Syllabus

IN THE MATTER OF

ANCHOR SERUM COMPANY

DECISION 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.

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, percentagewise, 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

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	$16,3[illegible]9.63 729,150 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	$507,107.59. 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:

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* ill have been delivered by about June 15th, although it is possible it is apt to st a little longer time. It is completely satisfactory with us if you would like 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 m 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 nties 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:

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

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.
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> * * * * * * *
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> 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 forseeable selling ability,

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:

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

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-

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

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 whicl said customers are located; and respondent, during all the time men tioned 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 manfacturer 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 bypassed 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.

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