

Syllabus

IN THE MATTER OF
WISCONSIN WHOLESALE GROCERS' ASSOCIATION
ET AL.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER
26, 1914

Docket 1196—November 3, 1926

SYLLABUS.

Where an association of wholesale grocers, and the officers and members thereof, in pursuance of a common undertaking to cause manufacturers, producers and their respective brokers to confine distribution of products dealt in by them to the so-called regular and legitimate channels of distribution, i. e., channels running from the manufacturer or producer to the so-called legitimate wholesaler to retailer to consumer, and to prevent concerns engaged in the distribution and sale of groceries at wholesale under contract with retailers on a cost plus basis, and other so-called irregular concerns, i. e., manufacturers who sell and retailers who buy without the assistance of the so-called legitimate wholesalers, from purchasing such merchandise at jobbers' prices,

- (a) Discussed and formulated plans at various association meetings for combating irregular concerns and restricting their competition;
- (b) Classified and designated various concerns as irregular and illegitimate channels of distribution and held their competition unfair by reason of such designation;
- (c) Informed each other through their secretary and through their association bulletins circulated by him, of means and methods employed by the various members to accomplish their joint undertaking, and the success thereof;
- (d) Circulated disparaging and derogatory statements concerning the business methods and plans of organization of the aforesaid concerns, for the purpose of inducing manufacturers and brokers not to sell to them and retailers not to affiliate with them;
- (e) Sought to induce manufacturers and brokers to refuse dealings with such concerns by sending and causing to be sent to them protests and objections made in concert by their customers among the members;
- (f) Complained to manufacturers and brokers that said concerns were selling at less than the manufacturer's list price and recognized said price as the proper selling price for the jobber;
- (g) Informed manufacturers and brokers that if they sold to such concerns they could not expect the support and patronage of the so-called legitimate wholesale grocer;
- (h) Canceled orders and refused to do business with brokers and manufacturers unless they would refuse to sell to said concerns.
- (i) Placed orders with manufacturers and brokers on condition that they would not sell to said concerns and refused shipments made in violation of such condition;
- (j) Discriminated and urged discrimination in favor of manufacturers and brokers who acceded to their requests and demands that they cease or refrain from selling said concerns; and

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- (k) Organized and carried out a campaign to induce manufacturers to eliminate the practice of shipping direct to retailers on the jobber's order, seeking thereby to restrict the ability of so-called irregular concerns, of whose business such shipments were a substantial portion, to undersell the so-called legitimate jobber, and to subject all shipments to the imposition of the jobbers' warehousing charge;

With the result that many manufacturers and brokers selling and shipping groceries and food stuffs into the territory herein concerned, refused to sell or discontinued selling to the aforesaid so-called irregular concerns, and confined their distribution to the so-called regular channels approved by the association and its members, so-called irregular dealers were prevented from purchasing various lines of goods from the manufacturers and in some instances were compelled to buy through members of the association, and retailers were compelled to purchase various lines from members of the associations at prices higher than those charged by manufacturers and by so-called irregular wholesalers; and

Where two merchandise brokerage concerns representing a number of nationally known line of food products, and also other producers of food stuffs;

- (l) Refused to sell and induced their principals not to sell further to so-called irregular concerns objected to by the members, pursuant to their aforesaid common undertaking and understanding, and because of assurances by the members that they would increase their sales efforts in behalf of the goods handled by the aforesaid brokerage concerns if the objectionable sales were discontinued;
- (m) Informed the members that certain other manufacturers and brokers sold to the so-called irregular trade, for the purpose and with the effect of causing said members to cease or refrain from dealing with such manufacturers and brokers and putting their sales efforts on its own lines; and
- (n) Diverted orders in the case of one of the aforesaid brokerage concerns designated by retailers as for the account of certain so-called irregulars, to the account of its so-called legitimate jobbing customers among the members:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. Walter B. Wooden for the Commission.

Schmitz, Wild & Gross, of Milwaukee, Wis., for respondents.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Wisconsin Wholesale Grocers' Association, its officers and members, purchasing the products dealt in by them from manufacturers and producers located, mostly, in other States than Wisconsin, and naturally and normally in competition with one another but for the matters and things alleged herein, and in competition with others similarly engaged, and respondents Glass-Turbush Co. and Otto L. Kuehn & Co., two Wisconsin corporations engaged in a brokerage business in groceries and allied products, and with principal place of

business in Milwaukee, with undertaking and cooperating together, for more than three years preceding the complaint, to confine distribution to so-called regular and legitimate channels of trade, prevent irregular dealers (and especially cooperative purchasing enterprises of retailers) from obtaining supplies from manufacturers and producers, and to fix uniform prices for the sale of the products dealt in and prevent the sale by others in the territory concerned, at substantially lower prices.¹

Methods employed, as charged, by respondents, to make effective their undertaking, included the following:

Agreeing upon, fixing, revising from time to time and abiding by uniform discounts from manufacturers' list or suggested retail prices for a number of the products dealt in by respondent members.

Making known to one another through association bulletins, and correspondence and reports between the association and the members, and between the members themselves, instances of sales to irregular dealers including cooperative purchasing enterprises of retailers, and to consumers, and bringing pressure to bear upon manufacturers or producers so selling, to cease doing so, and bringing about such result by persuasion, boycott, threats thereof and other species of intimidation.

Persecuting and harassing irregular dealers, including the aforesaid cooperative enterprises, by making and publishing statements disparaging the business methods and financial responsibility of said dealers, in the territory concerned, and by continually bringing pressure to bear upon manufacturers and producers supplying them, as herein above set forth.

Employing similar tactics and practices against dealers selling at wholesale for prices substantially below those in effect among the members and using other cooperative and individual means to carry out their undertakings herein above set forth.

Respondent brokers, as charged, cooperated generally with respondent association and members in the foregoing acts and things and especially by refusing to negotiate sales for products concerned

¹ According to the complaint "respondents regard the channel of distribution commencing with the manufacturer or producer, flowing thence to the wholesaler, from the wholesaler to the retailer and from the retailer to the consuming public, as the only proper and legitimate channel of distribution of the products in which they deal and which by them is denominated, the regular or legitimate channel of distribution. Channels of distribution originating with the manufacturer or producer and which do not flow through the wholesale dealer but go direct to the consumer or to the dealer doing both a wholesale and retail business or direct to retail dealers and especially to cooperative purchasing enterprises of retail dealers banded together to buy in wholesale or jobbing quantities, are by respondents regarded and denominated as irregular and illegitimate channels of trade and aforesaid dealers acquiring goods through said so-called illegitimate channels are by respondents considered and denominated irregular or illegitimate dealers."

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"between manufacturers and producers on the one hand and so-called irregular dealers, especially aforesaid cooperative retail purchasing enterprises, on the other, and by advising, persuading and urging manufacturers to refuse to supply such irregular dealers with goods either through the medium of themselves, said broker respondents, or otherwise."

According to the complaint "the above alleged acts and things done by respondents and by each of them have tended and still tend to, and did and do, unlawfully suppress and hinder competition in the sale and distribution of groceries in the territory served by respondents; have prevented and still prevent competing and other dealers selling said commodities in the territory served by respondent members from securing said commodities from aforesaid original sources at prices accorded wholesale dealers; have obstructed and still obstruct the natural flow of commerce in the channels of interstate trade and have denied and still deny to dealers in and consumers of said commodities in aforesaid territory the advantages in price and otherwise which they would obtain from the natural flow of commerce in said commodities under conditions of free and unobstructed competition. Wherefore, said acts and things done by respondents are all to the prejudice of the public and of respondents' competitors."

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Acting in the public interest, pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the various parties mentioned in the caption hereof, charging them with the use of unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act.

Respondents having entered their appearance and filed their answers herein, hearings were held before an examiner of the Commission theretofore duly appointed.

Thereupon this proceeding came on for a final hearing on the briefs and oral argument, and the Commission being fully advised in the premises makes these its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents Wisconsin Wholesale Grocers' Association is a voluntary trade association and on the date of the issuance of the complaint herein had the following members: Chip-

pewa Mercantile Co., Chippewa Falls, Wis.; Edward Dewey Co., Milwaukee, Wis.; L. Dobbritz, Milwaukee, Wis.; Dahlman & Inbusch Grocery Co., Milwaukee, Wis.; Eau Claire Grocery Co., Eau Claire, Wis.; Flannelly Grocery Co., Ashland, Wis.; Gateway Grocery Co., La Crosse, Wis.; George & Geiger & Co., Milwaukee, Wis.; E. R. Godfrey & Sons Co., Milwaukee, Wis.; Gould, Wells, & Blackburn Co., Madison, Wis.; Henrickson-Jacobson Co., Racine, Wis.; John Hoffman & Sons Co., Milwaukee, Wis.; J. J. Hogan, Inc., La Crosse, Wis.; Joannes Brothers Co., Green Bay, Wis.; Kenosha Wholesale Grocery Co., Kenosha, Wis.; A. Kickbush Grocery Co., Wausau, Wis.; Kleuter & Co., Madison, Wis.; Kurth Brothers Co., Milwaukee, Wis.; The H. T. Lange Co., Eau Claire, Wis.; Lange Grocery Co., Sparta, Wis.; Latsch & Sons Co., Winona, Minn.; Marshfield Grocery Co., Marshfield, Wis.; H. F. Mueller & Co., Racine, Wis.; E. R. Pahl & Co., Milwaukee, Wis.; Plumb & Nelson Co., Manitowoc, Wis.; D. Reck & Sons, Milwaukee, Wis.; George I. Robinson & Co., Milwaukee, Wis.; Roundy, Peckham & Dexter Co., Milwaukee, Wis.; Simon Brothers Co., Madison, Wis.; J. & M. Steiner, Milwaukee, Wis.; The Zincke Co., Fond du Lac, Wis.

At the time of the issuance of the complaint herein, the respondent Wisconsin Wholesale Grocers' Association had the following officers: James D. Godfrey, president, Milwaukee, Wis.; M. J. Brew, first vice president, Milwaukee, Wis.; Mitchell Joannes, second vice president, Green Bay, Wis.; Francis E. Dewey, treasurer, Milwaukee, Wis.; Francis J. Rickert, secretary, Milwaukee, Wis.

PAR. 2. The members of the respondent association are engaged in the sale and distribution of groceries at wholesale and form the usual sources of supply for the retail grocers of Wisconsin. They purchase their products largely through brokers representing manufacturers located in various States of the United States other than Wisconsin, and cause said products to be transported from such places of manufacture to said members' respective warehouses and places of business in the State of Wisconsin from which points respondent members sell and cause said products to be transported to their respective retail customers located in the State of Wisconsin. In some instances respondent members cause said products to be transported from their respective places of manufacture in other States direct to their customers in the State of Wisconsin. A number of members of respondent association cause their products to be sold and transported to their respective retail grocer customers located in the neighboring States of Iowa, Minnesota, Illinois, and Michigan either from respondent members' Wisconsin warehouses or from the places where the goods are manufactured. In the ordinary course

of said business respondent members are normally engaged in competition with each other and with other concerns also engaged in the wholesale distribution of groceries in the State of Wisconsin and adjoining States.

PAR. 3. For many years prior to the issuance of complaint herein one of the declared purposes of respondent association has been to confine the distribution of groceries to the channels considered by it as legitimate. Respondent members have designated as the only legitimate channel for the distribution of food products that which runs from the manufacturer or producer to the so-called "legitimate wholesaler", thence to the retailer, and from retailer to consumer. Channels of distribution running from manufacturer direct to the retailer, whether to a single retailer or to chain-store systems, from manufacturer to retailer through any form of cooperative purchasing by retailers, and from manufacturer to wholesaler who has any retail affiliations, have been classed by respondent as irregular or illegitimate channels. Manufacturers who sell and retailers who buy without the assistance of the so-called legitimate wholesaler were classed and designated as irregular.

PAR. 4. In order to effectuate and carry out its purpose as aforesaid, respondent association operated under a set of by-laws and rules of practice which declared that one of its objects was to establish harmonious relations between manufacturer, jobber, and retailer to the end that the jobber be universally recognized as the best channel through which the manufacturer should distribute his products to the retailer.

In order further to effectuate its purpose as aforesaid, respondent association has confined its membership to those engaged in the distribution of groceries exclusively at wholesale. To the same end it has for many years employed a paid secretary who devotes his entire time toward carrying out the purposes of the organization. His principal activity consists in conducting the correspondence of the association and the preparation and circulation of bulletins among the membership, thereby serving as the medium of communication between the members in the intervals between their meetings. The preparation and circulation of such bulletins, frequently incorporating correspondence with members, has been a practice of the secretary for a number of years and all expenses incident thereto have been paid out of respondent association's funds.

PAR. 5. For several years prior to the issuance of complaint herein there were a number of concerns which were incorporated to engage in the wholesale distribution of groceries in Wisconsin on the following plan. These concerns contracted with large numbers of retailers

to sell them such merchandise as the latter might desire to purchase under the terms of the contract. Said concerns became competitors of respondent jobbers in that the retailers so contracting with them were actual and potential customers of respondent members. Some of such retailers owned a portion of the capital stock of the corporation with which they had such contracts. In some instances these wholesale concerns have sold to retailers with which there were no contracts and who owned none of the capital stock. These concerns maintained warehouses, carried stocks of goods therein which they purchased from manufacturers outside the State of Wisconsin and sold to retailers out of warehouse stocks, besides making sales and deliveries direct from the manufacturer on the order of their customers. Approximately 25 per cent of the total business was handled by direct shipments from the manufacturers without warehousing charges or local freights, while some of respondent association's important members were accustomed to put practically all their goods through their warehouses.

The prices charged by said wholesale concerns were on the basis of invoice cost plus cost of doing business which ranged from 3 to 5 per cent, depending on the extent to which the retailer discounted his bills and required warehouse service. By reason of their method of operation and plan of organization said concerns sold numerous nationally advertised grocery products at prices substantially below the prices at which such products were sold by respondent members.

PAR. 6. For more than six years past the respondent association, its officers and members have had a mutual understanding for the purpose of causing manufacturers, producers, and their respective brokers, distributing their products in the State of Wisconsin, to confine said distribution to the so-called regular and legitimate channels of distribution and to prevent concerns operating as described in paragraph 5 hereof, retailers, and other so-called irregulars from purchasing said merchandise at jobbers' prices; thereby to suppress competition in the sale and distribution of grocery and allied products transported from other States into Wisconsin.

For the purpose of making effective their common undertaking, the respondent association, its officers and various members, have committed certain acts as hereinafter specified.

(a) They have discussed and formulated plans at various meetings of the association for combating so-called irregular concerns and restricting the competition from them.

(b) They have classified and designated various concerns described herein as irregular and illegitimate channels of distribution, and have held their competition to be unfair because of such designation.

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(c) They have informed each other through the secretary of respondent association and through the bulletins circulated by him, of means and methods which were being and had been employed by various respondent members to accomplish the joint undertaking described herein, and the degree of success attending their efforts.

(d) They have circulated disparaging and derogatory statements concerning the business methods and plans of organization of such concerns for the purpose of inducing manufacturers and brokers not to sell them and retailers not to affiliate with them.

(e) They have sought to induce manufacturers and brokers to refuse dealings with such concerns by sending and causing to be sent to them protests and objections made in concert by their customers among the members of respondent association.

(f) They have complained to manufacturers and brokers that such concerns were selling at less than the manufacturers' list price and have recognized said list price as the proper selling price for the jobber.

(g) They have informed manufacturers and brokers that if they sold to such concerns they could not expect the support and patronage of the so-called legitimate wholesale grocer.

(h) They have canceled orders and refused to do business with brokers and manufacturers unless they would refuse to sell such concerns.

(i) They have placed orders with manufacturers and brokers on condition that they would not sell to such concerns and have refused shipments made in violation of such conditions.

(j) They have discriminated and urged discrimination in favor of manufacturers and brokers who acceded to their requests and demands that they cease or refrain from selling such concerns.

(k) They have organized and carried out a campaign to induce manufacturers to eliminate the practice of shipping direct to retailers on the jobbers' order, seeking thereby to restrict the ability of so-called irregular concerns of whose business such shipments were a substantial portion to undersell the so-called legitimate jobber and to subject all shipments to the imposition of the jobbers' warehousing charge.

PAR 7. As a result of the means and methods adopted by respondent as set forth in paragraph 6 hereof:

(a) Many manufacturers and brokers selling and shipping groceries and foodstuffs into Wisconsin from various States of the United States have refused to sell or have discontinued selling to the so-called irregular concerns complained of and objected to by respondent jobbers, and have confined their distribution to the so-called regular channels approved by respondent association and its members;

(b) So-called irregular dealers have been prevented thereby from purchasing various lines of goods from manufacturers in interstate commerce and in some instances were compelled to buy through members of respondent association; and

(c) Retailers have been compelled thereby to purchase various lines of goods from members of respondent association in interstate commerce at higher prices than those charged by manufacturers and by so-called irregular wholesalers.

PAR. 8. Respondent Glass-Turbush Co. is a Wisconsin corporation engaged in the merchandise brokerage business at Milwaukee, where it represents the Corn Products Refining Co. and other producers of foodstuffs and sells their products largely to members of respondent association. The manufacturers represented by said respondent have reposed a wide discretion in it as to the classes of trade and the individual customers to which their products should be sold, and have accepted its recommendations in that respect. Upon the advice and recommendation of respondent Glass-Turbush Co., the Corn Products Refining Co. began selling some of the so-called irregular concerns described in paragraph 5 hereof in 1919 and continued to do so until the fall of 1921. Because of the complaints and objections made by members of respondent association to such sales, pursuant to their understanding as aforesaid and because of assurances pursuant thereto that respondent members would increase their sales effort on goods of the Corn Products Refining Co. if such sales were discontinued, respondent Glass-Turbush Co. advised and induced said Corn Products Refining Co. to discontinue selling to certain so-called irregular concerns. Respondent Glass-Turbush Co. immediately advised the members of respondent association of the severance of such sales relations and solicited their collective support in the sale of Corn Products Refining Co. goods. Said respondent company also informed members of respondent association of other manufacturers and brokers who sold to so-called irregular trade, for the purpose and with the effect of causing said members to refuse dealings with such manufacturers and to put their sales efforts on lines represented by it.

PAR. 9. Respondent Otto L. Kuehn Co. is the largest and oldest merchandise brokerage firm in Milwaukee and represents a number of nationally known lines of food products, such as Postum Cereals, Hills Brothers Coffee, and Del Monte line of canned fruits and vegetables. Its principals have reposed in it a wide discretion as to the classes of trade and the individual customers to which their products should be sold and have accepted its recommendations in that respect. Because of the objections and complaints made by

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members of respondent association pursuant to their understanding as aforesaid this respondent for several years refused to sell and induced its principals not to sell the so-called irregulars objected to by respondent jobbers. Because of its refusal to sell said irregulars this respondent received the cooperation, favor and support of the members of respondent association pursuant to their aforesaid understanding. The Postum Cereal Co. refused to sell the so-called irregulars upon the understanding that respondent members would urge their salesmen "that Post Toasties be pushed in preference to other corn flakes"; and members of respondent association, co-operating with the Postum Cereal Co. and its Wisconsin representative, Otto L. Kuehn, did so instruct their respective salesmen. Respondent Otto L. Kuehn Co. informed members of respondent association that certain other manufacturers and brokers sold to so-called irregulars, for the purpose and with the effect of causing respondent members to cease or refrain from dealing with such manufacturers and brokers and putting their sales efforts on the lines represented by it. Said respondent company diverted orders designated by retailers as for the account of certain so-called irregulars to the account of its so-called legitimate jobbing customers among respondent jobbers.

Prior to the issuance of formal complaint herein but subsequent to a preliminary investigation made by the Federal Trade Commission, said respondent company began and continued to sell the so-called irregulars objected to by respondent jobbers.

PAR. 10. Respondent association, its officers and members, and respondent brokers by the methods and in the particulars hereinbefore set forth, were engaged in a combination and common understanding to confine the wholesale distribution of grocery products in their territory to what respondent jobbers have designated the regular and legitimate channels of trade and to prevent by circulation of disparaging statements, by blacklist, by boycott and threats of boycott, and by other cooperative methods, to prevent manufacturers from selling such concerns as respondent members have designated irregular and illegitimate and who are not, according to the association standard, legitimate wholesale grocers.

CONCLUSION

The practices of said respondents as set forth in the paragraphs numbered 3 to 9, inclusive, of the foregoing findings as to the facts, in the circumstances therein set forth, are to the injury and prejudice of the public and respondents' competitors and manufacturers, producers and their representatives, and constitute unfair methods

of competition in interstate commerce in violation of the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and testimony and evidence submitted, the trial examiner's report upon the facts and exceptions thereto, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

Now therefore it is ordered, That the respondent association, its officers, both individually and in their official capacity, and its individual members, their agents, representatives and employees or any group of such respondents or their agents, either with or without the cooperation of persons not parties hereto, cease and desist from following a common course of action pursuant to mutual understanding, combination or agreement for the purpose or with the effect, directly or indirectly, of lessening competition in the course of trade in groceries or allied products, or any of them, entering the State of Wisconsin from other States, by the following methods, or of any one or more thereof, to wit:

(1) By ceasing to deal with or discriminating against any manufacturer, producer, broker or other manufacturer's agent on the ground or for the reason that such manufacturer, producer, broker, or agent sells goods direct to retailers or to wholesalers not considered regular and legitimate by said respondents;

(2) By advocating the said common course of action outlined in paragraph (1) foregoing, in bulletins, news letters, correspondence, orally at meetings or otherwise;

(3) By threats, oral or in writing, express or implied, directed to any manufacturer, producer, broker, or manufacturers' agent for the purpose or with the effect of inducing, persuading, or constraining such manufacturer, producer, broker, or agent to cease to sell, or diminish his sales to any competitor or retailer;

(4) By cooperatively soliciting assurances from manufacturers that they will remain loyal to the association's contention that it is improper and illegitimate for manufacturers to sell both jobbers and retailers, or jobbers who are affiliated with retailers and by giving

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assurances on the part of the association to such manufacturers of special selling effort in return for or on account of said cooperation;

(5) By cooperatively circulating among the members of respondent association, manufacturers, retailers, and their respective agents, disparaging statements concerning the methods of operation and financial standing of so-called irregular concerns;

(6) By recommending or procuring the circulation of disparaging attacks on manufacturers or producers or their respective agents, who sell direct to so-called irregular concerns;

(7) By cooperatively inducing or attempting to induce manufacturers to refuse or discontinue their practice of shipping direct from the factory to the retailer for the jobbers' account;

It is further ordered, That the respondents Glass-Turbush Co. and Otto L. Kuehn Co., their officers and agents, cease and desist from:

(1) Entering into agreements or understandings with respondent jobbers to cease dealings or refrain from selling to concerns not considered as regular and legitimate channels by said jobbers under the principles adopted and supported by respondent association.

(2) Cooperating with respondent association and its members for the purpose of preventing so-called irregular dealers from securing the goods of manufacturers represented by said broker respondents without the intervention of respondent jobbers.

(3) Reporting to respondent jobbers the names of manufacturers and brokers who sold to so-called irregular dealers for the purpose of causing respondent members, pursuant to their common understanding, to cease or withhold dealings with such manufacturers and brokers.

It is further ordered, That the respondents shall file with the Federal Trade Commission, within sixty days from date of this order, their report in writing stating the manner and form in which this order has been conformed to.

ORDERS OF DISMISSAL

LOUIS W. MEYER, DOING BUSINESS AS GRAND RAPIDS FURNITURE SALES CO.; AND WESTERN FURNITURE MANUFACTURERS EXPOSITION, INC., December 10, 1925. (Docket 1244.)

Charge: Adopting and using misleading trade and corporate name, advertising falsely or misleadingly and misrepresenting business status or connections; in connection with the sale of furniture.

Dismissed for the reason "that respondent has gone out of business."

Appearances: *Mr. Morgan J. Doyle* for the Commission.

BANNER SILK KNITTING MILLS, INC., December 10, 1925. (Docket 1280.)

Charge: Adopting and using misleading corporate name and advertising falsely or misleadingly; in connection with the manufacture and sale of textiles or fabrics.

Dismissed for the reason "that respondent has discontinued business."

Appearances: *Mr. O. R. Stites* for the Commission; *Gilbert & Gilbert*, of New York City, for respondent.

JOSEPH P. MANNING CO., December 11, 1925. (Docket 1072.)

Charge: Discriminating in price in violation of section 5 of the Federal Trade Commission Act and of section 2 of the Clayton Act, respectively; in connection with the sale of tobacco and tobacco products.

Dismissed, after answer, "on recommendation of the chief counsel for the Commission," Commissioner Thompson dissenting.

Appearances: *Mr. Robt. N. McMillen* for the Commission; *Mr. Henry V. Cunningham*, of Boston, Mass., for respondent.

REAL SILK HOSIERY MILLS, December 11, 1925. (Docket 1123.)

Charge: Advertising falsely or misleadingly and misrepresenting products offered; in connection with the manufacture and sale of hosiery.

Dismissed, after answer, stipulation, and trial, by the following order:

The above-entitled proceeding having come on for final determination, and it appearing to the Commission that the record fails to prove the use of any of the practices charged in the complaint except those charged in paragraph 4 thereof, which in substance charges the circulation of false and misleading statements, respondent having represented by advertisement, by reprints therefrom, and by selling talks of salesmen; that it produces its own silk in Japan; that it possessed a greater capacity to produce hosiery than it actually possessed; and that the volume of hosiery it produced was greater than the amount it actually did produce, and as to these the respondent has stipulated that it made use of such practices for a time, but had abandoned the use thereof and would never again resume the same, it is therefore concluded that there is no longer any public interest in further action; and in consideration of the foregoing,

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

By the Commission.

Commissioner Thompson dissented and made the attached statement:

I am in accord with the majority of the Commission in dismissing the complaint as to all matters except the misrepresentations in advertising the following:

The finest silk in the world comes from Japan. In Japan today 4,000 people are working to produce raw silk for the exclusive use of Real Silk Hosiery Mills, of Indianapolis. Our inspectors, right on the ground, insist that the quality standards of the Real Silk Hosiery Mills be strictly maintained. Every detail is scientifically supervised—the selection of silk worms crossed to secure silk of maximum tensile strength and the highest luster, their feeding and care, and the cultivation of hundreds of acres of mulberry trees from which the worms are feeding. Absolutely nothing is left to chance * * *.

While this advertisement was carried but once in the Saturday Evening Post, the respondent had reprints made of it and enclosed the reprints in books which were carried by its salesmen in their sales kits and were used by the salesmen in their talks to customers. In fact, it appeared at the time of the argument before the Commission, that the sales books carried this reprint up until the time of the taking of testimony in the case. As the facts were not true and as the statements contained assertions practically similar to those condemned in the case of *Sears, Roebuck & Company v. The Commission*,¹ I am unable to differentiate the reason for issuing an order in the latter case and not in the instant case.

¹ 258 Fed. 307, 2 F. T. C. 536.

Appearances: *Mr. G. Ed. Rowland* for the Commission; *Mr. Edmund H. Parry*, of Washington, D. C., and *Mr. Ralph Bamberger*, of Indianapolis, Ind., for respondent.

MORRIS & Co., December 14, 1925. (Docket 452.)

Charge: Acquisition of stock of competitor in violation of sections 7 and 5 of the Clayton and Federal Trade Commission Acts, respectively, in connection with the production and sale of meats, oleomargarine, cheese, poultry and eggs, etc.

Dismissed, after answer, trial and stipulation, "upon recommendation of chief counsel of the Commission for the reason that respondent has gone out of business."

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland* and *Mr. G. R. Jackson* for the Commission; *Mr. John M. Lee*, of Chicago, Ill., for respondent.

L. PINCUS AND BENJAMIN BLANSTEIN, PARTNERS DOING BUSINESS UNDER THE TRADE NAMES LOUBEN FURNITURE CO. AND THE BIG G FURNITURE WAREHOUSE, December 14, 1925. (Docket 1154.)

Charge: Advertising falsely and misleadingly and misrepresenting business status or connections; in connection with the sale of furniture.

Dismissed "upon recommendation of the chief counsel for the Commission for the reason that the respondent has gone out of business."

Appearances: *Mr. Morgan J. Doyle* for the Commission.

SWIFT & Co. AND UNITED DRESSED BEEF Co., December 19, 1925. (Docket 454.)

Charge: Acquisition of stock of competitors in violation of sections 5 and 7 of the Federal Trade Commission and Clayton Acts, respectively; in connection with the slaughtering of live stock, and of producing and dealing in meats and all kinds of products and by-products arising out of the slaughtering of live stock.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland*, and *Mr. G. R. Jackson* for the Commission; *Mr. Albert H. Veeder* and *Mr. Henry Veeder* and *Mr. Frank L. Horton* of Chicago, Ill., and *Mr. L. A. Ackley*, of New York City, for respondents.

ONEIDA COMMUNITY, LTD., December 19, 1925. (Docket 1101.)

Charge: Resale price maintenance; in connection with the manufacture and sale of silver-plated flatware.

Dismissed, after answer and trial, by the following order:

The above-entitled proceeding coming on for consideration upon the complaint of the Commission, answer of respondent, testimony

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(c) They have informed each other through the secretary of respondent association and through the bulletins circulated by him, of means and methods which were being and had been employed by various respondent members to accomplish the joint undertaking described herein, and the degree of success attending their efforts.

(d) They have circulated disparaging and derogatory statements concerning the business methods and plans of organization of such concerns for the purpose of inducing manufacturers and brokers not to sell them and retailers not to affiliate with them.

(e) They have sought to induce manufacturers and brokers to refuse dealings with such concerns by sending and causing to be sent to them protests and objections made in concert by their customers among the members of respondent association.

(f) They have complained to manufacturers and brokers that such concerns were selling at less than the manufacturers' list price and have recognized said list price as the proper selling price for the jobber.

(g) They have informed manufacturers and brokers that if they sold to such concerns they could not expect the support and patronage of the so-called legitimate wholesale grocer.

(h) They have canceled orders and refused to do business with brokers and manufacturers unless they would refuse to sell such concerns.

(i) They have placed orders with manufacturers and brokers on condition that they would not sell to such concerns and have refused shipments made in violation of such conditions.

(j) They have discriminated and urged discrimination in favor of manufacturers and brokers who acceded to their requests and demands that they cease or refrain from selling such concerns.

(k) They have organized and carried out a campaign to induce manufacturers to eliminate the practice of shipping direct to retailers on the jobbers' order, seeking thereby to restrict the ability of so-called irregular concerns of whose business such shipments were a substantial portion to undersell the so-called legitimate jobber and to subject all shipments to the imposition of the jobbers' warehousing charge.

PAR 7. As a result of the means and methods adopted by respondent as set forth in paragraph 6 hereof:

(a) Many manufacturers and brokers selling and shipping groceries and foodstuffs into Wisconsin from various States of the United States have refused to sell or have discontinued selling to the so-called irregular concerns complained of and objected to by respondent jobbers, and have confined their distribution to the so-called regular channels approved by respondent association and its members;

(b) So-called irregular dealers have been prevented thereby from purchasing various lines of goods from manufacturers in interstate commerce and in some instances were compelled to buy through members of respondent association; and

(c) Retailers have been compelled thereby to purchase various lines of goods from members of respondent association in interstate commerce at higher prices than those charged by manufacturers and by so-called irregular wholesalers.

PAR. 8. Respondent Glass-Turbush Co. is a Wisconsin corporation engaged in the merchandise brokerage business at Milwaukee, where it represents the Corn Products Refining Co. and other producers of foodstuffs and sells their products largely to members of respondent association. The manufacturers represented by said respondent have reposed a wide discretion in it as to the classes of trade and the individual customers to which their products should be sold, and have accepted its recommendations in that respect. Upon the advice and recommendation of respondent Glass-Turbush Co., the Corn Products Refining Co. began selling some of the so-called irregular concerns described in paragraph 5 hereof in 1919 and continued to do so until the fall of 1921. Because of the complaints and objections made by members of respondent association to such sales, pursuant to their understanding as aforesaid and because of assurances pursuant thereto that respondent members would increase their sales effort on goods of the Corn Products Refining Co. if such sales were discontinued, respondent Glass-Turbush Co. advised and induced said Corn Products Refining Co. to discontinue selling to certain so-called irregular concerns. Respondent Glass-Turbush Co. immediately advised the members of respondent association of the severance of such sales relations and solicited their collective support in the sale of Corn Products Refining Co. goods. Said respondent company also informed members of respondent association of other manufacturers and brokers who sold to so-called irregular trade, for the purpose and with the effect of causing said members to refuse dealings with such manufacturers and to put their sales efforts on lines represented by it.

PAR. 9. Respondent Otto L. Kuehn Co. is the largest and oldest merchandise brokerage firm in Milwaukee and represents a number of nationally known lines of food products, such as Postum Cereals, Hills Brothers Coffee, and Del Monte line of canned fruits and vegetables. Its principals have reposed in it a wide discretion as to the classes of trade and the individual customers to which their products should be sold and have accepted its recommendations in that respect. Because of the objections and complaints made by

members of respondent association pursuant to their understanding as aforesaid this respondent for several years refused to sell and induced its principals not to sell the so-called irregulars objected to by respondent jobbers. Because of its refusal to sell said irregulars this respondent received the cooperation, favor and support of the members of respondent association pursuant to their aforesaid understanding. The Postum Cereal Co. refused to sell the so-called irregulars upon the understanding that respondent members would urge their salesmen "that Post Toasties be pushed in preference to other corn flakes"; and members of respondent association, cooperating with the Postum Cereal Co. and its Wisconsin representative, Otto L. Kuehn, did so instruct their respective salesmen. Respondent Otto L. Kuehn Co. informed members of respondent association that certain other manufacturers and brokers sold to so-called irregulars, for the purpose and with the effect of causing respondent members to cease or refrain from dealing with such manufacturers and brokers and putting their sales efforts on the lines represented by it. Said respondent company diverted orders designated by retailers as for the account of certain so-called irregulars to the account of its so-called legitimate jobbing customers among respondent jobbers.

Prior to the issuance of formal complaint herein but subsequent to a preliminary investigation made by the Federal Trade Commission, said respondent company began and continued to sell the so-called irregulars objected to by respondent jobbers.

PAR. 10. Respondent association, its officers and members, and respondent brokers by the methods and in the particulars hereinbefore set forth, were engaged in a combination and common understanding to confine the wholesale distribution of grocery products in their territory to what respondent jobbers have designated the regular and legitimate channels of trade and to prevent by circulation of disparaging statements, by blacklist, by boycott and threats of boycott, and by other cooperative methods, to prevent manufacturers from selling such concerns as respondent members have designated irregular and illegitimate and who are not, according to the association standard, legitimate wholesale grocers.

CONCLUSION

The practices of said respondents as set forth in the paragraphs numbered 3 to 9, inclusive, of the foregoing findings as to the facts, in the circumstances therein set forth, are to the injury and prejudice of the public and respondents' competitors and manufacturers, producers and their representatives, and constitute unfair methods

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of competition in interstate commerce in violation of the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and testimony and evidence submitted, the trial examiner's report upon the facts and exceptions thereto, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

Now therefore it is ordered, That the respondent association, its officers, both individually and in their official capacity, and its individual members, their agents, representatives and employees or any group of such respondents or their agents, either with or without the cooperation of persons not parties hereto, cease and desist from following a common course of action pursuant to mutual understanding, combination or agreement for the purpose or with the effect, directly or indirectly, of lessening competition in the course of trade in groceries or allied products, or any of them, entering the State of Wisconsin from other States, by the following methods, or of any one or more thereof, to wit:

(1) By ceasing to deal with or discriminating against any manufacturer, producer, broker or other manufacturer's agent on the ground or for the reason that such manufacturer, producer, broker, or agent sells goods direct to retailers or to wholesalers not considered regular and legitimate by said respondents;

(2) By advocating the said common course of action outlined in paragraph (1) foregoing, in bulletins, news letters, correspondence, orally at meetings or otherwise;

(3) By threats, oral or in writing, express or implied, directed to any manufacturer, producer, broker, or manufacturers' agent for the purpose or with the effect of inducing, persuading, or constraining such manufacturer, producer, broker, or agent to cease to sell, or diminish his sales to any competitor or retailer;

(4) By cooperatively soliciting assurances from manufacturers that they will remain loyal to the association's contention that it is improper and illegitimate for manufacturers to sell both jobbers and retailers, or jobbers who are affiliated with retailers and by giving

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assurances on the part of the association to such manufacturers of special selling effort in return for or on account of said cooperation;

(5) By cooperatively circulating among the members of respondent association, manufacturers, retailers, and their respective agents, disparaging statements concerning the methods of operation and financial standing of so-called irregular concerns;

(6) By recommending or procuring the circulation of disparaging attacks on manufacturers or producers or their respective agents, who sell direct to so-called irregular concerns;

(7) By cooperatively inducing or attempting to induce manufacturers to refuse or discontinue their practice of shipping direct from the factory to the retailer for the jobbers' account;

It is further ordered, That the respondents Glass-Turbush Co. and Otto L. Kuehn Co., their officers and agents, cease and desist from:

(1) Entering into agreements or understandings with respondent jobbers to cease dealings or refrain from selling to concerns not considered as regular and legitimate channels by said jobbers under the principles adopted and supported by respondent association.

(2) Cooperating with respondent association and its members for the purpose of preventing so-called irregular dealers from securing the goods of manufacturers represented by said broker respondents without the intervention of respondent jobbers.

(3) Reporting to respondent jobbers the names of manufacturers and brokers who sold to so-called irregular dealers for the purpose of causing respondent members, pursuant to their common understanding, to cease or withhold dealings with such manufacturers and brokers.

It is further ordered, That the respondents shall file with the Federal Trade Commission, within sixty days from date of this order, their report in writing stating the manner and form in which this order has been conformed to.

ORDERS OF DISMISSAL

LOUIS W. MEYER, DOING BUSINESS AS GRAND RAPIDS FURNITURE SALES CO.; AND WESTERN FURNITURE MANUFACTURERS EXPOSITION, INC., December 10, 1925. (Docket 1244.)

Charge: Adopting and using misleading trade and corporate name, advertising falsely or misleadingly and misrepresenting business status or connections; in connection with the sale of furniture.

Dismissed for the reason "that respondent has gone out of business."

Appearances: *Mr. Morgan J. Doyle* for the Commission.

BANNER SILK KNITTING MILLS, INC., December 10, 1925. (Docket 1280.)

Charge: Adopting and using misleading corporate name and advertising falsely or misleadingly; in connection with the manufacture and sale of textiles or fabrics.

Dismissed for the reason "that respondent has discontinued business."

Appearances: *Mr. O. R. Stites* for the Commission; *Gilbert & Gilbert*, of New York City, for respondent.

JOSEPH P. MANNING CO., December 11, 1925. (Docket 1072.)

Charge: Discriminating in price in violation of section 5 of the Federal Trade Commission Act and of section 2 of the Clayton Act, respectively; in connection with the sale of tobacco and tobacco products.

Dismissed, after answer, "on recommendation of the chief counsel for the Commission," Commissioner Thompson dissenting.

Appearances: *Mr. Robt. N. McMillen* for the Commission; *Mr. Henry V. Cunningham*, of Boston, Mass., for respondent.

REAL SILK HOSIERY MILLS, December 11, 1925. (Docket 1123.)

Charge: Advertising falsely or misleadingly and misrepresenting products offered; in connection with the manufacture and sale of hosiery.

Dismissed, after answer, stipulation, and trial, by the following order:

The above-entitled proceeding having come on for final determination, and it appearing to the Commission that the record fails to prove the use of any of the practices charged in the complaint except those charged in paragraph 4 thereof, which in substance charges the circulation of false and misleading statements, respondent having represented by advertisement, by reprints therefrom, and by selling talks of salesmen; that it produces its own silk in Japan; that it possessed a greater capacity to produce hosiery than it actually possessed; and that the volume of hosiery it produced was greater than the amount it actually did produce, and as to these the respondent has stipulated that it made use of such practices for a time, but had abandoned the use thereof and would never again resume the same, it is therefore concluded that there is no longer any public interest in further action; and in consideration of the foregoing,

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

By the Commission.

Commissioner Thompson dissented and made the attached statement:

I am in accord with the majority of the Commission in dismissing the complaint as to all matters except the misrepresentations in advertising the following:

The finest silk in the world comes from Japan. In Japan today 4,000 people are working to produce raw silk for the exclusive use of Real Silk Hosiery Mills, of Indianapolis. Our inspectors, right on the ground, insist that the quality standards of the Real Silk Hosiery Mills be strictly maintained. Every detail is scientifically supervised—the selection of silk worms crossed to secure silk of maximum tensile strength and the highest luster, their feeding and care, and the cultivation of hundreds of acres of mulberry trees from which the worms are feeding. Absolutely nothing is left to chance * * *.

While this advertisement was carried but once in the Saturday Evening Post, the respondent had reprints made of it and enclosed the reprints in books which were carried by its salesmen in their sales kits and were used by the salesmen in their talks to customers. In fact, it appeared at the time of the argument before the Commission, that the sales books carried this reprint up until the time of the taking of testimony in the case. As the facts were not true and as the statements contained assertions practically similar to those condemned in the case of *Sears, Roebuck & Company v. The Commission*,¹ I am unable to differentiate the reason for issuing an order in the latter case and not in the instant case.

¹ 258 Fed. 307, 2 F. T. C. 536.

Appearances: *Mr. G. Ed. Rowland* for the Commission; *Mr. Edmund H. Parry*, of Washington, D. C., and *Mr. Ralph Bamberger*, of Indianapolis, Ind., for respondent.

MORRIS & Co., December 14, 1925. (Docket 452.)

Charge: Acquisition of stock of competitor in violation of sections 7 and 5 of the Clayton and Federal Trade Commission Acts, respectively, in connection with the production and sale of meats, oleomargarine, cheese, poultry and eggs, etc.

Dismissed, after answer, trial and stipulation, "upon recommendation of chief counsel of the Commission for the reason that respondent has gone out of business."

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland* and *Mr. G. R. Jackson* for the Commission; *Mr. John M. Lee*, of Chicago, Ill., for respondent.

L. PINCUS AND BENJAMIN BLANSTEIN, PARTNERS DOING BUSINESS UNDER THE TRADE NAMES LOUBEN FURNITURE CO. AND THE BIG G FURNITURE WAREHOUSE, December 14, 1925. (Docket 1154.)

Charge: Advertising falsely and misleadingly and misrepresenting business status or connections; in connection with the sale of furniture.

Dismissed "upon recommendation of the chief counsel for the Commission for the reason that the respondent has gone out of business."

Appearances: *Mr. Morgan J. Doyle* for the Commission.

SWIFT & Co. AND UNITED DRESSED BEEF Co., December 19, 1925. (Docket 454.)

Charge: Acquisition of stock of competitors in violation of sections 5 and 7 of the Federal Trade Commission and Clayton Acts, respectively; in connection with the slaughtering of live stock, and of producing and dealing in meats and all kinds of products and by-products arising out of the slaughtering of live stock.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland*, and *Mr. G. R. Jackson* for the Commission; *Mr. Albert H. Veeder* and *Mr. Henry Veeder* and *Mr. Frank L. Horton* of Chicago, Ill., and *Mr. L. A. Ackley*, of New York City, for respondents.

ONEIDA COMMUNITY, LTD., December 19, 1925. (Docket 1101.)

Charge: Resale price maintenance; in connection with the manufacture and sale of silver-plated flatware.

Dismissed, after answer and trial, by the following order:

The above-entitled proceeding coming on for consideration upon the complaint of the Commission, answer of respondent, testimony

and evidence, briefs and oral argument, and the Commission now being fully advised in the premises,

It is ordered, That the complaint be dismissed for the reason that the record shows without contradiction that the unfair practices complained of were abandoned on or about the 1st of June, 1922, and have not since been resumed, and that the time of abandonment was but a few months after the decision of the Supreme Court of the United States in the *Beech-Nut Packing Co. case*,¹ which settled the law with respect to the maintenance of prices by cooperative methods.

Appearances: *Mr. Alfred M. Craven* for the Commission; *Mr. Gilbert H. Montague* for respondent.

UNITED STATES ROOFING & PAINT Co., INC., December 19, 1925. (Docket 1300.)

Charge: Misbranding or mislabeling and advertising falsely or misleadingly; in connection with the sale of paints, colors, varnishes, asphalt shingles, prepared roofings, insulating and water-proof papers, wall board and similar products.

Dismissed for the reason that "respondent has abandoned the practice charged."

Appearances: *Mr. Henry Miller* for the Commission; *Brill & Maslon* of Minneapolis, Minn., for respondent.

CONTINENTAL BAKING CORPORATION, December 19, 1925. (Docket 1305.)

Charge: Acquisition of stock of competitors in violation of section 7 of the Clayton Act; in connection with the manufacture, purchase and sale of bakery products.

Dismissed by the following order:

It being made known to the Commission that, since the complaint was issued herein on April 10, 1925, the respondent has acquired the stock or share capital of nine or more other corporations, and it appearing that such subsequent acquisitions of stock and the acquisitions described in the complaint herein should be included in one proceeding against this respondent, and the Commission being duly advised in the premises:

It is ordered, That the complaint herein be, and the same is hereby, dismissed without prejudice to the right to issue and hear a complaint charging the respondent with all its acquisitions of stock or share capital to this date as a violation of section 7 of the Clayton Act.

Appearances: *Mr. A. R. Brindley* for the Commission.

¹ 257 U. S. 441, 4 F. T. C. 583.

INTERWOVEN STOCKING Co., December 21, 1925. (Docket 1189.)

Charge: Resale price maintenance; in connection with the manufacture and sale of men's hosiery.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. J. T. Clark* for the Commission; *Mr. Louis Prevost Whitaker*, of New York City, and *Mr. Edward S. Rogers*, of Chicago, Ill., for respondent.

SOUTH JERSEY WHOLESALE CONFECTIONERS' ASSOCIATION, OF TRENTON, NEW JERSEY, ET AL., December 30, 1925. (Docket 1257.)

Charge: Combining and conspiring to fix uniform prices and prevent price competition; in connection with the sale of candy.

Dismissed, after answer and trial, by the following order:

The above-entitled proceeding coming on for decision by the Commission, upon the complaint of the Commission, the answer of respondents, the testimony and evidence, and the briefs and argument of counsel, and the Commission having considered the record, and being now fully advised in the premises:

It is ordered, That this proceeding be, and the same is hereby, dismissed upon the ground that the South Jersey Wholesale Confectioners' Association of Trenton, N. J., discontinued its activities before the issuance of the complaint herein and is no longer in existence.

Commissioner Thompson dissents.

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Mr. W. Holt Apgar*, of Trenton, N. J., for respondent.

PLATELESS ENGRAVING Co., January 9, 1926. (Docket 1294.)

Charge: Using misleading corporate name and advertising falsely or misleadingly, in connection with the printing by special process, and sale of, social and business stationery.

Dismissed, after answer, by the following order:

This proceeding coming on for final disposition by the Commission, and respondent having executed the stipulation herein and performed the provisions thereof and changed its corporate name to Plateless Process & Printing Co.

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

Commissioner Nugent dissents.

Appearances: *Mr. Morgan J. Doyle* for the Commission.

WILSON & Co., INC., January 16, 1926. (Docket 450.)

Charge: Acquisition of stock of competitor (Paul O. Reyman) in violation of section 7 of the Clayton Act, in connection with the slaughtering of cattle and other livestock and in the preparation and sale of meats, meat products, and by-products.

Dismissed, after answer and trial, by the following order:

This proceeding coming on for final disposition, on recommendation of the chief counsel for its dismissal on the ground that further prosecution thereof has been obviated by the divestment by the respondent of the stock alleged to have been unlawfully acquired, under an order of the United States District Court, Southern District of New York, entered December 8, 1925, in *John Eiszner Co. v. Wilson & Co., Inc.* (receivership).

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

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland*, and *Mr. George R. Jackson* for the Commission; *Mr. W. R. Brown* and *Mr. J. P. Lightfoot* (general counsel for *Wilson & Co.*), of Chicago, Ill., for respondent.

THE STANDARD OIL CO. OF NEW JERSEY, January 26, 1926. (Docket 964.)

Charge: Acquisition of stock of competitor in violation of section 7 of the Clayton Act; in connection with the production, manufacture, transportation, sale, and delivery of petroleum, gasoline, kerosene, fuel oil, and other products of petroleum.

Dismissed, after answer and trial, without assignment of reasons, Commissioners Nugent and Thompson dissenting.

Appearances: *Mr. A. R. Brindley* for the Commission; *Mr. Chester O. Swain*, of New York City, and *Mr. Frank Andrews*, of Houston, Tex., for respondent.

ARMOUR & Co., January 27, 1926. (Docket 163.)

Charge: Operating concealed subsidiary or bogus independent, and discriminating in prices paid for supplies between localities; in connection with the purchase and sale of dairy products.

Dismissed, after answer, for the reason that "respondent has long since ceased the practices charged and there is no evidence that the same have ever been resumed."

Appearances: *Mr. George R. Jackson* for the Commission; *Mayer, Meyer, Austrian & Platt* and *Mr. Charles J. Faulkner, jr.*, of Chicago, Ill., for respondent.

IOWA-NEBRASKA-MINNESOTA WHOLESALE GROCERS' ASSOCIATION, ITS OFFICERS AND MEMBERS; SLOCUM-BERGREN Co., GOWAN-LENNING-BROWN Co., PEET BROS. MANUFACTURING Co., JAS. S. KIRK & Co., AND CUDAHY PACKING Co., January 27, 1926. (Docket 991.)

Charge: Combining or conspiring to boycott products of competitor; in connection with the manufacturer's policy of selling soap indiscriminately to retailers and jobbers.

Dismissed, after answer and trial, without assignment of reasons, Commissioner Nugent dissenting.

Appearances: *Mr. Walter B. Wooden* for the Commission; *Tinley, Mitchell, Ross & Mitchell*, of Council Bluffs, Iowa., for Iowa-Nebraska-Minnesota Wholesale Grocers' Association and various members of said association; *Lathrop, Morrow, Fox & Moore*, of Kansas City, Mo., for Peet Bros. Manufacturing Co.; *Cutting, Moore & Sidley*, of Chicago, Ill., for James S. Kirk & Co.; *Mr. Thomas Creigh* and *Mr. R. B. Webster*, of Chicago, Ill., for Cudahy Packing Co.

ARMOUR & Co., January 30, 1926. (Docket 531.)

Charge: Acquisition of properties, businesses, and stock of competitors, in violation of section 5 of the Federal Trade Commission Act, and of section 7 of the Clayton Act; in connection with the manufacture and sale of cottonseed-oil products and by-products (including lard substitutes, lard compound, cooking oil, soap stock, meal cakes, linters, etc.), and in connection with the purchase of hides and the production and sale of leather; the amended complaint being in four counts, of which the first two had to do with the formation of two new corporations and other acquisitions and transactions alleged to have had for their purpose the elimination of competition between respondent and the Lookout Refining Co. and a related concern, the Chattanooga Oxygen Gas Co., in violation, respectively, of sections 5 and 7, above referred to, and the last two had to do with the formation of a new corporation and other transactions and acquisitions which resulted, as alleged, in vesting in respondent complete control of a tanning business theretofore conducted by a competitor, with resulting elimination of competition, in violation, respectively, of the aforesaid sections.

Dismissed, after answer and trial, by the following order:

The above-entitled proceeding consisting of counts 1, 2, 3, and 4 coming before the Commission for final determination upon the amended complaint, answer of the respondent, testimony in support of allegations of the complaint as amended, testimony introduced on behalf of the respondent and report of the trial examiner as to the facts, and the Commission being now fully advised in the premises, it is therefore

Ordered, That counts 1 and 2 of said amended complaint be and the same are hereby dismissed for the reason:

(1) That the competition eliminated between Armour & Co. and the Lookout Refining Co. was brought about by the purchase of the physical properties of the Lookout Refining Co. by Armour & Co. and not by the acquisition of the capital stock of a new corporation, Lookout Oil & Refining Co. by Armour & Co., which acquisition of

capital stock was acquired 11 months subsequent to the purchase of the physical properties of Lookout Refining Co.

(2) That the competition eliminated between Armour & Co. and the Chattanooga Oxygen Gas Co. was brought about by the purchase of the physical properties of the Chattanooga Oxygen Gas Co. by Armour & Co. and not by the acquisition of the capital stock of a new corporation of the same name, Chattanooga Oxygen Gas Co., by Armour & Co. which acquisition of capital stock was acquired 11 months subsequent to the purchase of the physical properties of the Chattanooga Oxygen Gas Co.

It is further ordered, That counts 3 and 4 of the said amended complaint be and the same are hereby dismissed for the reason that under the evidence in this proceeding the acquisition of the physical assets is not a violation of the Clayton Act and also that the evidence is not sufficient to constitute a violation of the Federal Trade Commission Act.

Commissioners Nugent and Thompson dissent on the dismissal of counts 3 and 4.

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland*, *Mr. George R. Jackson*, and *Mr. J. M. Burkett* for the Commission; *Mr. Charles J. Faulkner, jr.*, and *Mr. R. F. Feagans*, of Chicago, Ill., for respondent.

PHILIP CAREY MANUFACTURING CO., PHILIP CAREY CO., WARING UNDERWOOD CO., PIONEER ASPHALT CO., AND WESTERN ELATERITE ROOFING CO., February 1, 1926. (Docket 1183.)

Charge: Combining and undertaking to suppress competition and to fix uniform prices; in connection with the manufacture and sale of paving joints.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. Eugene W. Burr* and *Mr. G. Ed. Rowland* for the Commission; *Mr. Alfred C. Cassatt*, of Cincinnati, Ohio, for respondents, Philip Carey Manufacturing Co., Philip Carey Co., and Waring Underwood Co.; *Newman, Poppenhusen, Stern & Johnston*, of Chicago, Ill., and *McGaughey, Tohill & McGaughey*, of Lawrenceville, Ill., for Pioneer Asphalt Co.; and *Dawson & Wright*, of Denver, Colo., for Western Elaterite Roofing Co.

KNIFE INFORMATION BUREAU ET AL., February 1, 1926. (Docket 1246.)

Charge: Combining and conspiring to enhance and standardize prices and suppress competition in connection with the manufacture and sale of knives and cutting tools and devices designed, adapted for, and used in cutting machines, also paper-mill bars and machine bed plates.

Dismissed after answer for the reason that "the practices charged have been discontinued."

Appearances: *Mr. T. John Butler* and *Mr. James M. Brinson* for the Commission; *Mr. James L. Bruff*, of New York City, for respondents, *Mr. D. H. James*, of Indianapolis, Ind., appearing also with *Mr. James L. Bruff* for *E. C. Atkins & Co.*

MIDLAND STEEL PRODUCTS Co., February 6, 1926. (Docket 1291.)

Charge: Acquisition of stock of competing corporations in violation of section 7 and acquisition of businesses and properties of competing concerns, with the effect of substantially lessening competition and with a dangerous tendency unduly to hinder the same and to create a monopoly (in violation of sec. 5); in connection with the manufacture and sale of automotive frames and parts therefor.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. James M. Brinson* for the Commission; *Tolles, Hogsett, Ginn & Morley*, of Cleveland, Ohio, for respondent.

FIRESTONE STEEL PRODUCT Co. ET AL., February 10, 1926. (Docket 1132.)

Charge: Combining or cooperating together to maintain and enhance prices and suppress competition in distribution; in connection with the manufacture and sale of automobile wheel rims and rim parts.

Dismissed, after answer and stipulation, for the reason that "the respondents abandoned the practices charged in the complaint after the decision of the United States Supreme Court in the matter of *Federal Trade Commission v. Beech-Nut Packing Company*.¹"

Appearances: *Mr. Henry A. Cox* for the Commission; *Mr. B. M. Robinson*, of Akron, Ohio, for respondents.

EDWIN W. BRAND, HARRY C. OPPENHEIMER, INDIVIDUALLY, AND BRAND & OPPENHEIMER, INC., February 11, 1926. (Docket 800.)

Charge: Naming product misleadingly, misbranding or mislabeling, and advertising falsely or misleadingly; in connection with the manufacture and sale of cotton.

Dismissed, after answer, stipulation and trial, by the following order:

The above-entitled proceeding coming on for decision upon the recommendation of the chief counsel for a dismissal and acceptance of the stipulation signed by the respondents, and the Commission having considered the same and being fully advised in the premises,

It is ordered, That the stipulation be accepted and that the amended complaint herein be and the same is hereby dismissed.

Commissioner Thompson dissented.

¹ 257 U. S. 441.

Appearances: *Mr. L. B. Perkins* for the Commission; *Mr. William J. Hughes, jr.*, and *Brown & Phelps*, of Washington, D. C., *House, Grossman & Vorhaus*, of New York City, and *Mr. Howard Moses* of Schuyler, Ettleson & Weinfeld of Chicago, Ill., for respondents.

JOHN J. MORRILL AND LOUIS HALVARSON, partners styling themselves A. H. McLEOD & Co., March 2, 1926. (Docket 833.)

Charge: Commercial bribery; in connection with the manufacture and sale of ship supplies.

Dismissed, after answer and trial, with prejudice or assignment of reasons.

Appearances: *Mr. Charles S. Moore* for the Commission; *Mr. Robert E. Cunningham*, of Mobile, Ala., for respondents.

WAVERLY OIL WORKS Co., March 2, 1926. (Docket 1176.)

Charge: Naming product misleadingly, advertising falsely or misleadingly, and misbranding or mislabeling; in connection with the manufacture and sale of various petroleum products.

Dismissed, after answer and stipulation, without assignment of reasons.

Appearances: *Mr. T. John Butler* and *Mr. Robert O. Brownell* for the Commission; *Mr. Fayette B. Dow* and *Mr. Willis Crane*, of Washington, D. C., for respondent.

OSA J. SMYTHE AND S. W. LEVY, partners styling themselves SMYTHE & LEVY, March 3, 1926. (Docket 798.)

Charge: Commercial bribery; in connection with the sale of ship chandlery.

Dismissed, after trial, without prejudice or assignment of reasons.

Appearances: *Mr. Charles S. Moore* for the Commission.

HOLLY SUGAR CORPORATION, March 3, 1926. (Docket 1181.)

Charge: Acquisition of stock of competitors in violation of section 7 of the Clayton Act; in connection with the manufacture and sale of beet sugar.

Dismissed, after answer and trial, by the following order:

A complaint herein having been issued by the Commission on the 17th day of May, 1924, and duly served upon the respondent and the respondent having thereafter duly served its answer; and the respondent having thereafter filed with the Commission a motion for the dismissal of said proceeding, on several grounds stated in the moving papers, and the Commission having (May 28, 1925) heard said motion and having ordered that the matters alleged in the respondent's motion to dismiss be referred back for hearing before a

trial examiner and report to the Commission; and a trial examiner having been appointed in pursuance of said order and having taken evidence on the matters alleged in respondent's motion and said trial examiner having filed his report, and the Commission now being fully advised in the premises;

It is ordered, That the complaint herein be, and the same is hereby dismissed for reasons based upon the report of the trial examiner and upon the recommendations of the trial attorney and the chief counsel as set forth in memorandum of December 10, 1925, from the trial attorney and memorandum of December 16, 1925, from the chief counsel.

Commissioners Nugent and Thompson dissenting.

Appearances: *Mr. A. R. Brindley* for the Commission; *Hodges, Wilson & Rogers*, of Denver, Colo., for respondent.

LANDERS, FRARY & CLARK, March 5, 1926. (Docket 1213.)

Charge: Resale price maintenance; in connection with the manufacture and sale of electrical heating and cooking appliances.

Dismissed, after answer and trial, without assignment of reasons, Commissioner Nugent dissenting.

Appearances: *Mr. James T. Clark* for the Commission; *Mason, Spalding & McAtee*, of Washington, D. C., for respondent.

CLEVELAND METAL PRODUCTS Co., March 9, 1926. (Docket 1140.)

Charge: Resale price maintenance; in connection with the manufacture and sale of various metal products, including kerosene stoves and heaters.

Dismissed, after answer and trial, "for the reason that it appears the practices have been abandoned, as there were but two instances of resale price maintenance on the part of the respondent after the Beech-Nut decision in the Supreme Court¹ and that these were within a few months after that decision."

Appearances: *Mr. E. J. Hornibrook* for the Commission; *Treadway & Marlatt*, of Cleveland, Ohio, for respondent.

CHAMPION SPARK PLUG Co., March 10, 1926. (Docket 1231.)

Charge: Resale price maintenance; in connection with the manufacture and sale of spark plugs.

Dismissed, without prejudice, "for the reason that the practices have long since been discontinued."

¹ 257 U. S. 441.

Appearances: *Mr. Robert O. Brownell* for the Commission; *Marshall, Melhorn, Marlar & Martin*, of Toledo, Ohio, and *Mr. Harry J. Gerrity*, of Washington, D. C., for respondent.

JOHN BLOCKI, ET AL., March 16, 1926. (Docket 1119.)

Charge: Resale price maintenance, passing off of product for that of competitor, and disparaging and misrepresenting competitor and its product; in connection with the manufacture and sale of perfumes and other toilet articles.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. E. J. Hornibrook* for the Commission; *Tinsman & Blocki*, of Chicago, Ill., for respondents.

KARL SOHN, ISAAC LEWIS, BESSIE LEWIS, B. LEWIS INCORPORATED, AND GRAND RAPIDS FURNITURE CLEARANCE WAREHOUSE, March 23, 1926. (Docket 1224.)

Charge: Adopting or using misleading trade or corporate name and advertising falsely or misleadingly; in connection with the sale of furniture.

Dismissed, after answer and trial, for the reason that "the practices charged have been discontinued," Commissioner Nugent dissenting.

Appearances: *Mr. Morgan J. Doyle* for the Commission; *Mr. Martin Charles Anson*, of New York City, for respondents.

NATHAN TANNEBAUM, AN INDIVIDUAL DOING BUSINESS UNDER THE TRADE NAME AND STYLE CAPITOL FURNITURE DISTRIBUTING Co., March 24, 1926. (Docket 1195.)

Charge: Adopting and using misleading trade or corporate name and advertising falsely or misleadingly; in connection with the sale of furniture.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. Morgan J. Doyle* for the Commission; *Mr. Leo Rosenberg*, of New York City, for respondent.

M. H. POWERS Co., INC., March 25, 1926. (Docket 1194.)

Charge: Advertising falsely or misleadingly; in connection with the sale of furniture.

Dismissed, after answer and trial, for "lack of jurisdiction in the absence of interstate commerce."

Appearances: *Mr. Morgan J. Doyle* for the Commission; *Mr. Donald Horne*, of New York City, for respondent.

CRESCENT MANUFACTURING Co., March 27, 1926. (Docket 1172.)

Charge: Resale price maintenance; in connection with the manufacture and sale of various food and grocery products.

Dismissed, after answer and trial, without assignment of reasons, Commissioner Nugent dissenting.

Appearances: *Mr. James T. Clark* for the Commission; *Mr. Charles A. Riddle* and *Bronson, Robinson & Jones*, of Seattle, Wash., and *Mr. Daniel N. Dougherty*, of San Francisco, Calif., for respondent.

WILSON & Co., Inc., March 29, 1926. (Docket 449.)

Charge: Acquisition of stock, assets, and businesses of a competitor, in violation of sections 5 and 7 of the Federal Trade Commission and Clayton Acts, respectively; in connection with the slaughter of cattle and other live stock, and the preparation and sale of meats, meat products and by-products.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland*, and *Mr. George R. Jackson* for the Commission; *Mr. J. P. Lightfoot*, general counsel for Wilson & Co., and *Mr. W. R. Brown*, of Chicago, Ill., for respondent.

ALWAYS READY PRODUCTS Co., April 1, 1926. (Docket 1353.)

Charge: Advertising falsely or misleadingly; in connection with the manufacture and sale of a solution for use in electric storage batteries.

Dismissed for the reason that "respondent has been adjudicated a bankrupt."

Appearances: *Mr. L. B. Perkins* for the Commission.

FISK RUBBER Co., April 2, 1926. (Docket 1248.)

Charge: Acquisition of stock of competitor in violation of section 7 of the Clayton Act; in connection with the manufacture and sale of automobile, motorcycle, and bicycle tires, and other rubber products.¹

¹ Commissioner Van Fleet filed a memorandum dissenting to the issuance of the complaint in the above case, which read as follows:

DISSENTING MEMORANDUM BY COMMISSIONER VAN FLEET

This is a proceeding by the Federal Trade Commission against the Fisk Rubber Co. to compel it to divest itself of the stock and assets of the Federal Rubber Co. as of the date of April 25, 1916, for the alleged reason that on said date the respondent acquired a controlling interest in the stock of said Federal Rubber Co., the details of which are more fully set forth in the complaint.

From an examination of all the files in this case it appears that there is no tendency toward monopoly on the part of respondent nor any suppression of competition by it save such as was affected in the acquisition of the Federal Rubber Co. No unfair or

Dismissed, after answer, without assignment of reasons.

oppressive methods are alleged against it. It is not alleged nor claimed that its acquisition affected competition in the trade generally nor in any locality specifically. The case rests solely on an alleged violation of section 7 of the Clayton Act and solely upon the allegation that in the acquisition of the stock, competition between the companies was substantially lessened. The complaint alleges that the companies were in competition but the extent thereof is not alleged, nor is it directly alleged that this competition was of a "substantial" nature or amount. The competition between the companies may have been very small and unsubstantial, yet it would not only be "substantially lessened" but in fact entirely eliminated. The whole being greater than the part, where there is any competition at all between two combining companies, it is *always* substantially lessened in the sense given the statute by the majority. There being no allegation that the competition between the companies was "substantial," it may well be that the competition was unsubstantial and inconsequential, and indeed under the well settled rules of pleading such would be the presumption.

The complaint rests solely on the allegation that the effect of said acquisition was to "substantially lessen" the competition between the companies. The foregoing is not said to criticise the complaint, but to indicate the theory upon which it is drawn and upon which the proceeding is based. The complaint in this respect, in my opinion, is as strong as it could be made on the facts before the Commission, for I am convinced from all the facts before us that it cannot be shown that the competition between the companies was of a substantial nature, the elimination of which would be offensive to the spirit of the antitrust laws, including the Clayton Act. But the theory of the case as maintained by the majority of the Commission is that the amount of competition is not material. It is maintained that if there was *some* competition, the amalgamation of the companies "substantially lessened" it because, of course, it entirely eliminated it. This is based on the language of the Act which says: (7) "no corporation engaged in commerce shall acquire * * * the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." If in this section "substantially" refers to "lessen", and means only quantity or amount, the theory of the majority is correct, and grammatically it does, because it is an adverb. But not all statutes are grammatical and they are never construed by the courts according to their strict grammatical construction when to do so would lead to absurd or palpably unjust results, which it never could be presumed the legislature intended.

To suppose a case: Two companies are consolidated when there is between them competition of only 1 per cent of their business or some wholly negligible and unsubstantial amount, the elimination of which would have no effect nor restraint at all upon business, prices, trade or competition. Years afterwards it is discovered that the negligible competition existed and was eliminated and thus, of course, substantially lessened. To tear them apart would be perhaps to destroy them. What court would not strain to avoid such an absurd and unjust result? And if the court should so apply the law, what layman would not say it was sticking in the bark and administering the law according to grammar rather than to common sense or justice? It is not my wish to extend this memorandum unduly or hosts of authorities could be cited that courts do not adhere to the strict grammatical construction of a statute when to do so would lead to such results. Furthermore, I do not believe the construction placed upon the statute was the legislative intent. If such was the intent, it is to be presumed that apt language would have been employed to express it. Assuming that it was the intent to invalidate all consolidations by stock control where there was any competition between the companies regardless of its nature or extent, the Congress would reasonably be expected to have said that "no corporation engaged in commerce shall acquire the whole or any part of the stock or other share capital of another corporation engaged also in commerce where" there is any competition between them. This would have expressed the meaning the majority places on the statute. But Congress had in mind the "effect" of such combination. Why use the word "substantially"? The use of this word is significant. If the position of the majority is correct it might well have been omitted and the act read: where the effect of such acquisition may be to lessen competition between the corporations. Under the construction placed on the act by the majority the word is superfluous. In my opinion it is not superfluous but was used by Congress in the sense of unreasonable and means to prohibit such acquisitions when they unreasonably lessen competition. At the time the

Appearances: *Mr. James M. Brinson* for the Commission; *Mr. Elisha Hanson*, of Washington, D. C., *Mr. Roland W. Boyden*, of

Clayton Act was passed, the Supreme Court in the Standard Oil and Tobacco cases had declared the rule of reason to be applicable to the Sherman Act, and I believe Congress had this in mind and intended to express the same idea in the use of the word "substantially". And why use the word "lessen", when the consolidation *always extinguishes all* competition between the corporations? And if the construction of the majority is to prevail, what becomes of the following clauses "or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce"? They would be superfluous because there never would be any necessity of resorting to them. The first part of the section would reach all cases anyway.

This question has never been directly raised nor decided by any court, but the language used by the courts in two cases is significant. In the Aluminum Company case the court said: "The effect of a transaction which ended competition between the Aluminum Company and *its one competitor* in the manufacture and sale of wide sheets and ended competition between it and *one of only two independent competitors* in the manufacture of sheets of any width, was inevitably to *lessen competition, and to lessen it substantially.*" The italics are mine. What competition was the court referring to? To competition between the two companies merely, or to competition generally? Plainly to competition generally, else why mention the fact that the acquired company was one of only two independents. On the theory of this present case, that would be immaterial.

In *Western Meat Company v. Federal Trade Commission*, U. S. C. C. A. Ninth Circuit, September 2, 1924 (Reported in 1 Fed. (2d) 95), the court said there was competition between the corporations and said: "And that it was substantial the evidence shows that in the year 1916 the Packing Company slaughtered 10,777 cattle, 977 calves, 13,425 hogs and 22,478 sheep, and that its gross sales for the fiscal year 1915-1916 amounted to approximately \$1,277,954."

Why go into the amount of the business the acquired company did in the same territory in which the respondent also did business? Plainly it was not upon any theory that *any* competition lessened or destroyed between them was sufficient, but rather to show that the competition was substantial to the extent of violating the spirit and intent of the antitrust laws.

There is another feature to this case which deserves attention. Bear in mind that there are here no unfair, oppressive or monopolistic practices. The case rests solely on what might be termed a technical violation of the Clayton Act. The consolidation was in no way offensive to the Sherman law nor to the spirit of the antitrust laws, but the offense rests solely in the method of acquisition, which was accomplished in 1916. In 1923, there were in the United States 528 establishments engaged primarily in the manufacture of rubber products and 160 such concerns engaged primarily in the manufacture of rubber tires. Some of the principal producers in size and value of such products were:

United States Rubber Co., Goodyear Tire & Rubber Co., B. F. Goodrich, Firestone Tire & Rubber Co., Fisk Rubber Co., Miller Rubber Co., Ajax Rubber Co., Inc., Kelly-Springfield Tire Co., General Tire & Rubber Co., Hood Rubber Co., Pennsylvania Rubber Co., Lee Rubber & Tire Corporation, Mason Tire & Rubber Co., Seiberling Rubber Co., Dunlop Tire & Rubber Corporation of America, Mohawk Rubber Co.

Four of respondent's competitors are larger in production and sales than it, two twice as large, and one more than three times as large. There is keen competition in the business. If the respondent is torn apart, will it help competition in the business? Plainly not. The result will be only to cripple one of the competitors of the others.

While this Commission is not a court, its orders must be such that a court will enforce, because its orders are only enforceable by a United States Court of Appeals. It is pertinent therefore to consider how the courts have ruled in such a case. There being no monopolistic or unfair practices alleged against the corporation since the stock was acquired, the case presents a situation similar to that presented in the case of *United States v. United States Steel Corporation*, 251 U. S. 417. The court there said on pages 452-453:

"We have seen whatever there was of wrong intent could not be executed, whatever there was of evil effect, was discontinued before this suit was brought; and this, we think determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies and equally clear in its direction that the courts of the Nation shall prevent and restrain them (its language is 'to prevent and restrain violations of' the act), but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do

Boston, Mass., and *Mr. John E. Searle*, of New York City, for respondent.

CONTINENTAL BAKING CORPORATION, April 7, 1926. (Docket 1358).
Charge: Acquisition of stock of competitors in violation of section 7 of the Clayton Act; in connection with the manufacture and sale of bread, biscuits, cakes, pies, crackers, candies, confectionery, ice cream, and other food products.

Appearances: *Mr. A. R. Brindley* and *Mr. Miles J. Furnas* for the Commission; *Mr. William H. Button* and *Chamberlin, Kafer & Wilds*, of New York City, for respondent.

Dismissed, after answer and trial, Commissioners Nugent and Thompson dissenting, by the following order:

Upon the recommendation of the chief counsel for a dismissal of the complaint herein to take effect when the decree in the case of United States of America, Petitioner *v. Ward Food Products Corporation* and others, defendants, in Equity No. 1073 in the District Court of the United States for the District of Maryland is entered, and it further appearing that said decree was entered on April 3,

injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—value in this case as in others. We do not mean to say that the law is not its own measure and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is certainly a matter for consideration that there was no legal attack on the Corporation until 1911, ten years after its formation and the commencement of its career. We do not, however, speak of the delay simply as to its time—that there is estoppel in it because of its time—but on account of what was done during that time—the many millions of dollars spent, the development made, and the enterprises undertaken, the investments by the public that have been invited and are not to be ignored.”

It was found that the original consolidation of the constituent companies forming the corporation was offensive to the Sherman Act. The court pointed out the difference between the case at bar and those cases in which it had decreed dissolution, those cases being where the offense was a continuing one and the restraint of competition and trade had continued. In the Steel case no such condition existed as the corporation, since its organization had in nowise offended by any oppressive or monopolistic practices.

The case is parallel to this case. In 1921, after five years management by the respondent of the Federal Rubber Co., on account of the business depression then existing, it became necessary for the respondent to borrow ten million dollars and to issue bonds secured by mortgage for the amount. The bankers required that the mortgage cover all the property, so the physical assets of the Federal Rubber Co. were transferred to the respondent. The security of the bond holders is not only the physical assets of the respondent but its business as it stands. To rend it asunder probably will seriously impair the security and may have far-reaching and disastrous consequences to the respondent. I do not say this is an insuperable obstacle to the court, but in the exercise of its equitable powers it will require its serious consideration.

Again I point out the language of the Supreme Court that the command of the anti-trust laws is “necessarily submissive to the” . . . “usual powers of a court of equity to adopt its remedies to those conditions. In other words it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law.” If an order of dissolution is entered by the Commission in this case, the Court of Appeals will be called upon under the facts I have indicated in this case to tear this respondent asunder and to cripple and perhaps destroy its business. And to what purpose? The only benefit which can accrue to any one will be to its numerous competitors. Competition will be injured rather than fostered. Such is not the object or intent of the anti-trust laws. Rather the contrary. Will the court do it? I do not think so. I therefore dissent from the action in issuing the complaint in this case.

1926, in the District Court of the United States for the District of Maryland.

It is now ordered in consideration of said decree that the complaint herein be and the same is hereby dismissed.

Dissent of Commissioners Nugent and Thompson from the order entered by Commissioners Hunt, Humphrey, and Van Fleet dismissing the complaint of the Federal Trade Commission against Continental Baking Corporation, Docket 1358

Commissioners J. F. Nugent and Huston Thompson dissent from the dismissal on April 2, 1926, of the complaint against Continental Baking Corporation charging it with the acquisition of the capital stock of a large number of baking companies in violation of section 7 of the Clayton Act.

HISTORY OF THE CASE

The Continental Baking Corporation, hereinafter called "Continental," was incorporated under the laws of Maryland on November 6, 1924. Within a few months thereafter it acquired the capital stock of a large number of baking companies, operating bakeries throughout the United States. After an investigation of the matter by the chief examiner, and consideration thereof by the Commission, at a meeting of the Commission on March 23, 1925, with Commissioners Van Fleet, Nugent, Thompson, and Humphrey present, and Commissioner Hunt absent on official business, it was ordered by unanimous vote that complaint issue against Continental Baking Corporation charging it with the acquisition of the capital stock of about sixteen baking companies in violation of section 7 of the Clayton Act. Such a complaint was issued on April 10, 1925, and served.

Under the rule theretofore adopted by Commissioners Van Fleet, Hunt, and Humphrey, the complaint was to be kept secret until an answer should be filed by the Continental. The rules require an answer within thirty days after service. On April 24, 1925, Mr. George G. Barber, chairman of the Continental board of directors, addressed a letter to the Commission, saying, among other things:

Referring to "complaint in the matter of the alleged violation of section 7 of an act of Congress approved October 15, 1914," Docket 1305, dated April 10, 1925, against the Continental Baking Corporation, permit me to say that we believe we have not violated any provision of the Clayton Act and that the complaint must, therefore, be based upon a misunderstanding of the actual facts.

As a matter of plain justice to ourselves we desire, informally to submit testimony showing the facts as they actually exist, and, therefore, we respectfully request the Commission to refer this matter to the board of review where we

may have the privilege of testifying and answering the questions which the Commission or its representatives may care to ask. The taking of formal testimony in this matter may necessitate traveling all over the country and mean the expenditure of much time and money.

On consideration thereof, on May 1, 1925, Commissioners Hunt, Humphrey, and Van Fleet voted to grant the request of Mr. Barber, and ordered that "the time for filing answer be postponed until after this matter is disposed of by the Commission." Commissioners Nugent and Thompson dissented.

The Continental was given an ex parte hearing before the board of review on May 14, 1925, and certain unsworn statements were made to the board by Mr. Barber and his attorney. Thereafter, three members of the board of review recommended that the complaint against the Continental be not dismissed and the two other members filed dissenting reports dated June 20 and July 2, respectively. The annual vacation period arrived before such reports were delivered to the secretary, and it was not until August 31, 1925, that said reports were placed in circulation among the members of Commission. No further action was taken until October 5, 1925, when Commissioner Thompson called the attention of the Commission, all members being present, to an Associated Press dispatch stating that a merger was being planned of the General Baking Co., Ward Baking Co. and Continental Baking Corporation. Commissioner Thompson moved, seconded by Commissioner Nugent, that the complaint against Continental be made public immediately, but the motion was lost, Commissioners Hunt, Humphreys, and Van Fleet voting "No." However, on October 7, 1925, Commissioners Nugent and Thompson made public the complaint against the Continental, and also released a statement criticizing the action of the majority in reference to the suppression of that complaint.

Some time thereafter the Commission's chief examiner reported that Continental had acquired the capital stock of nine other baking companies since the complaint was issued on April 10, 1925. On November 6 the Commission directed that such additional acquisitions be included in the charge against Continental. On November 23, 1925, on the recommendation of the assistant chief counsel and Attorney A. R. Brindley, the attorney assigned to try the case, it was ordered that the pending complaint be dismissed and another complaint issued against Continental charging it with violation of section 7 of the Clayton Act and including therein all acquisitions of capital stock to that date. Commissioners Humphrey and Thompson opposed a dismissal of the pending complaint. Commissioner Thompson stated as his opinion that the pending complaint was sufficient to enable the Commission to offer evidence of the subsequent

acquisitions, after which the complaint could be amended to conform to the facts. Commissioner Humphrey opposed the dismissal and filed a written dissent in which he stated, among other things:

I think it was a very great mistake to dismiss the complaint in this case. If there was anything done by the respondent since the filing of the complaint connected with the original cause of action, then a supplemental complaint should have been filed. If a new cause of action has occurred since the filing of the complaint, that was no cause for dismissing the pending action, but we should have proceeded with the instant case and have filed a new complaint. * * * By dismissing this case, we have not only written ourselves down as utterly incompetent to deal with an *unscrupulous respondent* under certain circumstances, but have distinctly pointed out to such respondent just how to take advantage of our impotency. (*Italics ours.*)

A new complaint charging Continental Baking Corporation with the acquisition of the capital stock of twenty-five baking companies was issued on December 19, 1925, and served simultaneously with the order dismissing the first complaint. The Continental filed its answer to the new complaint on January 4, 1926. The complaint contained notice that the charges against Continental would be heard on February 8, 1926, and on that day the taking of testimony began in New York City before an examiner duly designated therefor on January 11, 1926. Mr. Barber, chairman of the Continental board of directors, was called as a witness by the Commission and testified for the greater part of February 8 and 9. On February 9, 1926, the Commission's attorney asked Mr. Barber to produce certain data and reports concerning the character and volume of business transacted by the corporations whose stock Continental had acquired. Mr. Barber agreed to furnish the data as soon as it could be secured and tabulated. A continuance of the trial was taken by agreement until March 16, 1926, when it was resumed and proceeded until March 19, when it was continued by agreement until April 5, 1926.

Since December 10, 1925, Judge Bayard T. Hainer has acted as chief counsel under the supervision of Commissioner Van Fleet. On February 8, 1926, the day the Commission began taking testimony against the Continental, the Department of Justice filed a petition in the United States District Court at Baltimore against Ward Food Products Corporation, Continental Baking Corporation, United Bakeries Corporation, Ward Baking Co., Ward Baking Corporation, General Baking Co., General Baking Corporation, William B. Ward, George G. Barber, and others, and charged that the defendants were engaged in a combination and conspiracy in violation of the Sherman Act, that said corporations had violated section 7 of the Clayton Act, and said violation on the part of the Continental was set out substantially as charged in the Federal Trade Commission's

complaint against that company. On March 24, 1926, the following letter was received from the Attorney General:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., March 23, 1926.

HON. JOHN F. NUGENT,
Chairman, Federal Trade Commission,
Washington, D. C.

Re: United States v. Ward Food Products Corporation, et al.

MY DEAR MR. CHAIRMAN: The Government's petition in the above named case charges, among other things, that the Continental Baking Corporation has acquired the stock or other share capital of a number of competing baking companies in violation of Section 7 of the Clayton Act. Substantially the same charge is made in the complaint issued by the Federal Trade Commission against the Continental Baking Corporation, which is now being heard before an Examiner of the Commission.

Mr. William H. Button, counsel for the Continental Company, has represented to the Department that the trial of the same issue in two proceedings at substantially the same time will work an undue hardship on his company. He has therefore expressed the hope that an arrangement may be made between the Commission and the Department of Justice whereby the determination of the issue may be had in one proceeding or the other and not both.

I do not know whether this arrangement could be made in fairness to the Government and would want to consider the matter very carefully before committing myself. It would seem, however, that we might agree upon the taking of the testimony on this issue in only one proceeding. The Commission's proceeding being already under way, it would seem that if an agreement is reached it should provide for the reception of the Commission's record in evidence in the suit at Baltimore.

I do not want to take any action in the matter without a consultation with the Commission or such Commissioners or representatives as the Commission may designate. To that end I would be pleased to have a conference with the Commission or its representatives at some convenient time this week.

Yours very truly,

JOHN G. SARGENT,
Attorney General.

On the morning of March 25, 1926, Chairman Nugent called a special meeting of the Commission, with all members present except Commissioner Thompson, who was absent on official business. Chairman Nugent stated that the Attorney General's request for a conference should be complied with as a matter of courtesy. The other commissioners agreed, and Judge Hainer, chief counsel, and A. R. Brindley, trial attorney, were delegated to represent the Commission at a conference to be held at such time as suited the convenience of the Attorney General, and the Attorney General was advised accordingly.

The conference was held at the office of the Attorney General on March 27, 1926, and resulted in "a plan" which was reduced to writing in the office of the Attorney General and submitted to the Commission by its chief counsel, and reads as follows:

MEMORANDUM

At a conference between the Attorney General and his special assistant, A. F. Myers, Judge B. T. Hainer, chief counsel of the Federal Trade Commission, and A. R. Brindley, trial attorney, in the Continental Baking case before the Commission, the following plan was suggested, relating to the charge contained in both the case of *United States v. Ward Food Products Corporation et al.*, and the complaint issued by the Federal Trade Commission against the Continental Baking Corporation, viz, that the last-named company has acquired and now holds stocks or other share capital of competing baking companies in violation of section 7 of the Clayton Act:

(1) That the Federal Trade Commission proceed with the hearings under its complaint until it shall have taken all testimony to be adduced by it or the Continental Baking Corporation on that issue.

(2) That upon the conclusion of those hearings the Federal Trade Commission make its findings of fact, and certify the findings of fact and the evidence to the court at Baltimore, which shall be stipulated into the record in the case of *United States v. Ward Food Products Corporation et al.*, as the facts upon which the court shall determine the above-mentioned issue in that case.

(3) (a) That the Federal Trade Commission having taken the testimony and made its findings of fact relating to the issue in question, it shall thereupon suspend proceedings under its complaint until there has been a final determination of the issue in the *Ward case* by the court.

(3) (b) Or, in the alternative, that the Federal Trade Commission, after having taken all the testimony introduced in behalf of the Commission and the respondent, the Continental Baking Corporation, shall certify all the testimony taken to the United States Court at Baltimore to be used as evidence in the case of *United States v. Ward Food Products Corporation et al.*

(4) That nothing herein contained shall affect the proceedings in the case of *United States v. Ward Food Products Corporation et al.*, on other issues than that with respect to the acquisition and holding by the Continental Baking Corporation of stocks in competing bakeries in violation of section 7 of the Clayton Act; but all other such issues shall be heard and determined at such times and in such manner as the parties may agree or the court direct.

Explanatory Note.—Judge Hainer concurs in all of subdivision 3 (b) with this addition: That after the findings and testimony are certified to the court the Commission's proceedings shall be suspended until the final determination of the issue by the courts; but states that he has no objection to subdivision 3 (a) if the Commission shall favor that course. He further suggests that if subdivision 3 (a) is adopted it may be embarrassing to the court.

Colonel Brindley does not concur in any suggestion that the Commission suspend its proceeding.

Comment on the "plan" or the explanatory note is withheld. They speak for themselves. Suffice it to say that the object sought by the "plan" was to prevent the entry by the Commission of an order requiring Continental to divest itself of capital stock it had acquired contrary to section 7 of the Clayton Act. It is apparent that Chief Counsel Hainer was of the opinion that the Commission should not enter an order against the Continental but that after taking testimony it should "suspend proceedings . . . until there

has been a final determination of the issue in the *Ward case* by the court."

It also appears that the "plan" accorded with the views of the Attorney General for in his letter of March 23, he said:

It would seem, however, that we might agree upon the taking of this testimony in this issue in only one proceeding. The Commission's proceeding being already under way, it would seem that if an agreement is reached it should provide for the reception of the Commission's record in evidence in the suit at Baltimore.

The "plan" above quoted was submitted to the Commission by Chief Counsel Hainer with a memorandum containing the following statement: "Colonel Brindley concurs in the memorandum except that he does not desire to make any suggestions with reference to suspending the proceedings before the Commission." That is an entirely different statement than that contained in the explanatory note to the memorandum made in the office of the Attorney General. That statement was: "*Colonel Brindley does not concur in any suggestion that the Commission suspend its proceedings.*" (Italics ours.) It should be noted that thereafter Attorney Brindley, who had been in charge of the Commission's proceedings against Continental since its inception, was not informed of further conferences between the Commission's chief counsel and the Attorney-General, nor invited to attend such conferences.

The provision in the "plan" for the Commission to "suspend proceedings . . . until there has been a final determination of the issue in the *Ward case* by the court," meant nothing more than the dismissal of the Commission's complaint against the Continental. For, if the court found against the Continental, and decreed accordingly, there would be nothing for the Commission to do and its complaint necessarily would be dismissed. On the other hand, if the court found in favor of the Continental, the matter would have been adjudicated and it is fair to assume that the Commission would have dismissed its complaint.

In our opinion the Attorney General was reasonably certain, under the law and facts of this matter, that no court would have restrained the Commission from proceeding with its case against the Continental. We also think that the attorneys for the Continental held that opinion, otherwise they would have applied to the Federal court for a restraining order after the Department of Justice filed its petition in the court at Baltimore charging the Continental with violating section 7 of the Clayton Act on substantially the same facts set out in the Commission's complaint. The Continental instead of attempting to restrain the Commission through court action appealed to the Attorney General, as shown by his letter of March 23.

The "plan" devised in the office of the Attorney General and the "explanatory note" thereon with the memorandum of the Commission's chief counsel were circulated among the Commissioners, in order that they might familiarize themselves with their contents, and were pending at the regular meeting on Friday, April 2, 1926, and would doubtless have been acted upon that day. But early on the forenoon of April 2 the chief counsel appeared before the Commission and submitted a proposed "consent decree" to be entered in the Ward Food Products Corporation case in the Federal court at Baltimore. The chief counsel presented a copy of the "consent decree" and made a brief statement concerning it, and submitted a memorandum from which the following is quoted:

Pursuant to the direction of the Commission heretofore given the chief counsel in this matter, to confer with the Department of Justice in the matter of the proceeding before the Commission in the Continental Baking Corporation case and in the case of United States of America v. Ward Food Products Corporation, et al . . . pending in the District Court of the United States for the district of Maryland, I again had a conference yesterday, April 1, 1926, with the Attorney General, his assistants in charge of the above suit *and with counsel for the defendants* in the above entitled action and also in the Continental Baking Corporation proceeding now pending before the Commission. As a result of this conference a decree was agreed to in the case of United States of America v. War Food Products Corporation, and others, in the Baltimore court, *subject, however, to the condition that the proceeding in the Continental Baking Corporation case pending before the Commission be dismissed, effective on the entry of the decree by the court at Baltimore.* (Italics ours.)

The chief counsel's statement is erroneous. He was *not authorized* by the Commission to do more than confer with the Attorney General in relation to the matters plainly set out in the latter's letter of March 23. The conference authorized by the Commission was held on March 27, and the chief counsel submitted his report to the Commission on March 29. Thereupon his authority ceased. At no time was he authorized by the *Commission* to confer with the Attorney General *and the attorneys for the defendants* in the suit instituted by the Department of Justice in the Federal court at Baltimore against the Ward Food Products Corporation and others, for the purpose of assisting in preparing or agreeing upon a decree to be entered in that suit, or for any other purpose. He participated in the second conference and agreed to the "consent decree" without authority from the *Commission*, and without the knowledge or consent of Chairman Nugent who was unaware that such a conference was contemplated or requested.

The chief counsel, as above stated, made a brief oral statement to the Commission at its meeting on April 2, concerning his conference with the Attorney General and the attorneys for the defendants in the suit against Ward Food Products Corporation and

others. Chairman Nugent and Commissioners Hunt, Humphrey, and Van Fleet were present. Commission Thompson was absent on official business. The chief counsel's memorandum and a copy of the "consent decree" was thus placed before the Commission for the *first time*. Chairman Nugent had not been informed of the second conference or what was accomplished thereat. He inquired as to the length of the chief counsel's memorandum and of the "consent decree" and was informed that the memorandum consisted of about six typewritten pages and the "consent decree" of eight pages. Chairman Nugent requested that consideration thereof go over until the next meeting day, April 5, in order that he might examine the documents. Commissioner Van Fleet asked the chairman if he could not examine the papers that afternoon "and report at a special meeting April 3." The chairman assented and stated that he would be ready to act "to-morrow morning." Commissioner Humphrey expressed the view that the commission "should act promptly, especially as the other department and parties concerned were ready." Mr. Humphrey then moved that the Commission's case against Continental "be dismissed in consideration of the decree, on the entry of this decree, in accordance with the memorandum of the chief counsel." The motion prevailed by the votes of Commissioners Hunt, Humphrey, and Van Fleet. Chairman Nugent voted "No," and asked that his dissent be noted and stated for the record:

Let the record show that I dissent particularly from the action of the majority members of the Commission in railroading this matter through within about fifteen minutes, without giving me an opportunity, which I requested, to examine the memorandum of the chief counsel and the proposed consent decree, notwithstanding I stated I would be ready to act to-morrow. The proposed decree upon which the order of the majority is based has not even been read for the information of the Commission.

Commissioners Van Fleet and Humphrey thereupon insisted that the decree be read. It is true that the memorandum of the chief counsel, which was read by the secretary, set out what purported to be a *portion* of the consent decree but as said matters were not quoted, it did not appear whether they were his interpretations of the provisions of said decree, or otherwise. Unless Commissioners Hunt, Humphrey, and Van Fleet had seen the decree prior to the Commission meeting on April 2, they had not even read it before they dismissed the complaint. Thus, without consideration, discussion or explanation, Commissioners Hunt, Humphrey, and Van Fleet dismissed the complaint against Continental.

The majority commissioners would not allow Chairman Nugent, at his request, even twenty-four hours in which to examine said memorandum and consent decree which were presented to the Com-

Paragraphs 5, 6, and 7 of the consent decree entered by the Federal court at Baltimore in said suit at the request of the Department of Justice, enjoins, restrains, and prohibits each of said corporations from acquiring, directly or indirectly, or exercising direct or indirect control of, etc., the whole or any part of the shares of capital stock of either of the other corporate defendants, or their controlled companies, and from acquiring any of their *physical assets*.

Under the decree, the six corporations above named may not acquire either the capital stock or physical assets of each other but *all* of them are at liberty to acquire the *physical assets* of other bakeries.

Paragraph 8 of said decree enjoins, restrains and prohibits the said corporations—

from acquiring directly or indirectly, the whole or any part of the stock or other share capital of any other baking corporation engaged also in interstate commerce, where the effect of such acquisition may be to substantially lessen competition in such commerce between the corporation whose stock is so acquired, and the defendant corporations, or tend to create a monopoly.

We are, of course, aware of the fact that said paragraph follows, substantially, the language of the first paragraph of section 7 of the Clayton Act, except in one important particular, namely, that said corporations are *not* enjoined from acquiring the capital stock of other corporate competitors where the effect of such acquisition may be “to restrain such commerce in any section or community.” The acquisition by one of said corporate defendants of either the capital stock or the physical assets of a corporate competitor in many sections or cities would, as a matter of fact, restrain commerce in said sections or cities.

We call attention to the fact that Ward Baking Corporation, General Baking Corporation and Continental Baking Corporation are *holding companies only*, and as such are not engaged in the baking business. No acquisitions of stock they may make will lessen competition *between them and the companies whose stock they acquire*. The consent decree does *not* prohibit them from acquiring the capital stock of two or more baking corporations where the effect of such acquisition may be to substantially lessen competition *between such corporations, or any of them, whose stock is so acquired*, or to restrain commerce in any section or community. The second paragraph of section 7 of the Clayton Act specifically forbids stock acquisitions having such effects.

The complaint of the Department of Justice also charged that the corporate defendants—

have acquired * * * the whole or a substantial part of the stocks or other share capital * * * of other corporations engaged in interstate trade and commerce in the baking and related industries * * * in violation of section 7 of the Clayton Act. (Italics ours.)

ganized to act in those capacities instead of depending on individuals, and the Continental owned every share of its stock.

The evidence showed that certain companies whose stock was acquired were in competition prior to the acquisition, and that after the acquisition competition ceased. Adjustments of territory were made so that the companies did not conflict in the sale of their products. The Commission proved this by employees of companies acquired by the Continental. Hearings were to be resumed April 5. Respondent had agreed to furnish all witnesses in its organization whose testimony the Commission desired, and 53 witnesses had been requested to appear for examination. The Commission was prepared to prove the amount and character of the business of each company, the territory in which its products were sold, and other details to show that the acquisition of stock was contrary to law. The Continental knew that the evidence the Commission could and would introduce was strong and convincing.

The authorized and outstanding capital stock of Continental is as follows:

Class of stock	Shares	
	Authorized	Out-standing
Preferred 8 per cent (nonvoting)-----	2, 000, 000	516, 694
Class "A" (voting)-----	2, 000, 000	291, 365
Class "B" (voting)-----	2, 000, 000	2, 000, 000
Total-----	6, 000, 000	2, 807, 059

The Continental was incorporated in Maryland on November 6, 1924. The latest available Census figures show the capitalization of the bread-baking industry as approximately \$100,000,000, while the Continental's authorized capitalization is \$600,000,000.

THE CONSENT DECREE

The bill of complaint of the Department of Justice in the Ward suit alleged, among other things, that the Ward Baking Corporation, The Ward Baking Co., the Continental Baking Corporation, the United Bakeries Corporation, the General Baking Co. and the General Baking Corporation, together with certain individuals—

are engaged in a combination and conspiracy in undue and unreasonable restraint of trade and commerce among the several States, and in the District of Columbia * * * with respect of bread, cake, pastry and similar products * * * in violation of sections 1, 2, and 3 of the Sherman Antitrust Act.

Paragraphs 5, 6, and 7 of the consent decree entered by the Federal court at Baltimore in said suit at the request of the Department of Justice, enjoins, restrains, and prohibits each of said corporations from acquiring, directly or indirectly, or exercising direct or indirect control of, etc., the whole or any part of the shares of capital stock of either of the other corporate defendants, or their controlled companies, and from acquiring any of their *physical assets*.

Under the decree, the six corporations above named may not acquire either the capital stock or physical assets of each other but *all* of them are at liberty to acquire the *physical assets* of other bakeries.

Paragraph 8 of said decree enjoins, restrains and prohibits the said corporations—

from acquiring directly or indirectly, the whole or any part of the stock or other share capital of any other baking corporation engaged also in interstate commerce, where the effect of such acquisition may be to substantially lessen competition in such commerce between the corporation whose stock is so acquired, and the defendant corporations, or tend to create a monopoly.

We are, of course, aware of the fact that said paragraph follows, substantially, the language of the first paragraph of section 7 of the Clayton Act, except in one important particular, namely, that said corporations are *not* enjoined from acquiring the capital stock of other corporate competitors where the effect of such acquisition may be “to restrain such commerce in any section or community.” The acquisition by one of said corporate defendants of either the capital stock or the physical assets of a corporate competitor in many sections or cities would, as a matter of fact, restrain commerce in said sections or cities.

We call attention to the fact that Ward Baking Corporation, General Baking Corporation and Continental Baking Corporation are *holding companies only*, and as such are not engaged in the baking business. No acquisitions of stock they may make will lessen competition *between them and the companies whose stock they acquire*. The consent decree does *not* prohibit them from acquiring the capital stock of two or more baking corporations where the effect of such acquisition may be to substantially lessen competition *between such corporations, or any of them, whose stock is so acquired*, or to restrain commerce in any section or community. The second paragraph of section 7 of the Clayton Act specifically forbids stock acquisitions having such effects.

The complaint of the Department of Justice also charged that the corporate defendants—

have acquired * * * the whole or a substantial part of the stocks or other share capital * * * of other corporations engaged in interstate trade and commerce in the baking and related industries * * * in violation of section 7 of the Clayton Act. (Italics ours.)

and sets out the names and location of certain of such "other corporations." The consent decree does not require the defendants to divest themselves of the capital stock unlawfully acquired. Neither does it require them to divest themselves of said stocks and the *physical assets* so acquired by any of them. The Commission has issued such orders in several similar cases, and in two cases its orders have been affirmed by different circuit courts of appeal. Hence, the corporate defendants in the Ward suit are to-day in the enjoyment of property obtained contrary to law.

The said bill of complaint alleged that—

This unlawful plan for restraining and monopolizing interstate trade and commerce in bakery products and the ingredients and equipment used in the manufacture thereof originated with the defendants, W. B. Ward and Howard B. Ward. The other defendants, individual and corporate, entered into the plan from time to time as they came into relation with those defendants or were brought into existence by them. The defendant, W. B. Ward is to-day the most powerful single personage connected with the baking industry. Closely allied with Ward are the defendants Helms and Barber, who have been associated with him for many years and who with Ward constitute a triumvirate controlling and directing the fortunes of the baking industry. * * *

Howard B. Ward is a brother of the defendant, William B. Ward, and has been associated with him in all his enterprises since 1912. He is vice president of the defendant Continental Baking Corporation. * * *

Paul H. Helms has been associated for many years in the business enterprises of the defendants William B. Ward and George B. Smith. He is a former secretary-treasurer of both the Ward Baking Co. (of New York) and the Ward Baking Corporation. He is now president of the defendant General Baking corporation. * * *

George G. Barber has been associated for many years with the defendant, William B. Ward, in various baking enterprises. * * *

He was active in the promotion of the defendant Continental Baking Corporation, and has served as its president since it was organized.

Paragraph 10 of the consent decree reads as follows:

That the defendants, William B. Ward, Paul H. Helms, and George G. Barber are severally required to dispossess themselves of all *voting shares* of the capital stock in any of the defendant corporations and the companies controlled by them, other than such defendant corporation and its subsidiaries as he may elect to retain his holdings in under Section 9 hereof. (*Italics ours.*)

It will be noted that the gentlemen named are not required to divest themselves of said "voting shares" in good faith, or for an adequate or any valuation consideration. They can therefore comply with the provisions of said paragraph by merely transferring said shares to members of their families or to Howard B. Ward, George B. Smith, J. W. Rumbough, or R. E. Peterson, their personal friends and business associates, as to whom the complaint of the Department of Justice was *dismissed*.

Paragraph 13 of said consent decree reads as follows:

It appears that the charge contained in the petition herein that the acquisition and holding by the defendant, the Continental Baking Corporation, of the stocks and other share capital of alleged competing baking companies is in violation of section 7 of the Clayton Act, *was included also in a complaint filed by the Federal Trade Commission against the Continental Baking Corporation on December 19, 1925;*

Wherefore, the petition is dismissed as to that charge without prejudice to the right of the United States to again raise the issue in any other proceeding. (Italics ours.)

The only reasonable inference that can be drawn from that language and, unquestionably, the inference that it was *intended* should be drawn therefrom, is that said charge was dismissed for the reason a complaint involving the same subject matter was then pending and undetermined before the Federal Trade Commission. It is mere camouflage. The consent decree was signed by the judge of the Federal District Court at Baltimore and entered on *Saturday, April 3*, and the Federal Trade Commission, at a regular meeting held on *Friday morning, April 2*, was informed by its chief counsel that the entry of said decree was *subject to the dismissal by the Commission* of its case against the Continental.

At said meeting of the Commission, by vote of Commissioners Hunt, Humphrey, and Van Fleet, with Commissioner Thompson absent on official business, and Commissioner Nugent voting "no" and dissenting, the said complaint of the Commission *was dismissed*, the order to become effective when said decree was entered by the federal court, and the chief counsel of the Commission was directed to "informally advise the Attorney General" of said action which, we have no doubt, he did before noon of said day. However that may be, the fact remains that about 3 o'clock p. m. of *April 2*, the Attorney General was informed by *letter* dispatched to him by *special messenger* that the Commission had dismissed its complaint against the Continental as above stated.

We quote the following from said letter to the Attorney General:

In consideration of the above mentioned (consent) decree, and in accordance with the recommendation of its chief counsel, the Commission has dismissed its complaint against the Continental Baking Corporation, Docket 1358, alleging violation of section 7 of the Clayton Act, such dismissal to become effective upon the entry of the decree.

By direction of the Commission, Mr. Nugent dissenting.

It is therefore plainly apparent that when, on *April 3*, the Department of Justice requested the court at Baltimore to sign and enter said decree, which contained section 13 above quoted, it was fully aware of the fact that the very moment said decree was entered, the

order of dismissal of the Commission's case against the Continental became effective.

When Commissioners Hunt, Humphrey, and Van Fleet, "in consideration of this (consent) decree," dismissed the Commission's complaint against the Continental, it was with knowledge that said decree dismissed the section 7 charge of the Department of Justice against that corporation.

The result of said dismissals is that the Continental Baking Corporation is today in the quiet, undisturbed and unchallenged ownership and possession of the capital stock of corporations owning and operating at least eighty-three bakeries, among which are some of the largest in the country, and others are among the largest in the sections in which they are located, notwithstanding both the Department of Justice and the Federal Trade Commission had solemnly charged that said stock was acquired in violation of section 7 of the Clayton Act.

A few weeks ago the President of the United States, according to the public prints, addressed a letter to Mrs. Henry W. Peabody, chairman of a committee representing the Women's National Committee for Law Enforcement, in which he said:

This earnest manifestation of interest in *enforcement of law*, is gratifying. Such interest on the part of those citizens not *officially* connected with the *execution of the law* is heartening to those *charged* with that responsibility. In this message I desire to reiterate the following statement which I made on the subject of your present deliberations: "The law represents the voice of the people. Beyond it, and supporting it, is a divine sanction. *Enforcement of law and obedience to law*, by the very nature of our institutions, are not matters of choice in this republic, but the expression of a moral requirement of living in accordance with the truth. They are clothed with a spiritual significance, in which is revealed the *life or the death* of the American ideal of self-government." (Italics ours.)

It is evident that the Attorney General and Commissioners Hunt and Humphrey, who were appointed by President Coolidge, and Commissioner Van Fleet, are not in accord with the statements of the President on law enforcement. As public officials, they are, to quote the President, "charged" with the "execution of the law," and, so far as the Continental is concerned, they not only *executed* section 7 of the Clayton Act but they *buried* it, "unwept, unhonored, and unsung."

While the consent decree dissolved the Ward Food Products Corporation, which had issued no stock and owned no property, it left William B. Ward, his former employees, intimate friends, and business associates, in control of the Ward, the General, and the Continental baking corporations, the three largest in the country. The Department of Justice estimated the annual sales of the bakeries

controlled by the Ward and Continental corporations at between \$120,000,000 and \$140,000,000.

The decree would have been really effective and of great benefit to the public had it required the corporate defendants in the Ward suit to divest themselves in good faith of the capital stock and of the physical assets, where they had been taken over, of the baking corporations they had unlawfully acquired, as charged by the Department of Justice and also by the Federal Trade Commission in the case of the Continental.

We expressly disclaim any intention to criticise the Federal court at Baltimore for entering the consent decree. In view of the consent of the Department of Justice, the entry of said decree was, of course, a mere formal matter. We are confident that had the court been informed as to the facts in the case, a decree materially different from the one under consideration would have been entered.

HOLLY SUGAR CORPORATION, SOUTHERN CALIFORNIA SUGAR CO., SANTA ANA SUGAR CO., ALAMEDA SUGAR CO., AND S. W. SINSHEIMER. April 16, 1926. (Docket 1180.)

Charge: Having common director and serving as common director, in violation of section 8 of the Clayton Act; in the beet sugar business.

Dismissed, after answer, Commissioner Nugent dissenting, by the following order:

This proceeding being at issue, and the Commission being fully advised in the premises,

It is ordered, That the complaint herein be, and the same is hereby dismissed for the same reason that the complaint against the Holly Sugar Corporation, Docket 1181,¹ was dismissed, namely, that, due to natural conditions, there was no competition in interstate commerce, or prospect of it between the corporations respondent, and that to prosecute the proceeding would be futile and of no public benefit; and on the further grounds stated in the memorandum of the chief counsel, of March 16, 1926, recommending dismissal.

Appearances: *Mr. A. R. Brindley* for the Commission; *McKinstry, Haber & Firebaugh*, of San Francisco, Calif., for Alameda Sugar Co.; *Hodges, Wilson & Rogers*, of Denver, Colo., for Holly Sugar Corporation and other respondents.

HOLLY SUGAR CORPORATION, SOUTHERN CALIFORNIA SUGAR CO., AND E. A. CARLTON. April 16, 1926. (Docket 1182.)

Charge: Having common director and serving as common director in violation of section 8 of the Clayton Act; in connection with manufacture and sale of beet sugar.

¹ See *ante*, 430.

Dismissed, after answer, Commissioner Nugent dissenting, by the following order:

This proceeding being at issue, and the Commission being fully advised in the premises,

It is ordered, That the complaint herein be, and the same is hereby dismissed for the same reason that the complaint against the Holly Sugar Corporation, Docket 1181,² was dismissed, namely, that, due to natural conditions, there was no competition in interstate commerce, or prospect of it between the corporations respondent, and that to prosecute the proceeding would be futile and of no public benefit; and on the further grounds stated in the memorandum of the chief counsel, of March 16, 1926, recommending dismissal.

Appearances: *Mr. A. R. Brindley* for the Commission; *Hodges, Wilson & Rogers*, of Denver, Colo., for respondent.

NORTHERN JOBBERS' CLUB, ITS OFFICERS AND MEMBERS. April 19, 1926. (Docket 1197.)

Charge: Undertaking and cooperating together to confine distribution of products dealt in to the "regular" or "legitimate" channels of trade (i. e., from manufacturer or producer to wholesaler, to retailer, to consumer), and to fix uniform resale prices for said products in the territory involved; in connection with the sale of groceries and allied products.

Dismissed, after answer and trial, "without prejudice for the reason that respondent Northern Jobbers' Club ceased to function as an association, club, or otherwise, and for the further reason that the acts complained of were discontinued in the Fall of 1921."

Appearances: *Mr. Walter B. Wooden* for the Commission; *Schmitz, Wild & Gross*, of Milwaukee, Wis., for Glass-Turbush Co., and *Otto L. Kuehn & Co.*; *Williams & Williams*, of Oshkosh, Wis., for F. B. Ives Co.; and *Julius P. Frank*, of Appleton, Wis., for S. C. Shannon Co.

FINISHING PRODUCTS CO., April 28, 1926. (Docket 1848.)

Charge: Commercial bribery; in connection with the manufacture and sale of wood stains, wood fillers, varnishes and allied products.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. James M. Brinson* for the Commission.

KELSEY WHEEL CO., INC., ET AL., April 29, 1926. (Docket 1117.)

Charge: Combining and cooperating together to maintain and enhance prices and suppress competition in distribution; in connection with the manufacture and sale of automobile wheels and wheel parts.

Dismissed, after answer, without assignment of reasons.

² See *ante*, 430.

Appearances: *Mr. Henry A. Cox* and *Mr. Alfred M. Craven* for the Commission; *Stevenson, Carpenter, Butzel & Backus*, of Detroit, Mich., for Kelsey Wheel Co., Inc.; *Mr. Otto J. Kalt* of New York City, for Jacob Mattern & Sons, Inc.; *Smart, Ford, Taylor & Hasselman*, of Cleveland, Ohio, for The Motor Rim Manufacturers Co.; and *Corbet & Selby*, of San Francisco, Calif., for Keaton Tire & Rubber Co.

BENJAMIN MILLER, DOING BUSINESS UNDER THE TRADE NAME AND STYLE GREAT EASTERN WHOLESALE FURNITURE CO., April 30, 1926. (Docket 1151.)

Charge: Using misleading trade name and advertising falsely or misleadingly; in connection with the sale of furniture.

Dismissed, after answer and trial, "for lack of jurisdiction."

Appearances: *Mr. Morgan J. Doyle* for the Commission; *Mr. Max Herzberg*, of Philadelphia, Pa., for respondent.

ROSE BROTHERS Co., May 12, 1926. (Docket 1327.)

Charge: Misrepresenting products and advertising falsely or misleadingly; in connection with the manufacture and sale of umbrellas.

Dismissed, after trial, without assignment of reasons.

Appearances: *Mr. Henry Miller* for the Commission; *Mr. Charles L. Miller*, of Lancaster, Pa., for respondent.

SWIFT & Co., LIBBY, McNEILL & LIBBY (OF MAINE), LIBBY, McNEILL & LIBBY OF HONOLULU, LTD., May 25, 1926. (Docket 578.)

Charge: Acquisition of stock of competitors; in connection with the growing and selling of pineapples.

Dismissed, after answer and trial, on motion by respondents. Commissioners Nugent and Thompson dissenting.

Appearances: *Mr. J. A. Burdeau*, *Mr. W. T. Chantland* and *Mr. G. R. Jackson* for the Commission; *Messrs. Albert H. and Henry Veeder*, and *Mr. Frank L. Horton* of Chicago, Ill., for respondents.

JOSEPH GOODMAN DOING BUSINESS AS NIAGARA SHIRT CO. AND NYRA SHIRT Co., May 25, 1926. (Docket 1347.)

Charge: Misbranding or mislabeling; in connection with the manufacture and sale of shirts.

Dismissed without assignment of reasons.

Appearances: *Mr. Alfred M. Craven* for the Commission.

JOSEPH LAMPL AND CARL LAMPL DOING BUSINESS AS LAMPL KNITTING Co., June 1, 1926. (Docket 1355.)

Charge: Using misleading trade name and advertising falsely or misleadingly; in connection with the sale of knitted garments.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. L. B. Perkins* and *Mr. Henry Ward Beer* for the Commission; *Thorman & Goldman*, of Cleveland, Ohio, for respondents.

THE CORAZA CIGAR Co., June 3, 1926. (Docket 1254.)

Charge: Advertising falsely or misleadingly and misbranding or mislabeling; in connection with the manufacture and sale of cigars.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. O. R. Stites* and *Mr. Alfred M. Craven* for the Commission; *Mr. C. Andrade, jr.*, of New York City, for respondent.

Dissent by Commissioners Van Fleet and Thompson

The respondent manufactures cigars in Philadelphia, using the name Marshall Field and having a so-called coat of arms very similar to and evidently intended to simulate the coat of arms of the well-known house of Marshall Field & Co. of Chicago. Respondent sells large quantities of these cigars in Chicago. In fact the volume of its sales in Chicago as compared to other cities is significant. There is evidence in the record showing that people and especially in Chicago buy these cigars under the belief that they are made by Marshall Field & Co. The use of the name and evident simulation of the coat of arms by respondent convinces us that such is the intent of respondent. Such use is a fraud on the purchasing public, a wrong to Marshall Field & Co. and an unfair method of competition to other cigar manufacturers.

The majority of the Commission believes that there is, however, no public interest and that it is a private controversy between Marshall Field & Co. and the respondent. While we have no doubt under the decisions (see *Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509) Marshall Field & Co. can obtain redress in the courts, the public interest still remains. The duty of the Commission to protect the buying public and respondent's competitors is plain. We agree that a mere private controversy should not engage the attention of the Commission, but the fact that an applicant also has a right of action does not defeat the jurisdiction and duty of the Commission to proceed if a public deception or fraud is being practiced by a respondent. That the respondent uses the name and coat of arms with the intent to give the impression to the purchasing public that the cigars are made by Marshall Field & Co. and thereby to reap the benefit of their good name and advertising is too plain for debate. There could be no other purpose. Else why not use their own name?

An order should be issued in this case and we dissent from the action of the majority in discussing the proceedings.

JOHN C. HERMAN AND EDWARD S. HERMAN DOING BUSINESS AS JOHN C. HERMAN & Co., June 8, 1926. (Docket 1337.)

Charge: Misbranding or mislabeling; in connection with the manufacture and sale of cigars.

Dismissed, after trial, for the reason that "the practices complained of were discontinued by the respondent at the time the Commission's investigation was instituted."

Appearances: *Mr. Henry Miller* for the Commission.

GOODALL WORSTED CO. AND ALBERT ROHAUT, June 9, 1926. (Docket 976.)

Charge: Resale price maintenance; in connection with the manufacture and sale of "Palm Beach" cloth.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. Edward E. Reardon* for the Commission; *Borowsky & Burrows* and *Mr. Charles Wesley Dunn*, of New York City, for respondents.

OAKLEED OIL CO. ET AL., June 24, 1926. (Docket 956); TEXAS-MEXIA DRILLING SYNDICATE ET AL., June 24, 1926. (Docket 960); THE PARAMOUNT ROYALTY SYNDICATE ET AL., June 24, 1926. (Docket 988); and GUARANTY ROYALTIES CO. ET AL., June 25, 1926. (Docket 1028.)

Charge: Misrepresentation; in connection with the sale of oil stocks.

Dismissed, after answer (except in the case of Guaranty Royalties Co. et al., in which no answer was filed), without prejudice and without assignment of reasons.

Appearances: *Mr. James M. Brinson* for the Commission; *Mr. William R. Watkins*, of Wichita Falls, Tex., for Oakleed Oil Co., and *Mark Kleedon* and *Hunt, Hill & Betts*, of New York City, for Miss Julia K. Threlkeld; *Mr. Harry K. Brown*, of Fort Worth, Tex., for C. R. Farmer; *Mr. Sam J. Callaway* and *Mr. Arthur Collins*, of Fort Worth, Tex., for Lea R. Ellis.

DOUBLE A. PLATINUM WORKS, INC., July 2, 1926. (Docket 1226.)

Charge: Misbranding or mislabeling; in connection with the manufacture and sale of jewelry.

Dismissed, after answer and trial, by the following order:

The above-entitled proceeding coming on for consideration by the Commission, and the Commission having considered the record and being now advised in the premises,

It is ordered, That the complaint herein be and the same is hereby dismissed without prejudice. The Commission does not by its dismissal of the complaint herein approve of the practices charged but

dismisses said complaint without prejudice for the reason it is the understanding of the Commission that the respondent has gone out of business.

Appearances: *Mr. Henry Miller* for the Commission; *Kleiner & Britwitz*, of New York City, for respondent.

COSMOPOLITAN SILVER CO., INC., July 7, 1926. (Docket 1131.)

Charge: Misbranding; in connection with the manufacture and sale of silver-plated ware.

Dismissed, after answer, for the reason that respondent has gone out of business.

Appearances: *Mr. John R. Dowlan* for the Commission.

W. A. L. SILVER MANUFACTURING CO., July 7, 1926. (Docket 1158.)

Charge: Misbranding; in connection with the manufacture and sale of silver-plated ware.

Dismissed, after answer, for the reason that respondent has been adjudged bankrupt and its assets sold and the business discontinued.

Appearances: *Mr. John R. Dowlan* for the Commission; *Mr. E. E. Hoenig*, of New York City, for respondent.

THE RIALTO SILVER PLATED WARE CO., INC., July 7, 1926. (Docket 1162.)

Charge: Misbranding; in connection with the manufacture and sale of silver-plated ware.

Dismissed, for the reason that the respondent has been adjudged bankrupt, its assets sold, and the business discontinued.

Appearances: *Mr. John R. Dowlan* for the Commission.

SWIFT & CO., NATIONAL LEATHER CO., July 9, 1926. (Docket 775.)

Charge: Acquisition of stock of competitors, in violation of sections 5 and 7 of the Federal Trade Commission and Clayton Acts, respectively; in connection with the manufacture and sale of leather.

Dismissed, after answer, stipulation and trial, without assignment of reasons.

Appearances: *Mr. George R. Jackson* for the Commission; *Messrs. Albert H. & Henry Veeder* and *Mr. Frank L. Horton*, of Chicago, Ill., *Mr. Putnam B. Smith* of Boston, Mass., and *Mr. Chester N. Farr, jr.*, of Philadelphia, Pa., for respondents; and *Mr. William A. Glasgow, jr.*, of Philadelphia, Pa., for England, Walton & Co.

ARMOUR & Co., July 14, 1926. (Docket 455.)

Charge: Acquiring stock in competing corporations with the effect of restraining interstate commerce in, and materially lessening competition in the sale of, various commodities concerned, and with

the tendency to create a monopoly in the sale thereof, in violation of section 5 of the Federal Trade Commission Act and of section 7 of the Clayton Act, and operating a concealed subsidiary or bogus independent in violation of section 5; in the acquisition of stock in the Harold L. Brown Co., Inc., dealing in butter, cheese, eggs, and other commodities (Counts I and II);¹ in Eau Claire Creamery Co., producing and dealing in butter (Counts III and IV); in the Loudon Packing Co., dealing in canned vegetables, catsups, chile sauce, and similar products (Counts V and VI); in the A. S. Kininmonth Produce Co., dealing in eggs, butter, and poultry (Counts VII and VIII); in the Pacific Creamery Co., producing and dealing in condensed milk, and in the concealment of the ownership thereof following such acquisition (Counts IX and X); and in Smith, Richardson & Conroy, dealing in meat and meat products, poultry, eggs, and similar commodities (Counts XI and XII).

Dismissed, as to all unlawful acquisition charged, except those relating to the Eau Claire Creamery Co. and Pacific Creamery Co., by the following order, namely:

That Counts I and II, V, VI, VII, and VIII, XI and XII of the complaint herein, charging a violation by the respondent, Armour & Co. of the aforementioned act of Congress, in acquiring and owning capital stock of the Harold L. Brown Co., Inc., Loudon Packing Co., A. S. Kininmonth Produce Co., and Smith, Richardson & Conroy be and the same are hereby dismissed.

Commissioner Nugent dissents to the dismissal of the complaint against (a) Loudon Packing Co., Counts V and VI; (b) A. S. Kininmonth Produce Co., Counts VII and VIII, and (c) Smith, Richardson & Conroy, Counts XI and XII.'

Appearances: *Mr. George R. Jackson* and *Mr. John M. Burkett* for the Commission; *Mr. Chas. J. Faulkner, jr.*, *Mr. R. F. Feagans* and *Mr. H. K. Crafts* of Chicago, Ill., for respondent.

SPEAR & Co. (Docket 1338); **LUDWIG BAUMAN & Co.** (Docket 1339), July 14, 1926.

Charge: Advertising falsely or misleadingly and misrepresenting products; in connection with the sale of furniture.

¹ As charged in the complaint, each acquisition was pleaded in two counts, first, as a violation of section 5, and secondly, as a violation of section 7.

² Order issued as of the same date, requiring respondent to divest itself of stock in the Eau Claire and Pacific Creamery companies, was subsequently (April 13, 1927) vacated by the Commission after reconsideration and consideration of a memorandum from its assistant chief counsel and a report from respondent, by the following order:

"The above-entitled proceeding coming on for consideration on memorandum from the assistant chief counsel dated March 2, 1927, and report signed by respondent Armour & Co., dated February 11, 1927, by way of compliance with the order to divest made and entered by the Commission July 14, 1926, requiring respondent Armour & Co. to divest itself of the stock of (1) the Eau Claire Creamery Co. and (2) the Pacific Creamery Co., and the Commission having considered the same and reconsidered the said order to divest, and being fully advised in the premises,

"It is ordered, That the order to divest made and entered July 14, 1926, requiring respondent Armour & Co. to divest itself of the stock of (1) the Eau Claire Creamery Co. and (2) the Pacific Creamery Co., be and the same is hereby vacated."

Dismissed, after answer, for the reason that respondents have signed the trade practice submittal agreement."

Appearances: *Mr. M. Markham Flannery* for the Commission; *Mr. James B. McMahon, jr., of New York City*, for respondents.

WICKWIRE-SPENCER STEEL CORPORATION, October 11, 1926. (Docket 1298.)

Charge: Acquisition of stock in competitors, in violation of section 7 of the Clayton Act, in connection with the manufacture and sale of screen wire cloth.

Dismissed, after answer, "without prejudice to the right of the Commission to reinstate it after there has been an authoritative interpretation of section 7 of the Clayton Act if the Commission shall so decide."

Appearances: *Mr. Richard P. Whiteley* for the Commission; *Covington, Burling & Rublee*, of Washington, D. C., and *Storey, Thorndike, Palmer and Dodge*, of New City, for respondent.

PACIFIC COMMERCIAL COMPANY AND EXPORTERS AND IMPORTERS ASSOCIATION OF THE WORLD, AND JOHN P. AGNEW, ET AL., October 14, 1926. (Docket 1044.)

Charge: Tendering second hand, inferior, or worthless goods in settlement of orders and payments for first-class new goods, in violation of the provisions of section 5 of the Federal Trade Commission Act, as extended by section 4 of the Webb Act, in connection with the sale of automobiles or automobile parts.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. Charles Melvin Neff* for the Commission; *Sullivan & Cromwell*, of New York City, for Pacific Commercial Co., and *Mr. C. Royall Frazer* and *Mr. H. Howard Babcock*, of New York City, for Exporters and Importers Association of the World and John Agnew.

JOHN R. WALKER AND AMERICAN WOODS EXPORT ASSOCIATION, October 14, 1926. (Docket 1216.)

Charge: Filling orders contracted for in export trade with deliveries differing in kind, in inferiority of grade, in amounts and in the much later dates thereof, from contract specifications, invoicing falsely kind and quality of materials delivered in ostensible compliance with contract, and giving false pretended official certificates of measurement and inspection to vendees to deceive the same; all in violation of section 5 of the Federal Trade Commission Act; in connection with the sale of lumber.

*Relating to the practice involved, held at New York City on January 7, 1926, and reported in Commission's publication, "Trade Practice Conferences."

Dismissed, after trial, by the following order:

This proceeding having come before the Commission upon the complaint of the Commission, and though no answer was filed by the respondents or either of them, it appearing to the Commission that the said respondent John B. Walker has long since ceased to sell lumber either in local or export trade, and that the respondent, the American Woods Export Association, Inc., has gone into the hands of a receiver.

Now after full consideration the Commission orders that the complaint herein be and the same is hereby dismissed.

Appearances: *Mr. Charles Melvin Neff* for the Commission.

ECLIPSE FOUNTAIN PEN AND PENCIL CORPORATION AND MARK FINSTONE, LILLIAN FINSTONE AND DAVID KLEIN, October 16, 1926. (Docket 1366.)

Charge: Misbranding or mislabeling; in connection with the manufacture and sale of fountain pens and pencils.

Dismissed, after answer and trial, without assignment of reasons.

Appearances: *Mr. T. B. Dixon* for the Commission; *Block & Shlivek*, of New York City, for respondents.

HAYES WHEEL Co., October 19, 1926. (Docket 1219.)

Charge: Acquisition of stock in competitor in violation of section 7 of the Clayton Act; in connection with the manufacture and sale of automobile wheels.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. A. R. Brindley* for the Commission; *Mr. Justin R. Whiting*, of Jackson, Mich., for respondent.

PICTORIAL REVIEW Co., October 23, 1926. (Docket 266.)

Charge: Contracting on exclusive and tying basis; in violation of sections 3 and 5 of the Clayton and Federal Trade Commission Acts, respectively; in connection with the sale of paper dress patterns.

Dismissed, after answer, stipulation and trial, for the reason that respondent has stipulated that, since the service of the complaint upon it, it has abandoned, and will not hereafter make use of, the objectionable provisions herein concerned.

Appearances: *Mr. E. C. Alvord* and *Mr. Edward E. Reardon* for the Commission; *Mr. Herman B. Goodstein*, of New York City, for respondent.

SHEPPARD KNAPP SON Co., INC., October 25, 1926. (Docket 1341.)

Charge: Advertising falsely or misleadingly or misrepresenting product; in connection with the sale of furniture.

Dismissed "for the reason that respondent is now in the process of liquidation in bankruptcy."

Appearances: *Mr. M. Markham Flannery* for the Commission.

BARNES-AMES Co., BARNES-IRWIN Co., October 30, 1926. (Docket 1203.)

Charge: Filling orders in export trade with goods inferior to those specified and paid for, in violation of section 5 of the Federal Trade Commission Act as extended by section 4 of the Export Trade Act; in connection with the exporting of wheat.

Dismissed, after answer, without assignment of reasons.

Appearances: *Mr. Robert O. Brownell* and *Mr. M. Markham Flannery* for the Commission; *Shattuck, Bangs & Winant*, of New York City, for respondents.

DIGESTS OF STIPULATIONS PUBLISHED AFTER DELETING NAME OF RESPONDENTS¹

[NOTE.—The purpose of the following digests is to inform the public of those unfair methods and practices condemned by the commission and to establish precedents that will serve to eliminate unfair business methods of interest to the public and injury to competitors.]

STIPULATION OF THE FACTS AND AGREEMENTS TO CEASE AND DESIST

1. Resale Price Maintenance—Soft Drink Beverages.—Respondent, a copartnership, engaged in the manufacture of soft-drink beverages and in the sale of same in commerce between and among various States of the United States and in competition with other individuals, firms, partnerships, and corporations also engaged in the sale of similar products, entered into the following stipulation of facts and agreement to cease and desist forever from the alleged unfair methods of competition used in the sale of said product.

Respondent represented that it was engaged in the manufacture of soft-drink beverages and in the sale of said product in commerce to bottlers located in various States of the United States. In a contract entered into between the respondent and the bottlers of said product, it was understood and agreed that the bottlers would not sell to dealers at a price less than 70 cents per case of 2 dozen bottles each; that the purpose of the aforesaid clause is and was to require the maintenance of a resale selling price.

The respondent agreed to cease and desist forever from the use of the aforesaid contract, and further agreed to notify all parties bound by said contract that the clause maintaining resale prices was revoked and no longer binding, and the respondent further agreed that if it should ever resume or indulge in any of the alleged unfair practices as above set forth, or any other method having for its purpose the maintenance of resale prices, or any other unlawful practices or methods of establishing a resale-price system, the foregoing statement of facts may be used in evidence against said respondent. (April 15, 1925.)

2. False or Misleading Corporate Names—False and Misleading Advertising as to Business Status—Hosiery.—Respondent, a corporation engaged in the sale and distribution of hosiery in wholesale and/or retail quantities in interstate commerce and in competition with other corporations, firms, partnerships, and individuals likewise engaged, entered into the following stipulation of facts and agree-

¹ Stipulations published herewith include all those accepted by the Commission during the period covered by this volume, that is, to Nov. 5, 1926. 11

ment to cease and desist forever from the alleged unfair methods of competition as set forth therein.

Respondent, in the course and conduct of its business, in soliciting the sale of and selling its products in interstate commerce, adopted as a part of its corporate or trade name the word "Mills" and caused its said corporate or trade name containing the word "Mills" to be placed on its order blanks, letterheads, and other advertising matter which it circulated or caused to be circulated in interstate commerce, and further in the course and conduct of its business, said respondent caused advertisements to be inserted in newspapers having circulation throughout various States of the United States, and in other advertising matter used its corporate or trade name containing the word "Mills" and also used in connection or conjunction therewith statements as follows: "Low prices are made possible by concentrating the entire output of the mills on three special numbers," "Such cooperation between manufacturer and retailer is helping the retailer attract local trade to his store," "The * * * Mills have undertaken this work in the interest of dealers who serve you day after day"; when in truth and in fact said respondent did not own, operate, or control a mill or factory for the manufacture of the hosiery offered for sale and sold by it, and said respondent filled its orders for said hosiery purchased from a mill or mills that manufactured the same or from the stock consigned to or purchased by the said respondent.

Respondent agreed to cease and desist forever from the use of the word "Mills" as part of or in connection or conjunction with its corporate or trade name in the sale and distribution of its products in interstate commerce; and the use of its said corporate or trade name containing the word "Mills" in advertisements inserted in newspapers having circulation between and among States of the United States; and on its order blanks, letterheads, and other advertising matter circulated or distributed in interstate commerce; and the use of such statements as "Low prices are made possible by concentrating the entire output of the * * * Mills on three special numbers," "Such cooperation between manufacturer and retailer is helping the retailer attract local trade to his store," "The manufacturers have undertaken this work in the interest of dealers who serve you day after day * * *"; and from the use of any other similar statement or statements that may have the capacity and tendency to mislead and deceive the purchasing public into the belief that the said respondent either owns, operates, or controls a mill or plant for the manufacture of the product sold by it; or until such time as the said respondent does actually own, operate, or control a plant or factory for the manufacture of the product which it sells and distributes in interstate commerce under the aforesaid representations.