

Decision

IN THE MATTER OF
EASTMAN KODAK COMPANY

ORDER DISMISSING COMPLAINT

Docket 6040. Complaint, Sept. 8, 1952—Order, Jan. 6, 1955

Order adopting the initial decision of the hearing examiner dismissing, as within the exceptions of the McGuire Act, a complaint charging the leading concern in the photographic products industry in the United States, which operated its own 42 retail outlets in 24 States and the District of Columbia, with compelling some 75,000 independent retail stores to observe its fixed resale prices.

Mr. Fletcher G. Cohn, Mr. Paul H. LaRue and Mr. Lewis F. Depro for the Commission.

Nixon, Hargrave, Devans & Dey, of Rochester, N. Y., and *Donovan, Leisure, Newton & Irving*, of New York City, for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The Federal Trade Commission on September 8, 1952, issued a complaint charging respondent, Eastman Kodak Company, with having violated Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act,¹ by entering into contracts and agreements with retail dealers whereby respondent fixes and maintains the resale prices of amateur photographic products manufactured by it. Specifically, it is charged that such contracts and agreements are illegal in that some of the retail stores which have signed such contracts are in competition with wholly owned and controlled retail outlets of the respondent in the sale of said products to the consuming public.

Thereafter, respondent filed its answer and a motion to dismiss the complaint which was denied by the hearing examiner, on the ground that he lacked jurisdiction to consider the motion.² Respondent then filed a similar motion with the Commission, based on two separate and distinct grounds; (1) that the complaint fails to state a cause of action, and (2) that the Commission lacks jurisdiction in that the complaint fails to include certain indispensable parties as respondents.

¹ Act of July 14, 1952, Public Law 542, 2d Congress, amending Section 5 (a) of the Federal Trade Commission Act.

² The Commission held that this motion was properly filed with the hearing examiner who did have jurisdiction and should have considered it; as a matter of expediency the Commission considered and ruled on the similar motion as hereinabove indicated.

This motion was denied by the Commission on both grounds, and the case remanded to the hearing examiner for proceedings in regular course. Subsequent thereto hearings were held during which counsel supporting the complaint and counsel for respondent stipulated certain facts and presented other evidence all of which was recorded and filed in the office of the Commission. Respondent renewed its motion to dismiss "for all of the reasons heretofore stated," but ruling has been withheld by the hearing examiner pending issuance of his initial decision. Counsel in support of the complaint and for the respondent have filed proposed findings of fact, conclusions and supporting briefs.

THE FACTS

PARAGRAPH 1. The respondent, Eastman Kodak Company, is a corporation organized and existing under the laws of the State of New Jersey with its principal office and place of business located at 343 State Street, Rochester, New York. It is now and for several years last past, has been engaged in the manufacture, sale and distribution of certain professional and amateur photographic and optical materials, apparatus and equipment, as well as certain related and other chemical products. In the course and conduct of its business for many years last past, respondent has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or causes to be shipped products manufactured by it from the states in which the several places of production and business of respondent are located, to purchasers thereof located in other states and in the District of Columbia. There is and has been at all times herein mentioned, a continuous and substantial current of trade and commerce in said products between and among the several states of the United States and in the District of Columbia. Respondent's professional and amateur photographic products are sold under trade names and trade-marks owned by it, including "Kodak." Respondent's trade names and trade-marks are assets of substantial value.

PAR. 2. Respondent is the successor to the business originally established by George Eastman in 1880, and is one of the leading concerns engaged in the photographic products industry in the United States. It is the parent of certain subsidiary corporations, among which are 24 corporations all of which are named Eastman Kodak Stores, Inc., except one, the Illinois Corporation, which is named Eastman Kodak Stores Co. (herein collectively referred to as the Stores Corporations), and which are the only subsidiary corporations of respondent engaged in the sale of amateur photographic products at retail in the United States.

PAR. 3. Some of respondent's photographic products are designed for use primarily by the general public and are often referred to as "amateur products." Other of respondent's photographic products are designed primarily for professional, commercial or scientific use and such products are often referred to as "professional products." This proceeding involves only those of respondent's amateur products which are covered by its resale price maintenance agreements, designated by respondent as Retailer Fair Trade Agreements and referred to hereinafter as fair trade agreements, entered into by the respondent with retail outlets in the 45 states authorizing such agreements. There are approximately 163 such products.

PAR. 4. Respondent's amateur products are sold directly by respondent to over 10,000 stores and similar outlets which are engaged, among other things, in reselling such products at retail to the consuming public. Respondent's amateur products are also sold directly by respondent to about 350 wholesale dealers who in turn distribute them to retail stores and similar outlets. Over 75,000 retail outlets in the United States handle some or all of respondent's amateur products. Respondent's said amateur products are sold at retail only by such retail outlets and by 35 retail outlets of the Stores Corporations. Respondent has no financial or corporate interest in the business of any of said retail outlets, except with respect to the aforesaid 35 retail outlets of the Stores Corporations.

PAR. 5. Each of the Stores Corporations is incorporated in a different state of the United States, except one, which is incorporated in the District of Columbia, and each is engaged in the sale at retail of amateur and professional photographic and related products manufactured and distributed by respondent and by others, including some or all of the amateur products covered by respondent's current fair trade agreements.

The Stores Corporations are wholly owned subsidiary corporations of respondent. Respondent supervises and controls the general corporate, financial and administrative matters of the Stores Corporations, and the Secretary, an Assistant Secretary and an Assistant Treasurer of the respondent hold offices of the same title in each of the Stores Corporations, and each of these officers resides and carries out his respective duties at the principal place of business of the respondent in the City of Rochester, New York. Subject to this supervision and control, the business of the retail outlets of the respective Stores Corporations is managed by the respective local managers. In the manner

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above-described, the 35 retail outlets are conducted by the Stores Corporations.³

For the purposes of this proceeding only, it is agreed that, with respect to sales of respondent's products by the 35 retail outlets of the Stores Corporations under respondent's fair trade agreements, respondent controls the Stores Corporations and the retail outlets operated by them and requires them to abide by the terms of said agreements, including the prices stipulated therein, in those states in which fair trade acts are in effect and in said states said retail outlets have maintained and are maintaining the minimum resale prices prescribed in said agreements.

PAR. 6. Beginning in 1938, after the enactment of the Miller-Tydings Resale Price Maintenance Act,⁴ respondent offered fair trade agreements to its direct retail dealers in those states in which fair trade acts were in effect. These agreements fixed the minimum selling price, under specified conditions, at which certain of respondent's amateur products could be sold at retail. The minimum retail selling prices established under respondent's fair trade agreements relate only to products manufactured by respondent and sold under its trade-

³ The place of incorporation of each Stores Corporation and the address of each retail outlet thereof are as follows:

Place of incorporation	Principal address	Address of other stores, if any
California.....	643 South Hill St., Los Angeles.....	219 Post Ave., San Francisco, and 1210 Fifth Ave., San Diego.
Colorado.....	1635 California St., Denver	
Florida.....	129 West Adams St., Jacksonville	
Georgia.....	231 Peachtree St., Atlanta	
Illinois.....	133 North Wabash Ave., Chicago	
Iowa.....	513 Locust St., Des Moines.....	417 Nebraska St., Sioux City, and 217 Brady St., Davenport.
Louisiana.....	928 Canal St., New Orleans	
Maine.....	22 Franklin St., Boston, Mass.	
Maryland.....	309 North Charles St., Baltimore	
Michigan.....	1055 Wayne St., Detroit	
Minnesota.....	112 Fifth St. South, Minneapolis.....	3 West Superior St., Duluth, and 91 East 6th St., St. Paul.
Missouri.....	1009 Olive St., St. Louis.....	1010 Walnut St., Kansas City.
Nebraska.....	1618 Harney St., Omaha.....	1221 "O" St., Lincoln.
New Jersey.....	1020 Chestnut St., Philadelphia, Pa.....	117 South 16th St., Philadelphia, Pa.
New York.....	1 West 39th St., New York.....	356 Madison Ave., New York.
Ohio.....	1015 Euclid Ave., Cleveland.....	27 West 4th St., Cincinnati.
Oklahoma.....	315 North Broadway, Oklahoma City	
Oregon.....	730 South Morrison St., Portland	
Pennsylvania.....	606 Wood St., Pittsburgh	
Texas.....	2012 North Akard St., Dallas	
Utah.....	1400 South Main St., Salt Lake City	
Washington.....	1319 Fourth Ave., Seattle	
Washington, D. C.....	607 14th St. NW.	
Wisconsin.....	745 North Milwaukee St., Milwaukee	

⁴ Act of Aug. 17, 1937, Pub. Act No. 314, 75th Congress, 50 Stat. 693, amending Section 1 of the Sherman Act.

mark or name, and by agreement no question is raised in this proceeding as to whether or not such products are sold in free and open competition with products of the same general class produced and sold by other manufacturers. Approximately 5,500 of respondent's direct retail dealers voluntarily executed said agreements.

From the time said retailer fair trade agreements were first executed through the calendar year 1951, respondent enforced the provisions thereof to the extent authorized and required by federal and state laws. During said period, respondent obtained 39 injunctions in federal or state courts located in the States of California, Connecticut, Illinois, Massachusetts, New Jersey, New York and Pennsylvania, restraining retail dealers, some of whom were nonsigners of such agreements but who were bound thereby by applicable state laws, from selling respondent's amateur products covered by the terms of its fair trade agreements then in effect at retail prices lower than the minimum retail prices provided for therein. Execution of or compliance with any such agreement never has been a prerequisite to nor had any effect upon the availability of respondent's products to any dealer therein.

PAR. 7. On May 21, 1951, the Supreme Court of the United States decided the case of *Schwegmann Brothers, et al. v. Calvert Distillers Corporation*, and *Seagram Distillers Corporation*, 341 U. S. 384, 95 L. Ed. 1035, in which it was held that the Miller-Tydings Act did not exempt from the Sherman Antitrust Act the enforcement of a price agreement for the maintenance of minimum resale prices of trademarked commodities against a nonsigner of the said agreement. Subsequent to this decision by the Supreme Court of the United States, which rendered unenforceable its fair trade agreements except against those retailers who had actually signed the same, respondent, in accordance with the provisions of said agreements, canceled and terminated the same on May 28, 1952.

PAR. 8. The McGuire Act amending Section 5 (a) of the Federal Trade Commission Act, was passed by Congress and approved by the President on July 14, 1952. Beginning on July 28, 1952, respondent offered new fair trade agreements to its direct retail dealers in those states in which fair trade acts were in effect. Since that time, approximately 6,500 of its direct buying retail dealers in said states have entered into said agreements with respondent under which minimum selling prices are prescribed under specified conditions for the resale at retail of respondent's amateur products covered by said agreements and as prescribed therein. Said agreements are now in effect and are the only such agreements in effect.

Each of the fair trade agreements provides that it is between respondent, "the manufacturer of certain products now or hereafter made subject to this Agreement," and a dealer "engaged in selling said products at retail" and that "the parties hereto as manufacturer and retailer respectively, desire to avail themselves of the benefits of the Fair Trade Act of the state in which the dealer's principal place of business is located * * *." The products covered by said agreements are manufactured by respondent, sold under respondent's trademark or trade name for resale and are in free and open competition with products of the same general class produced and sold by other manufacturers. To the extent permissible under the McGuire Act and applicable state laws, retail dealers in respondent's amateur products are bound by said agreements whether or not they have signed the same.

PAR. 9. In those states in which fair trade acts are in effect, and in which are located retail outlets of the Stores Corporations, these retail outlets sell products manufactured by respondent and subject to respondent's fair trade agreements in the same marketing area where some other retail stores sell the said products, and pursuant to said agreements all retail outlets in said area are bound by the same prescribed minimum resale prices specified in such agreements. Each of the 35 retail outlets of the Stores Corporations is one of the leading outlets for the sale of respondent's amateur photographic products in the market area where it is located, and sells respondent's amateur products in competition with other retail outlets selling said products in the same market area.⁵

PAR. 10. For the calendar year 1951, the last full year of operation by respondent during which its fair trade agreements were in effect

⁵ For a selected list of cities, the number of other retail outlets selling amateur products manufactured by respondent within a radius of five blocks of the retail outlet of a Stores Corporation is as follows—(shown also is the number of such retail outlets buying direct from respondent)

	Other outlets	Direct buying
Atlanta, Georgia.....	45	16
Cincinnati, Ohio.....	49	15
Davenport, Iowa.....	21	5
Denver, Colorado.....	55	23
Des Moines, Iowa.....	35	10
Detroit, Michigan.....	82	23
Omaha, Nebraska.....	32	8
Seattle, Washington.....	55	19

and for which statistics are available,⁶ the net sales of the respondent and its subsidiaries totaled \$542,284,000 of which \$111,737,000, slightly less than 21%, represents sales of fair traded products; total net sales of the retail outlets of the Stores Corporations amounted to \$34,806,000 of which \$3,104,000, approximately 9%, represents sales of respondent's fair traded products; net sales of respondent's amateur products by other retail outlets was \$154,769,000 of which \$108,632,000, about 70%, represents sales of respondent's fair traded products. Sales of respondent's fair traded products by the retail outlets of the Stores Corporations amounted to less than 3% of the sales of such products by other retail outlets and less than 0.6 of 1% of respondent's total sales.

THE ISSUE

Paragraph 9 of the complaint reduces the controversy in this proceeding to a single issue, namely, whether

"The contracts and agreements entered into by respondent with its retail store customers, whereby it fixes and maintains the resale prices of many of its amateur photographic products, are illegal in that some of the said retail store customers are in competition with respondent's wholly owned and controlled retail stores in the sale of such products to the consuming public."

[†]Net sales by respondents, by stores corporations, by other outlets.*

	1950	1951	1952
(1) By Respondent and Subsidiaries.....	\$461,389,980	\$542,284,510	\$575,022,750
By Stores Corporations' Outlets:			
(2) Total.....	34,329,612	34,806,105	33,124,035
(3) Respondent's Professional & Products of other Mfrs.....	26,947,198	27,004,056	25,555,272
(4) Respondent's Amateur Products.....	7,382,414	7,802,049	7,568,763
(5) ***Respondent's fair traded Products.....	2,911,880	3,104,956	**2,509,522
By Other than Stores Corporations:			
(6) Respondent's Amateur Products.....	142,642,500	154,769,300	184,324,900
(7) ***Respondent's Fair Traded Products.....	97,203,600	108,632,900	**95,976,900
By 4 Outlets of Stores Corporations' Located in Areas not Subject to Fair Trade:			
(8) Total—All Products.....	4,241,777	4,285,794	3,963,577
(9) ***Respondent's Products Elsewhere Subject to Fair Trade.....	281,701	298,531	242,566

NOTES

*Figures in all except line (1) have been adjusted to reflect selling price to the consumer.

**Cover 10-month period only, since from May 28, 1952 to July 28, 1952, respondent's fair trade agreements were not in effect.

***Estimated since respondent's records do not show separately sales of amateur products not fair traded—Cine-Kodak film in magazines, sales to federal, state and local governments, sales to commercial and professional photographers, etc.

Do respondent's fair trade agreements fail to come within the protective provisions of the McGuire Act because respondent is not only a manufacturer but is also engaged in the operation of 35 retail outlets which compete with some of the independently-owned retail stores that are parties to the fair trade agreements?

THE STATUTE

The pertinent sections of the Federal Trade Commission Act as amended by the McGuire Act are as follows:

SEC. 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

* * * * *

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum, or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. * * *

The McGuire Act, as "H. R. 5767, a bill to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish resale prices and which are extended by State law to non-signers, [was] introduced by Rep. McGuire (N. Y.), October 17,

1951, enacted into law by the 82nd Congress and signed by the President of the United States on July 14, 1952.”⁷

The purpose of the McGuire Act is clearly set forth in the report of the Committee on Interstate and Foreign Commerce of the House.⁸

The primary purpose of the bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act (act of August 17, 1937, title VIII, 50 Stat. 673, 15 U. S. C. sec. 1), to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann v. Calvert Distiller Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair-trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply.

The end result of the Supreme Court decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. H. R. 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear the Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers.

In the House discussion, Congressman McGuire said with reference to his proposal—“The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts, so far as interstate commerce is concerned, that type of resale price maintenance contract which is permitted by the fair trade acts of 45 States.”⁹

Counsel in support of the complaint rely on that portion of Section 5 (a) (5) of the Act which states that the preceding provisions of the Act shall not make lawful price maintenance agreements “between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.” This qualifying provision of the McGuire Act is in exactly the same words as a similar proviso in the Miller-Tydings Act. Hence, so far as the issue in this case is concerned, the purpose of the two Acts is identical. Likewise, as to this issue, the interpretation of both Acts should be the same.

⁷ Resale Price Maintenance, Legislative History H. R. 5767, title page. The Bill passed the House May 8, 1952 by a vote of 196 to 10 (Cong. Record May 8, 1952, p. 5033) and the Senate July 2, 1952 by a vote of 64 to 16 (Cong. Record, July 2, 1952, p. 9145).

⁸ Rept. 1437 82d Cong., 2d Sess., pp. 1 and 2, House of Representatives.

⁹ 98 Cong. Rec. 4979, May 7, 1952.

CONSTRUCTION OF THE ACT

For the purposes of this case it is established that the requirements of Section 5 (a) (2) of the Act have been met in that (a) the fair traded products are manufactured by the respondent and bear its trade-mark, brand or name, (b) the contracts are with vendees who resell respondent's products at fair trade prices, (c) the products are in free and open competition with products of the same general class produced by others, and (d) fair trade agreements are lawful as applied to intrastate transactions under statute, law or public policy in each of the states in which the agreements are in effect.

The Act clearly authorizes vertical price fixing agreements when these conditions are met. But counsel in support of the complaint contend that the agreements are illegal because (1) respondent is a retailer and therefore the agreements are between retailers, and (2) respondent, as a retailer, is in competition with some of the other retailers who have entered into the agreements; hence the agreements are not vertical but horizontal and fail because they fall within the non-exempt classifications of Section 5 (a) (5) of the Act.

Counsel in support of the complaint assert that the language of the Act is clear and that it is an elementary principle of law that where the language of a statute is clear and unambiguous, legislative history and other aids may not be used to support a construction which adds to or takes from the significance of the words employed. Counsel for respondent agree that the language of the statute is clear but they and counsel in support of the complaint arrive at diametrically contradictory interpretations of the Act. The Commission, ruling upon the motion to dismiss in this preceeding, were not unanimous in their conclusions, and there was disagreement in the *Doubleday* case¹⁰ where the same issue was presented in an interlocutory appeal. In neither case has a final decision been rendered. It is evident that the meaning of the Act is not clear and that interpretation is required.

How shall that interpretation be made? In 1928, Justice Holmes, speaking for the Court, in *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48, stated:

It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.

Earlier, Chief Justice Marshall stated the rule in *United States v. Fisher*, 2 Cranch 358, 386, 1805):

¹⁰ In the *Matter of Doubleday and Company, Inc.*, Federal Trade Commission Docket No. 5897, Complaint issued June 29, 1951.

It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. * * * Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived.

Justice Frankfurter, in his dissent in *United States v. Monia*, 317 U. S. 424, 431 (1943), suggested the proper approach to this problem, as follows:

The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. * * * A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute * * * is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining an inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.

In 1943, the Supreme Court, in *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479 states its position:

But words are inexact tools at best, and for that reason there is wisely no rule forbidding resort to explanatory legislative history no matter how clear the words may appear on "superficial examination."

The decisions uniformly hold that in determining the purpose and intent of a statute the entire legislative history of the statute may be searched for every possible explanation.

The cardinal rule in statutory interpretation is to seek the legislative intent and purpose so that statutes may be properly administered and enforced.¹¹

When the Miller-Tydings bill was first offered it did not contain the proviso clause but this was added by Senator Tydings before the enactment of the measure at the suggestion of the Attorney General. In speaking of the amendment, Senator Tydings said:¹²

The amendment provides that nothing in this particular provision shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, or retailers with retailers. That is made absolutely certain. I do not think it was necessary, but I was glad to put it in to place the matter beyond the peradventure of a doubt.

In the Congressional debates on the Miller-Tydings Act, Representative McLaughlin pointed out that it was the purpose of the Act to permit fair trade agreements between the seller and the retailer buyer of an article but not to permit horizontal agreements. He said:

The act does not legalize contracts to maintain prices between manufacturers or sellers of different trade-marked articles of the same class or character.

¹¹ U. S. v. N. E. *Rosenblum Truck Lines*, 315 U. S. 50, 53 (1942).

¹² 81 Cong. Rec., p. 7496 (1937).

It only authorizes or permits contracts between the seller and the buyer, regarding resale price, *as to a particular article*, and then only provided that article is in free and open competition with articles of a similar character produced or distributed by others, and further provided only that the contract is authorized under the laws of the State in which it is to be carried out. The act, as amended in the Senate, and as now before the House in the conference report, specifically provides that the act shall not make lawful any contract or agreement providing for establishment or maintenance of minimum resale prices on any commodity covered by the act, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. As an example, *the act would not allow two manufacturers of similar trade-marked articles*, as, for instance, articles of food or drugs or clothing or soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold. The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply *authorizes contracts*, permitted by the States, *between the seller and buyer of one article*—contracts known as vertical contracts. *It does not permit contracts between seller and seller of different articles*—contracts known as horizontal contracts.¹³ (Italics added.)

The Congressional consideration of the McGuire Act provides further light. The House Judiciary Committee, favoring the enactment of resale price maintenance legislation, said:

The necessity and desirability of protecting the manufacturer's property right in trade-marks and brand names from diminution in value, is to that segment of our economy, the most important argument for the restoration of resale price maintenance.¹⁴

* * *

In the case of all fair-traded products, * * *, competitive forces and prices are supported by consumer-demand preference and not destroyed by the fixing of a price under a fair-trade contract or by means of the nonsigners' clause.¹⁵

During the debates, Congressman Hunter of California stated:

Growth of the use of trade-marks, brands and producer names has come about through a feeling of responsibility on the part of the manufacturer to produce a consistently good article at a fair price. If better manufacturing methods, increased sales and better distribution have produced a fine article at a competitive price, I feel that the manufacturer should have the right to protect his product with fair-trade provisions which apply even to nonsigners. * * *

Competition under fair-trade laws is stimulated between manufacturers who have the power to react with better products and lower prices, while competition between dealers who have no constructive effect over the product is eliminated.¹⁶

¹³ 81 Cong. Rec., p. 8141 (August 3, 1937).

¹⁴ House Report No. 1516, 82d Cong. 2d Session, p. 9 (1952).

¹⁵ Ibid, p. 15.

¹⁶ Cong. Record May 7, 1952, p. 4985.

In testimony before the House Subcommittee of the Committee on Interstate and Foreign Commerce, Representative Patman, whose Small Business Committee supported the enactment of fair trade legislation, indicated his belief that horizontal agreements have to do with different products whereas vertical agreements relate to fixing of the resale price of a single product.¹⁷

Senator Humphrey was recognized as the leading proponent of the McGuire bill in the Senate. On July 2, 1952, shortly before the vote was taken and following spirited discussion in which query was made as to the difference between vertical and horizontal pricing arrangements Senator Sparkman directed a pointed inquiry to Senator Humphrey in the following language:¹⁸

It would dispel any misunderstanding concerning lawful vertical resale price-maintenance agreements and unlawful horizontal resale price-maintenance agreements if the Senator from Minnesota would explain further for the Record the differences between the types of agreement.

To this Senator Humphrey replied:

I talked with the Senator about this matter, and I want to be very accurate. I have gone into it very carefully. * * *

In general, the test of whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, *the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.*

It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

¹⁷ Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 5767, p. 14, 82nd Cong., 2nd Sess., (1952). Part of the colloquy between Congressman Hale and Congressman Patman follows—

Mr. HALE. Why is not the vertical price fixing still monopolistic?

Mr. PATMAN. The vertical still monopolistic?

Mr. HALE. Yes.

Mr. PATMAN. Because it is in open competition with other articles of like grade and quality where they cannot agree on price.

Now if you permit horizontal price fixing too where Articles A, B and C are exactly the same, or similar, where they could go and make an agreement and say what they were going to sell for, that would be bad; that would be vicious; but that is still opposed under existing law and this does not change it.

This will permit A to fix the price on down to the retailer; it will permit B to do the same thing, and C to do the same thing; but they cannot agree among themselves. That makes competition. Then B will say, now, there is A, he is selling his commodity for so much, why can't I sell mine for just a little lower; and C will say; "Now, there is A and B. They are selling theirs at a certain price, and I believe I will put mine in a little lower."

You see this brings about competition there between them from the top clear on down, but it is still unlawful to have horizontal or across-the-board price fixing, but permits vertical price fixing.

Mr. HALE. Then your argument in brief is that vertical price fixing does not suppress competition whereas horizontal price fixing suppresses competition.

Mr. PATMAN. That is better than I could state it myself.

¹⁸ Cong. Rec., July 2, 1952, p. 9124.

Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. *While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.* (Italics added.)

The legislative history indicates that Congress saw no incongruity in a manufacturer entering into fair trade agreements establishing retail selling prices in his branded products even though at the same time he might be engaged in selling those same products at retail. Congress does not act in a vacuum but takes note of current business and industrial customs and practices. It is common knowledge that individuals, corporations and business organizations frequently act in dual capacities—often in conflicting dual capacities, carrying on practices and performing acts in one capacity which cannot be undertaken in any other capacity, the only restriction being that the functions relevant to the various capacities be kept separate.

Many manufacturers sell direct to the retail trade. Some sell to wholesalers exclusively. Others sell to wholesalers, to retailers and to the public, direct or through subsidiary organizations.¹⁹ These are all common business practices of which Congress was cognizant when it enacted the McGuire Act, as is shown by the debates upon the bill. The argument of counsel in support of the complaint ignores the complexity of the marketing structures of the present day business world and, if accepted, would to a great extent nullify and frustrate the purpose and intent of the McGuire Act.

CONSTRUCTION OF THE ACT BY THE COURTS

During the Congressional debates frequent references were made to the decisions of the courts. Senator Hunt said:

It is significant that prevailing interpretations and court decisions during a 18-year period following passage of the Miller-Tydings Act enabled the State fair-trade laws to be effective.²⁰

¹⁹ "Selling the U. S. Market" issued by the U. S. Dept. of Commerce in 1951 shows distribution methods for manufactured products of all industries based on 1939 sales, as follows (p. 29):

	Percent
Sales to or through own wholesale branches.....	22.4
Sales to or through own retail stores.....	2.1
Sales to wholesalers, jobbers and retailers.....	44.7
Sales to consumers at retail.....	1.6
Sales to industrial and other large users.....	26.0
Export sales.....	3.2
Total.....	100.0

²⁰ Cong. Rec. July 2, 1952, p. 9138.

The fact is significant that since 1937, no court has found any fair trade agreement invalid because the manufacturer-signer was also engaged in wholesale, or retail operations. It is significant too that in the many cases that have been brought in the various courts, both state and federal, to enforce fair trade agreements, the fact that one of the signers was operating in a dual capacity has been noticed but few times and never has been made the basis of a decision. The latest case cited by counsel in support of the complaint and discussed by respondent's counsel, is *General Electric Co. v. S. Klein on the Square, Inc.*,²¹

This was an action to enjoin defendant Klein from selling merchandise at less than the resale price established by plaintiff in its fair trade agreements. Defendant, among its defenses, alleged that General Electric in violation of the antitrust acts was a party to various price-fixing combinations and conspiracies with retailers, wholesalers and other manufacturers, particularly that it had entered into a conspiracy with its wholesale subsidiary, General Electric Supply Company, some of its other wholesalers and a large number of retailers to establish wholesale prices and retail prices. The court pointed out that violation of the antitrust acts would not in itself be a defense to the injunction action, and disregarding the dual capacity in which the plaintiff was operating, granted the injunction, stating (p. 57) :

* * * there is no evidence that plaintiff has agreed or conspired with other producers or with any wholesalers to fix any prices. It has exercised its clear legal right to have retailers agree that they will not sell at less than the prices stipulated by plaintiff, and it has suggested to wholesalers the prices at which it thinks such wholesalers should sell to retailers, but further than that it has not gone.

The Klein case does not support the position of counsel supporting the complaint. In *Old Dearborn Distributing Company v. Seagram Distillers Corporation*,²² an injunction was allowed to prevent violation of appellee's resale price agreements applicable on the retail level, even though in other branches of appellant's business it was a wholesaler as was appellee. There was no discussion of this relationship.

In *Doubleday, Doran & Company, Inc. v. R. H. Macy & Co., Inc.*,²³ the decision denying an injunction was based on the grounds that the defendant was a nonsigner of the fair trade agreements and that the New York Fair Trade Act was unconstitutional in that it attempted to bind nonsigners as well as signers of fair trade agreements. The

²¹ 121 N. Y. S. 2d 37, Supreme Court of N. Y. County, February 20, 1953.

²² 299 U. S. 183 (1936).

²³ 269 N. Y. 272 (1936).

fact that the agreement sought to be enforced was between Doubleday, Doran & Company, Inc., and its subsidiary corporation, Doubleday Doran Book Shops, Inc., a distributor and seller, did not enter into the decision.

In the case of *Gillette Safety Razor Co. v. Green, et al.*,²⁴ an action to enforce a fair trade agreement, the court said, "There is nothing in the law to prohibit a manufacturer or producer from selling both wholesale and retail * * *." However, the decision rested on other grounds.

In *General Electric Co. v. R. H. Macy & Co.*,²⁵ relief was granted to enforce a fair trade agreement through a General Electric subsidiary was selling direct to consumers in competition with defendant. A similar situation existed in *Westinghouse Elec. Corp. v. Disco N. Y., Inc.*²⁶ where an injunction was issued.

Respondent has obtained 39 injunctions in fair trade enforcement actions in seven different states yet its right to relief has never been challenged in any court because of its retail activities. The presumption that may arise from this judicial silence will be discussed under the next subheading.

The purpose of protecting good will by fair trade legislation has been adverted to repeatedly by the courts. In the *Old Dearborn* case previously referred to, the court said (pp. 193, 195) :

The primary aim of the law is to protect the property—namely, the good will—of the producer which he still owns. * * * It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition."

In *Eli Lilly & Co. v. Saunders*,²⁷ the court said :

This good will is as much property as is coal or pig iron or wheat, subject to audit, appraisal, taxation, purchase and sale, and is the most valuable asset of many businesses. But, unlike the tangibles mentioned, it is vulnerable to assault, through the brand which symbolizes it, since it is built up principally through reputation and may be destroyed by its loss. * * *

It is not conceivable how any horizontal restriction of trade can be effected through the provisions of the statute. The restraint intended does not apply to the commodity, in its generic sense, upon which the manufacturer has expended his care and skill—it is the commodity plus the brand which identifies it, guarantees its quality, and is symbolic of the good will which rightfully belongs to the manufacturer. It is this alone which the statute desires to protect, and to the piratical use of which it applies restraint. As stated by Justice Sutherland in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, supra [299 U. S. 183, 57 S. Ct. 145, 81 L. Ed. 109, 106 A. L. R. 1476] : "The ownership of the

²⁴ 3 N. Y. S. 2d 822, 824 (Sup. Ct. N. Y., 1938) Aff'd 15 N. Y. S. 2d 142.

²⁵ 103 N. Y. S. 2d 440 (Sup. Ct. N. Y., 1951).

²⁶ 123 N. Y. L. J. 2293 (Sup. Ct. 1950).

²⁷ 216 N. C. 163 ; 4 S. E. 2d 528, 532, 535 (1939).

good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the Act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n.*, 276 U. S. 71, 91, 92, 96, 97, 48 S. Ct. 291, 295, 296, 297, 72 L. Ed. 473. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

In *General Electric Co. v. Macy* (supra), p. 445, it was said:

"The chief purpose of the statute is expressed as being to protect a producer against injury of his good will, resulting from price cutting of goods bearing his trade-mark," and, "it is the duty of the courts to interpret and enforce it [the act] so as to carry out the purposes of the Legislature."

CONSTRUCTION OF THE ACT BY LAW ENFORCING AGENCIES

Since 1937 when the Miller-Tydings Act became effective, except for the Federal Trade Commission *Doubleday* case filed in June, 1951, and this proceeding started in September, 1952, no one charged with the administration and enforcement of the fair trade acts has undertaken any action based on the fact that a manufacturer engaged in fair trade practices has at the same time been acting as a retailer of the fair traded products even though violation of the Miller-Tydings Act, amending Section I of the Sherman Act, carried a penalty of a fine not exceeding \$5000 and/or imprisonment not exceeding one year.

In 1940 the Federal Trade Commission instituted a proceeding against the Eastman Company²⁸ charging that some of its fair traded products were not in free and open competition with other products of the same general character. Continuing jurisdiction of this matter was retained until July, 1947, yet no issue was raised as to respondent's retailing activities although they were the same during that period as they are now.²⁹ This inaction is significant.

The rule as stated in *Federal Trade Commission v. Bunte Bros.*³⁰ is:

²⁸ In the *Matter of Eastman Kodak Company*, Docket 4322, 39 F. T. C. 154, complaint issued September 23, 1940, decision, September 9, 1944; decision modified September 12, 1945, 41 F. T. C. 137; decision further modified July 3, 1947, 44 F. T. C. 14.

²⁹ Respondent's first fair trade contracts were executed in 1938.

³⁰ 312 U. S. 349, 352 (1941).

* * * Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.

In *Federal Power Commission v. Panhandle Eastern Pipeline Co.*,³¹ the court said:

* * * for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed.

A course of conduct indicating a particular understanding of a statute has value in determining its meaning especially where that course of conduct has been participated in by an administrative agency charged with enforcing the Act, by the Justice Department in its law enforcement capacity, by defendants in civil proceedings arising under the Act and by the courts. Non-application of the particular proviso of the Act which is sought to be invoked in this proceeding, is a practical construction which when considered with the avowed purposes of the Act leads to a strong presumption, in the absence of cogent reasons to the contrary, that the proviso is not applicable to the factual situation involved in the proceeding.

The desirability of federal fair trade legislation is not at issue. That is a matter exclusively within the province of Congress. If there is to be any change in governmental policy that too rests with Congress. The sole objective of this proceeding is to construe and apply the law as it is to the facts of this case.

CONSTRUCTION OF THE ACT—CONCLUSIONS

From the foregoing, the conclusion is reached that as far as the issues in this case are involved, the Act

(1) has among its purposes the protection of the good will of the manufacturer of trade-marked and branded articles;

(2) was intended to and does permit, when valid in the state of resale, the establishment by vertical agreement of uniform resale prices with respect of trade-marked and branded products of a manufacturer so long as those products are in free and open competition with products of the same general class produced by others; vertical agreements being between a manufacturer selling his own branded products and a buyer for resale;

(3) was not intended to and does not deprive a manufacturer of the right to make fair trade agreements with his retailers so long as

³¹ 337 U. S. 498, 513 (1949).

those agreements are entered into by him as a manufacturer, notwithstanding the fact that the same manufacturer may be carrying on other activities, including the retailing of his own products, provided the agreements meet the other conditions of the Act.

The remaining problem is to determine whether the respondent entered into its fair trade agreements as a manufacturer or as a retailer.—Are the agreements vertical or are they horizontal?

DID RESPONDENT ENTER THESE AGREEMENTS AS A MANUFACTURER?

The fair trade contracts involved in this proceeding are signed by "Eastman Kodak Company" which is referred to therein as Kodak. They recite that Kodak is the manufacturer of certain products which are to be distributed under trade-marks, brands or trade names owned by Kodak and are in free and open competition with commodities of the same general class produced or distributed by others; that the dealers with whom the agreements are made are engaged in selling said products at retail; and that the parties, as manufacturer and retailers respectively, desire to avail themselves of the benefits of the various applicable fair trade acts.

The record supports the averments of the contracts. The name used by respondent in its contracts is the corporate name under which its manufacturing activities are carried on;³² the articles involved are exclusively those produced and distributed by respondent as a manufacturer; the trade-marks and brand names belong to respondent as a manufacturer; the free and open competition mentioned is that between respondent as a manufacturer and other producers; the relationship between respondent and the retailer signers of the contracts is that of manufacturer and retail seller of specifically named branded products; the retailer signers of the contracts buy the trade-marked or branded products from the respondent for purposes of resale and do resell them to the public under those trade-marks or brand names.

Through the retail outlets of the Stores Corporations which are owned and controlled by respondent, the respondent, as a retailer, is in substantial competition with some of the retail stores which are bound by respondent's fair trade agreements. That competition is entirely at the retail level and involves amateur photographic supplies produced and distributed by many manufacturers. As to the amateur photostatic supplies manufactured and distributed by respondent under the fair trade agreements there is no price competition because respondent's retail outlets observe the fair trade prices, but as to all

³² The separate corporate entity theory was not suggested in this proceeding and is not here invoked or endorsed as a defense.

other amateur photographic products of the same general type and character which are sold alike by respondent's retail outlets and by the other retailers with whom respondent's outlets compete, there is full competition at the retail level. So far as the record shows none of the retail outlets selling respondent's fair traded products is engaged in the manufacture of any competing products so there is no competition between any of them and respondent at the manufacturing level.

Respondent's interest in protection of its trade-marked or branded products from price competition between retailers is a manufacturer's interest. If price competition existed, respondent's retail outlets would be in a most advantageous competitive position and could readily meet the lowest price any competitor could offer. In fact, if respondent were interested in reducing the competition of its retail outlets, price competition would be encouraged and respondent would not fair trade its amateur photographic products. Fair trade helps rather than injures the independent retail stores which are in competition with respondent's outlet stores. At the same time it protects respondent's good will as a manufacturer, good will being represented by respondent's trade marks and brand names. Respondent's financial interest in its fair trade contracts is a manufacturer's interest.

If these contracts were between retailers the contracts would relate normally to all articles of the same general class regardless of manufacturing source. They would fix retail selling prices on all lenses; not just on CineKodak lenses; on all $2\frac{1}{2} \times 4\frac{1}{4}$ roll film; not just on Kodak roll film; on all projectors; not just on Kodaslide projectors. Respondent's agreements do not fix the selling prices of competing products.

Further indication that respondent is functioning as a manufacturer in relation to these contracts is shown by the fact that sales of respondent's fair traded products by its own outlet stores represent only about 0.6 of 1% of respondent's over-all sales and about 3% of the total sales of respondent's fair-traded products. Respondent is primarily a manufacturer.

Some writers have suggested that the capacity in which contracts have been entered can be determined by looking at the benefits which may follow as a result of the contracts, the presumption being that if the benefits accrue to the manufacturing activities then the contracts were entered into in that capacity, and if the benefits accrue to the retail portion of the business then the contracts must have been entered into from that standpoint. No breakdown of respondent's profits was presented in this case but there is such a preponderance

of respondent's business in the manufacturing field that it is not reasonable to believe that its business or profits as a manufacturer have been sacrificed in order to bolster its profits as a retailer.

Regardless of the approach taken the conclusion reached is that respondent has entered into these fair trade contracts as a manufacturer, not as a retailer; that the contracts are vertical rather than horizontal, and are protected by the McGuire Act. Only by interpreting the McGuire Act as denying the right of a manufacturer to engage in any retail activities whatsoever, either directly or indirectly, can an opposite conclusion be reached. Such a conclusion would receive support only by an undue and unwarranted extension of the meaning of the Act and by a strained and unrealistic interpretation of the facts of this case.

The price control resulting from respondent's fair trade agreements is neither increased nor diminished by reason of respondent's operation of its retail outlets. The fact that respondent's fair trade agreements result in uniform retail prices on the fair traded products and prevent price competition at the retail level is the natural concomitant of all fair trade agreements and is made legal by the fair trade acts.

CONCLUSION

Upon the basis of the foregoing and all the facts of record in this proceeding, the conclusion is reached that the respondent has not violated Section 5 of the Federal Trade Commission Act as charged in the complaint and that the complaint should be dismissed.³³

ORDER

It is ordered, therefore, That the complaint in this proceeding be, and the same hereby is, dismissed.

Chairman HOWREY delivered the opinion of the Commission.

The McGuire Act,³⁴ like the earlier Miller-Tydings Act,³⁵ was enacted by the Congress for the purpose of exempting resale price main-

³³ In view of this conclusion and the order which follows no separate ruling is required on respondent's motion to dismiss.

³⁴ 66 Stat. 632, 15 U. S. C. Sec. 45.

³⁵ 50 Stat. 693, 15 U. S. C. Sec. 1. The Miller-Tydings Act ceased to afford adequate protection to the "fair-trading" manufacturer by reason of the decision of the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 334 (1951) which held that enforcement of resale price maintenance against a non-signing dealer was not included in the Miller-Tydings exemption from the Sherman Act. The McGuire Act, which is the same as the Miller-Tydings Act in most other respects, went beyond the statutory provisions of the latter to the extent felt necessary by the Congress to remove any doubt as to the binding effect of fair trade contracts upon non-signers who "wilfully and knowingly" advertise, offer for sale, or sell the commodity at a lower price. See Section 3 of the McGuire Act.

tenance agreements from the price-fixing prohibitions of the antitrust and Federal Trade Commission Acts.

This exemption, in favor of trade-marked commodities which are "in free and open competition with commodities of the same general class" sold by others, contains one important limitation:

Nothing contained in * * * [the Act] shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity * * * between manufacturers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other.³⁶

This proviso has been considered by the Commission on two prior occasions, namely, In the Matters of *Doubleday and Company, Inc.*, Docket No. 5897, decided September 25, 1953, and *Eastman Kodak Company*, Docket No. 6040, decided September 25, 1953. Both were interlocutory appeals with only four Commissioners participating. In the first the Commission divided 2-2; in the second appeal the Commission divided 3-1. Anything contained in those decisions contrary to the decision and opinion in the instant case is hereby expressly overruled.

The complaint in this case is based on the premise that since respondent maintains company-owned stores, it is not permitted to establish fair-trade pricing agreements with any independent retailer who may be in competition with said stores. The charging paragraph of the complaint reads as follows:

The contracts and agreements entered into by respondent with its retail store customers, whereby it fixes and maintains the resale prices of many of its amateur photographic products, are illegal in that some of the retail store customers are in competition with respondent's wholly owned and controlled retail stores in the sale of such products to the consuming public. Par. Nine.

This theory would apply, of course, with equal force to any manufacturer or producer who maintains retail or wholesale outlets or who engages in any other form of direct selling. In practical effect it would require such a manufacturer to choose between his partially integrated marketing system and a system of resale price maintenance. He could not retain both selling methods in the same market area.

The facts as found by the hearing examiner are not in dispute.³⁷ They can be briefly summarized as follows:

Respondent is one of the leading concerns in the photographic products industry in the United States. Its professional and amateur

³⁶ Sec. 5 (a) (5) of the Federal Trade Commission Act, as amended. 66 Stat. 632, 15 U. S. C. Sec. 45.

³⁷ Said findings are therefore adopted by the Commission.

products are sold under well known and valuable trade names and trade-marks, including the name "Kodak."

Some of respondent's photographic products are designed for use primarily by the general public and are referred to as amateur products. Others of its products are designed primarily for professional, commercial or scientific use. This proceeding involves only those amateur products which are covered by resale price maintenance agreements, about 163 separate items in all.

Respondent's products are sold at retail by about 75,000 outlets located throughout the country. Included among these are some 10,000 independent retail stores to whom Eastman sells direct and 35 retail stores which are controlled by respondent through wholly owned subsidiary corporations. It was agreed, for the purpose of this proceeding, that respondent controls the latter stores and requires them to abide by the terms of the so-called fair-trade agreements in those States in which fair-trade acts are in effect.

Respondent has entered into approximately 6,500 fair-trade agreements with said independent outlets under which minimum selling prices are prescribed. Each agreement provides that it is between respondent, "the manufacturer of certain products," and a dealer "engaged in selling said products at retail" and that "the parties as Manufacturer and Retailer respectively, desire to avail themselves of the benefits of the Fair Trade Act * * *". The products covered by the agreements are manufactured by respondent and are sold under respondent's trade-mark or trade name. By agreement, no question was raised in the proceeding as to whether or not such products are sold in free and open competition with similar products produced and sold by other manufacturers.³⁸

Each of the 35 company-owned stores is one of the leading outlets in the market area where it is located, and sells respondent's products in competition with other retail outlets selling the same products in the same market area.

For the calendar year 1951, the last full year of operation by respondent during which its fair-trade agreements were in effect and for which statistics were available, the net sales of respondent and its subsidiaries totaled \$542,824,000, of which \$111,737,000 (slightly less than 21 percent) represented sales of fair-traded products. The

³⁸ Included among the 163 items involved in this proceeding are two types of color film which were also involved in the Government's case against Eastman in the United States District Court for the Western District of New York (Civil Action No. 6450), culminating in the entry of a consent judgment on December 21, 1954. Under the terms of the consent judgment Eastman is prohibited from entering into or enforcing fair trade contracts which fix or control the resale price of any of this film. As to those items, therefore, this proceeding is moot.

total net sales of the company-owned stores amounted to \$34,806,000, of which \$3,104,000 (approximately 9 percent) represented sales of fair-traded products. Net sales of respondent's amateur products by other retail outlets was \$154,769,000, of which \$108,632,000 (about 70 percent) represented sales of respondent's fair-traded products.

Sales of such products by the company-owned stores amounted to less than 3 percent of the sales of fair-traded products by other retail outlets and less than six-tenths of 1 percent of respondent's total sales.

Upon the basis of the foregoing and all the facts of record, the hearing examiner reached the conclusion that the respondent had not violated the law as charged in the complaint and that the complaint should be dismissed.

The sole issue before the Commission on this appeal is whether respondent's resale price maintenance agreements are excluded, by the proviso quoted above, from the protection of the McGuire Act by reason of the fact that respondent is not only a manufacturer but is also engaged in the operation of 35 retail outlets which compete with other retail outlets dealing in the same fair-traded products. There is no contention that the contracts may for some other reason violate the Federal Trade Commission Act or fail to come within the McGuire Act exemption. There is no suggestion that a bona-fide relationship of seller and buyer did not exist between respondent and its independent retail customers or that respondent, as a retailer, combined or conspired with other retailers to maintain prices.

The provision of the McGuire Act upon which this proceeding is based was copied without substantial change from the Miller-Tdyings amendment. The language of the proviso was not contained in the original Miller-Tdyings bills and therefore did not receive Committee consideration, although the Committees did point out in their reports that the bills would not authorize "horizontal" contracts fixing resale prices of competing products.³⁹ Senator Tydings introduced it from the floor of the Senate as an amendment worked out between himself and the Attorney General to remove some of the Administration's objections to the bill, that is, in order to make it very clear that existing laws against horizontal price fixing were not changed by the proposed measure. Senator Tydings said, however, that he considered the amendment unnecessary:

In my judgment, Mr. President, the Amendment is unnecessary because the provision as now found in the bill allows none of the things which the amend-

³⁹ Sen. Rep. 2053, p. 2, 74th Cong. 2d Sess.

ment specifically eliminates; but in order that there may be no misunderstanding * * * the amendment has been offered * * *.⁴⁰

* * * * *

Mr. SCHWELLENBACH. Will the Senator explain just what the amendment does as compared with what is printed in the bill?

Mr. TYDINGS. Originally, as the Senator from Washington will recall, there was a message from the Administration in opposition to the measure. I may say that I have been in consultation with the Attorney General's Office, and the amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the Administration; * * *

The amendment provides that nothing in this particular provision shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, or retailers with retailers. That is made absolutely certain. I do not think it was necessary, but I was glad to put it in to place the matter beyond the peradventure of a doubt.⁴¹

Representative McLaughlin, in a statement on the conference report, explained the proviso as follows:

The act does not legalize contracts to maintain prices between manufacturers or sellers of different trade-marked articles of the same class or character. It only authorizes or permits contracts between the seller and the buyer, regarding resale price, as to a particular article. * * * The act, as amended in the Senate and as now before the House in the conference report, specifically provides that the act shall not make lawful any contract or agreement providing for establishment or maintenance of minimum resale prices on any commodity * * * between manufacturers, or * * * between wholesalers, * * * or between retailers, * * * or between persons, firms or corporations in competition with each other. As an example, the act would not allow two manufacturers of similar trademarked articles, as, for instance, articles of food or drugs or clothing or soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold. The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply authorizes contracts, permitted by the States, between the seller and buyer of one article—contracts known as vertical contracts. It does not permit contracts between seller and seller of different articles—known as horizontal contracts. The latter contracts, if violative of the Sherman Act now, will still be violative of the act if H. R. 1611 becomes a law.⁴²

From this and other statements made in debate and in the hearings on the bills,⁴³ "it seems reasonable to conclude that one purpose of

⁴⁰ 81 Cong. Rec. 7487 (1937).

⁴¹ 81 Cong. Rec. pp. 7495-96 (1937).

⁴² 81 Cong. Rec. 8141 (1937).

⁴³ In testimony before the House Subcommittee of the Committee on Interstate and Foreign Commerce, which held hearings on the McGuire Bill, Representative Patman used a somewhat similar test to differentiate between proscribed horizontal agreements and permissible vertical agreements:

"Now if you permit horizontal price fixing too where Articles A, B and C are exactly the same, or similar, where they could go and make an agreement and say what they were

adding the proviso at the last moment was to make it very clear that manufacturers or wholesalers or retailers of different competing trade-marked articles could not by means of fair-trade agreements prevent price competition between competing brands. For example, that would mean Eastman could not agree with its competitor, General Analine & Film Corp., that 'Kodak' and 'Ansco' films would both be fair traded at the same price by the subterfuge of each selling some of its product to the other. The best means of accomplishing this objective was thought to be the insertion of a proviso to preclude any fair-trade pricing agreements except where it was a bona fide relationship of seller and buyer * * * between the contracting parties. No other explanation of the proviso was given in the debates."⁴⁴

Counsel for respondent take the position that this was the sole purpose of the proviso, namely, to exclude from the exemption, agreements designed to curtail price competition between articles bearing *different* trademarks. While there is some support for this view in the legislative history, we cannot agree that this was its only purpose. We believe Congress also intended to prohibit horizontal price fixing agreements between parties at the same functional level with reference to the *same* trade-marked commodity. It has been suggested that this latter interpretation is unsound because "the very purpose of resale price maintenance is to establish horizontally a fixed price which the consumer must pay for the particular trade-marked article regardless of where he purchases it."⁴⁵ That may be the effect of resale price agreements but the ostensible legislative purpose in sanctioning fair trade agreements, or at least the legal justification therefor, was to protect the good will of their branded or trade-marked products against

going to sell for, that would be bad; that would be vicious; but that is still opposed under existing law and this does not change it.

"This [The McGuire Bill] will permit A to fix the price on down to the retailer; it will permit B to do the same thing, and C to do the same thing; but they cannot agree among themselves. That makes competition. Then B will say, now, there is A, he is selling his commodity for so much, why can't I sell mine for just a little lower; and C will say, 'Now, there is A and B. They are selling theirs at a certain price, and I believe I will put mine in a little lower.'

"You see this brings about competition there between them from the top clear on down, but it is still unlawful to have horizontal or across-the-board price fixing, but permits vertical price fixing.

"Mr. HALE. Then your argument in brief is that vertical price fixing does not suppress competition whereas horizontal price fixing suppresses competition.

"Mr. PATMAN. That is better than I could state it myself." (Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 5767, pp. 13-14, 82d Cong., 2d Sess. (1952).)

⁴⁴ Weston, *Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?*, 22 Geo. Wash. L. Rev. 658, 670-71 (1934).

Likewise if several integrated companies, controlling a substantial part of the market, enter into fair trade contracts with each others' outlets, a conspiracy to reduce product competition might be established. 67 Har. L. Rev. 892, 894. See *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, 141-144 (1948).

⁴⁵ Weston, *Id.*, 678.

"loss leader" practices.⁴⁶ Agreements permitting one selling a commodity bearing his brand or trade-mark to dictate resale prices to his purchaser had been recognized by many jurisdictions as valid at common law,⁴⁷ but were early held to be a violation of the Sherman Act. *Dr. Miles Medical Co. v. John D. Park and Son Co.*, 220 U. S. 373 (1911).

Another purpose, of course, was the protection of small or independent retailers against price cutting by larger stores and chain outlets.⁴⁸ These values were thought by Congress to compensate for the consequent diminution of competition.⁴⁹

While it may be that a horizontal agreement between two wholesalers or between two retailers with reference to the same fair-traded product would rarely lessen competition to a greater extent than vertical contracts between the manufacturer and the same outlets,⁵⁰ it is enough to say that in our opinion Congress simply was not engaged in exempting any form of horizontal contract when it enacted the Miller-Tydings and McGuire statutes. It was dealing exclusively with vertical contracts involving sellers and buyers at different levels of distribution.

"The purpose of the McGuire Act, * * * was to exempt from the operation of the Federal Trade Commission Act and the antitrust acts vertical agreements prescribing minimum or stipulated resale prices. Horizontal agreements of the same type were expressly *not* exempted. The ultimate question therefore is whether the agreements under scrutiny are 'vertical' or 'horizontal.' When negotiating the fair trade agreements with retailers was respondent acting in its capacity as a manufacturer * * * or in its capacity as a retailer? In other words, it is necessary to study the particular agreement, examine its form, economic purpose, intent and effect and then decide whether it is a vertical or horizontal * * * agreement. Form alone, of course, is not conclusive—the vertical form must not be used as a subterfuge or a cloak to cover a [horizontal] arrangement."⁵¹

⁴⁶ See *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193, 196 (1936); *Lionel Corp. v. Grayson-Robinson Stores*, 98 A. 2d 323, 626 (N. J. Super. 1953). See also 81 Cong. Rec. 8141 (1937).

⁴⁷ 67 Har. L. Rev. 892, 893.

⁴⁸ See 98 Cong. Rec. 4898, 4933, 8820 (1952); *Broxmeyer v. Polikoff*, 39 Pa. D. & C. 224, 228-29 (1940); 1 Callman, *Unfair Competition and Trade Marks*, 449-50 (2d ed. 1950); McLaughlin, *Fair Trade Acts*, 36 U. of Pa. L. Rev. 803, 817 (1938); 49 Yale L. J. 145, 146-147 (1939).

⁴⁹ 34 Columbia L. Rev. 282, 285.

⁵⁰ One example of further diminution of competition might be a horizontal agreement between two competing outlets fixing minimum prices higher than those contained in the vertical agreements.

⁵¹ Separate Opinion of Chairman Howrey in *Doubleday and Company, Inc.*, Docket No. 5897, September 25, 1953, p. 7.

Senator Humphrey, the leading proponent of the McGuire Act in the Senate, specifically discussed vertical and horizontal arrangements and their relationship to partially integrated concerns. He said:

In general, the test of whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.⁵²

Prior to the initial decision in this case no reported cases were found dealing with the precise question involved here.⁵³ However, several cases had been before the courts involving partially integrated companies in which the issue could have been raised but was not.⁵⁴ And a few of these contained broad dicta which might be interpreted as sustaining fair-trade pricing by partially integrated concerns. In the *Sunbeam* case, for example, the court said: "There is no indication in the Miller-Tydings Act itself or in its legislative history that Congress intended to * * * alter established systems of distribution in order [for a manufacturer] to avail himself of the benefits of the Act."⁵⁵

Since the filing of the initial decision two courts have dealt with the issue. The *McKesson* case,⁵⁶ decided July 1, 1954, because of its differing facts and because the ruling was made on a motion for summary judgment, is by no means conclusive. However, isolated state-

⁵² 98 Cong. Record 9124 (1952). While floor remarks of a single Senator need not necessarily be persuasive of legislative intention, the statement is of interest in that no one opposed this view and the Committee reports were silent on the point.

⁵³ Counsel in support of the complaint urge that the case of *General Electric Co. v. S. Klein-on-the-Square, Inc.*, 121 N. Y. S. 2d 37 (1953) is in point. A full analysis of that case compels us to agree with the hearing examiner that it does not support counsel's view.

⁵⁴ See, for example, *Doubleday, Doran & Co., Inc. v. R. H. Macy & Co.*, 269 N. Y. 272 (1936)—this was prior to the Miller-Tydings Act but the New York statute contained a similar provision; *Gillette Safety Razor Co. v. Green*, 3 N. Y. S. 2d 822 (1938), aff. 258 App. Div. 723, 15 N. Y. S. 2d 142 (1939); *General Electric v. R. H. Macy Co.*, 103; N. Y. S. 2d 440 (1951).

The initial decision in the instant case (p. 4) says that Eastman had obtained 39 injunctions against retail dealers in various jurisdictions.

⁵⁵ *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31, 39 (N. D. Cal. 1953).

⁵⁶ *U. S. v. McKesson & Robbins, Inc.*, S. D. N. Y., CCH Trade Regulation Reports, par. 67, 805.

ments of the court clearly support, as a matter of law, the position of the hearing examiner. The court said:

The heart of the problem presented arises from defendant's dual role as manufacturer and wholesaler. The language of the statute could provide an unerring guide to its speedy solution only if one of the defendant's capacities is carefully considered and the other happily ignored * * *

We reject the suggestion that either of alternate horns must be followed in the dilemma of fair trade agreements with independent wholesalers by a manufacturer who is also a wholesaler. * * * This court is unwilling at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair trade agreements because the producer is also a wholesaler * * *

Merely to establish a fair trade agreement with an independent wholesaler by a dual producer-wholesaler is insufficient to make out a *prima facie* case of restraint of trade under the Sherman Act.

Since every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition, the "true test of legality" in the situation of the producer-wholesaler of dual capacity is whether some *additional* restraint destructive of competition is occasioned * * *

The precise issue involved here was passed upon by a New York court in a recent injunction suit brought by Eastman for violation of its fair trade agreements. *Eastman Kodak Co. v. Aljan Camera Co.*, 131 N. Y. L. J., No. 108, p. 7, June 3, 1954. Modified and reaffirmed, 132 N. Y. L. J., No. 91, p. 8, Nov. 10, 1954. (CCH Trade Regulation Reports, par. 67, 770.) The defense was raised in that proceeding that the McGuire Act does not authorize fair trade agreements with retail stores that are in competition with Eastman's own retail stores. The court rejected this defense and approved the fair trade agreements. The court said:

At no time in the debates * * * was there the slightest intimation that any member of the Congress understood that a resale price agreement entered into by a manufacturer who also sold directly to consumers would not come within the exemption from the antitrust laws provided by the McGuire Act. On the contrary, the debates clearly establish that it was the understanding and intention of Congress that such agreements would be authorized and permitted by the McGuire Act. Furthermore, at no time did the Federal Trade Commission, in presenting its views to Congress in writing and by oral testimony, oppose the McGuire Act on such grounds.

Therefore, if Eastman distributed its products directly at retail, it is clear that Congress did not intend to deprive it of the right to enter into fair trade agreements with other retail distributors of its products. * * *

In analyzing the competition protected by the McGuire Act the court said:

Opinion

51 F. T. C.

Eastman Kodak Company, by its vertical price maintenance agreements, has eliminated price competition in Kodak fair-traded products among retailers, but that is exactly the result that Congress intended to accomplish by the McGuire Act. It is equally true that competition between "Kodak" products and products of the same general class manufactured by competing manufacturers remains free and open and there is no agreement between Eastman Kodak Company and other manufacturers of similar products or between retailers of those products fixing the prices at which all such products shall be sold. It is only the latter type of horizontal agreements which Congress intended to prohibit by the McGuire Act.

* * * To hold otherwise would be to completely frustrate the intent of Congress with respect to a large area of the nation-wide market, since, as stated by Senator Humphrey, many manufacturers who have fair-traded their products also engage in some wholesaling or retailing of said products. So long as Congress has determined that the public interest of the United States is best served in the continuance of fair trade, this court should not emasculate the full effectiveness thereof. As was stated by Justice Shientag in the leading case on this subject, *Calvert Distillers Corporation v. Nussbaum Liquor Store* (166 Misc. 342; Sup. Ct., New York County, 1938) :

"The attitude of the courts, however, must not be one of hostility to the new law 'as an alien intruder in the house of common law but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of keeping the law to social, and it may be added parenthetically, business needs.' Stone's Common Law in the United States (1936), 50 Har. L. R. 4, 15."

The merchandising practices of respondent are in no sense unique. We can take judicial notice of the fact that many manufacturers are partially integrated and engage to a lesser or greater degree in some form of wholesaling or retailing activity. In fact the volume of direct selling in this country has reached tremendous proportions.⁵⁷ This is so of manufacturers who "fair trade" as well as with others.⁵⁸ As a matter of fact the practice of selling exclusively through the "regular

⁵⁷ In a recent marketing guidebook for manufacturers and distributors issued by the United States Department of Commerce ("Selling the United States Market," by Gustav E. Larson and Marshall N. Potat, 1951) the following figures of distribution channels for manufactured products of all industries are given :

	Percent
Sales to or through own wholesale or retail branches or stores.....	24.5
Sales to other wholesalers, jobbers or retailers.....	44.7
Sales to consumers at retail.....	1.6
Sales to industrial and other large users.....	26.0
Export sales.....	3.2
Total.....	100.0

See also Engle, Development of Marketing Channels in the United States since 1920, in Marketing Channels for Manufactured Products (Clewett ed. 1954) 69.

⁵⁸ A recent survey of certain manufacturers who "fair trade" some or all of their products, disclosed that 253 out of 322 manufacturers sell their fair traded products both directly or through fully owned subsidiaries at wholesale to retail dealers therein and also sell to other wholesalers, and that 108 of these manufacturers sell these products directly or through wholly owned subsidiaries at retail to consumers and also sell to other retailers (Tr. 66).

channels" of distribution is almost becoming the exception rather than the rule.⁵⁹ Sound business or economic reasons may justify such methods of distribution.⁶⁰

This common business practice was well known and generally accepted at the time of the enactments of the Miller-Tydings and McGuire Acts. In determining Congressional intent there is a strong presumption that Congress does not act in a vacuum and is fully informed as to contemporaneous conditions of common knowledge.⁶¹

If resale price maintenance and partial integration are to be permitted when existing separately, the question is pertinent as to whether the combination of the two practices is detrimental to our

⁵⁹ Weston, *Id.* 675-76. "For an excellent new publication showing that the amount of partial integration is tremendous, see *Marketing Channels of Manufactured Products* (Clewett ed. 1954). As an indication of what the real effect on fair-trade pricing will be if the present theory is accepted, one chapter in this work shows that almost every manufacturer of well-known washing machines sells them through mixed channels. *Cascino, Channels Used in Marketing Selected Manufactured Products: Washing Machines*, 189, shows that as of December 1952, *Maytag* sold 60% direct to dealers, 23% to independent distributors and 17% through factory branches; *General Electric* sold 30% through independent distributors and 70% through factory branches; *Westinghouse* sold 25% through independent distributors and 75% through factory branches; *Frigidaire* sold 30% through independent distributors and 70% through factory branches; *Bendix* sold 96% through independent distributors and 4% through factory branches; *Blackstone* sold 10% direct to retailers and 90% through independent distributors; *Easy* sold 58% direct to dealers and 42% through independent distributors; *Thor* sold 97.9% through independent distributors and 2.5% through factory branches. A few other brands listed will not be given here.

"It is believed that most of these same manufacturers sell their other appliances in a similar manner. While no information is available on the extent to which mixed channels of this type are used in the same area, it is likely to be fairly substantial. Consider also that to some extent many independent wholesalers are in competition with the retailers they supply. Many wholesalers sell directly to large commercial users or, in the case of appliances, to building contractors, which are essentially retail sales.

"Sometimes a manufacturer finds it profitable to sell through two different channels because of different market conditions. Proctor & Gamble have their own warehouses and sell direct to grocery stores in the metropolitan districts. Throughout the country territory served by the rural towns, wholesalers still distribute their products. This is true of many other firms. Again the nature of the product sometimes requires a variety of distributive channels. One of the great silverware manufacturers sells the large retailers direct. He sells the wholesalers who supply some 40,000 jewelers. Then again he sells the great hotels, dining cars, and steamships direct." Agnew, Conner and Doremus, *Outlines of Marketing* (3d ed. 1950). See also Nystrom, *Economics of Retailing* 5 (3d ed. 1930)."

⁶⁰ In addition to the reasons given in note 26, Duncan, *Channels of Distribution for Consumers' Goods*, *Marketing by Manufacturers* 195 (Phillips ed. 1951) gives the following reasons why manufacturers do some direct selling to consumers; (1) to secure distribution under conditions that the manufacturer desires, as, for example, the control of prices; (2) to enable the manufacturer to "keep his fingers" on the pulse of the market; (3) to act as laboratories in which to test market reactions to certain products, etc.; (4) to act as "service stations" for the manufacturer's products.

"A further reason for some direct sales may be that in many instances of large scale buying the local retailer or even wholesaler may not be able to handle the sale, because of limited capital, limited warehouse facilities, lack of personnel, or inability to service such large accounts."

⁶¹ *Holy Trinity Church v. U. S.*, 143 U. S. 457 (1891); *Chesapeake and Potomac Telephone Co. v. Manning*, 186 U. S. 238 (1901); *United States v. Champlin Ref. Co.*, 341 U. S. 290 (1950).

economy. The present litigation which seeks to divorce them is supposed to be "in the public interest" but counsel in support of the complaint give no hint of an economic basis for the action. It is true, of course, that as a result of respondent's fair trade agreements there is a uniformity of retail prices. But this would continue to exist even if respondent were ordered to divest itself of the 35 stores.

An interesting discussion of several economic theories which might be broached for precluding the combination is contained in Prof. Weston's article on resale price maintenance.⁶² He suggests that it is unlikely that the combination either stimulates further integration, or tends to injure independent dealer competition. On the contrary there is respectable authority, he says, to the effect that resale price maintenance laws eliminate one of the strong incentives for integration⁶³ and tend to increase the number of independent retailers and wholesalers.

The interpretation of the statute now being suggested by counsel in support of the complaint comes rather late. It would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain but admittedly large economic consequences.

It would require the Commission to rely on an unrealistic reading of the proviso in face of the fact that there is nothing whatsoever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns.

Whatever this Commission or anyone else may think about the desirability or wisdom of eliminating price competition in a fair-traded product, that feeling must be laid aside. By the enactment of the Miller-Tydings and McGuire Acts, sanctioning the enforcement of State fair-trade laws, Congress declared that the practice was not unlawful and not against the public interest.

The initial decision of the hearing examiner is affirmed.

Commissioner Mason did not participate.

⁶² Weston, *Id.* 676-80.

⁶³ "One of the stronger motives for market integration is a desire to control price. Duncan, *op. cit. supra*, note 59, at 195; Grether, Price Control Under Fair Trade Legislation, Ch. 10 (1939). 'The reasons why manufacturers have attempted to control distributive trades * * * are numerous. Foremost has been the desire to divert the price pressure to which producers are exposed if cutthroat competition prevails among dealers.' Wolff, *Monopolistic Competition in Distribution*, 8 Law & Contemp. Prob. 303 (1940). *United States v. General Electric Co.*, 272 U. S. 476 (1926) is illustrative of how the desire to achieve resale price maintenance prior to its legislative authorization was responsible for market integration.

"It must be conceded that there may be *some* counter-trend. A guaranteed price could make it more profitable for a manufacturer to maintain a retail or wholesale outlet. Moreover, chain stores and other mass distributors may be encouraged to integrate backward." *Id.* 677.

ORDER DENYING APPEAL FROM INITIAL DECISION

This matter coming on to be heard by the Commission upon an appeal, filed by counsel in support of the complaint, from the initial decision of the hearing examiner dismissing the complaint; and

The Commission having concluded that the initial decision constitutes an appropriate disposition of this proceeding, and having set forth its reasons for such conclusion in the attached written opinion:

It is ordered, That the appeal of counsel in support of the complaint from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered, That said initial decision, a copy of which is also attached, be, and it hereby is, adopted.

Commissioner Mason not participating.

IN THE MATTER OF
AUTOMATIC CANTEEN COMPANY OF AMERICA

*Docket 4933. Complaint, Mar. 19, 1943—Order, Jan. 12, 1955*¹

Order—following reversal by the Supreme Court and remand to the Commission—dismissing Count II of the complaint which charged respondent with violation of sec. 2 (f) of the Clayton Act as amended, by knowingly inducing or receiving prohibited discriminations in price.

Before *Mr. Charles B. Bayly*, hearing examiner.

Mr. Austin H. Forkner for the Commission.

Sanders, Gravelle, Whitlock & Howrey, of Washington, D. C., and *Friedlund, Levin & Friedlund*, of Chicago, Ill., for respondent.

Mr. William A. Quinlan, of Washington, D. C., for National Candy Wholesalers Association, Inc., amicus curiae.

Mr. David Carliner, of Washington, D. C., for Automatic Merchandise Co., Davidson Bros., Keystone Vending Co., National Distributors, George E. Leach, Inc., Pack Shops Co., Southern Venders, Sterling Vending Co., W. W. Tibbals, Vendex Inc., and Vendomat Corp. of America, amici curiae.

OPINION OF THE COMMISSION

By *MASON*, Commissioner:

The complaint in this matter was issued March 19, 1943, and charged respondent in two counts with violation of Sections 2(f) and 3 of the Clayton Act, as amended. Extensive evidence was taken in support of the charges and when the case-in-chief was completed respondent filed a motion to dismiss as to both counts. After a review of the record the Commission denied that motion, holding that a prima facie case had been established with respect to the charges in both counts of the complaint.

Respondent elected to stand on its motion, made no attempt to bring forward any evidence other than that it adduced by cross examination of the government's witnesses, and the proceedings were thereupon terminated. The trial examiner's decision recommended a cease and desist order on both counts. Thereafter, the matter again came before the Commission for final disposition. Again the Commission reviewed the record, made findings of fact, concluded that respondent had violated Sections 2 (f) and (3) as charged, and thereupon issued an order

¹ For original case see 46 F. T. C. 861.

to cease and desist.² That order was reviewed and affirmed in its entirety by the Court of Appeals for the Seventh Circuit.³ On respondent's appeal from the holding with respect to the 2(f) charge, the Supreme Court reversed the judgment of the Court of Appeals on that particular count and the proceeding has been remanded to us for such further action on that count as is open under the opinion of the Supreme Court.⁴

In the findings we initially made in this matter we pointed out that Automatic Canteen occupied a dominant position with respect to the purchase of confection items of the 1¢ and 5¢ variety. In the operation of its business it competed with many different types of outlets including jobbers and wholesalers of such items. Some eighty of respondent's suppliers were called during the Commission's case-in-chief. The evidence adduced showed that on sales of like goods these suppliers accorded Automatic Canteen lower prices than they accorded competitive outlets. The price differentials favoring respondent varied from seller to seller and from product to product of the same seller.

We further found that Automatic Canteen knew that the prices accorded it were lower than the prices accorded competitors because (1) these confections were so-called standard priced items, it knew the standard price and knew that sales to most competitors were made at those prices and (2) because in some instances it was advised that the prices to it were lower than the prices charged others.

In our findings we emphasized that in negotiating for these prices Automatic used a variety of methods. We found that at times it informed prospective suppliers of the prices and terms of sales which would be acceptable to it without any inquiry on its part as to whether or not the supplier could justify the price on a cost basis. At other times it refused to buy unless the price to it was reduced below the price at which the supplier sold the same merchandise to others. We also found that in many cases respondent sought to explain to prospective suppliers that certain savings would accrue from selling to respondent which would, in respondent's opinion, justify a lower price.

The findings summarized above were before the Supreme Court and the Court held them insufficient. In a carefully pin-pointed opinion the Court held that the Commission had the burden in the first instance of going forward with evidence which would show that the

² 46 F. T. C. 861.

³ 194 F. 2d 433 (1952).

⁴ *Automatic Canteen Co. of America v. F. T. C.*, 346 U. S. 61, 73 S. Ct. 1017 (1953).

buyer knew or should have known that the differentials constituted prohibited discriminations.

In terms of the present record this means that as a basis for a conclusion that a prima facie case has been established the Commission must find further that Automatic Canteen knew or should have known that the prices it received were not justified under the cost proviso of 2 (a).⁵ That brings us to the first question on this remand: whether or not at the close of the Commission's case-in-chief there was evidence sufficient to warrant a finding against respondent in accordance with the criteria set up by the Supreme Court.

The prosecution tried the case on the theory that cost justification was a matter of defense to be established by the buyer charged with violation of 2 (f). While this position was emphasized throughout the trial, the prosecution on the motion to dismiss did claim by way of further argument that it had actually proved that respondent knew or should have known that the prices it received were not cost justified. Neither the citations offered in this respect by the prosecution nor a review of the record disclosed any evidence of probative value which would warrant this necessary further finding.

Automatic Canteen knew its market and even had considerable knowledge of seller's cost; but this knowledge was not related in the record to specific sellers and specific price situations. Certainly there is no evidence that respondent had direct knowledge that the prices it received were not cost justified. And a careful and studied analysis of the evidence adduced fails to reveal any evidence to support a finding of constructive knowledge. Incidentally, many of the transactions involved took place at or about the time of the passage of the amendment to the Clayton Act in 1936.

We can find, as we have, that (1) respondent received a lower price and (2) respondent knew that it received a lower price than its competitors; but it is also evident that there is some reason for that differential because of the different manner in which suppliers served respondent.

Respondent's price was an f. o. b. while the standard price to competitors was a delivered price.

Respondent obtained its confection items in plain cartons while suppliers shipped the same items to competitors in lithographed cartons.

⁵ In the present case, with unimportant exceptions, the record shows that the lower prices made to Automatic Canteen were said to be based upon savings in cost. It may be that this could be taken as showing knowledge of lack of justification upon other bases. A conclusion upon this however is not necessary because knowledge on the part of the buyer of lack of cost justification was not shown.

Respondent obtained a straight price which would reflect the elimination of free deals and the right to make returns of stale and unsaleable merchandise. The price to competitors did not reflect the elimination of these factors.

It also appears that in dealing with respondents, suppliers achieved some savings in selling expense.

We have found in the record situations which may suggest the possibility that the prices accorded respondent were not cost justified. But, consistent with the theory on which the case was tried, no attempt was made to circumscribe the area in which cost savings would be operative. Thus, we are left with no foundation for an inference that respondent should have known that the prices it received were not justified by differences in cost of manufacture, sale, or delivery.

The conclusion is inescapable that the prosecution has not established a prima facie case in this record and that respondent's motion to dismiss the 2 (f) charge should have been granted.⁶ We do so now.

This case has been in litigation for over a decade and is based upon evidence many years older than its onset. Lapse of time alone has made most all of the evidence now on record unresponsive to present market conditions.

Our final authority, the Supreme Court of the land, has rejected the original contention of the Commission. Whether or not the prosecution could have ultimately succeeded had it tried the case on some other theory is hardly pertinent at this time. If facts are such today in the course of the respondent's business as would warrant instigation of new proceedings on a new theory, such new facts can in nowise put the breath of life into the instant case. Nor does the final determination of this aged litigation preclude inquiry into the validity of present-day practices.

As we have said heretofore in a unanimous opinion, "At some stage there must come an end to litigation if our regulatory processes are to be effective."⁷

The proceedings as to 2 (f) are therefore dismissed.

Commissioner Mead dissented and Commissioner Howrey did not participate.

⁶ In similar vein we have already dismissed certain other 2 (f) proceedings which were initiated by us prior to the decision of the Supreme Court and which were predicated on our erroneous interpretation of this subsection of the Act. See, In the Matter of Safeway Stores, Incorporated, Docket 5990 (1953); In the Matter of The Kroger Company, Docket 5991 (1953); As to respondent, Philco Corporation, in the Matter of Sylvania Electric Products, Inc. and Philco Corporation, Docket 5728 (1954).

⁷ Opinion by Gwynne, Commissioner, In the Matter of Revlon Products Corp., Docket 5685, Nov. 22, 1954.

DISSENTING OPINION OF COMMISSIONER MEAD

In this case a large buyer, Automatic Canteen, was charged with knowingly inducing or receiving illegal price discriminations from various sellers. The applicable statute is Section 2 (f) of the Clayton Act as amended by the Robinson-Patman Act.

It is an obvious economic fact that in the absence of an extreme sellers' market a large buyer is capable, directly and indirectly, of exerting substantial economic pressure on sellers. Unless the large buyer economic pressure is restricted to the limits of fair equality of opportunity bargaining, competition may be injured and monopolies created.

The extent of the operations of Automatic Canteen was described in the Opinion of the Commission rendered by Commissioner Mason in this case when it was initially before the Commission on the merits. Commissioner Mason stated:

For a number of years respondent has been engaged in the business of purchasing candy, gum, nuts and other confectionery products from approximately 115 producers thereof and selling them as a wholesaler or jobber to various persons, firms, and corporations which lease its automatic vending machines and which are known as "Canteen Distributors." These distributors resold these products to the public by means of such machines. Respondent has also been engaged in the development, acquisition, ownership, operation and leasing of automatic vending machines. It has occupied a dominant position with respect to these two activities. On January 11, 1946, it owned 230,150 candy, nut and gum vending machines, most of which were leased to its 83 distributors located in 112 separate territories in 33 states and in the District of Columbia. Sales through such machines increased from \$1,937,117 for the year ending September 30, 1936 to \$14,253,547 for the year ending September 30, 1944.

Commissioner Mason concluded that the respondent "has occupied a dominant position." The strength and virility of competition depends substantially on the diffusion of economic power and choice. Congress in enacting Section 2 (f) of the Clayton Act directed this Commission to curb monopolistic and other trade restraining tendencies resulting from the unfair use of economic power by large buyers.

The questions presented in this case were and are twofold: (1) Statutory construction; and (2) Factual.

The public interest in this case is very great. The questions involved are important to (1) the general consuming public; (2) large business; and (3) small business. Basic rules of the road relative to buying and selling are at issue. Interested parties should have the answers to these questions if this Commission is authorized and able to give the answers. Economic power begets economic power. This dynamic expansion will not pause while regulatory agencies tinker

with the traffic lights. In my opinion the Commission should exert every effort in this case to answer the timely questions presented in *this* case.

This complaint was issued in 1943. Generally speaking, justice demands reasonably prompt proceedings and decisions by Courts and administrative bodies. However, the way of the law is not precipitous. It is deliberate, as it should be. Commission case law makes rules relating to business conduct. These rules have general application to business practices. Cases of first impression that formulate new and important trade rules should be carefully and deliberately initiated, tried and decided. In such cases not only the participants but the public at large has a strong and abiding interest. They are truly matters affected with a public interest. Time is, of course, an important element in such cases. It is more important, however, that the pertinent questions be answered as a guide for future conduct not only for the respondents in the cases but for the tens of thousands of members of the business community.

This is a case of first impression. The road has been long and perhaps weary to the participants. Some measure of blame for the delay in the case is due to World War II. The Supreme Court of the United States considered the case—not on the merits—but on an important question of statutory construction. We now have the answer to that question of law. We should now proceed to take appropriate measures to determine whether or not under the law as interpreted by the Supreme Court, Automatic Canteen has violated Section 2 (f) of the Clayton Act as amended. That is why the complaint was issued. We are now better informed as to the applicable law than when the complaint was issued.

The discriminations in price received by respondent are described by Commissioner Mason in his initial Opinion of the Commission on the merits. Commissioner Mason stated as follows:

Respondent has induced and received discriminations in price from approximately 80 of its suppliers of candy, gum, nuts, and other confectionery products. It has consistently paid these suppliers and sellers from slightly less than 1.2 percent to slightly more than 33 percent less than its competitors paid the same sellers for products of like grade and quality. These price differentials or discriminations varied from seller to seller and from product to product of the same seller. Officers, agents, and representatives of respondent were thoroughly aware that such price discriminations were being induced and received. They knew the prices at which their suppliers were selling candy, gum, nuts, and other confectionery products of like grade and quality to other customers, and employed various means to induce lower prices on purchases by respondent. The evidence of record clearly establishes that respondent at times informed prospective suppliers of the prices and terms of sale which would be acceptable

to it without consideration or inquiry as to whether such suppliers could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below the prices at which its supplier sold the same merchandise to others. In other instances, respondent sought to, and did, persuade its suppliers and sellers that they could effect certain savings in freight, sales, cartons, return and allowances, free deals and samples, and shipping container costs in selling to respondent, and thus could afford to sell to respondent at a net price of 21 to 27 percent below the price at which products of like grade and quality were being sold to respondent's competitors.

The evidence of record reveals that any discrimination in the price of candy, gum, nuts, and other confectionery products will divert business from any manufacturer or jobber of such products who does not grant such price discriminations to a manufacturer or jobber who does grant them. Such a condition is demonstrated beyond any doubt by respondent's refusal to buy in most instances except where it could induce and receive a discrimination in price.

Commissioner Mason noted in that Opinion of the Commission that the Commission had found from the evidence of record that the effect of the price discriminations induced and received by Automatic Canteen "has been, and may be, substantially to lessen competition and tend to create a monopoly."

In other words, the Commission found that Automatic Canteen was in a dominant position, that Automatic Canteen had induced and received price discriminations, and that the result of such price discriminations was the lessening of competition and the tendency to create a monopoly in Automatic Canteen. This case was reviewed on the merits by the United States Court of Appeals for the Seventh Circuit and that Court did not reverse any finding by the Commission.

Prior to the decision by the Supreme Court, Government counsel contended before the Commission that the record affirmatively showed that Automatic Canteen knew that the lower prices it was receiving could not be cost justified by the sellers. The Commission held in effect, however, that it was not necessary for Government counsel to prove this knowledge by the seller. The Commission held that this was a matter for defense on the part of Automatic Canteen and not a matter of required proof for the Government to make out a prima facie case. In the words of the Opinion of the Commission, "The statute places squarely on respondent the burden of showing that price differentials are thus justified."

The Supreme Court held that the Commission was in error in ruling that the burden of showing that price differentials are justified was on the respondent. The Court held that a necessary element of a prima facie case for the Government was an affirmative showing on the record that the respondent had actual or constructive knowledge that the lower prices received by it could not be cost justified.

The case was remanded to the Commission for further consideration in the light of the Opinion by the Supreme Court. It is now the duty of the Commission to ascertain whether or not the respondent had the knowledge relative to cost justification or lack of it as delineated by the Supreme Court in its majority opinion.

I assume that now that the Supreme Court has held that knowledge as to cost justification by the respondent is a necessary element in the Government's case, Government counsel would again contend that the record affirmatively shows the requisite knowledge by respondent.

In my opinion the Commission should strike from the record the findings of fact, order to cease and desist and other documents based on the Commission's original concept of the law which was reversed by the Supreme Court and should now set the case down for oral argument on the merits in the light of the opinion by the Supreme Court. Government counsel could specifically point in their brief and argument to those portions of the record which they contend support the theory that respondent had knowledge that the lower prices which it received could not be cost justified. Respondent would, of course, be accorded the privilege of making any appropriate arguments to the contrary. I would permit interested parties to intervene and file briefs and make oral arguments.

It may be, of course, that after hearing oral arguments the Commission would be of the opinion that further testimony should be taken so that the case would be clarified by additional development of the facts.

In any event, I would not dismiss this case at this time. Both the government and the respondent have many thousands of dollars invested in this case. Extensive testimony has been taken. There is obviously great continuing public interest in this case. The basic question of whether or not this "dominant" buyer legally received the substantial price concessions, which the Commission found tended to create a monopoly, should be answered clearly and unequivocally.

The Majority of the Commission has decided to dismiss the complaint. The Commission, of course, has not disposed of this matter by dismissing this complaint. The complaint is not being dismissed for the reason that Automatic Canteen has not violated the law. That question remains unsettled. The Commission must investigate again the practices of Automatic Canteen to determine whether or not Automatic Canteen is inducing and receiving illegal price discriminations. Such an investigation will, of course, require considerable time and the expenditure of a substantial amount of additional public funds. The investigation may result in the Commission issuing a new complaint against Automatic Canteen and thereafter the taking of testi-

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mony under the new complaint. In such events the Commission, perhaps two or three years from now, may have before it again the question of whether or not Automatic Canteen is inducing and receiving illegal price discriminations. It may be that the case will be appealed to the Courts and additional delays will be experienced in finally concluding the case on the merits. In the meantime, I trust the smaller competitors of Automatic Canteen will be patient. I trust that these smaller competitors can withstand the economic pressures until it is finally concluded whether or not the practices of Automatic Canteen, which the Commission has heretofore found tended to create a monopoly, are in violation of the Robinson-Patman Act.

The Majority of the Commission has dismissed this complaint. From that action by the Majority I dissent.

ORDER DISMISSING COUNT II OF THE COMPLAINT

Whereas, the United States Court of Appeals for the Seventh Circuit by judgment entered on March 10, 1952, in the matter of *Automatic Canteen Company of America, Petitioner v. Federal Trade Commission*, No. 10239 (193 F. 2d 433), affirmed the order of the Commission in this matter; and

Whereas, the Supreme Court of the United States by its decision of June 8, 1953, in the matter of *Automatic Canteen Company of America, Petitioner, v. Federal Trade Commission* (346 U. S. 61) reversed the judgment of the Court of Appeals as to the charges in Count II of the complaint; and

Whereas, the case was on August 1, 1953, remanded by the Court of Appeals to the Federal Trade Commission for such further action as is open under the opinion of the Supreme Court entered in said cause on June 8, 1953; and

The Commission having reconsidered the matter, and, for the reasons appearing in the accompanying opinion of the Commission, having determined that the record herein does not make out a prima facie showing of a violation of Section 2 (f) of the Clayton Act, as amended, as interpreted by the Supreme Court in said decision, and that Count II of the complaint should be dismissed:

It is ordered, That Count II of the complaint herein be, and it hereby is, dismissed.

Commissioner Mead dissenting and Commissioner Howrey not participating.

Decision

IN THE MATTER OF
THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC., ET AL.

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

Docket 5811. Complaint, Sept. 19, 1950—Decision, Jan. 13, 1955

Modified order¹—following reversal and remand by the Court of Appeals for the Second Circuit² of the Commission's order of Jan. 6, 1953, 49 F. T. C. 760, and reconsideration by the Commission of the matter—requiring the publisher of "Signet" and "Mentor" pocket-sized book reprints to cease offering for sale, etc., any abridged book unless the fact of abridgement appears *in clear, conspicuous type upon the front cover and title page of the book either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser*; and to cease using or substituting a new title for the original title of a reprinted book unless the original title appears conspicuously on the front cover and title page. (The wording in italics was added upon modification.)

Before *Mr. William L. Pack*, hearing examiner.

Mr. William L. Pencke for the Commission.

Littauer & Ullman, of New York City, for respondents.

MODIFIED 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 September 19, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, oral arguments of counsel and proposed findings as to the facts and conclusions pre-

¹ Affirmed by Court of Appeals for the Second Circuit, 227 F. 2d 384.

² 213 F. 2d 143.

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sented by counsel, and said hearing examiner, on April 16, 1951, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal and oral arguments of counsel; and the Commission having issued its order granting said appeal in part and denying it in part and being fully advised in the premises, found that this proceeding was in the interest of the public and on September 19, 1952, made its findings as to the facts and its conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner. Said decision was modified in certain respects on January 6, 1953.

Respondents petitioned the United States Court of Appeals for the Second Circuit for a review of the Commission's modified order and after hearing the cause on briefs and oral argument said Court on July 6, 1954, entered its final decree reversing the Commission's order to cease and desist and remanding the cause to the Commission for further proceedings consistent with the Court's opinion rendered on May 10, 1954.

Thereafter, the Commission having reconsidered the matter, on October 11, 1954, issued and subsequently served upon the parties an order granting leave to respondents and to counsel supporting the complaint to present their views with respect to whether the tentative modified decision of the Commission, attached to and served with said order, was in conformity with the said final decree and opinion of the United States Court of Appeals for the Second Circuit, and the Commission, having received and considered the views of the respondents and of counsel supporting the complaint and, for the reasons appearing in the accompanying opinion, having rejected the views expressed by the respondents to the effect that the said tentative modified decision is not in conformity with said final decree and opinion, now makes this its modified decision in lieu of its modified decision herein issued on January 6, 1953.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent The New American Library of World Literature, Inc., hereinafter sometimes referred to as the corporate respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with an office and principal place of business located at 501 Madison Avenue,

city and State of New York. Respondent Kurt Enoch is president, treasurer and general manager of the said corporation. Respondent Victor Weybright is chairman of the board of directors and secretary of the said corporation and is also its editor-in-chief. The two individual respondents jointly formulate the policies of the corporation and direct and control its operation and practices.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the business of publishing and selling small books, commonly referred to as pocket-size books. The said books are printed and warehoused in Chicago, Illinois, and are shipped therefrom to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain and have maintained a course of trade in the said books in commerce among and between the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is and has been substantial.

PAR. 3. Practically all of respondents' books are reprints of books which have theretofore been published by others, and include both fiction and nonfiction. The books of fiction and nonfiction are designated by respondents as "Signet" and "Mentor," respectively. Respondents obtain from the original publisher the right to reissue the book and then proceed to publish and sell it in a small or pocket-size volume. The books are marketed by respondents almost exclusively through a national distributor and eventually reach the public through book stores, drug stores, newsstands in railroad and bus stations and otherwise. Respondents are one of the leading publishers of pocket-size books, with annual sales of many millions of copies.

PAR. 4. Since the latter part of 1947 a substantial percentage of the books published by respondents have been abridged. In 1948, 1949 and 1950 the percentages of abridgements were approximately 10%, 22% and 27%, respectively. The extent of the abridgement has varied from "5.5% or less" to 66 $\frac{2}{3}$ %. Out of forty-eight abridgements published by respondents in the years 1947-1950 (both inclusive), thirty-four were abridged from 20% to 66 $\frac{2}{3}$ %.

PAR. 5. While the original titles of the books reprinted by respondents have usually been retained, they have been not infrequently changed by respondents. These changes have been made in cases where respondents felt that the original title was lacking in popular appeal or failed to indicate correctly the type or subject matter of the book.

PAR. 6. The offering of a book for sale constitutes an implicit representation that the book contains the entire original text and that the

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title under which it is offered is the original title. In the absence of a clear and conspicuous disclosure of the fact of abridgement or change of title, the offering of an abridged book or of an old book under a new title unquestionably has the capacity and tendency to deceive and mislead prospective purchasers.

PAR. 7. In offering for sale and selling books which are in fact abridgements and books which have been previously published under different titles, respondents have in numerous instances failed to disclose adequately the facts of abridgement and change of title. For example, on the covers of many of their abridged books, respondents have placed the words "A Special Edition" which, they claim, was intended to signal to the reader that the book was unique in some way and that further information was contained inside the book. "Special" is by no means synonymous with "abridged" or "condensed."

In other instances, the respondents' efforts have been somewhat more frank. For example, a statement "Original Title: Horseshoe Combine" appeared on the cover of one of the exhibits on a narrow stripe of contrasting color. This statement was, however, removed about as far as possible from the new title "Gunsmoke," and in much smaller type. In immediate connection with the title on the broader stripe of the same contrasting color appeared the words "Six-Guns Settle a Range War."

In addition to such disclosure as was made on the covers of respondents' books, there was almost without exception a further disclosure inside the books on the copyright page, the title page, in the introduction, as a publisher's note or elsewhere, in small type. Such a disclosure was wholly inadequate by itself and its combination with another inadequate disclosure on the cover did not result in an adequate disclosure; two poor disclosures do not add up to one good one.

It is apparent that the most conspicuous words on the covers of respondents' books are the titles. The titles are plainly intended to catch the eye, and there can be no doubt that to prospective purchasers they are initially the subjects of the greatest interest; even if nothing else on the cover is scanned, the title will be.

The Commission is of the opinion, and finds, that respondents have not disclosed adequately the facts concerning the abridgement and change of title of many of their books, and that the offering of said books for sale has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such abridged books contained the complete original text,

and that such newly titled books were new books, separate and different from the original publications from which they were copied.

PAR. 8. The Commission has given consideration to the places in which the disclosures with respect to abridgement and change of title must be made in order to avert deception of the public and is of the opinion, and finds, that these disclosures, in order to be adequate, must be made on the front cover and on the title page of the book either in immediate connection with the title under which the book is offered for sale or in a position adapted readily to attract the attention of a prospective purchaser.

CONCLUSION

(a) The acts and practices of respondents, as hereinabove found, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

(b) The complaint alleged that respondents had falsely stated upon the covers of certain books that such books were "Complete and Unabridged." The single instance of this, due to accident or inadvertence, which was shown by the record, is not regarded as sufficient to support this allegation.

(c) The complaint further alleged that respondents had represented all their books to be complete and unabridged by statements on book covers and on display stands. The representations in question were voluntarily abandoned by respondents under circumstances of such a nature that there is no present public interest in further considering them.

ORDER

It is ordered, That the respondent, The New American Library of World Literature, Inc., a corporation, and its officers, and the respondents, Kurt Enoch and Victor Weybright, individually and as officers of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of the book either

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in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless a statement which reveals the original title of the book and that it has been published previously thereunder appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospective purchaser.

It is further ordered, That the charges of the complaint hereinbefore referred to and considered in paragraphs (b) and (c) of the Conclusion be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further or other action in the future as may be warranted by the then existing circumstances.

It is further ordered, That the respondents, The New American Library of World Literature, Inc., Kurt Enoch and Victor Weybright, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

By MEAD, Commissioner:

The Commission on January 6, 1953, issued its modified decision in this matter in which it found that respondents have offered for sale, and sold, books which were abridgements and books which had previously been published under different titles, without adequate disclosure of the fact of abridgement or of title change and entered an order which had the effect of requiring respondents to make disclosure of the fact of abridgement and of title change in a specified manner.¹

Respondents petitioned the United States Court of Appeals for the Second Circuit for a review of the Commission's order and that Court on July 6, 1954, entered its final decree reversing the Commission's order and remanding the cause for further proceedings consistent with the court's opinion rendered on May 10, 1954 (213 F. 2d 143). Though agreeing with the Commission's findings that respondents'

¹ The order directs respondents to cease and desist from: 1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, appears upon the front cover and upon the title page thereof in immediate connection with the title, and in clear, conspicuous type.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless, upon the front cover and upon the title page thereof, such substitute title is immediately accompanied, in clear, conspicuous type, by a statement which reveals the original title of the book and that it has been published previously thereunder.

practices were deceptive, the Court held that the requirement of the order that the disclosures be made "in immediate connection with the title" was not warranted by the findings. The Court said, in substance, that there was no sufficient showing that the only way to prevent the deception shown to result from respondents' failure to make adequate disclosures was to require that the disclosures be made in immediate connection with the titles. The Court suggested that the public interest and the legitimate interest of the publisher could be sufficiently protected by a more flexible requirement as to the placement of the disclosure, "such as that the notice of abridgement or new title should be carried on the cover in immediate connection with the title or in a position adapted readily to attract the attention of a prospective purchaser."

The Commission reconsidered the matter in the light of the Court's opinion and thereafter made its tentative modified decision incorporating the Court's suggestion with respect to the requirements of the order as to the placement of the disclosure.² Counsel supporting the complaint and respondents were afforded opportunity to present their views with respect to whether the tentative modified decision was in conformity with the final decree and opinion of the Court.

Both counsel supporting the complaint and counsel for respondents have filed memoranda setting forth their views in the matter. Counsel supporting the complaint in his memorandum expresses the view that the tentative modified decision conforms in all respects to the final decree and opinion of the Court. Counsel for respondents, on the other hand, expresses the view that the tentative modified decision, while appearing to conform in words with the decision of the Court, in fact, violates the substance of that decision. Respondents suggest that the action which the Commission may take most consistent with the proceedings and the evidence in the case, and the opinion of the Court, is to dismiss the complaint. As alternative proposals, respondents suggest that any order which is entered be limited to the requirement that disclosures be made only on the front cover of the books,

² The order in the tentative modified decision directs respondents to cease and desist from: 1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless a statement which reveals the original title of the book and that it has been published previously thereunder appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospective purchaser.

or that the proceedings be reopened for the taking of additional evidence.

In support of their proposal that the complaint be dismissed, respondents contend that there is no finding, or evidence to support a finding that respondents' present disclosures of the fact of abridgement and of title change are not in positions readily adapted to attract the attention of prospective purchasers. The Commission's findings that respondents' disclosures, other than those which were discontinued prior to the issuance of the complaint, are inadequate, respondents argue, are based primarily on the premise that any disclosure which is not in immediate connection with the title is inadequate. The Commission's findings with respect to the inadequacy of respondents' disclosures are set forth in Paragraph Seven of the Commission's modified decision. There is no change in these findings in the tentative modified decision, and the Commission does not believe that the evidence in the record, or the Court's decision, requires any change. The principal finding is that "respondents have not disclosed adequately the facts concerning the abridgement and change of title of many of their books * * *." Some of the evidence in the record on which this finding is based is discussed in Paragraph Seven. It is readily apparent that in making this finding the Commission did not rely solely on the fact that respondents' disclosures in some instances were not made in immediate connection with the title. Neither did it rely solely on the fact that respondents in some instances have purported to have made disclosure of the fact of abridgement by placing the words "A Special Edition" on the cover of abridged books. Rather, the Commission found that in many instances all of the disclosures combined, nor any one of them alone, did not adequately inform prospective purchasers of the fact of abridgement or of title change. There was no holding by the Court that these findings by the Commission were erroneous. To the contrary, a majority of the Court was of the view that "some of the books in evidence as exhibits sufficiently demonstrated deceptive acts or practices which 'in the interest of the public' the Commission was empowered to prevent by a proper order to cease and desist." Some examples of the respondents' books on which the disclosures were inadequate appear in a footnote to the separate opinion of Judge Clark. Respondents' proposal that the complaint be dismissed is rejected.

In support of its alternate proposal that the order be limited to requiring that the disclosures be made only on the cover of the books, respondents contend that the Court's decision does not require that disclosure be made on the title page as well as on the cover, and also

that the Commission itself in its findings discounts the efficacy of a disclosure made on the title page. The Court's opinion does not discuss the requirement of the Commission's order that disclosures be made on the title page as well as on the cover. In the absence of a holding by the Court that such requirement is not warranted, it must be assumed that the Court approved of the requirement. Respondents' contention that the Commission's findings discount the efficacy of the disclosure on the title page is without merit. The finding to which respondents refer (subparagraph (3) of Paragraph Seven of the findings) is a finding that the disclosures heretofore made by the respondents on the title page, on the copyright page, in the introduction, as a publisher's note, or elsewhere, in small type, are inadequate to prevent deception. The Commission was, and is still of the opinion that, in order to avert deception, it is necessary that the disclosures be made on the title page as well as on the cover.

The findings in the tentative modified decision, except those in Paragraph Eight which deal with the nature of the remedy required, are the same in all respects as those in the Commission's original decision. There was no holding by the Court that these findings are not supported by the record. These findings fully support the order in the tentative modified decision. Under these circumstances there is no need to reopen this proceeding for the taking of further evidence, as respondents suggest as one of their alternate proposals.

The tentative modified decision will be made the decision of the Commission.

IN THE MATTER OF
ANN H. HARTMAN DOING BUSINESS AS FASHION
ACADEMY ET AL.

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

Docket 6194. Complaint, Mar. 12, 1954—Decision, Jan. 13, 1955

Consent order requiring the operator of a vocational school in New York City offering courses in fashion designing, to stop granting "Fashion Academy Gold Medal Awards" to manufacturers and distributors of various products which enabled the recipient to advertise falsely that his product had been granted a distinction as a result of a competitive contest.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Mr. Charles Segal and *Mr. Maurice Knapp*, of New York City, for Ann H. Hartman.

Mr. Henry Steinberg, of New York City, for Alexander H. Cohen.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ann H. Hartman, an individual doing business as Fashion Academy and Alexander H. Cohen, an individual doing business as Alexander H. Cohen and Associates, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ann H. Hartman is an individual doing business under the name Fashion Academy with her principal office and place of business located at 812 Fifth Avenue, New York, New York. Fashion Academy is a vocational school offering courses in fashion designing and operated by this respondent.

Respondent Alexander H. Cohen is an individual doing business under the name Alexander H. Cohen and Associates with his office and principal place of business located at 598 Madison Avenue, New York, New York.

PAR. 2. Respondents Ann H. Hartman and Alexander H. Cohen, in cooperation with each other, are now and for more than one year last