IN THE MATTER OF

THE VIRGINIA-CAROLINA PEANUT ASSOCIATION ET AL.

Docket 6188. Complaint, Oct. 29, 1953—Order, May 17, 1955

Order dismissing, for failure of proof, complaint charging a trade association and its members, constituting substantially all the cleaners and shellers of peanuts in the Virginia-Carolina area, with entering into an agreement or understanding to fix the prices at which they would purchase farmer's stock peanuts during the 1952 crop season.

INITIAL DECISION OF HEARING EXAMINER

Before *John Lewis*, hearing examiner.

Mr. Paul R. Dixon, counsel supporting the complaint, and *Mr. William A. Mulvey* with him on the brief;

Sanders, Gravelle, Whitlock & Markey, by *Mr. Louis A. Gravelle* and *Mr. Harold F. Baker* of Washington, D. C., and *Godwin & Godwin*, by *Mr. Charles B. Godwin, Jr.*, of Suffolk, Virginia, for all respondents except The Columbian Peanut Company and the Edenton Peanut Company; *Mr. Charles L. Kaufman*, of Norfolk, Virginia, for respondent The Columbian Peanut Company; and *Battle, Winslow & Merrell*, by *Mr. Francis E. Winslow*, of Rocky Mount, North Carolina, for respondent The Edenton Peanut Company.

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on October 29, 1953, charging them with the use of unfair methods of competition and unfair acts and practices in commerce in violation of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that the respondents entered into an agreement and understanding to fix, and did fix, the prices of peanuts purchased by them during the 1952 crop season from the growers thereof, thereby tending to limit price competition among themselves and create a monopoly. Respondents appeared by counsel and filed answers to the complaint in which they denied, in substance, having engaged in any of the illegal practices alleged in the complaint.

After the holding of a pre-trial conference on January 6, 1954, which was attended by counsel for all respondents except The Edenton Peanut Company, hearings on the charges alleged in the complaint

were held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding. Said hearings were conducted at Suffolk, Virginia, on various dates between January 18, 1954, and February 10, 1954. At such hearings testimony and other evidence were offered in support of the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard and to examine and cross-examine witnesses.

At the close of the evidence offered in support of the complaint further hearings were suspended, pending the filing by respondents of motions to dismiss the complaint herein for failure of proof. Motions to dismiss and supporting briefs were thereafter filed by counsel for The Edenton Peanut Company on March 16, 1954, and by counsel for the other respondents on March 24, 1954. An answer and brief in opposition to said motions was filed by counsel supporting the complaint on May 5, 1954. Pursuant to leave granted, a joint reply brief on behalf of all respondents was filed on May 20, 1954. Said motions to dismiss are disposed of in accordance with the findings, conclusions and order hereinafter made.

Upon consideration of the entire record herein and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

I. The Business of Respondents

A. *Identity of the Parties*

Respondent The Virginia-Carolina Peanut Association, Inc., hereinafter referred to as respondent Association, is a corporation organized, existing and doing business under the laws of the State of Virginia with its principal office and place of business located in the American Bank and Trust Company Building, Suffolk, Virginia. Said respondent is a trade association to which all the respondents herein belong.

Respondents James W. Jordan, M. C. Jordan and Robert W. Winborne (erroneously spelled Winbone in the complaint), are partners, trading under the firm name and style of Verlina Peanut Company, erroneously named in the complaint as Virginia Peanut Company.

Respondents James I. Beale III, Margaret Beale Keller [1] and Ann E. Beale, are partners, trading under the firm name and style of

[1] The complaint erroneously names John Keller as a partner in the above firm. However, the answer filed on behalf of said firm denies that said John Keller is a partner in the firm, alleges that Margaret Beale Keller is the third partner in the firm, and waives service of process upon said person.

Franklin Peanut Company, with their principal office and place of business located at Factory Street, Suffolk, Virginia.

Respondents Binford E. Parker, Margaret Parker Pond and Sarah Parker Pond, are partners trading under the firm name and style of Parker Peanut Company, with their principal office and place of business located at Factory Street, Suffolk, Virginia.

Respondent The Suffolk Peanut Company is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at 303 S. Saratoga Street, Suffolk, Virginia.

Respondent Planters Nut and Chocolate Company is a corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 212 Johnson Avenue, Suffolk, Virginia.

Respondent The Columbian Peanut Company is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at Wainright Building, 229 W. Bute Street, Norfolk, Virginia.

Respondent Old Dominion Nut Corporation is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at Factory Street, Suffolk, Virginia.

Respondent Lummis & Company is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 444 E. Washington Street, Suffolk, Virginia.

Respondent Severn Peanut Company is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Severn, North Carolina.

Respondent Pond Brothers Peanut Company is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at County Street, Suffolk, Virginia.

Respondents Robert L. Hancock III, Robert L. Hancock, Jr., G. S. Hancock and H. L. Hancock, are partners trading under the firm and style name of Hancock Peanut Company, with their office and principal place of business located at Courtland, Virginia.

Respondent The Edenton Peanut Company is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Edenton, North Carolina.

Respondent Birdsong Storage Company, Inc., is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at Suffolk, Virginia.

Respondent Farmers Cotton & Peanut Company, Inc., is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Plymouth, North Carolina.

Respondent The Williamston Peanut Company is a corporation organized, existing, and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Williamston, North Carolina.

Respondent Pretlow Peanut Company is a corporation organized, existing, and doing business under the laws of the State of Virginia, with its principal office and place of business located at Franklin Virginia.

Respondent John H. Maclin Peanut Company (erroneously named in the complaint as Maclin Peanut Company) is a corporation organized, existing, and doing business under the laws of the State of Virginia, with its principal office and place of business located at 103 Madison Street, Petersburg, Virginia.[2]

B. *The Peanut Industry*

The peanut industry is composed of three main levels. The first consists of the farmer who grows or produces the peanuts. The second is the cleaner and sheller, sometimes known as the miller, who performs intermediate processing operations on the peanuts before they are sold to the manufacturer or end-user. A few of the firms in this category merely perform cleaning operations and sell the peanuts in the shell. The bulk of the firms, however, also perform shelling operations. The cleaners and shellers purchase the peanuts directly from the grower or through intermediate independent buyers who receive a commission on purchases made for the account of the sheller. The third main category in the industry consists of the manufacturers or end-users who process the peanuts before their introduction into normal trade channels for sale to the consuming public. These consist of roasters, who roast and package the larger unshelled peanuts, salters who salt and package the shelled peanuts, and manufacturers of peanut butter, candy, and similar products, who use the peanuts in the manufacture of some product for sale to the public.

[2] For purposes of convenience, the respondent corporations and partnerships are sometime hereinafter referred to by the first portion of the firm name, e. g., Columbian for The Columbian Peanut Company, and Parker for the partnership, Parker Peanut Company.

Peanuts are grown in three main areas: the Virginia-Carolina area, consisting mainly of the States of Virginia and North Carolina and portions of certain joining States, the Southeastern area, and the Southwestern area. There are four main types of peanuts grown in the United States: Runner, Spanish, Valencia, and Virginia. The Virginia type, which is raised in the Virginia-Carolina area, is larger in size than the other types and is most frequently sold in the shell, after being roasted, and as large salted peanuts. The smaller type Virginia peanut is generally used in the manufacture of candy and peanut butter. The Spanish type, which is raised in the Southeastern and Southwestern areas, is a small round peanut, is generally used in the manufacture of peanut butter and candy, and also in salting processes. The Runner type, which is grown mainly in the Southeastern area, is a somewhat larger peanut than the Spanish peanut but smaller than the Virginia type, and is generally used in the manufacture of peanut butter and candy. The Valencia type, which is generally raised in the Southwestern area, is used in salting processes and for the manufacture of candy and peanut butter. Most of the above types, particularly those of the smaller variety, are also used for crushing into peanut oil.

C. *The Position of the Parties in the Industry*

With the exception of the respondent Association, all the other respondents are cleaners and shellers of peanuts in the Virginia-Carolina area. Two of the companies, Lummis & Company, and Planters Nut and Chocolate Company, are also end-users performing manufacturing operations at plants located in other parts of the country. The larger of the respondent shellers, including Birdsong, Pond, Lummis, Planters and Columbian, own or lease warehouses in a number of different sections in the Virginia-Carolina area and buy their peanuts generally throughout the area. The balance of the shellers operate within a more or less limited radius in the country-side adjacent to their mills. In the aggregate, the respondent shellers constitute substantially all of the cleaning and shelling section of the industry in the Virginia-Carolina area. During the 1952 marketing season, these respondents purchased approximately 440 million pounds of peanuts prior to March of 1953, out of a total yield of approximately 506 million pounds.

D. *The Interstate Commerce*

The respondent shellers sell, ship, and distribute or deliver, or cause to be shipped, distributed or delivered, peanuts in the various States

of the United States and in the District of Columbia, and said respondents maintain, and at all times mentioned herein have maintained, a regular course and current of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, in said peanuts, between and among the various States of the United States and the District of Columbia.

II. The Alleged Unlawful Practices

A. *Background and Issues*

1. The Government support program

During the period from 1933 to 1952 (with the exception of the years 1936 and 1937), the prices received by growers of peanuts were supported by the Federal Government pursuant to various Acts of Congress, beginning with the Agricultural Adjustment Act of 1933. The prices of farmers stock peanuts, i. e., peanuts which had not been shelled, crushed or cleaned (except for the removal of foreign matter), were supported through a program of acreage allotment, diversion of acreage to other crops, diversion to crushing for oil, loans to growers and purchases through designated cooperative associations. For some years prior to 1952, the peanut support program also involved the execution of marketing agreements between Commodity Credit Corporation and the cleaners and shellers. These agreements, which were commonly called "shellers contracts," provided for the purchase of farmers stock peanuts by the cleaners and shellers at a price not less than the existing support price for such peanuts. In return for such undertaking on the part of the sheller, the Commodity Credit Corporation agreed to reimburse them in an amount equal to the support price thereof for any unshelled peanuts which the sheller was unable to resell. For several years prior to 1951, the contracts also provided for reimbursement to the shellers, at a stipulated price, for certain shelled peanuts designated as No. 2 size, which were diverted for crushing to oil. The provision in the contract for reimbursement of the sheller was commonly referred to as the "bail-out clause."

During the latter part of 1951 and early 1952, meetings were held in Washington, D. C., under the auspices of the Production and Marketing Administration of the Department of Agriculture, which were attended by representatives of shellers, growers, and end-users of peanuts from various parts of the country to consider a change in the Government support program for peanuts. During the period from 1947 to 1951, the Government had sustained rather substantial financial losses in its peanut support program as a result of large crop sur-

pluses in the post-war years.[3] In an effort to cut down on these losses and also with the hope of giving the producers an opportunity to take advantage of any increase in price which might result from a proposed cut in the acreage allotment, it was suggested that the existing direct support program based on the shellers contracts be dropped, and that there be substituted in lieu thereof a program providing for loans to farmers which would enable them to hold their peanuts for a possible rise in market.[4] Despite the opposition of farm groups, who expressed concern that the change in the program would result in a decrease in the price of peanuts, and of sheller representatives, who opposed the dropping of the shellers contracts, a new program was announced by the Department of Agriculture under the provisions of Public Law 285 (signed March 28, 1952), which provided for the elimination of the cleaners and shellers agreements. Under the new program the growers could procure a storage loan on their peanuts, either directly or through a growers cooperative, and could also enter into an agreement with the Commodity Credit Corporation, providing for the purchase of the peanuts by that agency on May 31, 1953, at the support price, i. e., 90 percent of parity, less certain deductions. The loan advance which the grower could receive under the program amounted to approximately 10 percent less than the support price.

2. The disposition of the 1952 crop

The harvesting of the peanut crop in the Virginia-Carolina area usually begins around the end of October each year and the main part of the crop is harvested during November and December. The farmers endeavor to dispose of their crop as soon after harvesting as possible, since most of them do not have adequate storage facilities and it would expose the crop to deterioration through moisture and

[3] These losses were as follows:

Crop year	*Losses (million dollars)*
1947	3.5
1948	25.6
1949	39.7
1950	17.1
1951	*1.9

*Through Dec. 31, 1951.

[4] While counsel supporting the complaint prefers to stress the factor of giving the growers a chance at higher prices as the basic reason for the change in program, the evidence indicates that it was the financial burden of the program which was a moving factor behind the calling of the meetings and the proposed change. Since peanuts were the only basic crop on a direct support program, a change to a loan support program was suggested lest the whole support program be lost. Although it was hoped that the loan program would afford the growers an opportunity for higher prices, this was not the overriding consideration which precipitated a re-examination of the existing program (R. 1132, 446, 525; CX 536, p. 5).

rattage to permit the crop to lie in the field. The bulk of the purchases made by the shellers usually occur during November and December, although there may be some purchases in October, when the crop matures early, and there is also some purchasing on a lesser scale after the first of the year.

In 1952 the crop began to be harvested around the third week of October. Some of the respondent shellers began purchasing peanuts about October 20. As usual, however, most of the crop was purchased during November and December. Aside from some variations at the beginning and end of the season, the bulk of the peanuts were purchased by the respondent shellers at prices which were the equivalent of the Government loan value of such peanuts. The prices paid varied according to the grade of the peanuts, as determined by Federal-State inspectors. In making most of their purchases and computing the prices paid by them, the respondent shellers used an identical schedule designated as: "Price Schedule 1952 Crop Virginia Type Farmers Stock." The schedule was a 16-page document, containing the prices of different grades of peanuts. The basic grade factor was the amount of "Sound Meat Kernel" in a given lot of peanuts, designated as "SMK." Each page of the schedule reflected the prices of peanut containing a different percentage of SMK, the first page containing the prices of peanuts with 58 percent SMK, and the last page showing the prices of peanuts with 73 per cent SMK. Each page of the schedule also reflected variations in price within a given grade of SMK, depending upon the amount of foreign material in a given lot of peanuts and the percentage of extra large peanuts. Each page of the schedule contained approximately 400 separate prices, on a per pound basis, carried to the third decimal point.

By paying the equivalent of loan value for the bulk of their peanuts, the respondent shellers were able to purchase approximately 440 million pounds of peanuts prior to March 1953, out of a total crop of about 506 million pounds. During the same period only about 18 million pounds of peanuts were pledged by farmers with the Growers Peanut Cooperative, a Government-recognized marketing agency, as security for loan advances made under the terms of the loan program.

3. The contentions

It is the contention of counsel in support of the complaint that the purchase by the respondent shellers of the bulk of the 1952 peanut crop at prices which were the equivalent of Government loan values and the use by them of an identical schedule of prices were the result of an agreement or understanding on their part to fix the prices of

such peanuts. The case of counsel supporting the complaint rests largely on the circumstantial evidence, adduced through witnesses called from among the respondents, that the respondent shellers used the same price schedule and purchased the bulk of their peanuts at these prices. The respondent witnesses, while conceding the truth of these basic facts, denied that their conduct was the result of any agreement or understanding on their part to fix prices, and they sought to give an explanation for the coincidence of their actions. According to respondents, the fact that each company purchased most of its peanuts at loan value was due solely to economic conditions and was based on the individual decision of each company. With respect to the use of the same price schedule, respondents contended that the schedule was merely a replica of one issued by the Department of Agriculture for another crop area and that it was prepared by the bookkeepers employed by several of the shellers in order to facilitate the otherwise cumbersome process of computing the prices of peanuts which resulted from the change in the support program.

Since there is no dispute as to the basic facts presented by counsel in support of the complaint with respect to the prices at which most of the peanuts were purchased in 1952 by the respondent shellers and as to the use by them of an identical price schedule, the basic issue in the case resolves itself mainly into one of whether the explanations offered by respondents are sufficiently plausible and acceptable to overcome any inference which might otherwise arise from their common and parallel actions. To a consideration and evaluation of the evidence in this respect, the hearing examiner now turns.

B. *The Evidence*

1. The decision to pay loan value

It was the testimony of most of the respondent shellers that their decision to buy the bulk of their peanuts in 1952 at prices equivalent to the loan value thereof was based solely on economic factors and considerations. While there were some variations in emphasis and detail, the testimony of these witnesses was substantially similar with regard to the factors which caused them to conclude that loan value was the price at which they should bid for, and at which they could reasonably expect to purchase, farmers stock peanuts during the 1952 crop season. Boiled down to its essentials, the gravamen of their testimony was that due to a peanut surplus, both existing and prospective, and a stringency in the credit situation, they concluded it would be necessary for them to buy their peanuts at the cheapest possible price in order to stay in business. Since any price lower than loan value would encourage

farmers to place their peanuts under Government loan, most of the respondent shellers concluded that loan value was the cheapest price at which they could expect to purchase farmers stock peanuts. Most of them offered the farmer the added inducement of paying him the cost of hauling the peanuts from the farm to the mill, whereas, under the Government loan program the farmer would have to pay the cost of hauling himself. Moreover, the quotation of prices, f. o. b. the farm, was traditional in the Virginia-Carolina area. It was the contention of the sheller witnesses that the coincidence of their substantially parallel actions resulted not from any understanding or agreement on their part, but from the fact that they were confronted with parallel economic factors which were widely known in the trade.

The testimony given by the shellers as to the economic factors which affected their respective judgments impressed the hearing examiner as being plausible and not unreasonable on the whole. With respect to the matter of the peanut surplus, a number of the witnesses referred to the fact that there were approximately 1¼ million unsold bags of Government-owned peanuts hanging over the market from the 1951 crop which could be dumped on the market at prices below parity in the event they were found to be deteriorating. Most of the sheller witnesses also testified that surveys which they customarily made in the fields prior to the harvesting of the crop convinced them that there would be another large peanut crop in 1952. Despite the fact that there had been a cut in acreage in 1952, it was their testimony that the farmers had usually managed by more efficient methods of cultivation to produce as great, if not a greater, yield on the reduced acreage. They further claimed that the cut in acreage was offset by the fact that in 1951 the Government had ceased its program of diverting shelled peanuts to crushing for oil, thus augmenting the supply available for the edible trade. Another factor mentioned by some of the shellers as contributing to the surplus was the fact that the Southeastern crop area, in which harvesting had begun prior to the Virginia-Carolina area, was giving indications of an unexpectedly large crop, particularly in the Runner-type peanuts, which were competitive to the No. 2 Virginia-type peanut and were sold at substantially lower prices. The crop surplus situation was, according to the sheller witnesses, reflected in the lower prices which were being offered by end-users for the cleaned and shelled peanuts and this, in turn, affected the shellers' judgment as to what they could afford to pay for farmers stock peanuts.

The testimony of the shellers regarding the 1952 crop and market situation was corroborated to a considerable degree by the weekly

peanut reports of the Production and Marketing Administration of the Department of Agriculture, covering the period in question, which were offered in evidence by counsel supporting the complaint. Thus, the report of October 1, 1952, refers to the fact that the supply of peanuts "in commercial positions" as of August 31, 1952, was about one-third more than the holdings on that date in 1951, and that the holdings of farmers stock peanuts were three times as large as in the previous year, "principally due to large holdings of Government-owned farm stock peanuts in the Virginia-Carolina area." Concerning the matter of the demand for peanuts by end-users, the weekly report of October 8, 1952, states:

> There was little demand for new crop future shipments, with the trade generally following a wait and see attitude.

The report of October 15, contains the following statement regarding the prospective size of the 1952 crop:

> Indicated production in the *Virginia-Carolina area* increased about 2 percent during the month due to higher anticipated yields in Virginia. * * * Generally, a very good crop is in prospect in this area.

The report of October 22 refers to the fact that the yield of the 1952 crop "should be a little better than a year ago." The same report also refers to the fact that buying by end-users "is still light." The report of November 5 also emphasizes the lightness of the demand from end-users, stating:

> Demand for cleaned and shelled goods for close up shipment has been only fair, with most buying for current needs.

The report of November 12 again refers to the "rather light" demand for cleaned and shelled peanuts and contains quotations of price futures on such peanuts which are generally below the 1951 average.

In addition to the above crop and market factors which affected their judgment, the sheller witnesses placed considerable emphasis on the matter of the credit stringency which confronted them in 1952. Most of the shellers have resources to finance only a small part of their crop purchases, the greater portion thereof being financed through bank loans. According to the testimony of the sheller witnesses, they were confronted in 1952 by a reluctance on the part of the banks to loan money as freely as in the past due, not only to the softening of the market, but to the fact that the shellers had lost the protection of the shellers contracts containing the bail-out clause. In past years the bail-out clause in their contracts had assured the shellers against losses on unsold farmers stock peanuts and, until 1951, also limited their losses on some of the shelled peanuts. While this clause was

not frequently used in actual practice,[5] it facilitated their obtaining credit from the banks since it, in effect, gave them collateral for their loans. In 1952, with the collateral of the bail-out clause gone, the banks were more cautious in their loans to the shellers. The money was doled out on a gradual basis with instructions that the money was to be used to buy peanuts as cheaply as possible. At least one sheller, Farmers Cotton & Peanut Company, Inc., was instructed by its bank to pay no more than loan value for the peanuts. Another sheller, The Edenton Peanut Company, was required under its loan from the Reconstruction Finance Corporation not to expend the monies loaned for more than 80 percent "of the loan value" of the peanuts purchased. Several of the shellers testified that they had to go off the market prior to the end of the season due to a lack of funds with which to make further purchases.[6]

Another factor which influenced the thinking of a number of the shellers was the view that the new program established loan value, rather than the so-called support price, as the effective support level for farmers stock peanuts during the active buying season. While a farmer could, if he chose, hold his peanuts until May 31, 1953, and obtain the support price under his purchase agreement with the Commodity Credit Corporation, the actual difference between loan and support was more apparent than real since the deductions which would have to be made from the support price after May 31 (including allowance for shrinkage in weight, storage charges, interest on loan and other charges) would reduce the net amount received by the farmer substantially to the amount of the loan. Although it was possible that the farmer might still realize a profit if the Government resold the peanuts after May for more than support, this was a somewhat uncertain and speculative prospect when weighed against the natural inclination of the farmer to dispose of the crop as soon as possible and with a minimum of red tape. For this reason many of the shellers felt that in offering to pay a price equivalent to loan value during the active buying season, they were offering the farmer a price equal to the effective support price.

In his brief counsel supporting the complaint cites statements made by the Department of Agriculture, in announcing the new program, to the effect that they regarded it as offering growers an opportunity to

[5] The testimony reveals that the clause was taken advantage of for 1951 by respondent Columbian and that several other shellers gave serious consideration to availing themselves of their rights of resale under this clause at various times.

[6] This includes respondents Pond Brothers, Farmers Cotton, and Virlina. In obtaining its last loan during the season, respondent Pond Brothers was required to show that it had actual contracts of sale with reliable end-users.

secure prices above support. Counsel apparently regards these statements as belying the testimony of some of the respondent shellers that they considered loan value to be the effective support price. However, the minutes of the meetings in Washington which preceded the adoption of the 1952 loan program, reveal the widely held view by many segments of the industry that the practical result of the proposed new program would be to establish loan value as the effective support price. Thus, a farm representative from the Southeastern area stated that the proposal to establish a loan program providing for deductions of approximately 10 percent below support would establish loan value as the effective support price, since 90 percent of the farmers in his area would not avail themselves of farm loans.[7] A farm representative from the Virginia-Carolina area stated that with the large carryover from 1951 facing the market, any proposal for establishing a system of deductions below the support price would have the practical effect of reducing the price, and he suggested that the Government should stop "beating around the bush" and should tell the farmer it was going to cut the support price by the amount of the deduction.[8] Similar sentiments were voiced by others who were present at the meetings.[9] It should also be noted that great concern was voiced at the meetings, both by farmer representatives and shellers, that the shellers' difficulty in financing their purchases without the collateral of the shellers contracts would affect their ability to buy the crop.[10]

Recognition of the realistic nature of the views expressed at these meetings, as well as corroboration of the testimony of the respondent shellers, appears in the following prediction made by a county farm agent which appeared in a local newspaper just as the crop was beginning to move to market:

> Weather permitting, peanut picking will move into high gear shortly and right now it's impossible to predict how much of the crop will be stored under Government loan either on the farm or with the Growers Coop and how much will move directly into regular trade channels. *It's my guess that if buyers pay prices in line with the loan schedule a sizable portion of the crop will move directly from the picker to the mills.*[11] [Emphasis supplied.]

Although, as claimed by the respondent shellers, the laws of economic necessity naturally impelled them to the decision to pay loan value for their peanuts, it should be noted that there was no immediate and simultaneous unanimity in this decision. Thus, one of the

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[7] RX 9, pp. 13–14.

[8] RX 9, p. 35.

[9] See, for example, RX 9, pp. 4, 6, 25.

[10] CX 536, pp. 49–51; RX 9, pp. 21, 25, 26.

[11] The above article appeared in the Suffolk News-Herald under date of October 26, 1952.

largest shellers, respondent Columbian, started out buying at a price midway between loan value and support value, but came down to loan value when it found it was able to buy all the peanuts it wanted to at the latter price. Another large sheller, respondent Birdsong, decided to pay loan value f. o. b. its mill, with the farmer bearing the cost of hauling the peanuts, but soon changed to loan value f. o. b. the farm, when it found that the shellers generally were paying for the hauling of the peanuts. The experience of respondent Williamston was similar to that of Birdsong. In the case of several of the smaller of the respondent shellers, who entered the market rather late, the decision to pay loan appears to have been based not merely on the economic factors above related, which caused them to proceed cautiously, but also on the fact that when they entered the market they found that loan value had already been established as the going rate. Since most of the shellers bought through independent buyers, who purchased peanuts on behalf of more than one company, it would not be difficult for these latecomers to find out what prices were being paid without receiving such information from other shellers.

It should also be noted that despite the fact the bulk of the peanuts handled by the respondent shellers were purchased at loan value, there were, nevertheless, significant variations from this price, in addition to those already mentioned of shellers who changed their price after entering the market. Thus, respondent Edenton purchased at least 20 per cent of its peanuts at prices other than loan value. The figures covering purchases by respondent Williamston during the period from November 1 to December 6, 1952, show that approximately 42 per cent of its purchases were made at prices other than loan. While figures are not available for the other respondents, most of them testified that after January 1, 1953, they paid above loan for peanuts, despite the fact that from January 31 to May 31, 1953, there was no price support under the Government program.[12]

Given the economic factors with which the respondent shellers were confronted in 1952, it does not tax credulity to accept their claim that the decision to pay loan value resulted from the individual action of each sheller, impelled by economic necessity, and not from any agreement or understanding among them. There is nothing about their testimony or about their demeanor in testifying which suggests that the examiner should not give credence to their claims. In considering the probabilities inherent in the situation, it should be noted that in 1951, when they were operating under the shellers contracts,

[12] Farmers who desired to enter into a loan and purchase agreement with the Government were required to do so before January 31, 1953.

all the respondent shellers purchased the bulk of their peanuts at exactly the minimum price required under the contracts, to wit, at the support price. No claim is here made that such unanimity of action resulted from anything other than the operation of normal market factors, including a crop surplus which was aggravated by the dropping of a portion of the protection of the shellers contracts with respect to No. 2 size shelled peanuts. It is not unreasonable, therefore, to believe that confronted with a worsening of the market situation in 1952, including the complete dropping of the shellers contracts, the shellers should once again decide to pay no more than was required by what they considered to be the effective support level under the new program, to wit, loan value.

Accordingly, the hearing examiner cannot conclude that, insofar as the respondent shellers decided to pay the equivalent of loan value for farmers stock peanuts in 1952 and proceeded to buy the bulk of their peanuts at such price, their decision and action were based on anything other than the individual judgment of each sheller taking into consideration the economic factors which were common to them all.

2. The use of the loan-value price schedule

The case of counsel in support of the complaint rests not merely on the fact that the respondent shellers bought the bulk of their peanuts at prices equivalent to the Government loan values thereof but, even more important, on the fact that the shellers used an identical 16-page price schedule in the preparation of which the bookkeepers of some of the respondents cooperated. The respondent shellers, while admitting that they all used the loan-value schedule during the course of the 1952 crop season, denied that it had any connection with an agreement or understanding on their part to fix prices. They sought to show that the schedule was merely an adaptation of one prepared by the Department of Agriculture, which came into use because of the difficulties they had experienced in computing prices under the new loan program, and that they had used similar schedules in previous years. The explanation of respondents concerning the origin and distribution of the schedule, and the contentions of counsel supporting the complaint in connection therewith, are considered in greater detail below.

a. *The explanation*

During the period when the shellers were obligated under the shellers contracts to pay not less than the support price for peanuts, the Department of Agriculture had issued a schedule reflecting the support

prices of farmers stock peanuts on a per ton basis. Since peanuts in the Virginia-Carolina area were traditionally bought and sold on a per pound basis, it was necessary for the shellers to have a schedule translating the Government support prices to a pound basis. For a number of years this need was supplied by the bookkeeper of the respondent Pond Brothers, one Al Elliott, who prepared a schedule substantially similar to that issued by the Department of Agriculture, except that the prices were expressed on a per pound rather than a per ton basis. As to a private venture of his own, in which his employer did not participate, Elliott had copies of the schedule printed and sold them to other shellers at approximately five cents per copy. A similar schedule was prepared by Elliott in 1952 and distributed to the other shellers.

However, when it became apparent in the fall of that year that there was definitely going to be a loan program instead of the former direct support program,[13] many of the shellers found it necessary to have some more convenient method of computing loan values. This was important, not only because many of them had decided to pay loan value for their peanuts, but also because the farmers themselves, in deciding whether or not to accept a buyer's offer, would frequently want to know what they could get if they placed their peanuts under Government loan. In order to compute loan value, it was necessary to make a series of deductions from the support price, in accordance with a complicated formula prescribed in the loan program. The Department of Agriculture had issued a bulletin showing how these deductions were to be made from the support price in order to arrive at loan value. By using the Government schedule of support prices, expressed in a per ton basis, and making the deductions prescribed by the Government formula, it was possible to arrive at the loan value of farmer stock peanuts which could then be translated to a per pound basis. The same result could be achieved by using the Elliott schedule of support prices and making deductions therefrom in accordance with the Government formula. However, this procedure was cumbersome and time-consuming, requiring anywhere from 20 to 35 minutes to compute the loan value on a given lot of peanuts, and even longer where more than one grade of peanuts was involved in a transaction. As a result of this, the shellers found it necessary to have some more

[13] Although the new program had gone into effect in the spring of the year, many of the shellers were hopeful that some change might be effected which would restore the shellers contracts. Not until the late summer or early fall did it become definitely apparent that the loan program was going to control the 1952 crop, and not until about October 1 was detailed information received in the Virginia-Carolina area as to how the program was going to operate.

convenient method of computing peanut prices on a loan value basis, lest their payment system become bogged down in a mathematical morass.

The lead in preparing a schedule to meet this need was taken by E. K. Thompson, bookkeeper of respondent Birdsong. According to Thompson, when he told the president of his company that it took approximately 27 minutes to compute loan value on a given lot of peanuts, he was instructed by his employer to try to find some way of facilitating this task. Previous to this, Thompson and the bookkeepers of five or six other companies located in Suffolk had been to see a Mr. Johnson, head of the Growers Peanut Cooperative in Franklin, for the purpose of obtaining information which would aid them in computing the loan values of peanuts.[14] Johnson was not then able to help them. However, he subsequently sent them a table of instructions as to the method of making deductions from the support price in order to arrive at loan value. While the Government had issued a complete 21-page schedule of loan values on all grades of runner-type peanuts, it only issued a 1-page table of instructions illustrating how to compute such values on Virginia-type peanuts.

When Thompson realized that the Government was not going to issue detailed schedules for Virginia-type peanuts, he asked Elliott of Pond Brothers, who had had experience with price schedules in the past, if he would be interested in helping him prepare a schedule of loan values. Since Elliott also had need for such a schedule, he agreed to cooperate with Thompson.[15] Both of them worked out the format for the schedule, based substantially on that which had already been prepared by the Department of Agriculture for Runner-type peanuts. They also made the mathematical computations for the first two pages of the schedule. However, since there were over 6,000 computations to be made in working out the entire schedule and the harvesting of the 1952 crop was at hand, Thompson called in four of the other bookkeepers in Suffolk, most of whom had previously been with him on the visit to Franklin, to see if they would be interested in making the mathematical computations on the other pages of the schedule. Each of the bookkeepers agreed to make the computations

[14] The Cooperative was the officially recognized marketing agency under the loan program and received copies of releases from the Department of Agriculture pertaining to the program. It was apparently customary for the shellers to contact officials of the Cooperative from time to time for the purpose of obtaining information regarding the support program.

[15] According to Elliott's employer, Elliott would have prepared a complete loan schedule himself, except for the fact that the assistant who had helped him in preparing the earlier schedules, had left the company's employ and Elliott did not have the facilities to do the complete job by himself.

on two or three pages of the schedule.[16] The work was begun around October 15 and was completed on October 21, when the schedule was sent to a printer in Norfolk for printing. With one exception, Thompson did not request permission from any of the employers for their bookkeepers to work on the schedule, and in most instances the employers were not aware that their bookkeepers were so engaged until after work on the schedule had commenced or was completed.[17]

In the meantime, and prior to the preparation of this schedule, some of the respondent shellers were already buying peanuts at loan value. Several made the necessary computations by the longhand method of calculating the prescribed deductions for loan value, while others had prepared their own schedules using an average figure of deductions from support to arrive at loan value. In some instances, complaints had been received from farmers that these computations did not accurately reflect Government loan values. As soon as the schedules prepared by Thompson and Elliott, with the cooperation of the four other bookkeepers, were received from the printer, copies were distributed to those firms whose bookkeepers had assisted in the preparation thereof. When the other shellers learned about the schedule they procured copies through Thompson or Elliott. A number of them learned about the new schedules from Elliott, from whom they had previously purchased a support schedule and whom they had called in the hopes that he might be preparing a loan schedule, after they had run into difficulty in paying for peanuts without an accurate detailed schedule of loan values. One of the largest of the shellers, respondent Columbian, learned about the schedule quite by accident through the printer, who was a friend of its president, and was able to get copies from the printer after permission had been obtained from Elliott or Thompson.[18]

b. *The contentions of counsel supporting the complaint*

Counsel in support of the complaint refers in his brief to several facts and circumstances which he apparently regards as reflecting unfavorably on the story of respondents concerning the preparation and distribution of the loan value schedules. First of all he points

[16] In addition to Thompson and Elliott, bookkeepers from the following four companies worked on the schedule: Planters, Lummis, Old Dominion, and Parker.

[17] Only in the case of Lummis' bookkeeper was permission requested for the bookkeeper to assist in the work.

[18] According to Columbian's President, William Woodley, when he first learned of the schedule, he made no effort to obtain copies because he had received the impression from Johnson of the Peanut Growers Cooperative that the Government was going to issue its own schedule. However, when he learned that this was not so, he called the printer again and the latter, after receiving permission from Thompson or Elliott, gave Woodley a number of copies.

out that, unlike the Elliott schedule which had been prepared as a private venture by Elliott and for which he received payment from the various shellers, none of the respondents, other than Birdsong, ever paid for the 1952 price schedule. Thompson, who took the lead in preparing the schedule, gave the following explanation as to why he had not been paid for the schedule:

At the time the schedules were printed, Thompson had contemplated charging for them, as had Elliott. He had 2,000 copies printed because Elliott had advised him that this was the number which he had customarily ordered, and because the printer had informed him the difference in price between printing 500 copies and 2,000 copies was very small. However, he had some difficulty in deciding which companies to charge and how much to charge for the schedule. He felt that he could not charge the companies whose bookkeepers had helped him prepare the schedule. By the time the schedules came back from the printer, Thompson was so busy handling payments for the peanuts which were then moving to market in substantial quantities, that he gave up the idea of charging for the schedules. Eventually, his employer paid the printing bill and no reimbursement was received from any of the other shellers.

A number of the shellers testified that they had fully expected to be billed for the schedules, as they had in the case of the Elliott support schedules, but that they had never received a bill. Some of them testified that they had been under the impression right along that their companies had paid for the schedules and did not learn to the contrary until they checked their files just prior to the commencement of this proceeding, at the request of a Commission investigator, and were surprised to find that they had never received a bill for the schedules.

In the opinion of the examiner, the fact that the schedules were or were not paid for is not a fact of any controlling significance. There is no showing that the cost of printing the schedules involved any considerable sum of money. Moreover, the fact that no payment was made by the other shellers does not necessarily require the drawing of any inference adverse to the position urged by respondents. In fact, if the shellers had shared the cost of printing the schedules this might more logically be cited as a circumstance tending to show that the printing and distribution thereof was part of a common plan of action.

Another fact cited by counsel supporting the complaint as tending to impugn the explanation of the respondent shellers concerning the use of the schedule is the fact that the schedule was headed: "*Price* sched-

ule 1952 Crop Virginia Type Farmers Stock [Peanuts]." It is apparently the position of counsel that since the schedule was actually a schedule of loan values, it should have been called a "loan" schedule instead of a "price" schedule. Counsel in support of the complaint apparently regards the fact that the word "price" was used as tending to show that it was intended for use as part of a scheme to fix prices.

In the opinion of the examiner, the designation of the schedule as a "price" schedule is not a fact from which any adverse inference can be drawn. As pointed out by Thompson, the Elliott schedule upon which the loan schedule was in part modeled, also used the description "price schedule," although it was actually a schedule of support values. The reason it had been so designated was to avoid any possible misrepresentation to the farmers as to what the official Government support values were in the event an error in computation was inadvertently made in the schedule. In addition, the official instructions for computing loan values issued by the Department of Agriculture, which Thompson used as a model, also refer to the schedule as a "price table." Moreover, in view of the fact that respondent Birdsong had already decided to pay loan value for its peanuts there is nothing unusual about its bookkeeper calling the schedule, which he took the lead in preparing, a "Price Schedule."

Counsel in support of the complaint also cites as being of some significance, the dissimilarity between the Elliott support schedule and Thompson loan schedule, insofar as the size of each document is concerned. He points out that whereas the former was only a one-page document, the latter consists of sixteen pages. Counsel apparently accepts the Elliott schedule as being merely a bona fide effort to translate Government support prices from a per ton to a per pound basis, but regards any substantial deviation from the format of that schedule as having sinister implications.

In the opinion of the Examiner, the argument of counsel in support of the complaint based on the physical dissimilarity of the two documents rests on a distinction without a difference. The reason why the Elliott schedule was only one page was that the Government support schedule upon which it was patterned was also a one-page document. However, as a result of the complicated formula for deductions from support, set up under the 1952 loan program, it was necessary to have a separate schedule for each grade of peanuts according to the percentage of sound meat kernel (SMK). The Government instructions on how to compute loan value contain a separate table of base prices on a single grade of Virginia-type peanuts (65% SMK) and an additional table setting forth the formula for computing the loan

values on all grades of peanuts. The same document also contains a complete model loan-value schedule for runner-type peanuts, consisting of 21 pages with a different schedule for each percentage of SMK. The Thompson schedule is patterned substantially after the format of the Government schedule for Runner-Type peanuts, except that it is applicable to Virgina-type peanuts.[19] Considering the fact that the Government schedules themselves became more complicated after the enactment of the loan program, the examiner cannot see anything sinister in the fact that the Thompson schedule consists of 16 pages, while the Elliott support schedule was only one page.

Viewed in the light of the record as a whole, the explanation by respondent shellers as to how the loan-value price schedule came to be prepared and as to how it came to be distributed among all the shellers, impressed the examiner as plausible and as not unreasonable on its face. There is nothing in the facts and circumstances referred to by counsel supporting the complaint nor in any of the other facts presented in the record which requires the examiner to reject this explanation.

3. The other evidence

In addition to the fact that the respondent shellers all used the same price schedule and purchased the bulk of their peanuts at loan value, counsel in support of the complaint relies upon several other facts and circumstances as tending to support his claim that respondents entered into an agreement to fix prices. These matters are separately discussed below.

a. *The speech by Woodley*

At a meeting of the respondent Association on November 2, 1951, William P. Woodley, President of respondent Columbian, made a talk to the members in which he stated, in part, as follows:

> We know there is nothing we can do to reduce the cost of our peanuts if we are operating under the Shellers Contract, and I think all of us should sign the contract. The price we pay is fixed by the contract, and although we cannot reduce our cost below this level, we can limit our cost by buying peanuts strictly on the price determined by the federal grade. The only way we can do this is not to price any lot of peanuts until after the grade has been determined by a Federal Grader at a grading point. This will take the guess work out of buying and, as you know, whenever we guess the value of a lot of peanuts, we have to pay additional if we have under-guessed, but if we over-guess. we have to absorb our mistakes.

[19] The complaint states, and it was conceded by counsel supporting the complaint at the hearings herein, that the Thompson schedule reflects "exactly" the amounts of Government loan values.

The peanuts being marketed in the Southeast are being sold in accordance with the grades established at receiving points, and already being overpriced in competition with the Southeastern type, it would seem to me that it is absolutely necessary that we follow their practice in buying at the minimum support price. This, of course, will enable us to move more peanuts into edible consumption than we would be able to move under a Program of careless buying, and I believe we will be doing the farmers of this area a service in trying to move a greater quantity of the crop into edible consumption rather than into Commodity Credit, and by doing so, we may be able to eliminate the necessity of radical acreage reduction next year.

Counsel in support of the complaint cities these remarks as indicating that the respondent shellers "were cooperatively discussing the reasons why it would be in their best interest to purchase peanuts at the minimum support price," and he seeks to have the examiner infer that they took similar action in 1952. Aside from the fact that, as counsel recognizes, the speech was made in connection with the 1951 crop and there is no evidence that any action was ever taken by the Association based on Woodley's suggestion, the speech itself contains no proposal that the shellers undertake any illegal action. The gravamen of Woodley's remarks at the meeting was that economic conditions required that the shellers cut their cost of peanuts and that since they could not cut the price because they were obligated under the shellers contracts to pay not less than the support price, they could at least see to it that the peanuts were properly graded before they made an offer as to price.[20]

When the full speech is read in context it tends, if anything, to confirm much of the testimony of respondents' witnesses. For example, the speech quotes from an article written by a banker in which reference is made to the economic problems confronting the industry and in which it was forecast that loans to shellers would have to be "very closely screened." Woodley's own remarks regarding the problem of competition with the Southeastern-type peanuts confirm the testimony of some of the shellers regarding the effect of the Southeastern crop on their own area. He also refers to the problem of the large probable carryover of peanuts from the old crop, thus indicating that the shellers were confronted in 1951 with a problem similar to that which faced them in 1952. Viewing Woodley's remarks as a whole, there is nothing in them which suggests that illegal action on the part of the shellers was contemplated as a means of rectifying the industry's problem.

[20] Insofar as the 1952 crop is concerned, the evidence shows that offers by buyers were usually at a particular price, subject to the proper grade being established by Federal-State inspectors. However, some buyers apparently made their own estimate of grade and bid on the peanuts without a proper Federal-State inspection. This presumably is what Woodley was referring to.

b. *The letter from Gilliam to B. M. Birdsong*

E. F. Gilliam, the general manager and treasurer of respondent Pretlow, on June 24, 1952, addressed a letter to B. M. Birdsong, "% Birdsong Storage Company, Inc.," in which the following statement appears:

> I am reminded of the old proverb that goes something like this: "The mountain strained and brought forth a mouse," and it looks like that's about all those fellows in Washington have done for us. I have about decided that it is useless to look to Washington for any help, so it looks like if *we* are going to buy this crop of peanuts to stay in business, the help is not coming from Washington but lies in what *we* can do. [Italics by counsel supporting complaint.]

Counsel in support of the complaint seeks to have the examiner infer that this letter contemplated illegal action on the part of the shellers, arguing that the letter "must have been taken to heart by respondent Birdsong, * * * as a hub about which the unlawful activities charged in the complaint revolved."

Although counsel supporting the complaint appears to take the position that this was a proposal made by one sheller to another, it should be noted that B. M. Birdsong was not only employed by respondent Birdsong Storage Company, Inc. (in what capacity it does not appear from the record) but he was also a stockholder and officer of respondent Pretlow Peanut Company, of which Gilliam was an official. The letter may therefore be regarded as being one from one official of Pretlow to another official of the same company. Furthermore, it should be noted that Gilliam had attended the meetings sponsored by the Department of Agriculture in Washington during early 1952, as a member of the Committee sent by the Virginia-Carolina shellers. At these meetings his group had taken the position that they wanted to have the shellers contracts continued in view of the protection which they were afforded thereunder. Viewed in this light, Gilliam's remarks in the letter to Birdsong may be regarded simply as an expression of his views that since Washington was not going to help the shellers (having definitely decided to drop the shellers contracts), the latter would have to rely entirely on their own resources to buy the crop if they wanted to stay in business.

There is no more reason for inferring that the "we" mentioned in the letter means both respondents Pretlow and Birdsong or that it refers to the shellers as a group, than there is in assuming that it has reference to Pretlow Peanut Company alone, of which both the sender and recipient of this letter were officials. Reading the letter in its context and in relation to the events which preceded it, the examiner is convinced that there is no necessary connection between the sending of the

letter and any agreement or understanding between respondents Pretlow and Birdsong or any other group of shellers.[21]

c. The matter of warehouse space

At the hearings counsel in support of the complaint appeared to take the position that the respondent shellers had deliberately refused to make warehouse space available to the Government or to the Growers Cooperative, so as to force the farmers to sell their peanuts to the shellers due to the unavailability of warehouse space for storing peanuts placed under loan. It is not clear whether he has now abandoned this position since in the brief filed by him counsel merely refers to the lack of warehouse space as a factor which facilitated the plan of the shellers to fix prices. To the extent that counsel may still be urging the position which he appeared to take at the hearing, it is the opinion of the examiner that this contention is lacking in any substantial merit.

It is true that a number of the shellers declined to make warehouse space available to the Government or to the Co-op. However, according to the testimony of these shellers, the reason for this was that the Government never made any firm offer to use their warehouse space, but merely wanted the shellers to give the Co-op the option to use the space without committing it to take and pay for any definite amount of space. Even on the basis of this indefinite offer several of the shellers, including Pretlow and Maclin, actually offered to lease warehouse space to the Government but the space was never actually used or paid for. Several of the other shellers, particularly the smaller ones, made no offer to lease space because they did not have enough warehouse space for their own needs.

Aside from the fact that there is no substantial evidence of any effort on the part of the shellers, deliberate or otherwise, not to make warehouse space available to the Government, it is the opinion of the Examiner that the matter of warehouse space was not a significant factor in persuading the growers to accept the shellers' offer to pay loan value rather than place their crops under Government loan. While there may have been a shortage of warehouse space at the opening of the season, 35 warehouses were built during the season with funds provided by the Commodity Credit Corporation, some of them becoming available around the middle of November, and the balance by December 1, 1952. The testimony of the farmers who were called as witnesses in support of the complaint indicates that, generally speaking, the lack

[21] It may be noted that the balance of the letter, other than the portion above quoted, deals with personal matters and with certain business matters which were obviously being called to Birdsong's attention as an official of Pretlow.

of warehouse space was not a factor which persuaded them to sell to the shellers instead of availing themselves of a Government loan.[22]

d. *The alleged admissions of buyers*

Counsel in support of the complaint called a number of farmers who testified regarding their conversations with various buyers for the respondent shellers. In a number of instances the buyers had shown the farmers price schedules similar to those in general use among the respondent shellers, and had told them that they would be paid "according to the sheet." One of the farmers, Vernon K. Grizzard, testified that a buyer told him: "[W]e all have the same price. * * * We are buying on the same schedule as the Government price list." Another farmer, Joseph F. Turner, was also told by a buyer that the shellers were "all paying the same thing for the peanuts, and buying on that particular sheet * * *."

If this testimony has any value, it must be as admissions by agents of the shellers that the latter had fixed the prices at which they were buying farmers stock peanuts. In the opinion of the examiner, the testimony of the farmers cannot be so regarded. Insofar as they testified about being shown copies of price schedules by buyers, their testimony is not of any particular significance. All of the shellers admittedly gave their buyers copies of the schedules and so it was natural that the latter would show them to the farmers as reflecting the prices they were paying. Insofar as any buyer may have made the statement that all the companies were paying the same price, i. e., the price on the Government schedule, they were merely stating a fact which had become generally known in the market but which, under the circumstances, did not necessarily mean that there was any agreement or understanding on the part of the shellers with regard to this price.

The examiner has already discussed the reasons why the shellers decided to pay loan value and how they came to use the same schedule. The fact that the buyers made the statement that the shellers were paying loan value and using the same schedule does not add anything to the picture. Most of the buyers bought for several companies and it may be assumed that as a result of the instructions received from

[22] Farmer Paul C. Marks testified that he had warehouse space available near him but did not use it, although he was fully aware of what the Government loan program was. Fred Jones testified that although he was fully aware of the loan program, he made up his mind to sell his peanuts to one of the shellers because he had never stored any peanuts in a warehouse and, moreover, there was so much publicity about the Government losing money on the peanuts that he preferred to dispose of them himself. Francis A. Simmons testified that there were Government warehouses available near him and he was aware of the loan program. Likewise, Vernon K. Grizzard testified that he was familiar with the loan program and that he put part of his crop in a warehouse on loan and sold the rest to shellers.

their various principals and the wide distribution of the schedules, they became generally aware as to what the shellers were paying—not only their own principals but other companies as well. For this reason, the statements made by them cannot be regarded as admissions that their principals or employers had, in effect, fixed prices.

C. *Summary and Concluding Findings*

1. Summary

The contention of counsel supporting the complaint that respondents entered into an illegal agreement to fix the prices of farmers stock peanuts rests almost entirely on the circumstantial evidence that the respondent shellers bought the bulk of the 1952 peanut crop at prices which were the equivalent of Government loan values and that they all used an identical schedule embodying such values, in the preparation of which schedule the employees of some of the shellers participated. There is no substantial direct evidence in the form of correspondence, minutes or reports of Association meetings, or otherwise, that the respondents entered into any agreement or understanding such as that charged in the complaint or, indeed, that the subject of prices to be paid during the 1952 crop season was even discussed among respondents at Association meetings or elsewhere. While counsel in support of the complaint did seek to draw support for his position from certain statements made in a speech by one of the shellers at an Association meeting in 1951 and from a letter written by a sheller in 1952, as well as from statements made to farmers by peanut buyers, this evidence, which has been discussed above, is so ambiguous and inconclusive that it has no substantial probative value. It is clear, therefore, that the case of counsel supporting the complaint must stand or fall on the circumstantial evidence introduced with respect to the preparation and use by the respondent shellers of the same price schedule.

The respondent shellers, while admitting the basic facts relied on by counsel in support of the complaint, sought to show that their decision to buy at loan value and their use of the same schedule were based on circumstances having no connection with any agreement to fix prices. They explained that the basic decision which they made with respect to the 1952 crop, viz., to pay loan value, was compelled by economic circumstances beyond their control and was not the result of any understanding or agreement on their part. These economic circumstances included a large carryover of peanuts from the previous crop, a large prospective yield for the ensuing year, and a large yield of the lower-priced competitive Runner-type peanuts grown in the

Southeastern area, all of which factors spelled out a peanut crop surplus and were reflected in a softening of the prices quoted by end-users of peanuts. Equalling these factors in importance was the fact that the banks, which financed the greater portion of their purchases, became very restrictive in their commitments to the shellers as a result of the dropping of the shellers contracts containing the so-called bail-out clause. The amount of the loans were reduced and, in some instances, limitations were placed on the prices at which shellers could buy.

With these conditions facing them, the shellers contended that it was natural, in fact that it was imperative, for them to try to buy farmers stock peanuts as cheaply as possible. Since the Government loan program had the effect of establishing a floor under peanut prices, it was inevitable that they would all eventually arrive at the same price as the cheapest price at which they believed peanuts could be bought, viz., loan value. Since the farmers had to be offered some inducement for selling to the shellers rather than placing their peanuts under loan, most of the shellers offered to pay the cost of hauling the peanuts from the farm to the mill, a practice which was traditional in the area anyway. Even in this, there was no immediate unanimity since several shellers, including Birdsong Storage Company, one of the largest companies in the area, started out paying loan value f.o.b. their mill and another large sheller, Columbian Peanut Company, started out paying a price midway between loan value and the support price.

Insofar as the explanations given by the shellers for their decision to buy peanuts at loan value are concerned, they impressed the examiner as being plausible and worthy of credit on the whole. As previously indicated, their testimony regarding the economic conditions which they claimed motivated their decision was corroborated to a considerable extent by documentary evidence in the record. No evidence was offered by counsel in support of the complaint to show that the conditions which the shellers claimed confronted them did not exist or that this was not the true reason why each of the shellers decided to, and bought, the bulk of its peanuts at loan value.

While there may be cases, some of which will hereafter be discussed, where the fact that a given group of competitors buy or sell at precisely the same price can have no rational explanation other than that such action resulted from a common agreement or understanding among them, the circumstances of this case do not require the drawing of any such inference. Here there is a perfectly logical and non-culpatory explanation, which does not do violence to the laws of probability, as to how all the shellers came to pay the same

price for the bulk of their peanuts. Actually, the decision which preceded their purchases was not so much a decision to buy at a particular price, as it was a decision to buy as cheaply as possible. The price which each decided upon was not some arbitrary figure in which the coincidence of their decision would logically point to a combination of some kind, but was an amount predetermined to a large extent by the Government support program as the minimum figure at which the farmers would have an incentive in selling to the trade rather than placing their peanuts under loan. The fact that the shellers ultimately all arrived at substantially the same decision does not, under the facts here present, require the drawing of any inference that their decision was the result of collusive action. Significantly, in the year 1951, when they were confronted with similar, although not as acute, economic factors, they all arrived at substantially the same decision and bought the bulk of their peanuts at the cheapest price permitted under their contracts with the Government, to wit, the support price. No charge is here made that such action resulted from any agreement or understanding among the shellers.

The other significant fact upon which counsel in support of the complaint relies is that the shellers did not merely make a similar decision as to price but that they all used an identical price schedule, in the preparation of which some of their employees cooperated. However, here again the shellers gave a plausible and logical explanation which it does not tax credulity to accept. Thus the shellers showed that in past years they had all used a similar schedule of support prices which they purchased from the bookkeeper of one of the shellers; that this schedule, the so-called Elliott schedule, translated Government support prices from a per ton to a per pound basis and was needed because support was the minimum price which could be paid under the shellers contracts with the Government; that for the 1952 crop it was necessary to know what the loan value of the different grades of peanuts were, not only because most of the shellers had decided this was the price at which they could and should purchase farmers stock peanuts, but because the farmers themselves wanted to know what the loan values were; that it was burdensome and time consuming to compute such values without some schedule or other means of ready reference; that a number of the shellers had been led to believe that a schedule of loan values would be issued by the Department of Agriculture but that when the schedule was issued, it was for another type of peanuts grown predominantly in the Southeastern area, with only a single table showing how to compute loan

values for Virginia-type peanuts; that when it became apparent that the Government was not going to issue a usable schedule some of the bookkeepers, because of their mutual need and in most cases without instructions from their employers, cooperatively assisted in preparing a schedule patterned substantially on the model supplied by the Government; and that in the normal course of events other shellers who had previously purchased the Elliott schedule found out about the new schedule and obtained copies. The shellers further showed that prior to the receipt of the schedule, a number of them were already paying loan value and were computing payments either by the long-hand method of deductions or by using a homemade schedule in which deductions were approximated.

While the fact that a given group of competitors has used the same or a similar price list with a "to the last penny" correlation has, as pointed out by counsel supporting the complaint, been considered sufficient to support an inference that the group was acting in concert, no such inference is justified by the facts in this case. The "to the last penny" correlation here can logically be explained on a basis other than the existence of an agreement to fix prices, viz., that the price list used by the competitors merely reflected the official Government loan values reduced to a per pound basis. Accepting the apparently credible testimony of the shellers as to how each of them, acting independently, arrived at the basic decision to pay loan value, there is nothing unusual about the fact that they all began to use a schedule reflecting such values. Had they all prepared separate schedules containing the same amounts, based on the Government figures, this would not give rise to an inference that they were acting in concert. The fact that several of their bookkeepers, acting in most instances without the knowledge of their employers, collaborated in preparing such a schedule does not, in the opinion of the examiner, require any different conclusion concerning the bona fides of their action, particularly in the light of the fact that they had all used identical price schedules in the past originating from a common source.

2. Application of the legal authorities

Counsel supporting the complaint states in his brief that he does "not necessarily rely on any express agreement among respondent shellers respecting the promulgation of the 1952 price schedule and its use," and cites a number of legal authorities for the proposition that it is not necessary to show any actual or express agreement, simultaneously entered into, in order to establish a case under the Federal Trade Commission Act or the related Provisions of the Sherman Act. Counsel

then argues that the "joint preparation" of the price schedule and the use thereof by the respondents in paying "to the penny" prices for the bulk of their peanuts "constitutes such a set of circumstances that the respondent shellers would be per se in violation of the Federal Trade Commission Act."

While it may be that no express agreement, simultaneously entered into, need be shown, the evidence must be such that it can reasonably be inferred that the parallelism of respondent's conduct resulted from some concert of aciton in which all of them deliberately and intentionally participated, albeit without any formal agreement and without necessarily entering into the arrangement at precisely the same moment. It is clear from the various cases cited by counsel supporting the complaint that in order to sustain a charge of illegal price-fixing under the Federal Trade Commission Act or the related Sherman Act something more than the fact that respondents, consciously or otherwise, engaged in parallel action must be shown. Thus, in the *Interstate Circuit* case,[23] while the court stated that a "conspiracy may be * * * formed without simultaneous action or agreement on the part of the conspirators," it recognizes that there must be "[*a*]*cceptance* by competitors * * * of an *invitation to participate in a plan*," even though there was no previous agreement, and it concluded that the uniform action of respondents could not have occurred "without some *understanding* that all were to join" (emphasis supplied). Similarly, in the *Fort Howard Paper Co.* case,[24] the court while stating that "no formal agreement" was necessary and that the "essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words," recognized that "[i]t is the *agreement* to fix prices in *concert* that renders the conspiracy illegal." [Emphasis supplied.] Any doubt on the subject of whether parallel business behavior is ipso facto illegal was recently laid at rest by the Supreme Court in *Theater Enterprises, Inc.* v. *Paramount*, 346 U. S. 537, where the court in interpreting the analogous provisions of the Sherman Act, stated:

> The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

[23] *Interstate Circuit, Inc.*, v. *U. S.*, 306 U. S. 208, 227.
[24] *Fort Howard Paper Co.* v. *FTC*, 156 F. 2d 899, 905 (C. A. 7).

The examiner is not unmindful of the cases holding that a course of parallel conduct which falls short of a "combination" or "conspiracy" under the Sherman Act may, under some circumstances, constitute an unfair method of competition under the Federal Trade Commission Act.[25] However, these have involved situations where not only was the method of competition (use of basing point system) considered to be illegal, but there was evidence of actual collusion among the parties. Whatever may be the validity of the argument that such cases support the doctrine of "conscious parallelism," [26] the Commission has made it clear that it regards the "inherent evidence of *collusion*" in these pricing systems as being the gravamen of the offense charged and that "mere uniformity" of prices does not provide a basis for prosecution.[27] In the instant case there is not involved any inherently illegal pricing system and, moreover, the complaint is based on the alleged existence of an agreement or understanding among respondents to fix prices and not on any claim of mere parallel behavior.[28]

Insofar as the cases cited by counsel supporting the complaint hold that a finding of agreement or conspiracy may be based on a showing of conscious parallel action, they involve situations where the facts indicate that there was no reasonable explanation for the unanimity of action among respondents other than that it resulted from an agreement or conspiracy on their part. In such cases, the respondents either offered no explanation of their parallel conduct or the explanations offered by them were patently unacceptable. Thus, in the *Eugene Dietzgen Co.* case,[29] the court noted that respondents had made "[n]o rational or satisfactory explanation" for their identical bids on Government contracts and held that "concerted action" may be inferred from an "artificial price level not related to supply and demand * * *." Similarly, in the *Fort Howard Paper Co.* case, *supra*, the court held that the "artificiality and arbitrariness of the zone structure [on which respondents' prices were based] is so appar-

[25] *FTC* v. *Cement Institute*, 333 U. S. 683, 721, fn. 19; *Triangle Conduit & Cable Co.* v. *FTC*, 168 F. 2d 175 (C. A. 7).

[26] See Rahl, Conspiracy and the Anti-Trust Laws, 44 *Ill. L. Rev.* 743, 761 (1950).

[27] *Commission Policy Toward Geographic Pricing Practices*, October 12, 1948, 3 CCH Trade Reg. Rep., par. 10,412.

[28] The complaint here charges that the price list was circulated among respondents "for the purpose, and with the object and effect, of fixing [prices]" and that the prices therein set forth were adopted by respondents "in accordance with the agreement, understanding, desire, purpose and design of said respondents" to fix prices. In the *Triangle Conduit* case, *supra*, the complaint not only charged the existence of a conspiracy to use the basing point system, but also alleged in a separate count that respondents had adopted the basing point system "with knowledge that each did likewise," thereby restricting competition.

[29] *Eugene Dietzgen Co.* v. *FTC*, 142 F. 2d 321, 327, 332 (C. A. 7).

ent that it cannot withstand the inference of agreement." The court in the *Allied Paper Mills* case [30] also cited the "artificiality and arbitrariness" of the price structure as supporting an "influence of agreement." In the *Interstate Circuit* case, *supra*, the Court found that the unanimity of action among the defendants resulted in "such far-reaching changes in their business methods" that it taxed credulity to believe that such changes could have occurred without some understanding that all were to join" and, furthermore, that it was "beyond the range of probability that [this] was the result of mere chance."

The instant case does not fall within this category. The prices reflected in respondents' price schedules were neither artificial nor arbitrary but were directly related to the Government loan program. The respondents gave a rational and satisfactory explanation as to why they decided to pay such prices and also as to how the employees of some of them happened to cooperate in the preparation of a price schedule reflecting these prices. The actions of the respondent shellers do not represent any startling change from past industry practices, under which the prices paid by the shellers appear to have borne a considerable degree of relationship to the minimum price guaranteed to the grower under the Government support program, and in which schedules reflecting such prices and based on Government-supplied data have been widely used.[31]

It is clear from the foregoing that (1) in order to establish the charge that respondents have engaged in illegal price-fixing, as alleged in the complaint, counsel supporting the complaint must establish that the action of the respondent shellers in adopting identical prices was the result of some agreement or understanding on their part, tacit or express; and (2) that proof of parallel business behavior does not ipso facto establish the existence of such an agreement or understanding, except insofar as agreement may be inferred from the context of such parallel action. The question here presented is whether the evidence that the respondent shellers engaged in substantially parallel business behavior is sufficient, in the face of the explanations given

[30] *Allied Paper Mills* v. *FTC*, 168 F. 2d 600, 608 (C. A. 7).

[31] Counsel in support of the complaint has sought to analogize the position of respondents, based on past industry practices, to the position taken by their opposite numbers in cases such as the *Socony Vacuum* case (*U. S.* v. *Socony Vacuum Oil Co.*, 333 U. S. 150) where it was held that the fact certain illegal cooperative practices had been initiated during the period of the NRA with the knowledge and acquiescence of officials of the Federal Government, did not immunize such practices from prosecution where they were continued after the NRA period. However, the examiner does not understand the position of respondents here to be based on any claim of immunity gained from Government acquiescence in illegal practices engaged in during the period of the shellers contracts. Rather it is their position that the practices engaged in prior to 1952 were entirely legal and, so far as appears from the record, there is no evidence to the contrary.

by them, to justify the drawing of an inference that such parallelism of action resulted from a common understanding or agreement on their part. The criterion to be followed in resolving this question is well stated in *Wesson* v. *United States*, 172 F. 2d 931, 933 (C. A. 8), as follows:

> Inferences must be based upon proven facts or facts of which judicial notice must be taken and one inference cannot be based upon another inference. To sustain a finding of fact the circumstances must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. *Circumstantial evidence * * * is not sufficient to establish a conclusion where the circumstances are merely consistent with such a conclusion or where they give equal support to inconsistent conclusions.*[32] [Emphasis supplied.]

In the opinion of the examiner the explanation given by the respondent shellers for their use of the same price schedule and their payment of similar prices for the bulk of their peanuts, if it does not affirmatively establish the nonexistence of an agreement or understanding to fix prices, at least gives equal support to an inference that their parallel action was noncollusive in nature as it does to one that such action was the result of agreement or understanding among them.[33] Under these circumstances, the examiner cannot draw any inference adverse to respondents from their parallel activities.

3. Concluding findings

It is concluded and found, for the reasons above stated that the evidence introduced by counsel in support of the complaint is insufficient to establish a prima facie case that the respondent shellers entered into an agreement or understanding to fix the prices at which they would purchase farmer stock peanuts during the 1952 crop season. With respect to the respondent Association, it is found that there is a complete failure of proof that it participated in any illegal activities as charged in the complaint.

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[32] See also *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 370, (C. A. 8), in which the rationale of the *Wesson* case was adopted by the court, in reversing a conviction for engagement in a price-fixing conspiracy, where the evidence of conspiracy rested largely on the adoption of parallel prices and the defendants gave a detailed plausible explanation as to the economic reasons why each adopted these prices.

[33] In his brief counsel supporting the complaint urges that the explanation of respondents not be accepted in the light of the holding in *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395, in which the Court stated that "little weight" could be given to the denials of witnesses that they had acted in concert "[w]here such testimony is in conflict with contemporaneous documents." However, unlike the *U. S. Gypsum* case, there are no contemporaneous documents here which contradict the explanations or denials of respondents. The primary documentary evidence is the price schedules themselves, and there is no necessary inconsistency between these documents and the explanations of respondents. Cf. *C. H. Musselman Co.*, Docket No. 6041 (September 23, 1954), where the Commission declined to accept explanations in clear variance with written reports.

CONCLUSION OF LAW

It is concluded that counsel in support of the complaint has failed to establish by reliable, probative and substantial evidence that respondents have engaged in any unlawful conduct in violation of Section 5 of the Federal Trade Commission Act. The motion of respondents to dismiss the complaint herein, on the ground that no violation of said Act has been established by the evidence, should, accordingly, be granted.

ORDER

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

FINAL ORDER ON APPEAL

Counsel in support of the complaint having filed, on December 31, 1954, their appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on the whole record, including briefs and oral argument; and

The Commission having concluded that the hearing examiner's initial decision is correct, both on the law and the facts, and that the appeal of counsel supporting the complaint in all respects is without merit:

It is ordered, That the initial decision of the hearing examiner dismissing the complaint be, and it hereby is, affirmed and that the appeal therefrom filed by counsel in support of the complaint be, and it hereby is, denied.

Commissioner Howrey not participating, and Commissioner Mead dissenting.

IN THE MATTER OF

DEAN ROSS PIANO STUDIOS, INC., ET AL.

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

Docket 6229. Complaint, June 30, 1954—Decision, May 19, 1955

Consent order requiring a company in New York City to cease advertising falsely that by means of its home-study course of piano instruction consisting of a booklet and a device designated "Automatic Chord Selector," a person could play the piano with both hands the first day and, within a short time, read and play hymns, ballads, and sheet music.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Frederick J. McManus for the Commission.

Mr. Benjamin E. Winston, of New York City, for respondents.

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 Dean Ross Piano Studios, Inc., a corporation, and Leonard Greene, individually and as an officer of said corporation, 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 Dean Ross Piano Studios, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 45 West 45th Street, New York, New York. It is now, and for some time last past has been, engaged in the sale of a home study course in piano instruction known as Dean Ross Piano Course. The course consists of a booklet and a device designated "Automatic Chord Selector." Respondent, Leonard Greene, is president of said corporation. He individually formulates, directs and controls the policies, acts and practices of said corporate respondent. His address is the same as that of the corporate respondent.

PAR. 2. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their home study course, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other States of the

United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce between and among the various States of the United States and the District of Columbia.

PAR. 3. In the course and conduct of their business, and for the purpose of inducing the sale of their said course of instruction, respondents have made various statements with respect to the results that will follow the study and use of the materials furnished with said course, in advertisements published in various newspapers and other periodicals and by means of radio continuities. Among and typical, but not all inclusive, of said advertisements are the following:

Play Piano with BOTH Hands the FIRST Day—or Don't Pay!

Amazing, New, Patented Self-Teaching Device Gives "Secret"

You, too, can play piano with BOTH hands at once! Thousands have learned to play this fast, easy A-B-C way with the amazing invention, the AUTOMATIC CHORD SELECTOR, there's nothing to it. This is no trick method. You actually read and play any sheet music. And, the Patented AUTOMATIC CHORD SELECTOR guides your fingers every note of the way. No scales, no exercises, no boring practice. You play the minute you sit at the piano. In no time at all you're playing Hit Parade numbers, or hymns, or beautiful old ballads . . . or all three! Send for this marvelous Dean Ross Piano Course today. Consists of 30 illustrated lessons, 50 songs with words and music, special Dean Ross play-at-once arrangements, and the Patented AUTOMATIC CHORD SELECTOR. Only $1.98 complete. You have nothing to lose and Popularity and fun to gain, so mail the 10-day FREE-TRIAL coupon now.

This is no trick method. You actually read and play any sheet music.

I can personally Guarantee to teach you to play any sheet music.

PAR. 4. Through the use of the statements appearing in said advertisement, and others of the same import but not specifically set out herein, respondents represented, directly or by implication, that by means of their course of instruction a person is able to play the piano with both hands the first day and, within a short time, to read and play hymns and ballads as well as sheet music such as is featured on the Hit Parade.

PAR. 5. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, the ability to play the piano gained by respondents' course of instruction is limited to the playing of simple, single note melodies with one hand and simple bass chord accompaniments with the other. The instruction provided will not teach or enable a person to play hymns, ballads or sheet music unless they have been specially prepared so as to permit the use of respondents' course of instruction and then only in the manner above set forth.

PAR. 6. The use of the aforesaid false, misleading and deceptive statements and representations and the failure to disclose the limitations of the results that may be obtained through the purchase and use of respondents' course of instruction has had, and now has, the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of such statements and representations are true and into the purchase of a substantial number of said courses of instruction as a result of such erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on June 30, 1954, issued its complaint herein under the Federal Trade Commission Act against the above-named respondents, charging them in certain particulars with having violated the provisions of said Act. The respondents were duly served with process and thereafter filed their answer.

On March 11, 1955, the respondents, however, stipulated in writing with counsel supporting the complaint, therein withdrawing their answer and waiving the filing of another answer and agreeing that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein except that in paragraph 2 of said proposed order in said notice the following words were stricken: "has been specifically prepared so as to permit the use of respondents' course of instruction," and the following words have been inserted in lieu thereof: "it is arranged for or is adaptable to respondents' course of instruction." Such written stipulation was approved in writing by the Director and Assistant Director of the Commission's Bureau of Litigation.

By said stipulation, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing before the Hearing Examiner or the Commission and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease

and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation which may be altered, modified or set aside in the manner provided by the Statute for the orders of the Commission.

The aforesaid stipulation for consent order as so approved was submitted on March 18, 1955, to the above-named hearing examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. And upon due consideration of the complaint and the stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which such order may be entered, the hearing examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each of the parties respondent herein; that the complaint, which is not denied, states a legal cause for complaint under the Federal Trade Commission Act against respondents as an entirety and as to each of the particular advertisements alleged as violations of law therein; that this proceeding is in the interest of the public; that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, the same not to become final unless and until it becomes the order of the Commission; and that said order therefore shall be, and hereby is, entered as follows:

ORDER

It is ordered, That Dean Ross Piano Studios, Inc., a corporation, and its officers, Leonard Greene, individually and as an officer of said corporation, and respondents' representatives, agents and employees, in connection with the offering for sale, sale and distribution of their home study courses in piano instruction, known as Dean Ross Piano Course, or any other course of instruction of the same nature, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That by employing said course of instruction persons are able to play the piano, unless it is clearly and conspicuously disclosed that such playing is limited to simple, single note melodies with one hand and simple bass chord accompaniments with the other.

2. That by employing said course of instruction persons are able to play hymns, ballads or sheet music unless it is clearly and conspicuously disclosed that such music cannot be played unless it is arranged for or is adaptable to respondents' course of instruction and is limited to simple, single note melodies with one hand and simple bass chord accompaniments with the other.

ORDERS AND DECISION OF THE COMMISSION

Order modifying initial decision, adopting initial decision as modified as Commission's decision, and directing that report of compliance be filed, Docket 6229, May 19, 1955, follows:

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission having duly considered the entire record herein, and it appearing that the stipulation containing a consent order, upon which the hearing examiner's initial decision is based, provides no basis for the hearing examiner's finding that the allegations of the complaint, other than those admitted in the stipulation, are true, and that, therefore, the initial decision should be modified to eliminate said finding:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, modified by striking from the fourth paragraph thereof the words "and the allegations of which I therefore find to be true, state" and substituting therefor the word "states."

It is further ordered, That the initial decision of the hearing examiner as herein modified shall, on the 19th day of May 1955, become the decision of the Commission.

It is further ordered, That the respondents 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 the order to cease and desist.

IN THE MATTER OF

BOHN ALUMINUM & BRASS CORPORATION ET AL.

Docket 5720. Complaint, Dec. 20, 1949—Decision, May 22, 1955

Order dismissing, because of discontinuance of business by respondents in the automotive parts replacement service field, complaint charging discrimination in price in violation of sec. 2(a) of the Clayton Act as amended.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Butzel, *Eaman*, *Long*, *Gust & Kennedy*, of Detroit, Mich., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the Hearing Examiner upon motion of respondents to dismiss this proceeding, affidavit in support thereof, and answer to respondents' motion filed by counsel in support of the complaint.

The complaint in this proceeding was issued December 20, 1949. Thereafter, under date of February 9, 1951, counsel for respondents and counsel supporting the complaint entered into a stipulation as to the facts. This stipulation stated in part that during the period from 1943 through 1949 respondent Clawson & Bals, Inc., was a wholly owned subsidiary of respondent Bohn Aluminum & Brass Corporation and, under date of December 31, 1949, said Clawson & Bals, Inc., was liquidated and since that time the business formerly conducted by it has been carried as a division of Bohn Aluminum & Brass Corporation. It was stated in said stipulation that the respondents had discontinued the practices charged by the complaint to be in violation of subsection (a) of Section 2 of the Clayton Act, and further provided that the stipulation be incorporated into the record in this proceeding and the matter adjourned until thirty days after final disposition of the matter now pending before the Federal Trade Commission against Federal-Mogul Corporation, Docket No. 5769.

In his affidavit in support of the motion to dismiss, Clyde M. Adams, Vice President of Bohn Aluminum & Brass Corporation stated that in the year 1953 Bohn Aluminum & Brass Corporation liquidated and otherwise disposed of its automotive replacement parts division and since that time had not been and is not now interested in the operation of the automotive parts replacement business in the automotive