dollar-of-sales cost of advertising is directly related to sales volume in a particular marketing area. The absolute cost of running a full-page food ad in a daily paper in a given city is the same whether the advertiser has 10 stores with sales of $5 million or 100 stores with sales of $100 million; but the relative cost, per dollar of sales, is vastly different. Further, as volume and hence market share increases, an increasingly large share of the chain's advertising costs can be shifted to suppliers. For example, as pointed out above, respondent's Del Farm branch (the 12 stores acquired from Del Farm in 1958) had a *negative* advertising expenditure of $42,876 in 1959, *i.e.,* it received $42,876 more from its suppliers than it actually spent on advertising.

47. As noted above, National's "average" market shares in the counties and cities in which it operated in 1958 were 8.6% and 10.2%, respectively. However, this "averaging" fails to reveal the extent of respondent's power in some of these markets. Thus, in its "counties of operation in Arkansas, in 1958, it did only 1.4 per cent of the business, whereas in the other extreme, which is Wyoming, in its counties of operations it did 21.2 per cent." [181] But even these figures involve an "averaging" of a number of county shares within a given state. It is in considering the counties individually that respondent's real market power appears. Thus, "in 121 of the 292 counties in which National Tea operates, it does over ten per cent of the business. So in these counties it is a very substantial factor as a retail competitor." [182] In other counties National's market share is much greater. In 1958, it had 15% or more of all food store sales in 58 counties, 20% or more in 27 counties, over 25% in 15 counties, 30% or more in 9 counties, 35% or more in 4 counties, and over 45% in 1 county.[183]

Respondent's market position also varies widely from city to

[180] CX 356 *(in camera)*.
[181] Tr. 1720; CX 455-Z-34.
[182] Tr. 1721; CX 455-Z-35.
[183] CX 455-Z-35.

city. Census data permitted an analysis of its market share in 399 of the 514 cities in which it operated in 1958. In 48 of those 399 cities, it had less than 5% of all food store sales; in 141, less than 10%. Respondent had 10% or more of the market, however, in 258 cities. In 175 of them, it had 15% or more; in 120, 20% or more; in 73, 25% or more; and in 29 cities, more than 35% of the market.[184]

48. National Tea, being "a large firm which operates across a large number of local markets," is thus "in a position to carry on pricing policies in a particular local market and not be under or restricted by the competitive restraints of that market." [185] When a firm "operates across many markets, in some of which it enjoys substantial power and profits, it is not subjected to those restraints which competition and consumers' preferences place on firms operating in competitively structured markets." [186] National Tea is in fact operating at a loss in a large number of cities and towns. In 1958, as noted, its more than 900 retail stores were located in some 514 cities. A study of its 1958 sales and profits in 399 of those cities (those for which census data was available) shows that, in 66 of them, or more than 16% of the cities studied, respondent's stores did not even meet their own direct store expenses, much less contribute anything toward the operation of the branch warehouses, branch advertising, and their share of home office expenses. In at least another 49 of those cities, National's stores met their own direct store expenses, but failed to meet those indirect costs of operation.[187] Therefore, in 1958, respondent was operating at a net loss in at least 115, or some 30%, of the 399 cities studied (and thus in at least 20% of the entire 514 cities and towns in which it did business in 1958).[188]

49. Respondent's accounting system computes the profitability of its store operations in accordance with the following formula. Deducting the cost of goods sold from gross sales leaves a "gross profit." Then, deducting the store's own "direct expenses" (payroll, rent, etc.) from that gross profit leaves what respondent calls "store contribution" (to branch warehouse and home office "overhead"). Profit or loss is determined by subtracting that branch warehouse and home office "overhead" from the "contri-

[184] CX 463.
[185] Tr. 1728.
[186] Tr. 1953.
[187] Thus, "of all 841 stores operating during all 12 months of 1959, over 100 did not make any contribution to the cost of their warehouse overhead." Tr. 1953.
[188] CX 365-A; CX 461.

butions" made by the stores.[189] For example, National's "profit and loss" statement for its Memphis branch in 1959 is as follows: [190]

*Memphis Profit and Loss—1959*

| | |
|---|---|
| Sales | $21,755,265 |
| Gross Profit | 3,192,501 |
| Direct Store Expense | 3,344,320 |
| Store Contribution | (151,819) |
| Overhead (warehouse, store, advertising, and administration) | 1,020,661 |
| Federal Income Tax | (590,000) |
| Other Income | 22,882 |
| Net Income | (559,598) |

Thus, the stores in the Memphis branch lacked $151,819 earning enough to pay even their own direct store expenses. The branch overhead, including the cost of operating the warehouse, and of advertising in the branch area, amounted to $1,020,661, bringing total losses in the branch store to $1,172,480. Even after a $590,000 tax offset against profits earned in other areas, and a contribution of $22,882 from "other income," the Memphis branch sustained a net loss for the company of $559,598 in 1959.

50. The "overhead" expenses incurred by respondent's 13 branch operations varies from one branch to another. For example, in 1958 its Del Farm branch in Chicago (one of the acquisitions challenged here) had the lowest overhead of the 13, only 2.0%, or 2¢ per dollar of sales. The Memphis branch, at the other extreme, had the highest overhead of them all, 4.7% [p. 353]: [191]

Since advertising expenditures are a part of "overhead," the fact that the Memphis branch has particularly large advertising costs, while the Del Farm branch in Chicago collects more in advertising allowances from its suppliers than it actually spends on advertising,[192] accounts for a part of the difference in their respective overhead expenses.

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[189] CX 365–A defines these various terms used in National's accounting system: "Sales less cost of goods=gross profit. Gross profit less direct store expenses=store contribution." "Total store contribution less overhead plus other income (or less other expense)=income before federal income tax." "Direct store expenses" include: Payroll; payroll tax and benefits; utilities; store maintenance; laundry and uniforms; supplies; taxes and licenses; rent; depreciation; miscellaneous expense; cartage. "Overhead" includes "warehouse expense, all store expenses not deducted from gross profit to arrive at store contribution (*i.e.*, such indirect costs as supervision, auditing, insurance and some direct costs such as banking charges, certain supplies and other items which are too small to distribute over a number of stores), *advertising expense* and administration *(including an allocation of headquarters expense)*." (Emphasis added.) See tr. 1753–1755.

[190] CX 357 *(in camera)*. Parentheses indicate a negative or loss factor.

[191] CX 466 through 478.

[192] Finding number 43, *supra*.

| Branch | No. of Stores | Branch "Overhead" as % of Sales—1958 |
|---|---|---|
| Chicago Branch | 216 | 2.9% |
| Indianapolis | 66 | 2.4% |
| Minneapolis | 124 | 3.3% |
| Milwaukee | 56 | 4.1% |
| Detroit | 65 | 4.2% |
| Kalamazoo | 34 | 3.3% |
| St. Louis | 44 | 3.3% |
| New Orleans | 48 | 3.0% |
| Memphis | 29 | 4.7% |
| Davenport | 28 | 3.9% |
| Denver | 28 | 3.5% |
| Sioux City | 75 | 4.0% |
| Del Farms (Chicago) | 12 | 2.0% |
| Unweighted average: | | 3.4% |

51. The relative profitability of National's store operations in various cities can be seen in the chart below. For example, in one city, after deducting the cost of goods sold and direct store expenses, National's stores realized a "contribution" of more than 10¢

| "Contribution" Ratio (Sales less cost of goods and direct store expenses) | Number of cities |
|---|---|
| 10.0% to 10.9% | 1 |
| 9.0% to 9.9% | 2 |
| 8.0% to 8.9% | 13 |
| 7.0% to 7.9% | 27 |
| 6.0% to 6.9% | 49 |
| 5.0% to 5.9% | 64 |
| 4.0% to 4.9% | 50 |
| 3.0% to 3.9% | 41 |
| 2.0% to 2.9% | 37 |
| 1.0% to 1.9% | 22 |
| 0.0% to 0.9% | 27 |
| −0.0% to −0.9% | 15 |
| −1.0% to −1.9% | 16 |
| −2.0% to −2.9% | 8 |
| −3.0% to −3.9% | 5 |
| −4.0% to −4.9% | 8 |
| −5.0% to −5.9% | 4 |
| −6.0% to −6.9% | 2 |
| −7.0% to −7.9% | 1 |
| −8.0% to −8.9% | 2 |
| −9.0% to −9.9% | — |
| −10.0% to −10.9% | 1 |
| −11.0% to −11.9% | 1 |
| −12.0% and over* | 3 |

*One city −20.5% and another −26.1%.

per dollar of sales. (Deducting the unweighted average branch "overhead" of 3.4%, the net profit left here would be some 6.6¢ per dollar of sales. In 1958, National's over-all before-tax profits were 2.77% of sales.) At the other extreme, in 3 cities respondent's stores lacked more than 12¢ per dollar of sales meeting even their own direct store expenses, much less contributing anything to warehouse and headquarters "overhead" or to net profit [p. 353]: [193]

52. One of the principal reasons for the wide variation in respondent's profits from city to city is the fact that, as was stipulated here,[194] it varies its prices from city to city to meet local competition. Intense local competition tends to lower prices.[195] The chart below shows the wide variation in the "gross profit" realized by National in some cities as compared with that realized in others (gross profit, as noted above, is the difference between selling price and cost of goods sold, with no deductions for either store or overhead expenses). For example, in one city this gross profit margin was more than 20¢ per dollar of sales. At the other extreme, in another city it was less than 11¢ per dollar of sales, a difference of some 9¢ in the gross markup taken in the two cities: [196]

| *Gross profit ratio (to sales)* | *Number of cities* |
|---|---|
| 20.0% to 20.4% | 1 |
| 19.5% to 19.9% | 3 |
| 19.0% to 19.4% | 20 |
| 18.5% to 18.9% | 33 |
| 18.0% to 18.4% | 39 |
| 17.5% to 17.9% | 49 |
| 17.0% to 17.4% | 53 |
| 16.5% to 16.9% | 62 |
| 16.0% to 16.4% | 41 |
| 15.5% to 15.9% | 22 |
| 15.0% to 15.4% | 22 |
| 14.5% to 14.9% | 18 |
| 14.0% to 14.4% | 9 |
| 13.5% to 13.9% | 12 |
| 13.0% to 13.4% | 4 |
| 12.5% to 12.9% | 7 |
| 12.0% to 12.4% | 2 |

[193] CX 461.

[194] Tr. 1467; finding number 27, *supra*.

[195] "Intensified competition in several trading areas forced us to sacrifice profit margins in order to maintain traffic and hold customers in our stores." CX 9, p. 2.

[196] CX 462.

| *Gross profit ratio (to sales)*—Continued | *Number of cities*—Continued |
|---|---|
| 11.5% to 11.9% | 1 |
| 11.0% to 11.4% | — |
| 10.5% to 10.9% | 1 |
| | 399 |

Arithmetic mean — 16.8%
Median — 16.9%

53. There is a striking correlation between the relative profitability of respondent's operations in the various cities and the market share it enjoys in those cities. That is, in those cities where it has a relatively large market share, its profits tend to be relatively high; in those cities where its market share is relatively low, its profits tend to be relatively small. The Commission's Chief Economist, Dr. Willard F. Mueller, testified that he had "made a comparison [of] the market share which National Tea enjoys in various cities and the sorts of gross profit ratios and average contribution to profits which they enjoy in these cities. These comparisons reveal a very striking relationship between National Tea's market share in cities and the magnitude of its average gross profit and its average contribution to profits from those cities, contribution to overhead from those cities, contribution. For example, in the 48 cities in which National Tea enjoys a market share of less than five per cent, the average contribution to overhead of stores from those cities is a negative 2.3 per cent. And the average gross profit is 14.9 per cent. At the other extreme, in cities in which National Tea enjoys a market share of 35 per cent and above, and there are 29 such cities, National Tea has an average contribution to overhead of six and a half per cent, or approxi-

| Market Share (percent) | Number of cities | Average gross profit ratio | Average Contribution ratio |
|---|---|---|---|
| | | *percent* | *percent* |
| 35.0% and over | 29 | 17.3 | 6.5 |
| 25.0% to 34.9% | 44 | 17.5 | 5.5 |
| 20.0% to 24.9% | 47 | 17.5 | 5.7 |
| 15.0% to 19.9% | 55 | 17.0 | 4.0 |
| 10.0% to 14.9% | 83 | 17.0 | 3.7 |
| 5.0% to 9.9% | 93 | 16.4 | 1.6 |
| 4.9% and under | 48 | 14.9 | (−2.3) |

mately eight cents higher than in the first group of cities I mentioned." [197] The correlation is shown below [p. 355]: [198]
It is clear, therefore, that the stores in the 258 cities where National has more than 10% of the local market are in fact supporting its losses in the 141 cities where it has less than 10% of the market.

54. This "subsidization" of operations in cities where market share and thus profits are low, out of money earned in other cities where market share and profits are high, is illustrated by a comparison of National's operations in Memphis and Denver in 1958. As noted, respondent had only 5.8% of the Memphis market in 1958. Further, only two other national chains were operating in the city, A & P and Kroger. Together, those three chains had sales of only $34.7 million,[199] or 24.1% of the city's total food store sales.[200] In Denver, on the other hand, which National Tea had entered in 1957 by acquiring the more than 20% of the market held by the 27-store Miller's chain, respondent had 21.4% of all Denver food store sales in 1958. And National's 21.4% of the Denver market, together with that of three other chains, totaled no less than 64.1% of all food store sales in Denver in 1958.[201] The difference between holding 5.8% of a non-chain market like Memphis, and 24.1% of a chain-dominated market like Denver, is illustrated by a comparison of the "gross profits" and "contributions" earned in the two cities in 1959. Its Denver stores had gross profit margins (sales price less cost of goods sold) ranging from 16.82¢ per dollar of sales for one store, to a high of 19.70¢ in the top store. In the Memphis stores, on the other hand, gross margins ranged from a "high" of 15.49¢ to a low of 13.06¢ for each dollar of sales. The Denver stores, as a group, exceeded their own direct store costs, the branch's "overhead" of 3.5%, and made substantial contributions to the company's profits. More than half of the Memphis stores failed to meet even their own direct store expenses, having direct, individual store losses ranging from $8,542 to $27,123.[202] Altogether, the Memphis stores had direct store losses of $64,078. Considering the two branches as a whole (rather than just the cities of Denver and Memphis [203]), the

[197] Tr. 1756.

[198] CX 463. See also CX 660, which "compares National's market position and profitability in various *counties*. The correlation is unquestionable." Tr. 1947 (emphasis added).

[199] CX 416-A-IV.

[200] CX 454-C and D.

[201] CX 454-E.

[202] CX 400-Z-9 *(in camera)* (Memphis stores) and CX 400-Z-15 and 16 (Denver stores).

[203] National Tea stores in other cities in the Memphis branch are also losing money. See, *e.g.*, Nashville, Tennessee, store "contributions," CX 400-Z-9 and 10.

Memphis branch had before-tax *losses* of $1,149,598 in 1959, on sales of $21,755,265, or a loss of more than 5¢ on each dollar of sales; [204] the Denver branch had before-tax *profits* of $1,604,887 on total sales of $50,266,066,[205] or nearly 3.2% of sales.

55. Respondent attributes this wide variance in the relative profitability of its operations in different cities to a variety of factors, particularly to alleged differences in the "efficiency" of its managers in some cities as compared with that of its managers in other cities. In view of the testimony of National's president that he doesn't approve of inefficient management and doesn't hesitate to "switch [store managers] around," [206] it is unreasonable to suppose he would have tolerated the kind of "inefficiency" implied in, for example, the Memphis losses cited above. Moreover, as the Commission's Chief Economist pointed out in his testimony on this point, if managerial inefficiency and the various other factors advanced by respondent were responsible for these city to city variations in profits, then high and low profits should be distributed at *random* throughout the more than 500 cities in which National operates. "Profitability does depend upon many factors. However, one would expect that the factors mentioned by him [respondent's economist-witness] would tend to result in a random distribution of profits unassociated with National's market share, for practically all of the factors which he mentions would be at work whether National had a large or a small market share. The intended thrust of his presentation is to deny that National can and does adjust its pricing and other competitive policies in accordance with its market position. Yet National's own counsel have stipulated that, 'Respondent's prices may vary, *depending on local competitive conditions,* from one city or town to another within any particular warehouse area . . . .' " [207] "He, in effect, argues that it makes no difference to a firm's profitability whether it has 1%, 10%, or 25% of the business in a market." [208] Yet: "Even Livingston admits at one point that the intensity of competition limits both National's market share and its profits. He says, 'Third, the leading competitors may be more capable in some cities than in others; thus making it more difficult to achieve a large market share and also more difficult to earn a sat-

[204] CX 357 *(in camera)*. "The magnitude of this loss is indicated by the fact that it represents over 5% on sales, whereas large chains enjoyed average profits, before taxes, of about 2.8 percent in 1958." Tr. 1952.

[205] CX 362 *(in camera)*.

[206] Tr. 687–689.

[207] Tr. 1949 (emphasis in original).

[208] Tr. 1948.

isfactory profit.' "[209] It is abundantly clear that respondent does, in fact, subsidize its operations in those markets where intense competition keeps its prices and profits low, out of profits earned in other markets where competition is weak and prices and profits are thus relatively high. It is also clear that there is, in fact, a direct relationship between the market share enjoyed by National Tea and the other large chains "sharing its opinion" that price competition should be avoided and the relative profitability of National's operations. As the Commission's Chief Economist summed it up, "I have never seen a closer relationship between the market dominance of a firm in an individual market, or a group of markets, and its profitability than the records in this case depict . . . nor are the inferences better borne out by any group of statistical data as to the advantages which a conglommerate firm enjoys than is true in the case of this financial data we have analyzed" here.[210]

56. National Tea thus has several competitive advantages not possessed by its smaller competitors. Its great purchasing power (its purchases totaled $638.5 million in 1959) enable it, as found above, to secure from its suppliers price concessions and promotional payments not available to smaller retailers. Its integration into manufacturing, with the capacity to process still more of its own products if dissatisfied with its suppliers' prices, is another aid in its efforts to get price advantages denied to its smaller competitors. Further, the geographical scope of its operations (18 states, 292 counties, and more than 500 cities and towns), as pointed out above, permits it to subsidize below-cost operations in more than 100 cities where competition is strong out of profits earned in other cities where competition is weak and profits high, using those other-market earnings in the subsidized area for various competitive offensives, particularly intensive advertising. "While independents affiliated with a good wholesaler can and do sell as cheaply as the chains, it is my opinion that some are not able to convince the public that this is true because they do not have the money to spend on advertising."[211] Finally, National's

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[209] Tr. 1949. One of respondent's witnesses, contending that the supermarket has brought "more competition price-wise," stated: "This is attested by the *reduced gross margin* of the supermarket as compared with the old clerk-service stores . . . ." Tr. 1828–1829 (emphasis added). As proof that National was not "charging lower prices" in Dyersburg, Tennessee, one of its witnesses testified that "the *gross* profit was consistently higher" there. Tr. 1872 (emphasis added). Another testified that "there was a coffee war on recently, and that could affect your *mark-up* . . . ." Tr. 943 (emphasis added).

[210] Tr. 1760.

[211] Tr. 2194.

great resources give it a decided advantage over its smaller competitors in the matter of securing both the opportunity and the wherewithal to grow by building new stores.[212] As one witness in this proceeding put it, "independents have practically no chance in new shopping centers that are being built in the New Orleans area, because of the lack of finances. Those building the shopping centers prefer to have leases from the national chains rather than from local independent merchants . . . . [I]n the rapidly developing shopping centers the independents are practically frozen out because of lack of finances." [213]

Another witness testified that: "Landlords and loan companies who control the heavy traffic areas such as shopping centers prefer the national or regional chains as tenants. In my opinion, it is only a rare instance in Alabama that an independent has a prime location. While recently funds to assist independents in financing new stores for modernization programs have been made easier to secure, it is my opinion that it still is most difficult for many independents to expand and grow as rapidly as his national or local chain competitor." [214]

57. There is one advantage, however, that National Tea does *not* enjoy over its independent competitors—superior efficiency. Respondent's officials and witnesses have argued repeatedly here that National Tea is, in effect, less efficient than its local competitors.[215] There is some evidence that this is true. For example, in 1959, respondent's Memphis stores, on an average "gross profit" margin (difference between cost of goods sold and

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[212] "[W]hen a large chain enters a new market via merger, it is in a position to expand its merger-achieved beachhead by saturating the market with new stores." Tr. 1944. See RX 10.

[213] Tr. 2188–2189.

[214] Tr. 2194.

[215] It is said that "the economies achieved by the supermarket are primarily in the retail [store] operation. Thus the store that is a unit in a chain has no significant advantage [of economy] over one that is not." Tr. 1839. "Indeed, quite the opposite seems to be the case. The very best competitors are the ones with the 'local touch.' Such 'local' supermarket operators can best satisfy the particular customers in their area. They get to know those customers. They are part of their own business community. They can set their prices to meet local competitive needs . . . ." [T]hese operators obviously have more knowledge of the local needs and peculiarities of the markets in which they operate." Tr. 1829–1830. "[T]he big chain stores have store managers who are not quite the same type of merchants, who do not possess the same ability as the local entrepreneur, who knows his market, who can make on the spot decisions, who knows a great deal more about the food retailing, possibly, in terms of merchandising than the store manager of the chain unit." Tr. 2067. National contends it "has been at a serious disadvantage" vis-a-vis its small competitors, and its counsel argues that the small but affiliated retailers "frankly run rings around us . . . ." Tr. 1899, 1451. See also tr. 1811, 1833. The hearing examiner found no evidence that National's "over-all organization gives it a decisive advantage in *efficiency* over its smaller rivals" (Initial Decision, p. 263, emphasis added), and respondent quotes that conclusion with approval. Answering Brief of Respondent, pp. 3, 7.

sales price) of some 14.5¢ per dollar of sales, had direct store losses of about $64,000, or just under 1¢ per dollar of sales.[216] Average "overhead" for the Memphis branch in 1959 was 4.7¢ per dollar of sales, thus bringing the total loss of the Memphis stores to well over 5¢ for each dollar of sales. Having lost more than 5¢ on a gross margin of 14.5¢, the "break-even" point for those stores in 1959 would have been a markup of some 19%. One of respondent's exhibits in this record, a food publication article [217] reporting an interview with one of National's large, independent competitors in Memphis, a Mr. Montesi,[218] quotes Mr. Montesi as follows:

> Question: I assume this mechanization [of his single, giant supermarket in Memphis] has had its effects upon your operating costs. Will you touch upon this for a moment?
>
> Answer: Sure. Our percentage figures are no secret. Labor costs average in the vicinity of 5.5 per cent. Our rent is one-half of one per cent. One of our largest costs—promotion which includes coupons—runs about two per cent. Our advertising cost for the one store is one per cent. All-in-all figuring supply, heat, light and power and other incidental expenses, we're operating our store on 10 per cent of total sales. This leaves us with a substantial net, since the store operates on a 15 per cent margin.
>
> Question: The five points you're left with is substantially above the industry average, don't you think?
>
> Answer: Sure. But it's the result of efficiency not bilking the customer.[219]

In other words, Montesi says he takes a markup of 15%, incurs costs of 10%, and thus realizes a net profit of 5%, or 5¢ on each dollar of sales. National Tea's Memphis stores, on the other hand, took about the same markup in 1959 (14.5%), but *lost* more than 5¢ on each dollar of sales. The two operations are not entirely comparable, of course. Montesi was presumably giving his current figures at the time of the quoted interview, August 1962, whereas respondent's figures are for its 1959 Memphis operations. But even after making reasonable allowances for these differences, it seems clear that Montesi's single, large store is at least as efficient—if not more so—than National's multistore (11 stores in 1959) Memphis operation.[220]

[216] CX 400-Z-9 *(in camera)*.

[217] RX 6.

[218] RX 6-C. Montesi was acquired by respondent in 1955 but later, after the 5-year restrictive covenant expired, re-entered the market.

[219] RX 6-C. Mr. Montesi further explained that it was also the result of "volume." "The primary advantage is that you buy cheap. If you buy cheap you can sell cheap. If you sell cheap you get a built-in base of customer loyalty that's very important." RX 6-B.

[220] The Memphis situation is not an isolated example. As found above, National Tea is in fact selling below cost (including both direct and indirect expenses) in more than 100 cities. And, as respondent has reminded us, the fact "that a chain operates at a loss in a partic-

58. The increasing size of individual food and grocery stores has nothing to do with the steady growth of the 20 largest chains at the expense of the independent sector of food retailing. While the substitution of a single "supermarket" (minimum annual sales of $375,000) for 6 "corner grocery stores" (average sales of $60,000 per year) tends to reduce the total number of stores, it does not explain why, when this technological change occurs, one of the 20 largest chains, rather than the independent sector of the industry, should emerge as the *owner* of the new supermarket. As noted above, the 20 largest chains of 1960 increased their share of all United States food store sales by some 8–9% in the period 1948–1958 (from an estimated 20.1% to 30.1%) at the expense of the independents (down from an estimated 69.6% to 60%), a shift of some $4 billion in annual sales from the independent sector to the top 20 chains. Approximately $1.5 billion of this, or nearly half, was gained directly [221] from their acquisitions during that period (further acquisitions during 1959–1961 brought the total sales volume acquired by the 20 largest chains to $2.2 billion). The so-called "supermarket revolution" had nothing to do with this merger wave; that was the work of the 20 largest chains themselves, following the pattern set by National Tea Company.

59. Nor is there anything in the "voluntary" and "cooperative" group programs [222] to offset this increasing trend toward concentration in the food industry. First, such sales growth as they have apparently enjoyed is not due to the fact that their individual retailer-members are growing, but simply to the fact that they have succeeded in signing up new members.[223] This simply relabels particular independents, taking them out of the "unaffiliated" class and putting them under the "affiliated" label; the aggregate sales of all members of the independent sector—including both the affiliated and unaffiliated—continues to decline.[224] Further,

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ular area does not mean that independents competing with it *on the same gross margin* will also be operating at a loss." Answering Brief of Respondent, p. 25, n. 17 (emphasis added). There is not only no evidence in this record of any instance in which National predatorily forced prices below its *competitor's* costs, but positive testimony by independents that they know of no such practices by respondent. See, *e.g.*, tr. 2188.

[221] An acquisition's total contribution to the acquiring firm's ultimate growth may exceed the amount of the acquired company's sales volume at the time of the acquisition. Tr. 1712–1713.

[222] "A 'cooperative' is a group of retailers who have banded together to own a warehouse, while a 'voluntary' is where an independent wholesaler 'sponsors' a group of retailers." Tr. 1819–1820. See also tr. 2096.

[223] Tr. 1954–1956.

[224] In fact, "the members of these groups are experiencing an extremely high mortality rate." Tr. 1954.

the "voluntary" and "cooperative" groups are themselves losing their independent character. Thus many of them are joining the current merger wave, acquiring retail chains, wholesalers, and manufacturing facilities.[225] For example, Consolidated Foods, Inc., of Chicago, "was primarily a wholesaler, having acquired at least 13 grocery wholesalers in its growth history. . . . It subsequently transformed itself, largely through mergers, into a large food manufacturer as well as wholesaler . . . . [D]uring the last decade it began integrating into food retailing, largely through mergers. After a series of acquisitions involving over 250 food stores . . . Consolidated Foods today can boast that [, of] its sales of $500 million plus, slightly less than one-third is in wholesaling, and the remainder is equally divided between retailing and manufacturing. . . . Significantly, this is one of the voluntaries which the respondent has cited as an example of the vitality of the independent sector of food retailing." [226]

Further, the "cooperatives" and "voluntaries" are now acquiring members who are not independents at all, but large chains. In 1958, for example, 24 of the 180 chains with 11 or more stores were members of cooperative groups.[227] In fact, one cooperative is composed *exclusively* of chains with annual sales of $15 million or more (the equivalent of some 45 supermarkets of the minimum $375,000 annual sales class).[228] In 1960, it had 28 member-chains with combined sales of $1.5 billion, substantially more than National's own sales. "Among its chain members in 1960 were ACF Wrigley (the country's 11th largest chain) and Weingarten (19th largest chain)." [229]

Finally, however, there is nothing a "cooperative" or "voluntary" buying organization can do to help the individual, one-store member who must compete in a city where a national chain is operating its stores below cost. As noted, National Tea's stores are selling below cost in more than 100 of the approximately 500 cities in which it operates, subsidizing them out of earnings in the other cities. A one-store member of a "cooperative" or "voluntary," on the other hand, cannot call on other members of the group in other cities to give him a part of their profits; the members of these groups aggregate their purchases for the purpose of

[225] CX 633; tr. 1956–1962.
[226] Tr. 1957.
[227] Tr. 1956.
[228] *Ibid.*
[229] *Ibid.*

achieving economies in buying and engaged in various other forms of mutual aid, but they do not share or "pool" their profits. Each is, in the final analysis, an independent businessman who must either earn a profit in his own store or go under. [230]

60. The acquisitions challenged here may have the effect of injuring the wholesaling and manufacturing sectors of the industry. Prior to those acquisitions, 26 firms operating some 485 retail stores, with annual sales of approximately $250 million, were buying their food products from suppliers of their own choice. Since many of the more than 5,000 food products sold in grocery stores are bought by the retailers in a single, national market,[231] those 26 acquired firms formerly competed with each other on the buying side, bidding against each other in the purchase of meats, produce, etc. Now, those 26 competing purchasing-offices have been eliminated, and a single buyer—National Tea Company—confronts the suppliers that fomerly sold to the acquired companies. The number of customers available to food manufacturers and wholesalers selling in the national market has thus been reduced from 26 to 1. Moreover, the supplier who formerly sold to the 26 acquired firms, and who now attempts to sell to National Tea, is confronted by not merely a reduced number of customers, but by a customer of an entirely different character. Whereas even the largest of the 26 acquired firms had annual sales of "only" $42 million and thus annual purchases of perhaps $35 million, National Tea's 1958 sales were $789 million and its purchases $638 million, or nearly 20 times those of the largest of the retailers it acquired. And some of the smaller retailers acquired by respondent—such as Food Bank, the firm with 3 stores in Colorado Springs, Colorado, with an estimated 18% of all food store sales in the city, but an absolute sales volume of "only" $4.2 million—had only a fraction of 1% of National's bargaining power with suppliers. Suppliers, even when they themselves are large and powerful, get lower prices for their products when they sell to National Tea than when they sell to its smaller competitors.[232] Many of the food manufacturers—packers, canners, processors,

[230] Tr. 1962.

[231] Stipulation, tr. 1260. "Our [Chicago] branch purchases from suppliers all over the country." Tr. 1036. See also tr. 1031.

[232] As noted above, National bought dairy products from Beatrice, in Denver, for as much as 12.5% less than the smaller Denver grocers were paying, and as much as 7.9% less than a very substantial Denver chain (King Soopers—annual sales of more than $40 million) was paying Beatrice. CX 648–656.

[Footnote 234 follows.]

etc.—are quite small, however, a fact that enhances National's relative buying power still more.[234]

Further, these acquisitions have entirely foreclosed manufacturers and wholesalers [235] from a substantial part of the business of supplying those acquired stores. National Tea, as noted above, operates its own manufacturing and processing facilities, including meat processing plants, bakeries, and a general food plant that produces such products as coffee, tea, peanut butter, soft drinks, detergents, and so forth. In 1959, National "bought" $47,498,153 worth of food products, or 6.9% of its total purchases, from its own manufacturing and processing facilities. It also purchased some $17 million worth of goods from manufacturing firms owned or controlled by its parent or stockholder interests. Thus, if the 26 acquired firms have now been required to turn from their former suppliers for 7% of their purchase requirements (some $200 million), those independent suppliers have irrevocably lost a very substantial volume of business. And of course National can expand the output of its manufacturing facilities and thus preempt a still larger share of the patronage of its own stores if at any time its over-all buying power, together with the leverage its maufacturing facilities necessarily gives it over its manufacturer-suppliers, fails to secure from those suppliers what respondent considers a satisfactorily low price.

61. The probable effects of National's acquisitions on the buying side of food retailing appear even more substantial when considered in the context of the current merger movement in food retailing. National acquired, in the period 1948–1958, 26 retailers with 485 stores (28.9% of the 1,676 stores acquired by the 20 largest chains) having annual sales of $251 million

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[234] One of respondent's officials testified that: "I know of no packer, other than probably some extremely small packers, that would give any kind of advertising allowance or discount on [meat] products." Tr. 516. This witness further testified that National does not like "dealing with the big packers" and their "department heads." It prefers, instead, to "build connections with our smaller independent packers, because we always felt we got a better deal of handling their products." Tr. 531. "In Memphis alone we do business with 32 packers." Tr. 530.

[235] A loss of business by an independent manufacturer necessarily means an equivalent loss by the independent wholesaler through whom the manufacturer's product was formerly distributed. But the wholesaler has additional losses as well. "The extent to which the chains have integrated backwards to take over the wholesaler's function appears in the analysis of sources of chain store merchandise. Of the $15.2 billion purchased by 156 corporate grocery chains in 1958, over 86 percent came from independent producers, assemblers or manufacturers; 8 percent from company-owned manufacturing and assembly plants; less than" 6 percent from wholesalers. *Food Inquiry*, p. 7. Hence a chain's acquisition of a retailer that formerly bought from a wholesaler (who in turn bought from an independent manufacturer) might cost the wholesaler's manufacturer-supplier only 8% of that retailer's business, (assuming the acquiring chain does not switch to another manufacturer), but cost the wholesaler himself 94% of it.

(16.8% of the sales volume acquired by the 20 largest chains). During that period, as noted, those 20 chains increased their share of all United States food store sales by some 9%—from 21% to 30.1%—a gain of more than $4 billion, $1.49 billion of which was gotten from the 147 companies they acquired. Other acquisitions in the next 3 years brought the total number of retailers acquired by the 20 largest chains to 187—2,199 stores with annual sales of $2.2 billion, [236] a sum almost as great as the sales, in 1958, of all of the other 160 chains with 11 or more stores ($3.4 billion).[237] "By 1958 the overall trend toward concentration had progressed to a point where the great bulk of retail food sales was concentrated among relatively few centers of power—over 40 percent among fewer than 200 corporate chains with 11 or more stores and the bulk of the remainder among fewer than 500 voluntary and cooperative groups. This represents a very high degree of concentration, even at the national market level, in an industry of this vast magnitude. And, of course, as has been stipulated to, many products are sold to retailers in regional, and some in local markets, where the degree of concentration in buying and selling obviously is considerably higher than it is at the national level." [238] For a local supplier serving only a particular city, the effects of this increasing concentration at the retail level can be particularly adverse. For example, 3 chains (Safeway, National Tea, and Dillon) had 64.1% of all food store sales—and thus of all food store purchases—in Denver, Colorado, in 1958. In Trenton, Michigan, 4 chains have 91.6% of the market.[239] In these and numerous other markets the local food suppliers are faced with the necessity of selling to 3–5 chains on the latters' terms or not at all. If the present merger movement continues, this market structure may in time emerge in most cities and towns throughout the country.

The almost incredible decrease in the number of competitors in the food retailing industry evidenced by this record has occasioned, and will occasion, an imbalance in the bargaining position of retailers vis-a-vis their suppliers. While some very large firms operate at the grocery store supplier level, these suppliers are for the most part infinitely smaller than the respondent and the other large chains which mergers have produced. Such large buyers are in a position to buy all or most of the output of smaller suppliers

[236] CX 455–I; CX 455–S; CX 455–Z–57–59.
[237] Tr. 1717.
[238] Tr. 1960–1961.
[239] See CX 454.
[Footnote 242 follows.]

with the result that such suppliers become solely dependent upon the largesse of their customers. Moreover, the very nature of the product of many suppliers, perishable food stuffs, favors the buyer, for it is impossible to withhold goods for a better price. The grower of lettuce, the baker of bread and the producer of fresh milk must find a buyer within the few hours their products remain marketable. With national and local grocery store shelf space in the hands of fewer and fewer buyers, the balance of power has and is shifting to the point where small suppliers are in danger of becoming the economic serfs of their customers.

## CONCLUSIONS

1. National Tea Co. and each of the 26 acquired food retailers enumerated in Finding number 7, above, were engaged in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act at the time of the acquisition.

2. Respondent's acquisition of two of those firms, Pick-N-Save, of Park Forest, Illinois, and Kalamazoo Market Basket, of Kalamazoo, Michigan, was not unlawful. National subsequently sold Pick-N-Save and discontinued all operation in Park Forest, Illinois. The other firm, Kalamazoo Market Basket, was an adjudged bankrupt at the time of the acquisition.

3. Respondent's acquisition of the remaining corporations described in Finding number 7 (as contrasted with the individual proprietorships and partnerships listed there), may have the effect of substantially lessening competition at the manufacturing, wholesaling, and retailing levels of the food industry, in the various markets described in the above findings, and are unlawful under Section 7 of the amended Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

4. Respondent's acquisition of the remaining individual proprietorships and partnerships described in Finding number 7 may have the effect of substantially lessening competition at the manufacturing, wholesaling, and retailing levels of the food industry, in the various markets described in the above Findings, and are unlawful under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

5. The Commission is not "foreclosed" from proceeding against 5 of these acquisitions simply because, after initial investigation in 1953, it "closed" the inquiries "without prejudice," [242] nor

[242] The Commission wrote to National: "On the basis of the available facts, it appears that the matter does not warrant further investigation by the Commission, and it is accordingly

against 5 more of these acquisitions—those involving noncorporate firms—simply because, in the examiner's view, the Commission's counsel "abandoned" the complaint's charge that those acquisitions violated Section 5 of the Federal Trade Commission Act.[243] As a matter of fact, at one point in the hearings complaint counsel expressly reminded the examiner that "we have a Section 5 count. . . ." [244] In any event, however, as the court said in *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 55–56 (4th Cir. 1950), "it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." See also *United States* v. *Vulcanized Rubber & Plastics Co.*, 178 F. Supp. 723, 726 (D. Pa. 1959).

6. This record is replete with evidence of the competitive vitality of these noncorporate firms acquired by respondent.[245] Barkett's, a proprietorship, operated a large supermarket in Charleston, Missouri, with sales of $908,000 per year, some 18% of the food store sales in its county. Food Bank, a partnership, operated 3 stores in Colorado Springs, Colorado, with total sales of $4,284,831, and estimated 18% of that market. Guidone (Arlington Market) had only 1 store in Indianapolis, but it was a giant supermarket with annual sales of $5,200,000, an estimated 2.98% of that vast market, a market in which respondent is now the dominant factor with more than 20% of all food store sales. Ashton, a proprietorship, operated a very large supermarket in Gulfport, Mississippi, with annual sales of $802,000, or some 8% of

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being closed *without prejudice*," RX 14–15 (emphasis added). *See Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437, 441 (2d Cir. 1944).

[243] It has long been settled that, if a "practice . . . runs counter to the public policy declared in the Sherman and *Clayton* Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 463 (1941) (emphasis added). And the question of whether an anticompetitive *acquisition* can be held "unfair" and divestiture ordered under the Federal Trade Commission Act was apparently settled in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). See also *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 339–340, n. 17. (The Federal Trade Commission Act, unlike Section 7 of the amended Clayton Act, is applicable not merely to "corporations," but to "persons" and "partnerships" as well. 15 U.S.C. 45(a)(6).) In such cases, no greater showing of competitive injury is required than under the relevant provision of the Clayton Act. *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 99 (2d Cir. 1962); *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 108, 110 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962); *R. H. Macy & Co.* v. *Federal Trade Commission*, 326 F. 2d 445, 450 (2d Cir. 1964). Here, therefore, the question of whether the challenged noncorporate acquisitions are "unfair" within the meaning of the Federal Trade Commission Act is whether their effects "may be," as Section 7 of the Clayton Act declares, "to lessen competition, or to tend to create a monopoly."

[244] Tr. 296.

[245] These firms are in fact larger than several of the *corporate* organizations acquired here by respondent. See Findings, p. 315.

the local market, a store respondent itself described as the "largest in Gulfport, Mississippi . . . the most modern super market in this area . . . ."[246] Slim's, a proprietorship, operated 1 store in Fort Dodge, Iowa, with sales of $945,000, about 8% of the food store sales in that city. At the time of this acquisition, National Tea described Slim's as "one of the largest and most modern super markets in the state of Iowa . . . ."[247]

There is, moreover, another of these challenged acquisitions to be considered along with the 5 the examiner classed as noncorporate in character. Montesi, an 8-store organization operating primarily in Memphis, Tennessee, consisted of 2 corporations and 9 individual proprietorships or partnerships. This family group had annual sales of over $11 million, with more than 7% of the Memphis market at the time of its acquisition in 1955. By operating it at a loss every year thereafter,[248] National increased the sales of its new Memphis branch to over $21 million in 1959. See *United States* v. *Grinnel Corp.,* 236 F. Supp. 244, 254 (D. R.I. 1964).

7. The examiner's "substitution" theory—the notion that there can be no lessening of competition where one company simply replaces another without further additions to the acquired market share—flies in the face of the Supreme Court's repeated rulings that the intensity and effectiveness of competition depends not only upon the quantitative factor (*e.g.,* the number of competitors and the volume of goods offered in a given market) but upon the character or the quality of the competitive forces at work there. The Court has made it abundantly clear that *who holds* a given market share can be as significant as the market share itself. "In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5% of control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered. . . . Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, *the fact that this share is held by a large national chain can adversely affect competition* . . . . [A] strong national chain of stores can insulate selected outlets from the vagaries of competition in parti-

[246] Findings, pp. 337, 338.
[247] *Id.,* at 337.
[248] *Id.,* at 349.

cular locations . . . ." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 343–344 (1962) (emphasis added). Or as the Court observed in *United States* v. *Alcoa,* 377 U.S. 271, 280–281 (1964): "The acquisition of Rome added, it is said, only 1.3% to Alcoa's control of the aluminum conductor market. . . . It is the basic premise of that [antimerger] law that competition will be most vital 'when there are many sellers, none of which has any significant market share'. . . . Preservation of Rome, rather than its absorption by one of the giants, will keep it 'as an important competitive factor'. . . . Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7."

This is precisely what the instant case is about. Respondent recognizes a distinction between "hard" and "soft" competition,[247a] and acknowledges that the latter comes from the large "interstate chains" like itself while "hard" competition, when it exists in a market, comes from just the sort of "local competition" [248a] eliminated by these acquisitions. It is this very removal of many small, "hard" competitors and the "substitution" of a few large firms that produces the "oligopoly Congress sought to avoid," *Brown Shoe, supra,* and increases the "likeihood that parallel policies of mutual advantage, not competition, will emerge." *Alcoa, supra.*

8. But even if we could accept the premise that National Tea is an acceptable "substitute" for the firms it removed from these markets, we would still have grave doubts about the legality of these acquisitions. The Supreme Court's most recent merger opinions have placed increasing emphasis upon the high value of even "potential" competition. *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964); *United States* v. *Continental Can Co.,* 378 U.S. 441 (1964); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964). Here, National Tea had already formulated a "plan" to enter all of the then 48 states, to cover the country "like a book," "from coast to coast." [249] As we understand the merger law, a firm already on the periphery of a particular geographic market, with the known capacity and inclination to expand into that market, is even then reckoned as a definite competitive force in that market. Its mere presence "at the edge of the market, continually threatening to enter," exerts a competitive pressure on the firms already in that market, a pressure that " 'may restrain producers from overcharging those to whom they

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[247a] *Id.,* at 320.
[248a] *Id.,* at 321.
[249] *Id.,* at 318–319.

sell or underpaying those from whom they buy . . . .' " *Penn-Olin, supra* at 173–174. In other words, if there are already 10 firms in a given market, and an 11th firm is on the edge of it "threatening to enter," the aggregate competitive force in that marketing area is not just 10, but 10 *plus*. But if the 11th company, the one on the "edge," then buys out one of the 10 already in that market, the "plus" has been removed and the total competitive force has been reduced back to 10. The acquisition was not a mere "substitution" of one-for-one; if it was reasonably probable that the 11th firm was going to enter—by internal expansion, if not by acquisition—then one firm has been "substituted" for two, and competition has, to that extent, been lessened.

9. National Tea has not, as pointed out above, lost market shares subsequent to these acquisitions.[250] But such post-acquisition drops in market share, even where they exist in fact, are meaningless standing alone. Certainly they would not prove that National Tea, with assets of $147 million and sales of $794 million in 1958, was incapable of holding its own in any city it might choose to enter when some 50% of all grocery store sales are still made by one-store operators with annual sales of less than $100,000. First, a slight drop in sales almost invariably accompanies a change of ownership. Further, acquiring companies of National's size can make allowances for this by acquiring extra-large shares in the first place. For example, National bought 35.86% of the West Baton Rouge, Louisiana, market in 1954, thereafter letting it fall to "only" 31.8%. Since respondent had not operated there prior to the acquisition, its market share has not "fallen" at all; it has increased from 0% to 31.8%.

Moreover, the examiner's analysis misconceives the test under the merger law. Post-acquisition behavior and growth—here National's retention of "only" 31.8% of the West Baton Rouge market—is of course highly relevant to the question of whether an acquisition may "tend to create a monopoly." But that is only one of the issues under the merger law; the other is whether the effect of the acquisition "may be substantially to lessen competition." The "competition" in a given market is the aggregate competitive "pressure" exerted by its members on each other; to "relieve" a part of that pressure is, by definition, to "lessen" competition. Suppose, for example, respondent had simply *closed down and dismantled* those West Baton Rouge stores, in preparation for its own entry into that market. That "released" sales

[250] *Id.*, at 343.

volume would have been promptly absorbed by the remaining stores in the area, but this elimination of competing establishments and the transfer of their sales volume to a reduced number of competitors is the very definition of a "lessening" of competition.[251] The "test of a competitive market is not only whether competitors flourish but *also whether consumers are well served.*" *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 367, n. 43 (1963) (emphasis added). Hence the law is concerned not merely with what the acquiring firm *retains,* but what it *takes out* as well.

10. With the two exceptions noted, each of these acquisitions has or probably will have the effect of substantially lessening competition. In the aggregate, however, their anticompetitive character is even more evident. "We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through *giant steps striding across a hundred cities* at a time . . . . [T]his is an appropriate place at which to call a halt." *Brown Shoe, supra* at 346 (emphasis added).

## ORDER

*It is ordered,* That for ten (10) years from the effective date of this order, respondent, National Tea Co., shall not, without the prior approval of the Federal Trade Commission, directly or indirectly, acquire the whole or any part of the stock or assets of any firm, partnership or corporation engaged in the retail sale of food products.

*It is further ordered,* That the initial decision be, and it hereby is, set aside, and the Findings As To The Facts, Conclusions and Order of the Commission be, and they hereby are, substituted therefor.

*It is further ordered,* That respondent, National Tea Co., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth herein.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner Jones concurred and has filed a concurring opinion.

[251] One of respondent's officials testified that "competition" is increased by new "operators opening up." Tr. 445; Findings, p. 320. Conversely, operators "closing down" must decrease the intensity of competition.

*APPENDIX A*

| State | Acquired Company | Acquired Co.'s Sales in 12 mos. prior to acquisition | Acquired Co.'s Sales as estimated % of food store sales in counties of operation | National's Sales as % of food store sales in counties of operation—1958 |
|---|---|---|---|---|
| Alabama | Van-Horner | $ 9,099,000 | 9.30 | 6.60 |
| Colorado | Miller's | 39,575,000 | 19.61 | 20.7 |
| | Food Bank | 4,285,000 | | |
| Illinois | Food Center | 2,831,000 | | |
| | Ill. Valley | 6,053,000 | 1.12 | 11.10 |
| | Del Farm | 17,650,000 | | |
| Indiana | Guidone | 5,200,000 | 0.60 | 11.85 |
| Iowa | Tolerton | 11,652,000 | 4.30 | 7.41 |
| | Slim's | 945,000 | | |
| Louisiana | Capitol | 22,980,000 | 4.25 | 9.51 |
| Michigan | C. F. Smith | 36,980,000 | | |
| | G. T. Smith | 6,737,000 | | |
| | Dole | 6,825,000 | | |
| | H. A. Smith | 6,625,000 | 3.26 | 4.69 |
| | Maker's (3) | 3,247,000 | | |
| | Kal Mkt. | 2,158,000 | | |
| Minnesota | Gamble-Skogmo | 4,118,000 | | |
| | Piggly-Wiggly | 2,927,000 | 1.15 | 10.59 |
| | Tolerton | 1,253,000 | | |
| Mississippi | Ashton's | 802,000 | 1.64 | 5.78 |
| | Montesi | 702,026 | | |
| Missouri | Food Center | 27,964,000 | 5.75 | 7.96 |
| | Barkett's | 908,000 | | |
| Nebraska | Tolerton | 5,613,000 | 13.04 | 11.62 |
| N. Dakota | Gamble-Skogmo | 237,000 | 0.38 | 9.81 |
| S. Dakota | Gamble-Skogmo | 1,732,000 | 7.24 | 8.99 |
| | Tolerton | 4,369,000 | | |
| Tennessee | Montesi | 10,498,000 | | |
| | Edenton | 633,000 | 4.78 | 4.73 |
| | Logan | 3,798,000 | | |
| Wisconsin | Gamble-Skogmo | 674,000 | 0.08 | 5.09 |
| Wyoming | Miller's | 2,924,000 | 20.41 | 21.20 |

SOURCE: CX 455–Z–47; CX 395.

*APPENDIX B*

| County | No. of acquired stores | Sales of acquired stores in county in 12 mos. prior to acquisition | Sales of acquired stores as % of food store sales in county* | National's share of county sales 1958 |
|---|---|---|---|---|
| | | *GAMBLE-SKOGMO (1951)* | | |
| *MINNESOTA* | | | | |
| Hennepin | 2 | $ 854,068 | 0.42 | 12.3 |
| Itasca | 1 | 271,568 | 3.27 | 9.0 |
| Koochiching | 1 | 149,477 | 3.37 | 36.5 |
| Otter Tail | 1 | 116,344 | 1.64 | 11.0 |
| St. Louis | 4 | 1,396,607 | 2.38 | 14.2 |
| Sibley | 1 | 87,768 | ---- | --- |
| Stearns | 2 | 1,133,660 | 10.54 | 9.9 |
| *N. DAKOTA* | | | | |
| Cass | 1 | 63,520 | 0.46 | 5.7 |
| Walsh | 1 | 173,747 | 5.58 | 7.1 |
| *S. DAKOTA* | | | | |
| Brown | 1 | 453,941 | 5.75 | 11.2 |
| Codington | 1 | 157,900 | 3.87 | 14.7 |
| Davison | 1 | 136,354 | 3.26 | 10.0 |
| Pennington | 1 | 984,206 | 8.42 | 3.6 |
| *WISCONSIN* | | | | |
| Price | 2 | 674,428 | 21.11 | 8.0 |
| | | *C. F. SMITH (1952)* | | |
| *MICHIGAN* | | | | |
| Macomb | 5 | $36,053,000 | 3.54 | 5.6 |
| Oakland | 10 | | | 5.6 |
| Washtenaw | 2 | | | 6.7 |
| Wayne | 193 | | | 3.2 |
| | | *PIGGLY-WIGGLY NW (1952)* | | |
| *MINNESOTA* | | | | |
| St. Louis | 6 | $ 2,927,000 | 4.99 | 14.2 |
| | | *GEORGE T. SMITH (1952)* | | |
| *MICHIGAN* | | | | |
| Ingham | 6 | $ 6,737,000 | 12.75 | 10.3 |
| | | *DOLE'S (1952)* | | |
| *MICHIGAN* | | | | |
| Calhoun | 4 | $ 5,079,000 | 14.18 | 15.1 |
| Kalamazoo | 2 | 1,746,000 | 4.95 | 7.1 |
| | | *FOOD CENTER (1953)* | | |
| *MISSOURI* | | | | |
| St. Clair | 3 | $30,467,000 | 7.93 | |
| St. Louis | 10 | | | 8.3 |
| St. Louis (City) | 15 | | | 8.3 |
| | | *CAPITOL STORES (1954)* | | |
| *LOUISIANA* | | | | |
| Acadia | 1 | $ 535,325 | 8.88 | 19.8 |
| Ascension | 1 | 342,378 | 10.04 | 38.1 |
| Caddo | 2 | 1,079,443 | 2.18 | |

See footnote at end of table, p. 376.

*APPENDIX B—Continued*

| County | No. of acquired stores | Sales of acquired stores in county in 12 mos. prior to acquisition | Sales of acquired stores as % of food store sales in county* | National's share of county sales 1958 |
|---|---|---|---|---|
| | | *CAPITOL STORES (1954)—Continued* | | |
| Calcasien | 2 | 1,375,661 | 6.67 | 5.4 |
| E. Baton Rouge | 10 | $ 8,661,759 | 22.34 | 17.6 |
| Lafayette | 2 | 1,625,555 | 18.18 | 28.2 |
| LaFourche | 1 | 1,163,000 | 13.91 | 15.3 |
| Orleans | 6 | 4,836,065 | 4.14 | 4.5 |
| Ouchita | 1 | 635,988 | 3.60 | 0.4 |
| Tangiphahoa | 1 | 476,616 | 4.86 | 7.3 |
| W. Baton Rouge | 1 | 670,851 | 35.86 | 31.8 |
| | | *ASHTON'S (1955)* | | |
| *MISSISSIPPI* | | | | |
| Harrison | 1 | $ 802,000 | 3.24 | 5.8 |
| | | *MONTESI (1955)* | | |
| *MISSISSIPPI* | | | | |
| Lowndes | 1 | $ 702,026 | 8.95 | 5.5 |
| *TENNESSEE* | | | | |
| Madison | 1 | 208,986 | 1.60 | 10.2 |
| Shelby | 6 | 10,289,034 | 6.55 | 5.3 |
| | | *H. A. SMITH (1955)* | | |
| *MICHIGAN* | | | | |
| Macomb | 1 | $ 6,625,000 | ---- | 5.6 |
| St. Clair | 7 | | | 18.1 |
| Wayne | 1 | | | 3.2 |
| | | *MAKER'S (1956)* | | |
| *MICHIGAN* | | | | |
| Calhoun | 2 | $ 1,759,000 | 3.96 | 15.1 |
| Eaton | 1 | 1,488,000 | 13.17 | 8.6 |
| | | *BARKETT'S (1956)* | | |
| *MISSOURI* | | | | |
| Mississippi | 1 | $ 908,014 | 18.50 | 13.6 |
| | | *EDENTON-LAMB (1956)* | | |
| *TENNESSEE* | | | | |
| Dyer | 1 | $ 633,450 | 8.97 | 8.8 |
| | | *MILLER'S (1957)* | | |
| *COLORADO* | | | | |
| Adams | 1 | $ 2,151,290 | ---- | --- |
| Arapahoe | 3 | 1,806,121 | 6.13 | 12.3 |
| Denver | 18 | 31,188,699 | 21.56 | 26.9 |
| Jefferson | 2 | -------- | ---- | --- |
| Weld | 1 | 2,240,381 | 13.05 | 12.6 |
| *WYOMING* | | | | |
| Laramie | 2 | 2,924,490 | 20.41 | 21.2 |

See footnote at end of table, p. 376.

*APPENDIX B—Continued*

| County | No. of acquired stores | Sales of acquired stores in county in 12 mos. prior to acquisition | Sales of acquired stores as % of food store sales in county* | National's share of county sales 1958 |
|---|---|---|---|---|
| | | *TOLERTON & WARFIELD (1957)* | | |
| *IOWA* | | | | |
| Woodbury | 11 | $ 4,245,995 | 13.54 | 14.3 |
| Palo Alto | 1 | 253,628 | 8.06 | 7.2 |
| O'Brien | 2 | 589,143 | 9.61 | 8.7 |
| Buena Vista | 1 | 481,514 | 8.52 | 6.3 |
| Kussuth | 1 | 357,701 | 6.31 | 6.5 |
| Plymouth | 3 | 928,114 | 16.79 | 13.2 |
| Humboldt | 1 | 388,298 | 10.85 | 9.4 |
| Osceola | 1 | 287,114 | 11.90 | 10.8 |
| Sioux | 3 | 818,858 | 16.75 | 19.7 |
| Pocahontas | 1 | 88,689 | ---- | --- |
| Monona | 2 | 98,779 | 2.68 | 8.5 |
| Calhoun | 2 | 297,184 | 7.02 | 2.8 |
| Ida | 2 | 585,575 | 29.34 | 31.0 |
| Audubon | 1 | 212,630 | 9.37 | 11.3 |
| Dickinson | 1 | 337,886 | 11.33 | 14.0 |
| Carroll | 1 | 155,942 | 2.57 | 3.1 |
| Crawford | 1 | 252,805 | 6.39 | 7.6 |
| Sac | 1 | 289,062 | 6.80 | 6.3 |
| Cherokee | 1 | 388,629 | 11.30 | 12.4 |
| Emmet | 1 | 199,092 | 4.37 | 0.5 |
| Lyon | 1 | 131,722 | 4.35 | 3.5 |
| *MINNESOTA* | | | | |
| Rock | 1 | 330,058 | 13.52 | 11.3 |
| Nobles | 2 | 431,978 | 7.23 | 12.3 |
| Pipestone | 1 | 491,065 | 13.20 | 9.2 |
| *NEBRASKA* | | | | |
| Dakota | 1 | 601,104 | 13.28 | 11.5 |
| Platte | 2 | 463,783 | 7.36 | 6.8 |
| Cedar | 2 | 283,994 | 12.25 | 11.9 |
| Wayne | 1 | 247,980 | 11.24 | 12.5 |
| Holt | 2 | 358,402 | 13.92 | 6.7 |
| Burt | 3 | 471,519 | 18.19 | 18.8 |
| Pierce | 2 | 386,641 | 28.53 | 29.3 |
| Madison | 2 | 212,738 | 2.97 | 2.0 |
| Knox | 3 | 533,191 | 18.48 | 18.8 |
| Cuming | 2 | 445,809 | 16.44 | 11.1 |
| Antelope | 2 | 321,981 | 13.52 | 9.7 |
| Rock | 1 | 123,756 | 23.94 | 19.0 |
| Boone | 1 | 338,283 | 15.75 | 17.2 |
| Stanton | 1 | 57,263 | ---- | --- |
| Cherry | 1 | 395,459 | 20.66 | 24.0 |
| Brown | 1 | 254,958 | 17.49 | 20.9 |
| Dixon | 1 | 115,929 | ---- | --- |
| *SOUTH DAKOTA* | | | | |
| Codington | 1 | 482,503 | 7.92 | 14.7 |
| Davison | 1 | 412,579 | 10.50 | 10.0 |
| Minnehaha | 1 | 159,641 | 0.69 | 0.1 |
| Lincoln | 2 | 490,015 | 19.32 | 15.5 |
| Union | 2 | 529,449 | 33.92 | 37.7 |
| Yankton | 1 | 585,323 | 12.03 | 8.4 |
| Clay | 1 | 526,120 | 24.19 | 19.0 |
| Brookings | 1 | 548,667 | 14.53 | 21.3 |

See footnote at end of table, p. 376.

*APPENDIX B—Continued*

| County | No. of acquired stores | Sales of acquired stores in county in 12 mos. prior to acquisition | Sales of acquired stores as % of food store sales in county* | National's share of county sales 1958 |
|---|---|---|---|---|
| | *TOLERTON & WARFIELD (1957)—Continued* | | | |
| Lake | 1 | $ 266,503 | 9.02 | 12.3 |
| Kingsbury | 1 | 47,866 | ---- | --- |
| Turner | 2 | 321,326 | 13.60 | 8.1 |
| | *LOGAN'S (1957)* | | | |
| *TENNESSEE* | | | | |
| Davidson | 9 | $ 3,798,000 | 3.11 | 3.1 |
| | *DE VAN-HORNER (1957)* | | | |
| *ALABAMA* | | | | |
| Mobile | 7 | $ 9,099,000 | 12.33 | 7.7 |
| | *ILLINOIS VALLEY (1958)* | | | |
| *ILLINOIS* | | | | |
| Peoria | 5 | $ 4,524,419 | 8.41 | 9.9 |
| Tazewell | 2 | 911,215 | 3.29 | 2.5 |
| | *DEL FARM (1958)* | | | |
| *ILLINOIS* | | | | |
| Cook | 12 | $18,377,687 | 1.16 | 12.0 |
| | *FOOD BANK (1958)* | | | |
| *COLORADO* | | | | |
| El Paso | 3 | $ 4,284,831 | 13.23 | 9.9 |
| | *KALAMAZOO MARKET BASKET (1958)* | | | |
| *MICHIGAN* | | | | |
| Kalamazoo | 3 | $ 2,158,000 | 4.03 | 7.1 |
| | *GUIDONE (Arlington Market) (1958)* | | | |
| *INDIANA* | | | | |
| Marion | 1 | $ 5,200,000 | 2.62 | 22.1 |
| | *SLIM'S (1958)* | | | |
| *IOWA* | | | | |
| Webster | 1 | $ 945,000 | 7.57 | 6.5 |

SOURCE: CX 395-397; CX 455-Z-36 through 46.

*These percentage figures are approximations based on a comparison of the acquired company's sales in the 12 months prior to acquisition (CX 395-397) with the sales of all food stores in the county (CX 455-Z-36 through 46) in the next succeeding Census year (1954 or 1958). For example, where the acquisition occurred in 1951, the acquired company's sales in the county for the preceding 12 months were compared with all food store sales in the county in *1954;* where the acquisition occurred in 1955, Census universe figures for *1958* were used. Since population and hence food store sales are generally increasing in most areas, this method tends to overestimate the county's total food store sales at the time of the acquisition and thus to understate the acquired company's actual market share at that time.

APPENDIX C

| City or Town | No. of acquired stores | Sales of acquired stores in city or town in 12 months prior to acquisition | Sales of acquired stores as % of food store sales in city or town* | National's share of city or town sales 1958 |
|---|---|---|---|---|
| | | GAMBLE-SKOGMO (1951) | | |
| *MINNESOTA* | | | | |
| Minneapolis | 2 | $ 854,068 | 0.54 | 13.1 |
| Grand Rapids | 1 | 271,568 | 7.13 | 17.3 |
| International Falls | 1 | 149,477 | 4.88 | 64.1 |
| Hibbing | 1 | 563,200 | 8.08 | 25.9 |
| *NORTH DAKOTA* | | | | |
| Grafton | 1 | 173,747 | 10.23 | 11.7 |
| *SOUTH DAKOTA* | | | | |
| Aberdeen | 1 | 453,941 | 6.75 | 12.9 |
| Watertown | 1 | 157,900 | 4.09 | 15.3 |
| Mitchell | 1 | 136,354 | 3.43 | 10.8 |
| | | C. F. SMITH (1952) [1] | | |
| *MICHIGAN* | | | | |
| | | PIGGLY-WIGGLY NW (1952) | | |
| *MINNESOTA* | | | | |
| Duluth | 6 | $ 2,927,000 | 9.25 | 15.3 |
| | | GEORGE T. SMITH (1952) | | |
| *MICHIGAN* | | | | |
| Lansing | 5 } | $ 6,737,000 | 16.50 | 14.5 |
| East Lansing | 1 } | | | |
| | | DOLE'S (1952) | | |
| *MICHIGAN* | | | | |
| Battle Creek | 4 | $ 5,079,000 | 22.56 | 16.8 |
| Kalamazoo | 2 | 1,746,000 | 7.46 | 9.9 |
| | | FOOD CENTER (1953) | | |
| *ILLINOIS* | | | | |
| Alton | 1 | $ 959,130 | 5.97 | 5.1 |
| East St. Louis | 2 | 1,872,017 | | 7.1 |
| *MISSOURI* | | | | |
| University City | 1 | 1,102,350 | 8.65 | 10.3 |
| St. Ann | 1 | 1,928,529 | 41.47 | 23.9 |
| Maplewood | 1 | 1,061,919 | 15.91 | 18.6 |
| St. Louis | 19 | 19,845,412 | 8.59 | 7.4 |
| | | CAPITOL STORES (1954) | | |
| *LOUISIANA* | | | | |
| Lake Charles | 2 | $ 1,375,661 | 10.09 | 4.5 |
| Baton Rouge | 11 | 8,661,759 | 23.38 | 20.0 |
| Lafayette | 2 | 1,625,555 | 20.90 | 46.2 |
| New Orleans | 6 | 4,836,065 | 4.14 | 4.5 |
| Hammond | 1 | 476,616 | 20.48 | 30.3 |
| Crowley | 1 | 535,325 | | |
| Thibodaux | 1 | 1,163,000 | | |

See footnotes at end of table, p. 379.

*APPENDIX C—Continued*

| City or Town | No. of acquired stores | Sales of acquired stores in city or town in 12 months prior to acquisition | Sales of acquired stores as % of food store sales in city or town* | National's share of city or town sales 1958 |
|---|---|---|---|---|
| | | *ASHTON'S (1955)* | | |
| *MISSISSIPPI* | | | | |
| Gulfport | 1 | $ 802,000 | 8.13 | 11.3 |
| | | *MONTESI (1955)* | | |
| *MISSISSIPPI* | | | | |
| Columbus | 1 | $ 702,026 | 10.46 | 6.4 |
| *TENNESSEE* | | | | |
| Jackson | 1 | 208,986 | 2.00 | 12.8 |
| Memphis | 6 | 10,289,034 | 7.11 | 5.8 |
| | | *H. A. SMITH (1955)* [2] | | |
| *MICHIGAN* | | | | |
| | | *EDENTON-LAMB (1956)* | | |
| *TENNESSEE* | | | | |
| Dyersburg | 1 | $ 633,450 | 14.82 | 14.6 |
| | | *BARKETT'S (1956)* | | |
| *MISSOURI* | | | | |
| Charleston | 1 | $ 908,014 | [3] | |
| | | *MAKER'S (1956)* | | |
| *MICHIGAN* | | | | |
| Albion | 1 | $ 656,000 | | |
| Marshall | 1 | 1,103,000 | | |
| Charlotte | 1 | 1,488,000 | 33.75 | 32.1 |
| | | *MILLER'S (1957)* | | |
| *COLORADO* | | | | |
| Aurora | 1 | $ 2,151,290 | 21.05 | 23.5 |
| Englewood | 1 | 1,795,469 | 13.55 | 27.3 |
| Denver | 20 | 29,391,230 | 21.56 | 21.4 |
| Greeley | 1 | 2,240,381 | 20.58 | --- |
| *WYOMING* | | | | |
| Cheyenne | 2 | 2,924,490 | [4] | |
| | | *TOLERTON & WARFIELD (1957)* [5] | | |
| *IOWA* | | | | |
| Sioux City | 10 | $ 3,986,755 | 13.8 | 14.5 |
| *MINNESOTA* | | | | |
| Worthington | 1 | 293,743 | 8.29 | 16.5 |
| *SOUTH DAKOTA* | | | | |
| Brookings | 1 | 548,667 | 20.7 | 29.4 |
| Watertown | 1 | 482,503 | 8.24 | 15.3 |
| Mitchell | 1 | 412,579 | 11.41 | 10.8 |
| Madison | 1 | 266,503 | 10.29 | 14.0 |
| | | *LOGAN'S (1957)* [6] | | |
| *TENNESSEE* | | | | |

See footnotes at end of table, p. 379.

*APPENDIX C—Continued*

| City or Town | No. of acquired stores | Sales of acquired stores in city or town in 12 months prior to acquisition | Sales of acquired stores as % of food store sales in city or town* | National's share of city or town sales 1958 |
|---|---|---|---|---|
| | | *DE VAN-HORNER (1957)* [7] | | |
| *ALABAMA* | | | | |
| | | *ILLINOIS VALLEY STORES (1958)* | | |
| *ILLINOIS* | | | | |
| East Peoria | 1 | $ 617,597 | 10.99 | 8.4 |
| Peoria | 4 | 4,176,615 | 11.51 | 9.0 |
| Peoria Heights | 1 | 347,804 | 4.81 | --- |
| Pekin | 1 | 911,215 | 8.01 | 6.1 |
| | | *DEL FARM (1958)* | | |
| *ILLINOIS* | | | | |
| Chicago | 12 | $18,377,687 | 1.64 | 11.1 |
| | | *FOOD BANK (1958)* | | |
| *COLORADO* | | | | |
| Colorado Springs | 3 | $ 4,284,831 | 18.07 | 13.5 |
| | | *KALAMAZOO MARKET BASKETS (1958)* | | |
| *MICHIGAN* | | | | |
| Kalamazoo | 3 | $ 2,158,000 | 5.65 | 9.9 |
| | | *GUIDONE (1958)* | | |
| *INDIANA* | | | | |
| Indianapolis | 1 | $ 5,200,000 | 2.98 | 20.8 |
| | | *SLIM'S (1958)* | | |
| *IOWA* | | | | |
| Fort Dodge | 1 | $ 945,000 | 8.29 | 7.5 |

SOURCE: CX 395–397; CX 454, 479.
*See note, Appendix B.

[1] City sales data for the 210 stores involved in this acquisition are not available. (148 of the stores were located in the City of Detroit, and the others were located in some 40 or more cities and towns in adjacent areas.) See, however, the county data, Appendix B.

[2] City sales not available.

[3] 18.50% of food store sales in county.

[4] 20.41% of food store sales in county.

[5] This acquisition involved 85 stores, located in 5 Iowa cities; 4 Minnesota cities; 28 Nebraska cities; and 14 South Dakota cities. See county data, Appendix B.

[6] See county data, Appendix B.

[7] See county data, Appendix B.

*APPENDIX D*

| State and City | Acquired Company | Year of acq. | No. of stores acq. | Sales of acquired stores in 12 mos. prior to acquisition | Acquired sales as est. % of food store sales* | National's % of city market | |
|---|---|---|---|---|---|---|---|
| | | | | | | 1954 | 1958 |
| *MINNESOTA* | | | | | | | |
| Minneapolis | Gamble-Skogmo | 1951 | 2 | $ 854,068 | 0.54 | 19.2 | 13.1 |
| Grand Rapids | " | 1951 | 1 | 271,568 | 7.13 | 31.8 | 17.3 |
| International Falls | " | 1951 | 1 | 149,477 | 4.88 | 41.5 | 64.1 |
| *NORTH DAKOTA* | | | | | | | |
| Grafton | " | 1951 | 1 | 173,747 | 10.23 | 22.3 | 11.7 |
| *SOUTH DAKOTA* | | | | | | | |
| Aberdeen | " | 1951 | 1 | 453,941 | 6.75 | 21.3 | 12.9 |
| *MINNESOTA* | | | | | | | |
| Duluth | Piggly-Wiggly | 1952 | 6 | 2,927,000 | 9.25 | 17.9 | 15.3 |
| *MICHIGAN* | | | | | | | |
| Detroit | H. A. Smith | 1955 | 1 | n.a. | n.a. | 1.7 | 2.8 |
| Mt. Clemens | " | 1955 | 1 | n.a. | n.a. | 12.4 | 8.5 |
| *MINNESOTA* | | | | | | | |
| Worthington | Tolerton | 1957 | 1 | 293,743 | 8.28 | 8.1 | 16.5 |
| *SOUTH DAKOTA* | | | | | | | |
| Brookings | " | 1957 | 1 | 548,667 | 20.07 | 23.1 | 29.4 |
| Madison | " | 1957 | 1 | 266,503 | 10.29 | 8.3 | 14.0 |
| Mitchell | " | 1957 | 1 | 412,579 | 11.41 | 5.4 | 10.8 |
| Watertown | " | 1957 | 1 | 482,503 | 8.24 | 16.4 | 15.3 |
| *ILLINOIS* | | | | | | | |
| Chicago | Del Farm | 1958 | 12 | 18,377,687 | 1.64 | 9.6 | 11.1 |
| *MICHIGAN* | | | | | | | |
| Kalamazoo | Kalamazoo Mkt. | 1958 | 3 | 2,158,000 | 5.65 | 7.2 | 9.9 |
| *INDIANA* | | | | | | | |
| Indianapolis | Guidone | 1958 | 1 | 5,200,000 | 2.98 | 20.6 | 20.8 |
| *IOWA* | | | | | | | |
| Fort Dodge | Slim's | 1958 | 1 | 891,023 | 8.29 | 10.6 | 7.5 |

SOURCE: CX 395-397, 479.
*See note, Appendix B.

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## IN THE MATTER OF

# GENERAL FOODS CORPORATION

### ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

*Docket 8600. Complaint, September 30, 1963—Decision, March 11, 1966*

Order requiring General Foods Corporation, one of the Nation's largest manufacturers of packaged grocery products with headquarters in White Plains, N.Y., to divest itself within one year of all assets and properties of the S.O.S. Company of Chicago, Ill., the dominant manufacturer and distributor of household steel wool, to a purchaser not connected in anyway with the respondent or any of its affiliates or subsidiaries.