

Order

IN THE MATTER OF

METAL LATH MANUFACTURERS ASS'N ET AL.¹

Docket 5449. Complaint, June 28, 1946—Order, etc., opinion and dissenting opinion, Feb. 16, 1954

Charge: Concertedly maintaining delivered price zones for metal lath.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Fletcher G. Cohn, Mr. Paul R. Dixon, Mr. Robert F. Quinn and Mr. Paul H. LaRue for the Commission.

MacLeish, Spray, Price & Underwood, of Chicago, Ill., for Metal Lath Manufacturers Ass'n, United States Gypsum Co. and A. J. Tuscany.

White, Bradley, Arant, All & Rose, of Birmingham, Ala., for Alabama Metal Lath Co., Inc.

Evans, Chanson & Gentithes, of Warren, Ohio, for The Bostwick Steel Lath Co.

Johnston, Thompson, Raymond & Mayer, of Chicago, Ill., for Ceco Steel Products Corp.

Frost & Jacobs, of Cincinnati, Ohio, for Goldsmith Metal Lath Co.

¹ The Commission on August 30, 1949, issued an order granting in part and denying in part respondents' motion to dismiss the complaint, and denying request for oral argument, as follows:

This matter came on to be heard upon joint and several motion to dismiss the complaint herein filed on October 25, 1948, by respondents, answer thereto filed on November 10, 1948, by counsel in support of the complaint opposing the motion except as to respondent A. J. Tuscany, briefs of counsel in support of and in opposition to the motion, trial examiner's report and recommendations, on the motion and exceptions to said report and recommendations by certain of the respondents, including separate exceptions of respondent The Goldsmith Metal Lath Company, and by counsel in support of the complaint, and request of respondents for oral argument on the motion.

Respondents' motion was made after counsel in support of the complaint closed their case in chief and is based upon the contention that the evidence produced fails to make out a prima facie case under the complaint. The motion was referred to the trial examiner theretofore appointed by the Commission to receive evidence in the case, for report and recommendation. The trial examiner reported that the evidence of record fails to connect respondent Metal Lath Manufacturers Association and individual respondent Joseph A. Sampson with the conspiracy alleged and recommended that the motion be granted with respect to them and individual respondent A. J. Tuscany. With respect to the other respondents, the trial examiner found that there is sufficient evidence in the record to make out a prima facie case, and recommended that the motion to dismiss the complaint be denied.

Respondents, except Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson, filed exceptions to substantially each point upon which the trial examiner's comments and recommendations were adverse to them. The bases for these exceptions are substantially the same as those on which the same points were presented in the motion and briefs. Respondent The Goldsmith Metal Lath Company filed separate exceptions to the trial examiner's finding and recommendation as to it, on the basis that the record contains no direct evidence of participation by The Goldsmith Metal Lath Company in the conspiracy alleged and that the conclusion of the trial examiner is based upon

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Mayer, Meyer, Austrian & Platt, of Chicago, Ill., for Milcor Steel Co.

Finck & Huber, of Buffalo, N. Y., for National Gypsum Co.

Roberts, Cushman & Grover, of Boston, Mass., for Penn Metal Co., Inc.

Mr. Thomas F. Patton and *Mr. Arthur J. Gentholts*, of Cleveland, Ohio, for Truscon Steel Co.

Schmidt, Hugus & Laas and *Mr. Harry R. Hesse* and *Mr. J. E. Bruce*, of Wheeling, W. Va., for Wheeling Corrugating Co.

Macleay & Lynch, of Washington, D. C., for Joseph A. Sampson.

ORDER DISPOSING OF APPEALS FROM INITIAL DECISION OF HEARING EXAMINER, AND DECISION OF THE COMMISSION DISMISSING THE COMPLAINT

This matter having come on to be heard by the Commission upon the complaint, answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint, initial decision of the hearing examiner, appeals from said initial decision by counsel supporting the complaint and by respondents except those

unwarranted inferences. The Commission has considered these exceptions, and its ruling on the motion itself for the reasons hereinafter stated constitutes a denial of the exceptions for the same reasons.

Counsel in support of the complaint excepted to that portion of the trial examiner's report and recommendation pertaining to respondent Metal Lath Manufacturers Association, on the basis that the evidence of record establishes a prima facie case against the Association. The Commission is of the view that the evidence of record fails to connect respondent Metal Lath Manufacturers Association with the conspiracy alleged and, therefore, denies the exception.

There is evidence in the record tending to show that respondent manufacturers followed a common pricing system, including zone pricing, and issued substantially identical price lists, and from time to time made identical and simultaneous price changes upward in the presence of decreasing prices on sheet metal. These and other matters appearing in the record and reasonable inferences therefrom are sufficient to make a prima facie case under the allegations of the complaint with respect to respondent manufacturers.

It does not appear that the evidence of record is sufficient to connect either of the individual respondents A. J. Tuscany and Joseph A. Sampson with the conspiracy alleged.

The motion and answer thereto, with supporting briefs, clearly set forth the position and contentions of opposing counsel and it does not appear that oral argument is necessary. Respondents will have opportunity to present their contentions orally when the proceeding is before the Commission for final determination on the merits.

Having duly considered the matter and being now fully advised in the premises:

It is ordered, That the joint and several motion of respondents to dismiss the complaint and the request for oral argument thereon be, and the same hereby are, denied, except as to respondents Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson.

It is further ordered, That the motion of Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson be, and the same hereby is, granted, and that the complaint herein as to Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson be, and the same hereby is, dismissed.

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against whom the complaint has heretofore been dismissed, and briefs and oral arguments of counsel; and

The Commission having decided, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal of the respondent manufacturers should be granted, that the appeal of counsel supporting the complaint should be denied, and that the complaint herein should be dismissed without prejudice to the right of the Commission to institute a new proceeding or to take such further action or other action in the future as may be warranted by the then existing circumstances:

It is ordered, That the respondents' appeal from the initial decision of the hearing examiner be, and it hereby is, granted, and that the appeal of counsel supporting the complaint be, and it hereby is, denied.

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

Commissioners Mead and Gwynne dissenting.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This proceeding is before the Federal Trade Commission upon appeals from an initial decision of a hearing examiner of the Commission holding that the respondent manufacturers have violated Section 5 of the Federal Trade Commission Act.

The complaint herein, issued on June 28, 1946, charges a violation of Section 5 of the Federal Trade Commission Act, and alleges generally that the respondent manufacturers have acted, and are still acting, wrongfully and unlawfully by means which include cooperation between and among themselves through the respondent Association and with the individual respondents in establishing, adopting, and continuing a common course of action resulting in substantial restriction, suppression, elimination, and frustration of actual and potential competition among the respondent manufacturers respecting price in the sale and distribution of metal lath. Among the specific allegations in the complaint is one that respondent United States Gypsum Company has used a patent owned by it (Pearce patent) and license agreements entered into in connection therewith for the purpose and with the effect of contributing to, promoting, and furthering the alleged unlawful course of action, and to that end has entered into mutual understandings and agreements with other respondent manufacturers. The complaint has heretofore been dismissed as to respondent Metal Lath Manufacturers Association and the two indi-

vidual respondents, A. J. Tuscany and Joseph A. Sampson, for the reason that the evidence introduced fails to sustain the charges as to them. Such dismissal had the effect of also dismissing those allegations of the complaint that the respondent manufacturers have cooperated through the respondent Association and through the individual respondents Tuscany and Sampson in establishing, adopting, and continuing the unlawful activities described in the complaint.

The hearing examiner in his initial decision found, among other things, that the respondent manufacturers, beginning in or about February 1932, entered into a mutual understanding or agreement, which was in effect a conspiracy, to fix and maintain delivered price quotations, terms, and conditions of sale to purchasers of metal lath in the United States, and that pursuant to and in furtherance of such unlawful understanding or agreement the respondent manufacturers have been and still are performing a number of specified acts and practices, including using a zone delivered price system and systematically matching delivered price quotations.

Appeals from said initial decision of the hearing examiner were filed by counsel supporting the complaint and the respondent manufacturers. Counsel supporting the complaint, in their appeal, do not except to the hearing examiner's findings as to the facts, but do except to his order on the ground that it fails to include certain provisions which they contend are necessary to prevent a continuation of the illegal acts and practices. The respondent manufacturers, in their appeal, except to the findings as to the facts, conclusion, and order in the initial decision, to the hearing examiner's failure to include proposed findings of fact and of law and the order of dismissal requested by the respondents, and to the hearing examiner's rulings excluding certain evidence offered by the respondents.

It appears that the contention that the respondent manufacturers entered into an unlawful understanding or agreement or a conspiracy to restrict, suppress, eliminate, and frustrate competition in the sale and distribution of metal lath is based primarily on evidence in the record relating to certain patent licenses and the respondent manufacturers' operations thereunder. There is no contention that the evidence in the record exclusive of that relating to the said patent licenses and operations thereunder establishes a conspiracy. The pertinent facts shown by the evidence with respect to the said patent licenses and the respondent manufacturers' operations thereunder are here summarized.

On January 14, 1930, a patent (the Pearce patent) covering an improved metal lath was issued. Said patent was owned by Northwestern Expanded Metal Company. Respondent United States Gyp-

sum Company acquired the assets, including the Pearce patent, of Northwestern Expanded Metal Company in March 1930. At about the same time, United States Gypsum Company acquired the Metal Lath Division of the Youngstown Pressed Steel Company. Thereafter, United States Gypsum Company became one of the largest manufacturers of metal lath in the United States. On February 26, 1932, United States Gypsum Company granted a license to make, use, and sell metal lath embodying the Pearce patent to respondents Truscon Steel Company, The Bostwick Steel Lath Company, Milcor Steel Company, Wheeling Corrugating Company, and the Penn Metal Company, predecessor of Penn Metal Company, Inc. A similar license was granted to respondent National Gypsum Company in 1935, to respondent Penn Metal Company, Inc., in 1936, to respondent Ceco Steel Products Corporation in 1938, and to Alabama Metal Lath Company, Inc., in October 1940. No license agreement was entered into with respondent Goldsmith Metal Lath Company. These license agreements, which were identical, provided among other things that the licensees would pay the licensor a royalty on all of the patented metal lath sold by the licensees, that the licensor had the right to fix the minimum price at which the licensees could sell the patented product, and that the licensor would not grant a more favorable license to one licensee than to another.

Respondent Milcor Steel Company canceled its license agreement in June 1941. On November 1, 1941, respondent United States Gypsum Company and respondent Milcor Steel Company entered into a new license agreement which provided for a lower royalty payment and omitted any reference to United States Gypsum Company's right to fix minimum prices. Respondent United States Gypsum Company thereafter offered the new license to the other licensees and it was accepted by each of them.

Respondent United States Gypsum Company, in the exercise of its right under the license agreements to fix minimum prices, issued bulletins from time to time notifying the licensees of changes in prices and also of changes in the boundaries of the different geographical zones. Each of the bulletins so issued was expressly limited to patented metal lath. The licensees generally sold at the prices fixed by the licensor. No such bulletins were issued after August 1940. Prior to 1939 respondent United States Gypsum Company held meetings from time to time with its licensees during which violations of the license agreements were discussed. Between August 1940 and March 1942 (the latter date being the date on which prices in the industry came under the control of the Office of Price Administration), there were three industrywide price increases, one in January 1941, one in

April 1941, and one in August 1941. Other than the fact that the price increases were identical in amount and that the effective dates of the increases were approximately the same for all the respondent manufacturers, there is no evidence that these increases resulted from any agreement or understanding between the respondents. From March 1942 until November 1946, prices in the metal lath industry were controlled by the Office of Price Administration. In June 1946 the Office of Price Administration approved price increases for the industry and price lists issued by the various manufacturers reflected the approved increases. There is no information in the record as to prices after June 1946. The complaint herein was issued on June 28, 1946. The Pearce patent and the license agreements thereunder expired on January 14, 1947.

The principal provisions of the license agreements which are questioned by this proceeding are those giving the licensor the right to fix the minimum price at which the licensees could sell the patented metal lath, and the principal activities of the respondent manufacturers under the patent licenses relied upon as showing an unlawful course of action were the issuance of bulletins by the licensor notifying the licensees of changes in prices and in zone boundaries, the licensees' observance of and adherence to the changes so announced, and the holding of meetings by the licensor with its licensees, during which violations of the license agreements were discussed.

As has been noted hereinabove, the second series of license agreements, entered into on or about November 1, 1941, did not contain any provision with respect to the price at which the licensees could sell the patented product. No bulletins were sent out by the licensor after August 20, 1940, and no meetings of licensees were held after 1939. The record affords no basis for a determination that these, or any substantially similar acts and practices, were continued, resumed, or engaged in after about 1941. Neither is there any basis for a determination that there is likelihood of a resumption of the same, or similar, acts and practices in the future. On the contrary, the expiration of the Pearce patent and the licenses thereunder makes it unlikely that a similar course of action, regardless of whether lawful or unlawful, will be resumed by the respondent manufacturers.

These facts must be considered in the light of the decision of the United States Court of Appeals for the Ninth Circuit in *Oregon-Washington Plywood Company v. Federal Trade Commission*, 194 F. 2d 48 (1952) (the *Plywood* cases) and the decision of the United States Court of Appeals for the Fourth Circuit in *New Standard Publishing Company v. Federal Trade Commission*, 194 F. 2d 181 (1952). In the *Plywood* cases, the Commission found in 1950 that the respond-

ents had, "during a substantial part of the period of time between May 1, 1935, and August 1, 1941" in one case and "during a substantial part of the period of time between January 1, 1938, and November 29, 1941" in the other, engaged in illegal activities. The court in vacating the Commission's orders said, "The record here is silent as regards the existence of any special circumstances suggesting a likelihood that the petitioners will resume the practices discontinued so many years prior to the issuance of the complaints." In the *New Standard Publishing Company* case the Commission entered an order in 1951 based on findings that the respondents had engaged in the prohibited practices some ten years before the order was entered. The order was vacated because there was nothing in the record to show that the illegal practices had been continued.

We do not interpret these decisions as requiring dismissal of every proceeding in which the respondents are shown to have terminated the challenged practices prior to the issuance of the complaint. The law to the contrary is well established. We do, however, interpret these decisions as requiring dismissal when, as in this case, the principal activities relied upon to prove an unlawful course of action were engaged in approximately five years prior to the issuance of the complaint. If it should be determined that the respondents did engage in certain illegal activities some five years prior to the issuance of the complaint and some thirteen years before the case was finally disposed of, there is no record basis for a determination that such activities, or the results of such activities, were continued or resumed, or that there is likelihood of their being resumed in the future. Under these circumstances, it is not material whether the evidence in the record relating to the first series of patent licenses and respondents' operations thereunder shows a course of conduct then unlawful, and we are not here making any determination as to the legality or illegality of the license agreements.

The complaint in this proceeding must, therefore, be dismissed. Such disposition of this proceeding renders it unnecessary to rule more specifically on each of the exceptions to the initial decision of the hearing examiner raised by counsel supporting the complaint and the respondent manufacturers in their appeals.

DISSENTING OPINION OF COMMISSIONER MEAD

Metal lath is an important product in the building industry. The Commission issued a complaint charging in effect that the principal producers of metal lath were conspiring to fix prices in violation of Section 5 of the Federal Trade Commission Act. It is elementary that a price fixed by conspiracy is not a competitive price. A "rigged"

price is generally higher than a competitive price. The basic purpose of a price conspiracy is generally to achieve a higher stabilized price for the product.

The public policy of the United States is that the public is entitled by law to purchase articles offered for sale in interstate commerce at a price determined by the free play of competitive forces. In fact, the Sherman Act provides that conspiracies in restraint of trade are a criminal offense against the United States. Our economic strength is due in large measure to that public policy. To the extent that we protect it, we will remain strong and free.

Competition, like truth, is a hard taskmaster. The easy way is to follow the pattern of least resistance. The easy way is the conspiracy way. The conspirator favors the shortsighted temporary price advantages which may be achieved by a conspiracy rather than the long view of a strong enduring competitive industry.

The allegations in the complaint in this case are detailed in the Majority Opinion of the Commission. The respondent, U. S. Gypsum Company, owned a patent on a type of metal lath and licensed other respondent manufacturers to produce this patented lath. The license agreements provided that Gypsum would fix the minimum price at which the patented lath was sold by the licensees. Gypsum agreed not to give any licensee a better deal than Gypsum gave any other licensee. This was the "Favored Nation" clause.

The obvious result of this pricing pattern was that all producers sold patented metal lath at the same price. The price on the nonpatented lath which was sold also by the producers and which was not specifically covered in the license agreements naturally followed the price of the patented lath.

Obviously, prices within the industry were not competitive. The complaint recognizing the obvious lack of competition charged that respondents were engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Respondents deny that they were engaged in an illegal conspiracy. Respondent Gypsum alleges that the licensing agreements were legal under the principle decided by the Supreme Court in *U. S. vs. General Electric* (272 U. S. 476).

The Supreme Court has not directly overruled the General Electric case. The Court, however, in subsequent opinions has limited and qualified the application of the General Electric case. Patent law was designed to encourage invention by protecting the inventor and his licensees from piracy and to enable the inventor for a reasonable time to enjoy the fruits of his originality. Patent law was not designed to afford a legal cloak of protection to an industrywide price stabiliza-

tion agreement. Under the Patent law, for the duration of the patent the price arrangement between the holder of the patent and his licensee acting on a bilateral basis in the protection of the patent monopoly is exempt generally from the application of the antitrust laws. This exemption, however, does not apply to an industrywide horizontal, multilateral agreement between and among the licensor and the other licensee producers. That, basically, is a concert of action among all the producers to fix the price of the product involved. If the Courts had not so interpreted the patent and antitrust laws, the Congress would have amended these laws so as to protect the public against the abuse of an otherwise useful and needed principle of law.

Extensive testimony was taken in this case before the Hearing Examiner. The Examiner in this case is the Chief Hearing Examiner of this Commission. He has had many years of experience in the antitrust laws. The Chief Hearing Examiner heard all the testimony and saw the demeanor of the witnesses on the stand. He lived with this case for a substantial period of time during the course of the hearings. At the conclusion of the hearings, the Examiner filed his very carefully prepared and ably written Initial Decision. The Examiner found the facts which had been proven in the record and based thereon, he concluded as follows:

"It is further concluded that the said acts, practices, methods, policies and courses of action, as hereinbefore found, are all unfair, oppressive and to the prejudice of the public; have a dangerous tendency to, and have actually hindered, restrained, suppressed, frustrated, eliminated and prevented competition in the sale of metal lath in commerce within the intent and meaning of the Federal Trade Commission Act, and have the tendency and capacity to restrain unreasonably and have unreasonably restrained such commerce in said product and therefore, in the light of the decisions of the United States Federal Courts in the *U. S. Gypsum* case, *supra*, and the case of *Fort Howard Paper Company v. Federal Trade Commission* (156 F. 2d 899), and *Allied Paper Mills, Inc. v. Federal Trade Commission* (168 F. 2d 600), constitutes unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

The Administrative Procedure Act was a sort of Magna Charta for Hearing Examiners in the administrative agencies of the Federal Government. The Act gave the Examiners the status of administrative judges. Much has been spoken and written both in and out of Court rooms relative to this new and more independent and dignified status of Examiners. The dismissal of agency complaints by Examiners has been cited as an indication that Examiners are independent of the agencies. Court opinions have given substantial weight to

the decisions of Examiners when the Examiners dismissed allegations of complaints. The obvious reason for giving substantial weight to a finding of an Examiner is that he is the trier of the facts and is in the best position to evaluate conflicting testimony. If these arguments are valid in cases in which an Examiner dismisses a complaint, the arguments should be equally valid in cases in which an Examiner finds for the complaint.

It is not often in an antitrust conspiracy case that the various elements of the case are substantially similar to another conspiracy case which has been decided by the Supreme Court of the United States. I refer to the case of *United States v. U. S. Gypsum Co., et al.* (333 U. S. 364). In that case the Supreme Court held that an independent patent licensing agreement containing minimum price provisions resulting in identical prices and the absence of price competition was in violation of the Sherman Act. The respondents in this case attempted to differentiate the facts in this case from the facts in the *Gypsum* case, *supra*. As stated by the Hearing Examiner:

"It is contended by respondents that the licensees of respondent U. S. G. in the present case were not aware that similar licenses were being granted by respondent U. S. G. to other members of the industry and for that reason this case can be distinguished from the *Gypsum* case. This contention is not supported by the record in the first place, the license agreement itself, in language almost identical with that used in the *United States Gypsum* case, contains the so-called 'Favored Nation' clause which gives each licensee the right to insist upon as favorable consideration as any other licensee. This clause clearly indicates that the consummation of similar license agreements with their competitors must have been contemplated by the various licensee respondents. The Court in the *Gypsum* case held 'the concert of action being established by the favored licensee clause of the standard license agreement.'

"Secondly, the record shows that from time to time these licensees were called together in meetings by the respondent U. S. G. and questioned with respect to alleged violations of the license agreements by selling patented metal lath at prices below the minimum prices fixed by respondent U. S. G. in the license bulletins which were sent out by U. S. G. and received by the respective licensees, so that they then became aware of who the other licensees were, if they had not known before."

The Majority Opinion of the Commission points out that the minimum price provisions of the licensing agreement were not continued after 1941. That may be true insofar as the written agreements are concerned. However, by the use of the minimum price provisions in

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the license agreements and the "Favored Nation" clause, the foundation and structure of the pricing pattern had been constructed. The zone pricing system had been created in the industry. Under this system the entire United States had been divided into a few pricing zones and all purchasers buying the patented metal lath within any particular zone were quoted the same price by the various respondent licensees. The price of unpatented lath followed the price of the patented lath.

After the discontinuance by U. S. Gypsum, the licensor, of the license bulletins advising licensees of the minimum prices of patented lath, there were three price changes in the industry, all of which were price increases. The Examiner comments on these identical price advances as follows:

"It is believed from the whole record that the coincidence of these significant changes were not due to mere happenstance but were the result of the conscious cooperative action of the various respondents."

Sellers of commodities frequently claim that they sell at prices identical to their competitors in order to meet competition in good faith. The Examiner asked the question whether or not if a seller's competitor increases his price must the seller also increase his price to the same amount in order to meet competition. Call that what you will, it is not the vigorous competition contemplated by the antitrust laws.

As I stated in the Majority Opinion of the Commission in the National Lead et al. case, Docket 5253, a zone pricing system established by conspiracy operates almost automatically. The freight rate books and the other conspiratorial paraphernalia common to the basing point systems of pricing are not needed when a zone system of pricing is used. Detection of a conspiratorial zone pricing system is difficult because so few overt conspiratorial acts are necessary to maintain the pricing patterns.

The ability of the regulatory agency to preceive a conspiracy should keep pace with the skill of the conspirator in concealing the conspiracy. Otherwise, the finder of facts would be in the difficult position of an old-style Indian trying to track his man by looking for footprints and broken twigs on a city sidewalk. Thankfully, we do have modern Indians. The Courts have recognized that the law of conspiracy should be and is dynamic. Discerning Judges of our time have understood the realities of the modern type of planned common course of action by sellers intent on "stabilizing upward" prices. These judges have interpreted the law as it was intended by the Congress.

In an antitrust conspiracy case a few simple questions should be asked and answered. Are the prices in the industry competitive? Do purchasers have price alternatives? From all the facts, would a reasonable man conclude that the identical prices in the industry are due to a planned common course of action by the sellers?

The majority of the Commission does *not* find that an illegal conspiracy did not exist. The majority indicates that the record does not affirmatively show that the alleged conspiracy existed subsequent to 1941 and that on the basis of *Oregon-Washington Plywood Co. v. Federal Trade Commission*, 194 F. 2d 48 (1952) (*Plywood* cases) and the *New Standard Publishing Company v. Federal Trade Commission*, 194 F. 2d 181 (1952), the complaint should be dismissed.

I strongly dissent from the indication in the Majority Opinion that the *Plywood* cases and the *New Standard* case, *supra*, are authority for dismissing this complaint. Is the majority holding that the burden is on the Government to prove that the conspiracy continued up to a period shortly before the complaint issued? Must the Government prove overt conspiratorial acts committed immediately prior to the issuance of the complaint, or even subsequent thereto? If that is the position of the majority, I emphatically disagree with that position.

The record in this case shows that the pricing patterns which had been continued and perfected by a concert of action, closely identical to that condemned by the Supreme Court in the *Gypsum* case, continued until substantially the establishment of the Office of Price Administration. If the pricing pattern is perfected by conspiracy, and the pattern is continued by the conspirators, then the conspirators will continue to enjoy the fruits of their illegal practice. It is reasonable to assume that the O. P. A. froze for the duration of its existence this pricing pattern used by respondents. The complaint was issued in 1946. Evidence of activities by respondents subsequent to 1946 would not be admissible to prove an allegation in the complaint that respondents had violated the law prior to the issuance of the complaint.

Modern price conspiracies usually may only be proven by showing the activities of sellers over a substantial period of years. It is unrealistic to assume that a pricing conspiracy can be proved by proving only acts of the alleged conspirators for a period of a month or a year or even two years prior to the complaint. In order to prove such conspiracies, it may be necessary to begin the proof with evidence as to events taking place several years prior to the complaint when the foundation of the conspiracy was laid and the procedures and techniques of pricing were established. The conspiratorial tree having

been planted and duly nourished in its formative period, the conspirators may continue for several years to enjoy the illgotten fruits from this tree with a minimum of overt observable gardening on their part.

In the *Plywood* cases, the Government stipulated itself out of Court. The Court ruled that by the stipulated facts the Government admitted that the price conspiracy had been discontinued for several years prior to the issuance of the complaint. The Court obviously meant that the Government also admitted that not only the conspiracy, but the advantages flowing from the conspiracy had been long since terminated. This admission by the Government would indicate that the Plywood Industry was then and had been competitive for several years.

The facts are entirely different in this case. There is no admission by Government Counsel that the conspiracy has terminated. There was no showing by respondents that they had purged themselves of the pricing patterns which they had used by unlawful agreement. In fact, respondents contend that they never acted unlawfully. If this complaint is dismissed, respondents will probably consider themselves free to continue the pricing patterns which were, in my opinion, established by unlawful agreement. It is reasonable to assume from the record that these pricing patterns have been continued by respondents.

As stated above, respondents point out that the minimum price provisions in the licensing agreements have long since been discontinued. In this connection, the decision of the Court in *C-O-Two Fire Equipment Co. v. U. S.*, 197 F. 2d 489 is interesting. In that Sherman Act case the defendants contended that a provision regarding minimum prices in a license agreement was abrogated by mutual consent in August of 1942. The Court of Appeals said in its decision on May 29, 1952:

"The record, however, does not reveal any price competition as might be expected in the industry after the alleged abrogation of the price maintenance provision. From such circumstances, the trier of the facts might properly have inferred either that no such abrogation did, in fact, take place, or that it was done for appearance's sake only and was not a thing of substance."

In this case, as described above, the record shows that there were three price changes after the minimum price bulletins by the licensor were discontinued. The record further shows, and it was so found by the Examiner, that in all three of these instances the price increase by the respondents were in similar amounts and at substantially the same times. The Court in the *C-O-Two* case, *supra*, stated:

"In the instant situation, appellants have not come forward with any satisfactory explanation for the admitted price uniformity nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions save for the bare statements that such provisions were abrogated."

The *New Standard Publishing Company* case, *supra*, was a false advertising case. That type of case is dissimilar to a conspiracy case. The question of whether or not a representation has been discontinued is readily susceptible of proof. Representations are published for the world to see and are not hidden and concealed as are conspiratorial acts. Once the representation has been discontinued its value quickly and substantially decreases until it is nil. Members of a conspiracy may continue to enjoy the fruits of a pricing pattern established by conspiracy although they have discontinued provable conspiratorial acts.

The *New Standard* case, *supra*, is not authority for dismissing this complaint for an additional compelling reason. The order to cease and desist in that case was entered by the Commission nine years after the respondent ceased handling the Doubleday products which were the subject matter of the alleged misrepresentations. The order of the Commission was vacated by the Court because of the protracted delays in the trial of the case. The Court did not hold that the case was moot. The Court stated:

"We agree with the Commission that there has been no such showing that the case is moot as would warrant us in so declaring and directing the dismissal of the proceedings."

The Court in vacating the order of the Commission indicated that it was acting at the suggestion of the Commission. The Court stated:

"We think, however, as suggested by the Commission, that the delay which has occurred in the case requires notice and that the order of the Commission should not be enforced without the taking of additional evidence showing that its entry is appropriate under present circumstances."

The detecting and proving of the modern streamlined matured pricing conspiracy admittedly is difficult. Identity of prices for short periods of time on homogeneous products such as cement, sand, etc., may be the result of competition. The problem is to determine whether or not the identical prices are the result of competition or conspiracy. For this task one must be aware of the dynamic concept of the law of conspiracy.

This Commission attempted in Count II of the *Rigid Conduit* case, Docket 4452, to attack a system of identical prices which injured

competition without the necessity of proving a conspiracy. This action engendered sharp criticism of the Commission from certain sources. The Commission recoiled from this criticism. Subsequently, it has been the policy of the Commission to proceed in such matters only by the conspiracy route. This should not deter the Commission from giving to the law of conspiracy its full purposeful meaning in order to protect the public interest. The Courts in certain great opinions by distinguished and able members of the judiciary have shown the way. The Supreme Court stated in *U. S. v. Masonite Corporation*, 316 U. S. 265:

"It is not clear at what precise point each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement, but it is clear that as it continued, each became familiar with its purpose and scope * * *"

The Supreme Court stated in *Interstate Circuit v. U. S.*, 306 U. S. 208:

"* * * acceptance by competitors, without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

In the *C-O-Two* case, *supra*, the Court stated:

"But the trial court sitting as the trier of the facts regarded this evidence as being another one in a series of 'plus factors' which, when standing alone and examined separately, could not be said to point directly to the conclusion that the charges in the indictment were true beyond a reasonable doubt, but which when viewed as a whole in their proper setting spelled out that irresistible conclusion."

In *U. S. v. Patten*, 226 U. S. 525, the Court stated:

"the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

It is frequently noted that Federal Trade Commissioners are, or should be, experts in the field of unfair methods of competition. I fully agree. It is in conspiracy law that this expertness should be most valuable in the public interest. This Commission should be capable because of its expertness to pierce the outer deceptive facades of make-believe competitive conduct and detect the collective concert of action by conspirators underneath. The Commissioners should understand and recognize normal competitive behavior as distinguished from conspiratorial behavior. In conspiracy law the Courts have shown the way as indicated by the opinions quoted above. This Commission with its expertness should blaze the paths and thereby assure the consuming public that the prices of widely used commodi-

ties will be determined not by the few but by the impartial law of supply and demand.

If this Commission wrongs a corporation, the corporation can appeal to the Courts for relief. If this Commission wrongs the public in deciding a case, there is no appeal by the public to the Courts. We have, therefore, a great responsibility because, for the public, we are the Court of last resort.

Corporations represent wealth owned by individuals. Corporations are therefore, entitled to due process and to the impartial administration of justice. The Federal Trade Commission, when it issues a complaint, acts for the people of the United States. The people, in actions before this Commission, are also entitled to due process and to impartial justice. I am confident that all my colleagues on the Commission agree on this basic principle. In the application, there is the rub. Honest and sincere men will, and do, differ.

In conclusion, and to sum up, the prices in this industry were obviously not determined by the free play of competitive forces. Respondents claim that their practices were protected by the patent monopoly and the *General Electric* case, *supra*. The majority of the Commission states that whether or not respondents did conspire illegally, the record does not show that respondents have conspired lately.

In my opinion, this industry-wide "rigged" non-competitive pricing pattern is not protected by the *General Electric* case, *supra*. In addition, the most recent evidence in the record was to the effect that the pricing pattern was still being used. There is no affirmative evidence in the record that respondents have been competitive—lately.

I agree with the Chief Hearing Examiner that the record shows that respondents have conspired to fix prices and have restrained competition. An appropriate order to cease and desist should issue restraining respondents from continuing this conspiracy. The majority of the Commission has not directed that such order issue but has dismissed the complaint. From that action of the majority, I dissent.

Syllabus

IN THE MATTER OF
ANCHOR SERUM COMPANYDECISION AND DISSENTING OPINION IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 3 OF THE CLAYTON ACT*Docket 5965. Complaint, Mar. 14, 1952—Decision, Feb. 16, 1954*

Where a corporation which was engaged since 1913 in the manufacture, distribution, and sale of various animal health products, principally anti-hog-cholera serum and hog-cholera virus, and other biological products; was licensed since 1936 to produce and sell its products by the Bureau of Animal Industry, United States Department of Agriculture; sold its said products which it advertised nationally and by means of farm magazines, local newspapers, direct mail, billboards, and, to some extent, by radio advertising, to customers variously denominated as wholesalers, dealers, and consumers, located throughout the various States of the United States, with about 95% of such sales being to wholesalers, 4% to dealers, and 1% to consumers as defined by said Bureau; was in active and substantial competition with others similarly engaged, and one of about 32 manufacturers who produced, sold, and distributed such serum and virus in the same trade areas as did it, and who competed with it for customers who resold or used said products; and was the largest lay producer of the nine "lay" producers included in said 32 manufacturers, namely, those who sell in other than veterinarian channels, such as to drug stores, farm bureaus, wholesalers, etc., in competition, like the others, for the ultimate consumer market, viz., the farmer hog owner;

In accordance with aims and policies to obtain contracts with large-volume or wholesale purchasers, to require the latter to purchase their entire requirements from it, and to monopolize the field in said class of customers; and theretofore in free and open competition in the sale of its products in commerce but for the matters and things below set forth—

Entered into exclusive-dealing contracts, beginning in or about 1947 with 16 of its wholesale customers, in which classification were embraced all of its customer farm cooperatives in various States, including the two largest hog producing States and largest potential market for serum and virus, where the largest distributors of said products in their respective areas, contract purchasers, namely, the Iowa Farm Serum Co., with 137 dealers strategically located throughout the State's 99 counties, obligated to deal in and sell only serum and virus obtained from said Iowa company, and the Illinois Farm Bureau Serum Association, with 90 dealers similarly located in various counties and similarly obligated, enjoyed a competitive advantage over both wholesalers and retailers of serum and virus in their respective areas in that said cooperatives were able to purchase at the lower wholesale price and additionally to pay patronage dividends to their members, to the ultimate benefit of the individual farmer-consumer:

Held, That such acts and practices constituted a violation of Sec. 3 of the Clayton Act.

Before *Mr. James A. Purcell*, hearing examiner.

Findings

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Mr. William C. Kern and Mr. Andrew C. Goodhope for the Commission.

Cushman, Darby & Cushman and Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., *McBride & Baker*, of Chicago, Ill., and *Culver, Phillip, Kaufman & Smith*, of St. Joseph, Mo., for respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), the Federal Trade Commission, on March 14, 1952, issued and subsequently served its complaint in this proceeding upon Anchor Serum Company, a corporation, charging it with violation of the provisions of Section 3 of the said Clayton Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it and said testimony and other evidence were duly recorded in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel (oral argument not having been requested); and said hearing examiner, on April 10, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, respondent filed an appeal from said initial decision, and the Commission, after duly considering said appeal and briefs of counsel in support thereof and in opposition thereto, and the record herein, issued its order granting in part and denying in part the said appeal.

Thereafter, this matter regularly came on for final consideration by the Commission upon the entire record herein, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Anchor Serum Company, is a corporation chartered in 1917 and organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at South St. Joseph, Missouri.

PAR. 2. Respondent is now and since the year 1913 has been engaged in the manufacture, distribution, and sale of various animal health products, principally anti-hog cholera serum and hog cholera virus (hereinafter referred to as serum and virus), and other biological products. Since the year 1936 respondent has been licensed to produce and sell its products by the Bureau of Animal Industry, United States Department of Agriculture.

PAR. 3. Respondent markets its said products by selling same to customers, variously denominated as wholesalers, dealers, and consumers, located throughout the various States of the United States and has, at all times herein mentioned, maintained a constant current of trade in commerce in its said products between and among the various States of the United States. Respondent advertises its products nationally and by means of farm magazines, local newspapers, direct mail, billboards, and, to some extent, by radio advertising.

PAR. 4. In the course and conduct of its said business respondent has been, at all times herein mentioned, in active and substantial competition in interstate commerce with persons, firms, and other corporations similarly engaged in the sale and distribution of serum, virus, and other biological products.

PAR. 5. There are approximately thirty-two manufacturers who produce, sell, and distribute serum and virus in the same trade areas as respondent and who compete with respondent for customers who resell or use the said products. All such manufacturers are known in the trade as either "lay" or "vet" producers, such characterization being determined by, and descriptive of, the type of customer to whom they sell. "Vet" producers sell principally to veterinarians or to wholesalers who resell exclusively to veterinarians, and "lay" producers sell in other than veterinarian channels, such as to drugstores, farm bureaus, wholesalers, etc. All producers compete for the ultimate consumer market, viz, the farmer hog owner. The total of thirty-two manufacturers is divided into twenty-three "vet" and nine "lay" producers, of which latter category the respondent is the largest.

Respondent sells to three classifications of customers divided, percentage-wise, approximately as follows: To wholesalers, 95%; to dealers 4%; and to consumers 1%, all of these categories of purchasers being defined by the Bureau of Animal Industry (U. S. Department of Agriculture) Order Regulating the Handling of Anti-Hog-Cholera Serum and Hog-Cholera Virus, as Amended (Sept. 1, 1952).

PAR. 6. Respondent, in the course and conduct of its said business, has executed written contracts of sale of its products with sixteen of its wholesale customers. While the specific language of these contracts varies, each contract contains a clear and unambiguous clause requiring the customers to purchase all their requirements of serum, virus, and other biologicals or pharmaceuticals, which respondent sells, only from the respondent. An example of the specific language

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employed in four of such contracts (those of the Illinois Farm Bureau Serum Association and the Iowa Farm Serum Company being selected) follows:

Association agrees: 1. To buy, and does by these presents buy, and agrees to pay for all of its requirements of serum, virus and other products at the prices and on terms specified herein.

Seven of such contracts, specifically between respondent and its wholesale customers located in Sioux City, Iowa, Jackson, Mississippi, South St. Paul, Minnesota, National Stock Yards, Illinois, Grand Island, Nebraska, Albuquerque, New Mexico, and Shreveport, Louisiana, all contain the following quoted provision:

In consideration of the foregoing, the party of the second part agrees to purchase and pay for all his (their) requirements of anti-hog cholera serum, hog cholera virus and other serums, vaccines and biological products produced by the party of the first part [the respondent] and which it is able and willing to supply * * *.

All of the aforesaid contracts are currently in force and remain effective for indefinite periods of time or until canceled by expiration of specific contract periods or the happening of certain contingencies in each contract specified.

PAR. 7. The names and geographical locations of respondent's contract purchasers above mentioned, together with the sales to such purchasers of all products, expressed in dollar value, and the sales of serum, expressed in cubic centimeters (the latter for purposes of comparison where competitors' volume of business is expressed in cubic centimeters and not in dollars), and for the years indicated are as follows:

	1949	1950	1951
Anchor Serum Co. of Iowa, Sioux City, Ia.....	(\$50,274.31..... 2,728,100 cc.....	\$61,491.22..... 3,316,600 cc.....	\$91,530.80. 4,163,900 cc.
Anchor Serum Co. of Minnesota, St. Paul, Minn.....	(\$46,464.11..... 2,457,100 cc.....	\$90,031.01..... 6,014,300 cc.....	\$154,802.27. 8,925,900 cc.
Anchor Serum Co. of Illinois, Chicago, Ill.....	(\$43,355.96..... 2,857,925 cc.....	\$34,679.04..... 2,657,150 cc.....	\$47,245.25. 3,229,000 cc.
Anchor Serum Co. of Grand Island, Nebr., Grand Island, Nebr.	(\$73,839.26..... 4,266,225 cc.....	\$72,518.00..... 5,287,650 cc.....	\$93,064.44. 5,715,190 cc.
Anchor Serum Co. of New Mexico, Albuquerque, N.M.....	(\$9,052.04..... 422,000 cc.....	\$26,016.16..... 2,298,000 cc.....	\$31,538.67. 1,196,750 cc.
Arkansas Farmers Association, Little Rock, Ark.....		(\$5,796.89..... 351,700 cc.....	\$7,491.69. 366,600 cc.
Missouri Farmers Association, Inc., Columbia, Mo.....		(\$48,805.09..... 3,113,200 cc.....	\$51,061.56. 3,197,650 cc.
Anchor Serum Co. of Spokane, Spokane, Wash.....		(\$3,480.86..... 152,500 cc.....	\$7,867.30. 314,000 cc.
Anchor Serum Co. of Charlotte, Charlotte, N. C.....	(\$5,517.36..... 2,711,400 cc.....	\$33,663.83..... 2,828,750 cc.....	\$52,410.89. 4,020,000 cc.
Anchor Serum Co. of San Angelo, San Angelo, Tex.....	(\$4,922.27..... 99,200 cc.....	\$15,777.05..... 298,300 cc.....	\$27,421.37. 325,900 cc.
Hiram T. French & Wife, Fresno, Calif.....	(\$16,319.63..... 729,150 cc.....	\$23,239.69..... 1,499,300 cc.....	\$32,649.01. 2,225,000 cc.
Illinois Farm Bureau Serum Association, Chicago, Ill.....	(\$535,708.61..... 38,842,150 cc.....	\$454,752.58..... 40,649,200 cc.....	\$507,107.19. 40,037,700 cc.
Iowa Farm Serum Company, Des Moines, Ia.....	(\$549,373.85..... 39,836,475 cc.....	\$509,690.92..... 43,334,200 cc.....	\$605,794.11. 43,243,850 cc.
Anchor Serum Co. of Indiana, Indianapolis, Ind.....	(\$252,758.70..... 18,040,475 cc.....	\$265,462.20..... 23,697,000 cc.....	\$279,689.07. 20,413,900 cc.

It will be noted that the foregoing figures represent sales by respondent to *contract* purchasers only and do not represent sales of respondent's total output. . All such sales were made under terms of the contracts as described in Paragraph 6 hereof which contracts imposed upon the purchasers the onus or obligation to purchase respondent's products to the exclusion of the products of respondent's competitors. That the aggregate dollar value, and cubic centimeter quantity, of respondent's annual sales under such restrictive conditions to its wholesale customers have been substantial, and the wide distribution of respondent's activities in many areas of the United States, is self-evident from the foregoing sales recapitulation.

PAR. 8. The results naturally consequential to the use by respondent of its exclusive dealing contracts have been to arrogate to respondent a monopoly of a very substantial portion of the available market for serum and virus and thus to foreclose such market to competitors. For example: The States of Iowa and Illinois are the two largest hog-producing States in the country and constitute the largest potential markets for serum and virus. In the former, the Iowa Farm Serum Company, and in the latter, the Illinois Farm Bureau Serum Association, are the largest distributors of serum and virus in their respective areas, and both are contract purchasers of respondent. Respecting actual area coverage, the Iowa Company has 137 dealers located strategically throughout the State's 99 counties, all such dealers, in turn, being required to deal in and sell only serum and virus obtained from the Iowa Company; the Illinois Association has 90 dealers located in the various counties of Illinois all of whom are likewise required to deal in and sell only serum and virus obtained from the Illinois Association. The Iowa Company and the Illinois Association, exclusive dealers of respondent, are in competition with both wholesalers and retailers of serum and virus in their respective areas and enjoy a competitive advantage in that they are able to purchase at the lower wholesale price and additionally to pay patronage dividends to their members, thus ultimately inuring to the benefit of the individual farmer consumer.

PAR. 9. As a result of respondent's exclusive dealing contracts aforesaid, competing manufacturers and producers have suffered loss of a substantial volume of business by them enjoyed previous to adoption by respondent of its exclusive contracts. As examples:

A. Lederle Laboratories Division of the American Cyanamid Company (Lederle Laboratories, Inc., prior to September 1, 1946), competitor of respondent, sold serum and virus to the Iowa Farm Serum Company during the years and in the amounts following:

FEDERAL TRADE COMMISSION DECISIONS

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1945.....	\$56,757.57
1946.....	65,211.16
1947.....	17,943.14
1948.....	¹ 621.24
1949.....	None

and also sold to the Illinois Farm Bureau Serum Association as follows:

1945.....	\$172,114.08
1946.....	169,338.69
1947.....	125,903.10
1948.....	None

¹ This being an unfilled quota under its 1947 contract.

The reasons assigned by both the Iowa Company and Illinois Association for cessation of purchases from Lederle were the contracts between them and the respondent.

The following quotations are given as indicating the purposes and intentions of respondent and the results anticipated from said contracts:

Letter from respondent, dated March 20, 1947, addressed to Mr. Harry Meloy, General Counsel for Illinois Farm Bureau Serum Association:

Since visting you in your office I have been doing a lot of thinking and talking concerning our problems of proposing to you a suitable proposition *covering a long term purchase of all of your serum and virus requirements from us.* We now have the following proposition to make to you.

*This is to be for a long term contract covering five years with an option of renewal for every five year period thereafter and it may be terminated by either party with the giving of eighteen months written notice of such. * * * It is also understood that your entire purchases of serum and virus be covered in this contract and that we are to furnish all of your requirements. * * ** (Italics supplied.)

And again, letter from respondent, dated June 5, 1947, addressed to Mr. Sam Russell of the Illinois Farm Bureau Serum Association, *inter alia*, as follows:

* * * I note that you state that *the serum you have purchased from Lederle* will have been delivered by about June 15th, although it is possible it is apt to ust a little longer time. It is completely satisfactory with us if you would like to set a date farther in the future so that you could give your counties a definite me when they could make the change.

It is also stipulated in the contract that when you get into an organized cterin and pharmaceutical department you would purchase these products om us. In the meantime I have a salesman who is going to work the State Illinois, calling on your counties in the promotion of these new products. I uld appreciate it very much if you would get a letter out to all of your unties advising them of his coming and to show him all possible courtesy, and ou deem it helpful, *I would appreciate your mentioning the fact that all of*

*the serum and virus requirements are being purchased from this company. I would appreciate receiving a copy of the letter you send out to these counties for my information. * * * [Italic supplied.]*

Respondent introduced testimony to the effect that the Illinois Association was the moving party in negotiating the original cost-plus exclusive contract with respondent and, during the negotiations, opportunity was afforded Lederle to compete for the business but nothing came of it. Such evidence was also to the effect that the Illinois Association, by such a contract, sought to assure its members a constant and uninterrupted flow of serum and virus in large quantities and at critical periods, yet it is significant to note that no testimony was offered complaining of the quality or quantity of goods furnished the Association by Lederle during the years preceding 1948, when the first exclusive contract was effectuated.

Irrespective of the contention that the Illinois Association was the movant in negotiating the contract, the fact remains that the contract (and succeeding ones) became a *fait accompli* and must speak for itself, and the parties thereto are chargeable with the results flowing therefrom.

B. The Diamond Serum Company of Des Moines, Iowa, a competitor of respondent, sold virus and serum to Iowa Farm Serum Company during the years and in the amounts following:

	<i>Virus</i>	<i>Serum</i>
Oct. 1, 1945–Sept. 30, 1946-----	{ 830,985 cc----- \$15,950.09-----	11,814,015 cc. \$79,403.72.
Oct. 1, 1946–Sept. 30, 1947-----	{ 834,340 cc----- 16,686.35-----	12,769,675 cc. \$90,469.73.
Oct. 1, 1947–July 30, 1948-----	{ 190,950 cc----- \$2,199.00-----	1,961,000 cc \$15,087.39.

The sales by Diamond to the Iowa Company for the fiscal period 1945–1946 represented the entire production of Diamond, and during the next succeeding period 1946–1947, Diamond had but one other customer than the Iowa Company, and Diamond's last sale to Iowa Company was in July 1948. The record is silent as to why the Iowa Company ceased doing business with Diamond, but when the fact that respondent entered into its full-requirement contract with Iowa on April 29, 1947, is considered together with the advantages accruing to Iowa by reason thereof, the resulting cessation of sales speaks for itself. Here again, as in the instance of the Illinois Association, respondent brought out that the Iowa Company, through its counsel, sought the contract and, while offering to negotiate with Lederle on a similar basis, did not approach Diamond. On this attempted defense showing the same conclusion must be reached as in the same circumstances set up concerning the Illinois Association.

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Further analysis from the viewpoint of injury to competition inuring to Lederle and Diamond is graphically illustrated by the following figures showing increased sales by respondent to Illinois Association and Iowa Company, the year 1946 having been selected as the starting point because it is the last complete year of sales under free competitive conditions and before the 1947 full-requirement contracts were initiated by the respondent:

Sales by Respondent to:—

Illinois Farm Bureau Serum Association:

1946	-----	\$134,737.48.
		16,558,200 cc.
1947	-----	\$327,727.77.
		26,034,150 cc.
1948	-----	\$504,846.55.
		36,742,795 cc.
1949	-----	\$535,708.61.
		38,842,150 cc.
1950	-----	\$454,752.58.
		40,649,200 cc.
1951	-----	\$507,107.59.
		40,037,700 cc.

Iowa Farm Serum Company:

1946	-----	\$133,638.70.
		16,168,325 cc.
1947	-----	\$221,836.66.
		17,132,500 cc.
1948	-----	\$497,285.49.
		36,111,295 cc.
1949	-----	\$549,373.85.
		39,836,475 cc.
1950	-----	\$509,690.92.
		43,334,200 cc.
1951	-----	\$605,794.11.
		43,243,850 cc.

On the basis of the above figures compared with the tabulations of sales by respondent's competitors to the identical purchasers, as set forth in subparagraphs "A" and "B" of this paragraph, no other finding of fact would be compatible with the results than that such ensued as a direct corollary of the respondent's exclusive full-requirement contracts and the natural effects flowing therefrom.

PAR. 10. The aims and policies of respondent were to obtain contracts with large volume or wholesale purchasers and to require the latter to purchase their entire requirements from respondent. The qualifications to attain the designation of "wholesaler" before being licensed as such by competent and legal authority (as in fact are the other categories of dealers and users) are fixed by the appropriate

control agency of the United States Department of Agriculture, and one of the requirements of a "wholesaler" is that he must have purchased at least 15,000,000 cc. of serum in the previous calendar year, i. e., he must be a large-volume purchaser. Respondent's sales are approximately as follows: 95% to wholesalers; 4% to dealers, and 1% to consumers, as defined in the B. A. I. Marketing Order as amended. All of the farm cooperative organizations, who are respondent's customers, belong to the "wholesaler" group.

Indicative of respondent's policy to monopolize the field in this class of customers, it is deemed expedient to quote from a letter of respondent to a potential customer, Fidelity Laboratories, Inc., of Chicago, dated January 19, 1948. It is regretted that the following lengthy quotation should be made but, upon the theory that one picture is worth ten thousand words, the following is presented as a picture of the respondent's aims and policies, painted in the words of its president and executive officer, and would be difficult to paraphrase without danger of misinterpretation or loss of values:

I am not particularly interested in selling serum by a million cc's or so at a time for that does not allow us to enlarge our production sufficiently to plan an increased volume throughout the year. What I would like for you to do is to contract with us for your entire requirements of anti-hog-cholera serum and virus and definitely obligate yourself to purchase a minimum number of cc's in a year's time—say, for instance, 20 or 25 million cc's and that this serum should be paid for at a certain number of cents below our wholesale price at the time of delivery. This would be a sliding scale arrangement that would be profitable to both of us and the volume of serum that you would purchase would be large enough that we could materially increase production and therefore count on reducing our overhead at the same time.

* * * * *

For your information, I have already sold for this year over 160,000,000 cc of serum and I can assure you that with this volume that our overhead costs, etc., are practically at a minimum and therefore would enable us to make serum a great deal cheaper than any other company in the country. What I want to do is to contract with other producers, wholesalers, etc., to bring our total production up to 250,000,000 cc's a year which we can comfortably produce in our plant. As you know, we are on a cost-plus arrangement with the farm bureaus and due to this contract there is no possibility of our raising the price to suit our own needs. We are out to make large quantities of serum, are set up to do the job efficiently, and frankly, are going to start cutting serum prices down to a figure that no one else will be able to touch in the country. I believe you will be making a very wise and profitable move by coming in with this on a proposed setup as I have outlined above.

In addition to the actual injury to competition above found, contracts of the type negotiated by respondent with wholesalers have had the further result and effect of enabling respondent to operate its facilities at top capacity, consistent with its foreseeable selling ability,

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and avoiding the fluctuations incident to high- and low-production periods, thus reducing unit costs to a minimum, advantages denied respondent's competitors who did not indulge in respondent's practice of securing full-requirement contracts.

PAR. 11. The policies and contracts of the respondent have had a further adverse and injurious effect, at another level of competition, upon competitors of the respondent in that the former have been seriously hampered and hindered in maintaining the interest of drugstores in the retail distribution of their products, the said drugstores being unable to compete with respondent's large wholesale customers under the aforesaid total-requirement contracts with respondent. An example of this is found in the case of Fidelity Laboratories, Inc., a competitor of respondent. Combined sales by Fidelity in the States of Iowa and Illinois to its customers follow :

<i>Year</i>	<i>Serum</i>	<i>Virus</i>
1945-----	{ \$31,554.72----- 4,688,800 cc----	\$6,474.12. 340,920 cc.
1946 (1st 6 mos. only; figures for last 6 mos. unavailable).	{ \$17,028.91----- 2,216,050 cc----	\$3,380.57. 164,180 cc.
1947-----	{ \$35,396.71----- 3,151,035 cc----	\$6,529.34. 224,285 cc.
1948-----	{ \$11,187.66----- 893,150 cc-----	\$3,528.49. 109,745 cc.
1949-----	{ \$16,253.60----- 1,377,850 cc----	\$2,763.58. 88,040 cc.
1950-----	{ \$12,789.97----- 1,270,100 cc----	\$2,501.41. 93,015 cc.
1951-----	{ \$13,034.31----- 943,250 cc-----	\$1,293.95. 41,195 cc.

Examination of the foregoing figures indicates the time of break or decline in Fidelity's sales took place in 1948, which is concurrent with the time of negotiation and effective dates of respondent's contracts with its wholesalers as hereinbefore delineated. And further, Fidelity enjoyed 36 drug store accounts in these States in the year 1945; it had only 23 in 1948 and but 12 in 1951. An attempt to meet this situation by placing traveling salesmen in these States failed because of the aforesaid competition.

PAR. 12. Not only is the aggregate dollar volume of serum and virus and other products sold by respondent to its customers pursuant to the restrictive conditions and agreements hereinabove found to be substantial, but such sales, made under such conditions and restrictions, materially lessen competitive sales in each of the trade areas in which said customers are located; and respondent, during all the time mentioned in the complaint, would have been, and would now be, in free

and open competition in the sale of such products in commerce were it not for the suppression of said competition in the manner and form hereinabove found.

PAR. 13. Respondent's sales and contracts for sale of serum and virus on the aforesaid conditions, agreements, and understandings that the purchasers thereof shall not purchase like or similar products of competitors may have, have had, and now have, the effect of substantially lessening competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent are engaged; and have had, and now have, a tendency to create a monopoly in respondent in the sale in commerce of such products sold by the respondent.

CONCLUSION

The record in this proceeding establishes that respondent has entered into contracts with sixteen of its wholesale customers under which these customers have agreed to purchase their entire requirements of anti-hog cholera serum, hog cholera virus, and other products sold by the respondent, from respondent. Respondent is the largest of nine "lay" producers of serum and virus in the United States. Respondent's sales to its sixteen wholesale customers who have agreed to purchase their entire requirements of serum, virus, and other products from respondent have increased considerably since the execution of the agreements, and respondent's volume of business under these agreements is substantial. As a result of respondent's exclusive dealing arrangements with sixteen of its wholesale customers, a very substantial portion of the available market for serum and virus has been foreclosed to respondent's competitors, and competing manufacturers and producers have suffered the loss of a substantial volume of the business enjoyed by them previous to the execution by the respondent of the restrictive contracts.

It is thus established that respondent has made sales and contracts for sale of its products on the condition, agreement, and understanding that the purchasers shall not deal in like or similar products of competitors and that the effect of such sales and contracts for sale on such condition, agreement, and understanding has been to substantially lessen competition between respondent and its competitors and to tend to create a monopoly in the respondent.

Respondent introduced evidence to the effect that its contracts with certain of its large volume purchasers, whose names included the word "Anchor," were entered into for the purpose of protecting the "Anchor" name and respondent's investment and extensive advertis-

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ing to promote that name. Some of these customers were Anchor Serum Company of Iowa; Anchor Serum Company of Mississippi; Anchor Serum Company of Minnesota; Anchor Serum Company of Illinois; Anchor Serum Company of Grand Island, Nebraska; Anchor Serum Company of New Mexico; and Anchor Serum Company of Louisiana. Respondent's contracts with these purchasers were on a full-requirement basis and all of them contained the provision that the purchaser was:

* * * at liberty to make such purchases elsewhere to the extent the party of the first part [respondent] is unable or unwilling to supply the same.

Respondent claims that these contracts, with their restrictive provisions, are fully justified because their purpose was to protect respondent's trade name and good will attaching to the name "Anchor." It is noted, however, that the evidence fails to indicate that these purchasers would improperly brand or advertise competitive products handled by them or that they would do any other act inimical to the respondent in the absence of the restraint imposed by the contracts. Nor is there any evidence indicating effort on the part of the respondent to assure it adequate protection without resorting to methods which are clearly unlawful. See *International Business, etc. v. United States*, 298 U. S. 131.

Respondent also introduced the testimony of authorized agents of two of its large volume contract purchasers, with whom it had full-requirement contracts, to the effect that negotiations for such contracts had been initiated by the purchasers and not by the respondent. Such testimony further tended to show that this action was motivated by a desire on the part of the purchasers to achieve assured continuity of a supply of respondent's products, and that such contracts would be otherwise beneficial to the purchasers in giving them advantageous prices and freedom from "shopping" around among the various producers in the industry.

In the Commission's view, no consideration of economic merit, expediency, or necessity is sufficient to constitute an adequate defense to those acts which are proscribed by the applicable provisions of the Clayton Act here invoked. It is, therefore, immaterial at whose instance the negotiations for the contracts were instigated, or whether the contracts were for the benefit of respondent or its customers. It may be pertinent to here point out also that these parties are the only ones whose interests were considered by the respondent, as a result of which the tri-dimensional aspect of the situation was disregarded and the interests of the public and of those competitors of the respondent to whom injury ensued from the acts of the respondent were not con-

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sidered. *United States v. United Shoe Machinery Corp.*, 264 Fed. 138; *United States v. International Business Machines Corp.*, 13 F. Supp. 11, *aff'd* 298 U. S. 131; *United Shoe Machinery Corp. v. United States*, 258 U. S. 451; and as particularly apposite: *Standard Oil Co. of Calif. v. United States*, 337 U. S. 293.

Respondent challenged the jurisdiction of the Commission on the ground that jurisdiction of the subject matter is vested solely in the Department of Agriculture by the Anti-Hog Cholera Serum and Hog Cholera Virus Act of 1935 (7 U. S. C. A. §§ 851-855). This contention finds no support in the specific language of the said Act, nor in any reasonable construction thereof. Further, neither the order of the Secretary of Agriculture nor the marketing agreements entered into pursuant to the directions and authority of said Act are susceptible of any such construction, nor indeed could they be effective to oust the Commission's jurisdiction in the absence of clear and unequivocal legislative language of specific intent.

The respondent is not exempt from the operation of the antitrust laws, as the only contracts exempted by the said Act are those provided for in the Act. This question of exemption from operation of the antitrust laws was considered in the case of *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 153 F. 2d 907, which was a suit for treble damages against Anchor Serum and the Illinois Farm Bureau Association to recover for violation of Section 2 of the Clayton Act, as amended. In that case the same plea of exemption was urged by this respondent, with adverse results to it. See also: *Hinton v. Columbia River Packers*, 131 F. 2d 88; *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531.

The Commission therefore concludes that the acts and practices of the respondent as hereinabove found constitute a violation of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act).

ORDER

It is ordered, That the respondent, Anchor Serum Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of anti-hog cholera serum or hog cholera virus in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making a contract or agreement for the sale of any such products on the condition, agreement, or understanding that the

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purchaser of said products shall purchase all of his (its) requirements from respondent or that otherwise requires that the purchaser thereof shall not use or deal in or sell the goods, wares, and merchandise of a competitor or competitors of the respondent.

2. Enforcing or continuing in operation or effect any condition, agreement, or understanding in, or in connection with, any existing sales contract, which condition, agreement, or understanding is to the effect that the purchaser of said products shall purchase all of his (its) requirements from respondent or which otherwise requires that the purchaser thereof shall not use or deal in the goods, wares, and merchandise of a competitor or competitors of the respondent.

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

Commissioners Mason and Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

The Commission's "Order Disposing of Respondent's Appeal from Initial Decision of the Hearing Examiner" states, among other things:

"One of respondent's contentions is that there is insufficient evidence in the record to support the hearing examiner's findings with respect to 'other biological products,' and that, therefore, the hearing examiner was not warranted in including 'other biological products' in the prohibitions of the order. The Commission agrees with this contention of the respondent."

I disagree with the majority of the Commission when it concludes that the above-quoted contention of the respondent is sufficient to warrant a modification of the Order recommended by the Hearing Examiner in this matter, which Order applied its inhibitions to "*anti-hog cholera serum or hog cholera virus or other biological products or similar or related products*." The Commission, having been convinced by the argument made by respondent, has modified the Order of the Hearing Examiner by limiting such Order to "*anti-hog cholera serum or hog cholera virus*." This I believe to be error.

By referring to the very "Findings as to the Facts" which the majority of the Commission uses as the basis for its modified Order, we find that in Paragraph Four thereof, the Commission states:

"In the course and conduct of its said business respondent has been, at all times herein mentioned, in active and substantial competition in interstate commerce with persons, firms, and other corporations

similarly engaged in the sale and distribution of serum, virus, *and other biological products.*" (Italics added.)

From the foregoing, it must be concluded that the Commission is convinced that the subject respondent is in competition with other firms not only in the sale and distribution of serum and virus, but also in the sale and distribution of other biological products.

In Paragraph 6 of the Commission's "Findings as to the Facts," the Commission, among other things, states:

"Respondent, in the course and conduct of its said business, has executed written contracts of sale of its *products* with sixteen of its wholesale customers. While the specific language of these contracts varies, each contract contains a clear and unambiguous clause requiring the customers to purchase all their requirements of serum, virus, *and other biologicals or pharmaceuticals*, which respondent sells, only from the respondent. (Italics added.)

This Finding appears to be conclusive as to the extent of the exclusive dealing contracts of the respondent. Such contracts relate not only to serum and virus, but also to "other biologicals or pharmaceuticals."

In Paragraph 9 of its "Findings as to the Facts," the Commission, among other things, states:

"As a result of respondent's exclusive dealing contracts aforesaid, competing manufacturers and producers *have suffered loss of a substantial volume of business* by them enjoyed previous to adoption by respondent of its exclusive contracts." (Italics added.)

This finding of the Commission does not say that the competing manufacturers and producers have suffered loss of a substantial volume of only their business in anti-hog cholera serum or hog cholera virus. It states that the competing manufacturers and producers *have suffered loss of a substantial volume of business*—which must be read to include serum, virus and other biologicals as well. (By referring to Paragraph Four of the "Findings as to the Facts," we note that respondent's competitors are engaged in the sale and distribution of serum, virus, and other biological products.)

Paragraph 12 of the Commission's "Findings as to the Facts" reads as follows:

"Not only is the aggregate dollar volume of serum and virus *and other products* sold by respondent to its customers pursuant to the restrictive conditions and agreements hereinabove found to be substantial, but such sales, made under such conditions and restrictions materially lessen competitive sales in each of the trade areas in which said customers are located; and respondent, during all the time mentioned in the complaint, would have been, and would now be, in fre

and open competition in the sale of *such products* in commerce were it not for the suppression of said competition in the manner and form hereinabove found." (Italics added.)

By the use of the term "other products" in the above-quoted Finding, the Commission must have intended to refer to the other biological products or similar or related products which are sold by the respondent. What else could the Commission have intended?

I am of the opinion that the record in this case is sufficient to warrant the issuance of a cease and desist order against this respondent in the language as recommended by the Hearing Examiner. The Order of the Commission should apply not only to anti-hog-cholera serum or hog cholera virus, but also to other biological products or similar or related products.

The reasoning used by the Commission in the order issued herein seems to indicate that in a Section 3 proceeding, the Commission has the burden of proving "effect upon competition" for each and every product distributed by a respondent. I am not willing to bind myself to such an interpretation of the statute. It is my opinion that whenever a manufacturer enters into exclusive dealing contracts with its customers, and such contracts cover *all of the products* manufactured by such respondent, the Commission need only show that the effect of such contracts may be substantially to lessen competition in its field of operation. If such manufacturer sells or distributes 100 separate and distinct but related products, the Commission should not be required to prove the effect upon competition as to each and every one of the 100 products. It should suffice, when exclusive dealing contracts cover a manufacturer's entire line of products, if the Commission were required to prove the effect upon competition of such exclusive dealing contracts. Competition, in this case, must of course relate to competition among those distributing approximately the same line of goods.

In this instant case, the respondent sold anti-hog-cholera serum, hog cholera virus, and other biological products. Its competitors sold the same line of products, although some may have sold only the serum and the virus. Consequently, even if we grant for the sake of argument that in the instant case, counsel in support of the complaint only proved the "effect upon competition" as it relates to anti-hog-cholera serum and to hog cholera virus, the Commission may nevertheless issue its Order in such form as to apply also to "other biological products or similar or related products."

As authority for my opinion in this matter, I should like to cite the decision of the Supreme Court of the United States in the matter of *Federal Trade Commission v. The Ruberoid Co.*, 343 U. S. 470 (1952). The Ruberoid case involved a violation of Section 2 (a) of the Clayton

Act, as amended by the Robinson-Patman Act. Since the instant case involves a violation of Section 3 of the same Act, I should like to point to similarities in the two sections. Section 2 of the Clayton Act pertains to discriminations in price, service or facilities. However, Section 2 does not make unlawful all such discriminations. They are unlawful only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly *in any line of commerce*, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them." (Italics added.) Section 3 pertains to tying or exclusive leases, sales or contracts. However, not all such leases, sales, or contracts are unlawful. They are unlawful only "where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly *in any line of commerce*." (Italics added.)

From the foregoing, it may be seen that the tests are approximately the same, and that both Section 2 and Section 3 use the language "in any line of commerce."

In the Ruberoid case, in disposing of the attacks made by The Ruberoid Co. upon the breadth of the Commission's order, the Supreme Court stated:

"Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

In that case, the Supreme Court also stated:

"Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.'"

In *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321 (1944), the United States Court of Appeals for the Seventh Circuit had before it, among other things, the question pertaining to the in-

sufficiency of the evidence to support the order as entered by the Commission. There, the Court said:

"Complaint is made that the *evidence* chiefly concerned itself with blue print paper and other reproduction papers and cloths, whereas the *order* covers a multitude of items as to some of which there was little or no evidence."

Notwithstanding the foregoing complaint made by respondents, the Seventh Circuit approved the order of the Commission.

In *Local 167 v. United States*, 291 U. S. 293 (1934) the Supreme Court considered an appeal from an injunction issued under the Sherman Act for violations of Sections 1 and 2 thereof. Although the principal commodity was live poultry, the injunction also included "poultry feed, or other commodities necessary to the poultry business." In approving the breadth of the injunction issued therein, the Supreme Court said:

"Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like."

In further support of my position, see also: *Hershey Chocolate Corporation v. Federal Trade Commission*, 112 F. 2d 968, 971-972 (3rd Cir. 1941); *Haskelite Manufacturing Corporation v. Federal Trade Commission*, 127 F. 2d 765, 766 (7th Cir. 1942); *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58-59 (4th Cir. 1950); *Consumer Sales Corporation v. Federal Trade Commission*, 198 F. 2d 404, 408 (2nd Cir. 1952).

Based upon the record in this case, and based upon the same "Findings as to the Facts" adopted by the majority of the Commission, it is my opinion that the Order to Cease and Desist included in the initial Decision of the Hearing Examiner should have been adopted in its entirety by the Commission.

Commissioner Mason concurring.

Decision

IN THE MATTER OF
ASTOR INDUSTRIES, INC. ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5889. Complaint, June 27, 1951—Decision, Feb. 17, 1954

Where a corporation and its three officers, engaged in the competitive sale to distributors and retailers of sewing machine heads imported by them from Japan, upon some of which there appeared on the back of the vertical arm a decalcomania displaying the word "Japan" and upon some of which there appeared on brass or brass colored medallions on the front of the vertical arm, the words "Reg. Applied for Hudson" or "Reg. Applied for Hudson, Japan", and of the completed sewing machines of which said heads were a part, and, as thus engaged, in attaching to said heads at the only place provided therefor motors marked "Made in U. S. A." thus concealing the aforesaid marking on said imported heads—

- (a) Offered and sold the aforesaid machines upon some of which the word "Japan" as included on the front of the vertical arm, as above set forth, was, by virtue of the lettering, coloring, and general arrangement, indistinct, difficult to read, unemphasized, and distinguishable only by careful inspection, with no adequate marking to show the place of manufacture or origin of said imported heads; and
- (b) Falsely represented that their said sewing machines were manufactured by or connected in some way with the Hudson Motor Car Company, through conspicuously branding their said machines with the name "Hudson" and use thereon of the words "The Hudson Sewing Machine Co.", and the featuring of said name in instruction booklets, advertising circulars, displays, and letters:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of their competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William L. Taggart for the Commission.

Mr. Joseph N. Klapper, of New York City, for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 27, 1951, issued and subsequently served its complaint in this proceeding upon Astor Industries, Inc., a corporation, and Max Goldberg, Manny Goldberg, George Zuckerman, Henry Spiegelman, and John D. Bussel, individually and as officers of said corporation, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in