

IN THE MATTER OF
THE C. H. MUSSELMAN COMPANY ET AL.

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

Docket 6041. Complaint, Sept. 8, 1952—Decision, Apr. 6, 1956

Order dismissing, for failure to sustain the allegations, complaint charging more than 1700 apple growers and their trade associations and five corporate processors of apples in the "Appalachian Belt" with concertedly fixing and maintaining the prices paid to growers for raw apples and diverting shipments from one to another processor for the purpose of averting a price-break from the established prices by any processor.

Mr. Leslie S. Miller, Mr. William J. Boyd, Jr. and Mr. Wilmer L. Tinley for the Commission.

Mr. Daniel R. Forbes, of Washington, D. C., for National Fruit Product Co., Inc., and along with—

Keith, Bigham & Markley, of Gettysburg, Pa., for The C. H. Musselman Co., and

Mr. J. P. Arthur, of Winchester, Va., for Shenandoah Valley Apple Cider & Vinegar Corp.

Mr. David Putney, of Harrisburg, Pa., for Knouse Foods Cooperative, Inc.

Wharton, Aldhizer & Weaver, of Harrisonburg, Va., for Bowman Apple Products Co., Inc.

Mr. Lyman S. Hulbert, of Washington, D. C., for Appalachian Apple Service, Inc.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

HISTORY OF THE PROCEEDING

On September 8, 1952, the Federal Trade Commission issued its complaint, charging the respondents named above with entering into "an understanding, agreement and combination" to restrain trade in raw apples in interstate commerce in the "Appalachian area of Virginia, West Virginia, Pennsylvania and Maryland" by (1) fixing, establishing and maintaining prices to be paid for apples for processing purposes; (2) fixing and establishing a mathematical percentage pricing formula for calculating the prices to be paid for various grades of apples and price differentials between such grades; and (3) diverting raw apples from one processor to another for the purpose of maintaining the prices thereof set by

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respondents, all in violation of the Federal Trade Commission Act. Answers were filed severally by all respondents, denying the above charges.

In due course counsel in support of the complaint completed their presentation of evidence and rested their case, whereupon respondents moved that the complaint be dismissed on the grounds of insufficiency and lack of substantiality of the evidence. By an initial decision issued on April 15, 1953, the hearing examiner then presiding herein granted respondents' motions. Appeal from his decision dismissing the complaint was taken to the Commission, which, on September 15, 1954, issued its order setting aside the hearing examiner's initial decision and remanding the proceeding to him for further appropriate action.

Immediately thereafter, the hearing examiner disqualified himself from further participation herein, and, without objection from any of the parties, the proceeding was reassigned for adjudication to the hearing examiner now presiding. Hearings on behalf of the respondents were thereafter held in Winchester, Virginia, and Washington, D. C., and on February 7, 1955, counsel for the respondents rested their case. Thereafter proposed findings as to the facts and proposed conclusions were presented by all parties, and oral argument was heard thereon.

The length and complexity of the record herein necessitates a careful analysis of the many factors involved, together with a review of the structure of the Appalachian area apple industry in general, and the activities of each respondent in particular.

IDENTIFICATION OF RESPONDENTS

Respondent C. H. Musselman Company is a Pennsylvania corporation, with its principal office and place of business located at Biglerville, Pennsylvania, and is engaged in purchasing raw apples from growers thereof and processing them into various food products, including canned sliced apples, applesauce, apple butter, jellies, juice and vinegar, with their processing plants located at Biglerville and Gardners, Pennsylvania, and inwood, West Virginia.

Respondent National Fruit Product Company, Inc., is a Virginia corporation, with its principal office and place of business located at Winchester, Virginia, and is engaged in the same type of business as Respondent C. H. Musselman Company, with processing plants at Winchester and Strasburg, Virginia, and Martinsburg, West Virginia.

Respondent Knouse Food Cooperative, Inc., is a cooperative organization incorporated March 15, 1949, under the laws of the State

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of Pennsylvania, with its principal office and place of business located at Peach Glen, Pennsylvania, and a membership of 428 apple growers. It is likewise engaged in the purchase and processing of raw apples, with processing plants located at Peach Glen, Chambersburg, Altoona and Scotland, Pennsylvania.

Respondent Bowman Apple Products Company, Inc., is a Virginia corporation, with its principal office and place of business located at Mount Jackson, Virginia. It is similarly engaged in the business of purchasing and processing raw apples, and operates a processing plant at Mount Jackson, Virginia.

Respondent The Shenandoah Valley Apple Cider & Vinegar Corporation is a Virginia corporation, with its principal office and place of business located in Winchester, Virginia. It is engaged in the same type of business as the other respondents hereinabove described, and operates a processing plant at Winchester, Virginia.

Respondent Appalachian Apple Service, Inc., is a West Virginia corporation, with its principal office and place of business located at Martinsburg, West Virginia. It is essentially a growers' organization, with approximately 1,700 grower-members in Virginia, West Virginia, Maryland and Pennsylvania, and is supported in part by tax assessments collected by the State Apple Commission in Virginia and Maryland, and in part by direct dues paid by apple-growers in Pennsylvania and West Virginia. It is engaged primarily in advertising and promoting the sale of apples grown by its members, and in keeping its members informed of market conditions in the apple industry throughout the Appalachian area.

THE APPLE INDUSTRY OF THE APPALACHIAN AREA

Approximately one-third of the apples processed annually in the United States, in the manufacture of food products such as applesauce, cider, apple juice, jellies and vinegar, are grown in the orchards of the Appalachian area, which embraces parts of the States of Virginia, West Virginia, Pennsylvania and Maryland. Of that one-third, approximately seventy-five percent is processed by the five respondent processors named herein. Although some apples are sold through brokers, the majority are sold directly by the growers to these processors, and are delivered to their processing plants, some of which are located in States other than the States of origin of the apples.

The apple-harvesting season generally extends over a period of approximately three months, beginning south of Roanoke, Virginia, in August, moving northward through the Shenandoah Valley to Maryland and Pennsylvania, and ending in the northernmost part

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of the area in late October or early November. The individual grower, however, has only, at the most, six weeks during this period, within which he must harvest and dispose of his crop. Because of this short harvesting season, the various apple growers compete keenly with each other in selling their apples. It is not uncommon for a grower to sell and deliver processing apples to several of the respondent processors. Fieldmen of the respective respondent processors maintain contact with the growers throughout the year and solicit and urge the growers to deliver apples to the particular respondent processor they represent. Not infrequently, the growers begin delivering apples to the processors before knowing what price they are to receive therefor. The record shows, however, that with apples selling at three dollars and twenty-five cents per hundred-weight, a variation of five cents more or less would be sufficient to determine to which processor the particular grower would sell his crop. From this it is evident that the competition among the respondent processors is also keen.

In the Appalachian area processing apples are sold on a graded basis. An inspector from the Federal-State Inspection Service grades the apples for quality and size, using a machine and a sizing ring, and grading representative samples of fruit from one crate of apples for each 100 crates delivered. The grades and sizes accorded these representative samples determine the grades and sizes for the whole load of apples.

In the Appalachian area it is customary for the respondent processors to issue a price scale announcement to the growers, usually late in August or early in September each year, naming the prices which will be paid the growers at respondents' plants for the various sizes, grades, and varieties of processing apples. The price announcements are usually mailed by each processor to all of the growers from whom apples are regularly purchased. It is customary, however, for each respondent processor to purchase apples from a regular group of growers, which are considered its growers. The prices named in the announcement usually prevail throughout the season, and are the minimum prices on which the processor bases his transaction with the grower for all apples purchased. In addition to this minimum price, however, the respondent processors frequently make concessions of various kinds to individual growers, such as furnishing the grower with apple crates or transportation for his apples from orchard to processing plant; storing a portion of his crop; or accepting a higher proportion of culls than that originally announced as acceptable. Such concessions are obviously considerations of value which tend to

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augment the minimum price to a greater or less degree, the amount of which varies from grower to grower.

Another factor which tends to result in different rather than identical prices paid to individual growers by respondent processors is the fact that in some years, at the end of the apple-harvesting season, respondent processors have paid bonuses, in varying amounts, to the growers, apparently for the purpose of retaining their good will and assuring themselves of a continuing supply of apples.

BACKGROUND OF APPALACHIAN APPLE SERVICE, INC.

Respondent Appalachian Apple Service, Inc., was organized in 1936 as Appalachian Apples, Inc., and was founded for the principal purpose of advertising and promotion of the sale of apples grown in the States of Maryland, Pennsylvania, Virginia and West Virginia. Although membership is open to anyone contributing over twenty-four dollars per year, control of the organization is vested in its apple-growing members. From 1936 through 1941, it was primarily concerned with the advertising and promotion of the sale of fresh apples.

The grower members in Pennsylvania and West Virginia pay dues directly to the organization, but the growers in Virginia and Maryland contribute indirectly through their State Apple Commissions, which support Respondent Appalachian Apple Service, Inc., by appropriating a portion of an apple tax assessed against growers in those States. In addition to assessments from its grower members, this respondent, over the years from 1937 through 1949, has received financial support from "Allied Industries," which includes concerns related to the apple industry, such as cold storages, processors, dealers, package people, spray material manufacturers and basket or crate manufacturers. Respondent Bowman Apple Products Company, Incorporated was an Allied Industry member from 1942 through 1949. Respondent The C. H. Musselman Company contributed several hundred dollars a year to Respondent Appalachian Apple Service, Inc., from 1936 through 1949. Respondent National Fruit Company, Incorporated contributed five thousand dollars to the support of the organization between 1943 and 1947.

THE MARKETING CLINICS

Respondent Appalachian Apple Service, Inc., usually holds a Marketing Clinic, generally late in August each year, attended by seventy-five to one hundred representative growers, handlers, processors and others from the Appalachian area interested in buying

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and selling apples. The function of these clinics is to develop and present information and data concerning all prevailing conditions and circumstances which have any bearing on the marketing of the forthcoming apple crop, such as the size of the prospective apple crop and of particular varieties of apples, the carry-over of canned apple products and the price levels on such products during the preceding year, the general over-all economic outlook, and any other factors which may affect the price structure of general selling of apples.

COOPERATIVE ACTIVITIES DURING WORLD WAR II

During the period from 1942 through 1946, the close relationship and cooperation between Respondent Appalachian Apple Service, Inc., and the respondent processors developed rapidly under the influence of the Office of Price Administration, the United States Department of Agriculture, and the War Food Administration. During this period a committee of growers and processors from the apple industry in the Appalachian area cooperated and rendered advice and assistance to the Government in the promulgation and administration of emergency measures relating to price controls, allocations and set-aside orders for the Armed Forces. These cooperative activities between the growers and processors during this period seem to have resulted in the formation in 1946 of the Joint Grower-Processor Committee of Respondent Appalachian Apple Service, Inc. This committee consists of six grower representatives and six processor representatives. From the time of its organization throughout the period involved in this proceeding, this committee has held periodic meetings at which the various problems of grower and processor have been discussed, including the prices to be paid for raw apples. Carroll R. Miller, the Secretary-Manager of Respondent Appalachian Apple Service, Inc., appears to have been primarily responsible for its formation, and to have been the chief leader in promoting cooperation between grower and processor. From 1949 until the present, all respondent processors have had representation on this committee.

ACTIVITIES FROM 1947 TO 1949

There is considerable evidence in the record concerning the activities of the Joint Grower-Processor Committee during the years 1947 to 1949, and of the efforts of the Secretary-Manager of Appalachian Apple Service, Inc., to promote concerted price-fixing by the respondents. In fact, the activities of the Secretary-Manager during this period seems to have been designed to accomplish un-

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lawful concerted price control. There is, however, no reliable, probative or substantial evidence that such an illegal objective was accomplished.

ACTIVITIES IN 1950

The activities of the Joint Grower-Processor Committee and of the respondents, in 1950, relative to cooperative price control present, however, a more serious issue. In fact, it appears that it was such activities which formed the basis for the Commission's decision holding that, at the completion of the presentation of evidence in support of the complaint, a *prima facie* case had been established. Now, for the first time, those crucial facts are being considered in the light of the entire, completed record, including the rebuttal evidence presented by the respondents.

Three meetings of the Joint Grower-Processor Committee were held in 1950. The first was held on August 15th, at which discussions took place concerning the current apple crop, its size in the Appalachian area and throughout the country, competitive crops, the increasing cost of production, available markets for both fresh and processing apples, processors' cost of production, and other subjects, including prices. In view of all the evidence relative to this meeting, and in the light of the subsequent meetings in 1950 at which prices were discussed, the conclusion is compelled that no agreement on price was reached at the meeting on August 15th.

The second of the three meetings in 1950 was held as a marketing clinic. It was attended by a large number of growers and representatives of processors. Various subjects concerning apples were discussed, including prices. It appears that the growers outlined to the processors their difficulty in meeting the cost of producing apples, and did their best to justify asking for a higher price for their apples. On the same day, the six grower-members of the Joint Committee adopted the following resolution:

After further study of all available information it is the judgment of the 6-man growers' half of The Joint Grower-Processor Committee of this Appalachian Belt that it will take a starting price scale based on not less than \$3.50 per hundredweight for Class A, U.S. 1 Canners, 2½ inches up to channel sufficient apples to processing from the present crop; assuming that Class B and lower sizes and grades carry the same dollars-and-cents differentials as last season.

The above resolution, and other evidence relative to the second meeting in 1950, indicate clearly that the growers were merely announcing a desired price, but that no agreement between them and the processors resulted at that time.

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The day following the marketing clinic discussed above, the Secretary-Manager of Appalachian Apple Service, Inc., notified the processor-members of the Joint Grower-Processor Committee that the grower-members of the Committee urgently requested a meeting of the full Committee to be held on Saturday, August 26th, at the Shenandoah Hotel in Martinsburg, West Virginia. In response to his summons, the third meeting of the Committee in 1950 was held on August 26th. This meeting was attended by ten persons, including the Secretary-Manager of Appalachian Apple Service, Inc., of the others, five were executive representatives of the processor respondents, one was an executive representative of a processor not a respondent herein, and four were growers. All testified under lengthy examination concerning what occurred there. Although all the witnesses admitted that prices to be paid by the processors to the growers for the forthcoming harvest of apples were discussed, they all denied that any agreement was entered into concerning those prices. Witness Stockdale, a representative of Zero-Pack, a processor not a respondent in this proceeding, who was not, therefore, as directly an interested witness as the others who testified herein, in response to the direct question by the hearing examiner, "What did this meeting accomplish?", stated:

Nothing, to my viewpoint, except that it has been pretty clearly—I felt, pretty clearly that the growers represented there were telling us that they believed \$3.50 was the price; I felt pretty clearly that the ones that stipulated prices of the processors, which mainly was Mr. Hunt, was \$3.00, and I left there and when I reported to my office in Cincinnati I told them then, they asked me how I thought the thing would wind up, and I said, "It looks to me like a \$3.25 price"; but as to the actual meeting, that was evolved in my own mind out of the various discussions that I heard at the meeting, but to say the meeting, itself, accomplished anything other than to bring forth these points in discussion, I couldn't name any reason for it.

In addition, Witness Hauser, President of Respondent C. H. Musselman Company and representative of that organization on the Committee, testified that the Musselman corporation conducted an orchard survey in the area each year in order to determine the prices to be paid for raw apples, and that such a survey was conducted in 1950, before the meeting on August 26th. This testimony is confirmed by that of two growers. This survey, according to Witness Hauser, indicated that three dollars per hundredweight would be too low a price to be paid for apples, whereas three dollars and fifty cents would be too high. He concluded that the growers would be happy with a price of three dollars and twenty-five cents. As a result of his company's survey, Witness Hauser determined that his company would pay

a top price of three dollars and twenty-five cents per hundred-weight, weeks before the meeting on August 26th, and that he had caused his price announcement to that effect to be mimeographed before the date, intending to issue it regardless of the outcome of the meeting. He nevertheless delayed its release in order to see if he could learn anything new from the discussions at the meeting. After the meeting, however, he concluded that he had "hit the nail on the head." This latter testimony is corroborated by another witness, and also by Witness Bigham, who testified for respondents on rebuttal.

All the witnesses who attended the August 26th meeting, as well as all the witnesses who testified concerning the activities of the respondent processors, were unanimous in stating that no agreement was made at the August 26th meeting or anywhere else, by them or by their organizations, with the apple growers of the Appalachian area or with anyone else, concerning the prices to be paid for the 1950 crop of apples.

Tending, by implication, to contradict the above testimony is the fact that shortly after the meeting on August 26th each of the processors issued price announcements identical in all respects for each of the sixteen classes and grades of apples purchased by them, excluding prices for culls. Such uniformity in the prices announced by competing processors following a meeting by them with growers, at which price was one of the principal topics of discussion, suggests that an agreement for the payment of uniform prices had been entered into. On the other hand, before such an inference can be drawn, fairness to respondents requires that consideration be given to all other relevant circumstances. The record shows very clearly that keen competition existed among the few processors located in the relatively small Appalachian apple-growing area, so that a difference of five cents per hundredweight could determine which processor would get a grower's apples. This fact would tend to compel each processor to meet the price of the others, and therefore to result in uniform prices independent of any agreement. The fact, therefore, that uniform prices were announced by the respondent processors, in the light of all the circumstances relevant thereto, does not of itself supply the basis for a trustworthy inference that respondents had agreed on such prices.

Furthermore, the record shows that throughout the season the prices paid by the respondent processors were varied, and that respondent growers received, in many instances, added considerations for their apples over and above the announced price, such as free transportation of apples from orchard to processing plant, storage

facilities, free use of crates, and payment for culls. In addition, Respondent The C. H. Musselman Company paid a season-end bonus to growers, which had the effect of augmenting further the price already received by such growers for their apples. It is also a fact that many growers actually sold their apples to these same processors for prices over and above the announced price. These facts clearly demonstrate that uniform prices were not maintained throughout the season, and also tend to refute the inference that any agreement setting such prices was ever made.

In addition to the fact of uniform price announcements, counsel supporting the complaint insists that the letter written by the Secretary-Manager of Appalachian Apple Service, Inc., on September 2, 1950, to the President of that organization, relative to the meeting of August 26, 1950, should, because it was written contemporaneously with that meeting and before the beginning of this litigation, outweigh the unanimous and uncontradicted testimony relative to such meeting of all the witnesses who had attended the meeting, and testified concerning it. The letter in question is as follows:

You have the results of last Saturday's Joint Committee session. In general, growers seem satisfied with the scale, so far as I've heard. It was all that seemed justified at the time—and the door was left open for action later if warranted.

The processors were much more co-operative than ever before. We really negotiated with them, for the first time. It is conservative to say that grower organization pushed the price up from \$2.75 to \$3.25 "top" and pushed the scale up proportionately. If the deal goes well, as it should, by another year we can probably make some headway on these other questions:—the differentials etc.

The above letter, which recites that "we (the growers' organization) really negotiated with them (the processors)" and "pushed the price up from \$2.75 to \$3.25 'top,'" seems to show, by inference, that an agreement concerning such prices had been reached at the meeting on August 26th. It is necessary, however, in evaluating this letter, to consider the temperament of the writer; the relationship between the writer and the president of the growers' organization, to whom he was writing; and the fact that the writer himself, in testifying, joined in the unanimous denial by all witnesses that any agreement had been reached. The writer of the letter, Mr. Carroll R. Miller, demonstrated by his testimony and demeanor in testifying that he was a voluble type, prone to exaggerate the achievements of the Committee which he had created and the value of his services to his organization. It is reasonable to expect, therefore, that he would, in a letter to his superior, present,

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as facts accomplished, the objects which he may have hoped to accomplish at the meeting on August 26th. Although this letter indicates that announcement of higher prices followed the meeting, the letter, like the testimony of its author, is ambiguous as to what caused the higher prices. In view of this ambiguity, and of the unanimous testimony of all the witnesses, who attended the meeting on August 26th that no agreement as to price was there made, the letter cannot be taken as a basis for a conclusion that such an agreement was entered into by respondents.

FIRST CONCLUSION

Considering the entire record, it seems fair to conclude that there is no reliable, probative or substantial evidence therein to support the first allegation of the complaint, that the respondents entered into an understanding, agreement or combination to establish and maintain prices to be paid for raw apples in the Appalachian area.

PRICING FORMULA

The second allegation of the complaint avers that the respondents fixed by agreement a mathematical percentage pricing formula for calculating the prices to be paid for various grades of apples, and price differentials between such grades. The record discloses that in 1943, under the authority of the Office of Price Administration, such a formula was established for raw apples. The record contains, however, no evidence that the respondents, by understanding or agreement, continued the 1943 mathematical percentage formula, or that they ever, by agreement, established any similar formula. Correspondence in the record shows that in 1950 Witness Hunt suggested the adoption of changes in grades of apples rather than in prices; but all members of the Joint Grower-Processor Committee testified that this suggestion was not adopted by their Committee or by the respondents, and that no agreement was made to establish such a formula or scale. Also, Mr. Miller, in his letter to the President of Appalachian Apple Service, Inc., above referred to, states that "by another year we can probably make some headway on * * * the differentials, etc.," thereby tacitly admitting that his Committee had not agreed on differentials.

SECOND CONCLUSION

Accordingly, it must be concluded that there is no reliable, probative and substantial evidence in the record to sustain the second allegation of the complaint.

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The third allegation of the complaint avers that the respondents, by agreement, diverted raw apples from one processor to another for the purpose of maintaining the prices therefor and thus preventing a price-break during a period of over-production in one area and under-production in another. Although it was the normal custom of Pennsylvania processors, year after year, to buy some of their apples in Virginia, the evidence concerning this charge refers solely to the 1950 apple season. During that season, the apple crop in Virginia and West Virginia was unusually heavy, whereas the apple crop in Pennsylvania was unusually light. As a result, it appears that the two respondent processors located in Pennsylvania, The C. H. Musselman Company and Knouse Foods Cooperative, Inc., were not receiving as many apples as they could normally process, whereas the respondent processors located in Virginia and West Virginia, particularly Respondent National Fruit Products Company, Incorporated, were receiving raw apples in excess of their normal and expected needs.

Witness Hunt, Vice-President of Respondent National Fruit Product Company, Incorporated, explained that under such circumstances it would have been simple for his company to curtail its purchase of apples, but that such action would have resulted in a serious loss of the goodwill of the growers. According to his explanation, respondent processors regard the growers from whom they buy regularly each year as "their" growers, and attempt to "take care of" these regular suppliers. Growers will not sell to a processor in a lean year if that processor does not buy all the apples they have to offer him in a year of abundance. Accordingly, Witness Hunt's company concluded that it was facing a serious problem. It must either buy more apples than it could economically process, or it must sacrifice the goodwill of its grower-suppliers. Not wanting to adopt either of these alternatives, Witness Hunt requested the Secretary-Manager of Appalachian Apple Service, Inc., to call a meeting of the grower representatives to discuss "the market situation." In response to that request, a meeting of the Joint Grower-Processor Committee was held on October 23, 1950, at Hagerstown, Maryland.

At this meeting, Witness Hunt described the market situation to those present and suggested that his company pay to the growers selling to it fifty percent of the announced price on delivery, with the understanding that if all of the processed apples could be marketed at the current price, the remaining fifty percent would

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be paid, but if the price for processed apples declined, the growers would get proportionately less than the announced price. Witness Hunt characterized this proposal as a "trial balloon" to ascertain the reaction of the growers. When that reaction proved to be definitely adverse, the suggestion was abandoned. Thereupon representatives of Respondent Processors Knouse Foods Cooperative, Inc., and The C. H. Musselman Company observed that the crop in Pennsylvania was light and that they could handle more apples, to which the growers responded that it looked as if the thing to do was to send some of their fruit up to Pennsylvania. With regard to this suggestion, Witness Hunt testified, "Now we were no party to that agreement." It is obvious that his use of the words, "that agreement," refers to the suggestion recited above rather than to any agreement in the sense of mutually-exchanged promises among the parties; and his further testimony explains his meaning and the dilemma in which his company found itself, as follows:

We could not say, "Don't send your fruit up there." And we couldn't agree to it. I would be foolish to say to a grower, "Well, you take your fruit up there," because next year—I am going to put you in a grower position again—suppose that I would say to you, "Well, I am sorry, we can't take any more of your fruit. You haul it up into Pennsylvania." Then next year if it was a short crop, and for your information traditionally we have a short crop following a large crop for the reason that the York Imperial which is the variety that we use in the largest volume is a biennial bearer and if I said to you in 1950, "Sorry, we can't take any more of your fruit; you haul it to our competitor up in Pennsylvania," and then we came to 1950 and the crop was short, which by all the laws of averages it should be, and we got in a competitive situation fighting for fruit, and I went to you and you would say, "Well, you didn't take care of my fruit last year; I am going to give it to the other man." We did not want to be in that position. So as a result, after the meeting we went home and the following day we went into a huddle as to what to do.

We decided this: to borrow more money and continue taking apples.

Finally, rather than risk losing the good will of their regular grower-suppliers by refusing to purchase more of their apples, Respondent National Fruit Product Company, Incorporated borrowed a million, seven hundred fifty thousand dollars and purchased more apples for processing in order to avoid diverting apples to other processors, and, but incidentally, lost money on the transaction.

One of the growers who attended the meeting testified that he thought some of the Virginia apples were delivered thereafter to Pennsylvania processors, but could not say definitely that this was true.

Following this meeting, the Secretary-Manager of Appalachian Apple Service, Inc., issued a bulletin, on October 24, 1950, in which he reported upon the October 23rd meeting as follows:

NOT FOR PUBLICATION: FOR MEMBERS' USE ONLY.

SOME VIRGINIA CANNERS ARE FILLING: PENNSYLVANIA CANNERS NEED FRUIT:

In 1949, "the apple crop was in Pennsylvania." This year, the apples are in The Virginias. The crop in The Virginias has been notably increased by the ample late rains; and percentage of packed fruit has been reduced by russeting. A result of this is that several Virginia processors in the heart of the Virginia production have received apples beyond early-season expectations, and are approaching the limits of what they feel they can accept, hold either in storage or otherwise, and process and sell. When this limit is reached, they expect to shut off acceptance of apples, except those previously contracted for.

Larger Pennsylvania processors, in the midst of Pennsylvania's short crop (which seems, as short crops do, to be getting smaller) are not facing this situation; will need a considerable volume of apples from south of The Potomac. This is the reverse of 1949, when Virginia processors, in the middle of a short Virginia crop, took considerable fruit from Pennsylvania's large crop.

The above is the result of a conference of The Joint Grower-Processor Committee for Appalachia, held Monday at Hagerstown. Several Virginia processors noted that their pack-out so far was larger than ever before at the same period; that their cold-stored apples, for later use, were far above any previous holdings; that they are approaching the volume of pack, in both sauce and slices, that they feel can be well sold; and when that point is reached, they must stop acceptance of any fruit not previously contracted for.

Pennsylvania processors, in the middle of a light-crop area, have no such inventory of stored fruit nor of their finished product; and indications are that, by and large, they will be in the market for sufficient apples to "take up the slack" of Virginia's processable fruit.

The above bulletin appears to be self-explanatory. It sets forth the condition of the apple crop in the entire Appalachian area, and the situation of the processors with regard to the amount of apples they would be able to process. No mention is made of any agreement to divert apples from Virginia to Pennsylvania. In fact, the report states that the "* * *" indications are that, by and large, they (the Pennsylvania processors) will be in the market for sufficient apples to 'take up the slack' of Virginia's processable fruit." Such a statement does not reflect an agreement to divert, nor does it constitute a diversion. Contrariwise, it appears to be a simple statement of existing market conditions and an exposition of the needs of the processors in the Appalachian area, for the information of all concerned. Furthermore, it would appear that in making such a statement, the Secretary-Manager of Appalachian Apple Service, Inc., was merely performing the function for which his organization was created, namely, the advertisement and promotion of the sale of apples. The only fair inference which can be

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drawn from this document is that it does not warrant the conclusion that respondents agreed to divert, or actually did divert, any apples from Virginia to Pennsylvania.

A search of the record fails to reveal any reliable, probative or substantial evidence that any Virginia or West Virginia apples were actually delivered to any respondent processor in Pennsylvania as a result of agreement among the respondents, or for any other reason.

THIRD CONCLUSION

Accordingly, it must be concluded that the third allegation of the complaint, with respect to diversion of raw apples for the purpose of maintaining prices, is not supported by any reliable, probative or substantial evidence.

FINAL CONCLUSION

In the light of the entire record, it appears that, for the reasons hereinabove set forth, the complaint herein should be dismissed. Accordingly,

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

OPINION OF THE COMMISSION

Per Curiam:

The hearing examiner's initial decision on the merits provides for dismissal of the complaint. Counsel supporting the complaint has appealed from that decision and the case is presented here on the appeal, briefs in support of and in opposition thereto and oral arguments of counsel.

The complaint under which this proceeding was instituted charges the respondents with entering into an unlawful understanding and combination to restrain trade and interstate commerce in raw apples produced and processed in an area known as the Appalachian Belt comprising Virginia, West Virginia, Pennsylvania and Maryland. It further charges that, in effectuating their alleged combination and agreement, the respondents engaged in a planned common course of action for, among other things, fixing, stabilizing and maintaining the prices paid by the respondent processors to the growers. Named as parties are five corporations engaged in processing apples in the area and Appalachian Apple Service, Inc. The latter is a trade association and its membership has included more than 1,700 growers, who control its activities, and a number of the area's canners including the respondent processors.

Among the evidentiary matters relevant to the complaint's allegations of unlawful fixing of purchase prices for apples and dis-

cussed in the initial decision were those relating to certain meetings held in the fall of 1950. In August of each year, the respondent Appalachian Apple Service, Inc., sponsors a clinic for exchanging market information on the forthcoming apple crop which is attended by growers, processors and handlers. Its Joint Grower-Processor Committee consists of six grower members and six representatives of processors. In 1950, all of the respondent processors were represented on the committee. During the clinic held on August 23, 1950, the grower members of the Joint Grower-Processor Committee met separately and adopted a resolution to the effect that, on the basis of available market information, it was their judgment that a starting price scale of \$3.50 per cwt. would be necessary to channel sufficient apples to processors. The committee convened on Saturday, August 26, and the growers' resolution was presented and discussed. On Monday, August 28, one of the respondent processors issued a top price announcement of \$3.25 per cwt., f.o.b. factory, with proportionately lower prices for other sizes, grades and classes of apples; and the others on August 29, 30, and 31, and September 1, announced prices identical thereto.

Growers and processors' representatives who attended the meeting have testified that no pricing agreements were entered into there or elsewhere. The initial decision recognized nonetheless that the announcements of uniform prices by the respondent processors shortly after meetings where price was the principal topic of discussion indicated and suggested that the prices may have been adopted as a result of agreements and understandings. It concluded, however, that findings of collusive agreements were not warranted when due weight was accorded to evidentiary matters negating inferences of agreement.

One evidentiary matter cited by the hearing officer as tending to refute conclusions of collusion by the processors in promulgating their price announcements is the testimony indicating that respondent, The C. H. Musselman Company, had determined after an orchard survey and sometime prior to the meeting of August 26, to pay a top price of \$3.25. Mimeographing of its announcement was completed prior to the meeting, and, according to a company official, its release was intended following the meeting irrespective of what occurred there. Various matters are cited in support of the appeal's contentions that this testimony was in part misrepresented in the initial decision and should be disregarded. We deem these exceptions to be without merit, however; and think the hearing examiner's evaluation of this aspect of the evidence was substantially correct.

It also was concluded in the initial decision that payments or allowances above the announced prices were received by apple growers throughout the season, and that uniform prices were not maintained by respondent processors during that period. The appeal states that the hearing examiner should have found instead that the prices were adhered to and that there was no showing in the record as to how often or to what extent the respondent processors may have departed from their announced terms. There can be no question but that a substantial amount of fruit was bought by the respondent processors at their announced opening prices. However, one of the respondent processors paid a bonus of approximately \$75,000 at the end of both the 1949 and 1950 seasons; and there is substantial evidence showing that this concern frequently accorded special allowances for hauling and handling when purchasing its apples. Moreover, the testimony of various growers is to the effect that allowances and concessions as to handling, culls and other price-related matters were made available by various other respondent processors.

In this situation we perceive no substantial error in the hearing examiner's findings to the effect that pricing departures were general; and, when considered with related evidentiary matters, we share the initial decisions view that there is inadequate record support for conclusions that such uniformity as did exist with respect to purchase prices indeed resulted from agreements to maintain uniform prices. Those pricing departures tend also to refute inferences that the announced prices were originally established through processors' collusion.

Additional allegations of the complaint charge that respondents have unlawfully fixed and maintained a mathematical pricing formula for establishing price differentials between the various grades of fruit and that they diverted raw apples from one processor to another for maintaining their allegedly collusive prices. These allegations and the evidence pertinent thereto are closely related to the previously discussed price fixing charge, and we find no error in the initial decision's conclusions that these additional charges likewise lack adequate record support.

This case previously was considered by the Commission on an appeal from an initial decision rendered when the presentation of evidence in support of the case in chief was concluded. The Commission then held that a prima facie case had been established and remanded the matter for further appropriate proceedings. The appeal argues that the evidence received after the remand fails to rebut the evidentiary matters originally received into the record

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Order

and held by the Commission to establish a prima facie case and that the initial decision is in erroneous conflict with the Commission's earlier interlocutory decision.

After the remand approximately 400 pages of evidence was received and thirteen witnesses appeared before the hearing examiner. In addition to testimony by growers, which is relied on by respondents as evidence that price competition existed on the processors' purchase of fruit, the rebuttal matters include statements relative to bonus payments by a respondent processor in certain years and policies adopted by other processors in purchasing fruit. The hearing examiner manifestly gave weight to these evidentiary matters in reaching conclusions to the effect that the greater weight of the evidence does not support findings of unlawful combination and collusive action by the respondents. Not only was that evidence in major part relevant to the issues, but it obviously tended to place the evidentiary material previously received in its proper perspective and to corroborate certain factual aspects adverse to the position adopted earlier in the proceeding by counsel supporting the complaint. We do not construe the initial decision to be in erroneous conflict with the Commission's prior interlocutory decision on the basis of the present record.

The appeal is denied and the initial decision affirmed.

Commissioners Secrest and Kern did not participate in the decision herein.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having come on to be heard upon the record including the briefs and oral arguments of counsel, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

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

Commissioners Secrest and Kern not participating.

Complaint

52 F. T. C.

IN THE MATTER OF
YARDLEY OF LONDON, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (e) OF THE CLAYTON ACT

Docket 6442. Complaint, Nov. 8, 1955—Decision, Apr. 19, 1956

Consent order requiring a manufacturer of soaps, cosmetics, perfumes, etc., with principal place of business in Union City, N. J., to cease discriminating in price in violation of Sec. 2 (e) of the Clayton Act through furnishing demonstrator services or allowances to some customers, when not according such services on proportionally equal terms to all their competitors.

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

Mr. Donald K. King for the Commission.

Appell, Austin & Gay, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that Yardley of London, Inc., hereinafter designated as respondent, has violated and is now violating provisions of Subsection (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Yardley of London, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 620 Fifth Avenue, New York, New York. It also maintains plants and warehouses at Union City, New Jersey, Chicago, Illinois, Dallas, Texas, and San Francisco, California.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of manufacturing and selling soaps, cosmetics, perfumes, beauty aids and toilet preparations. Respondent divides its products into four different categories or lines as follows: The "A" line which is its general line of merchandise; the "B" line, consisting of skin treatment creams and allied products; the "Flair" line, consisting of perfume, bath oil and dusting powder; and the "Lavanesque" line, a perfume and toilet water preparation marketed under the brand name of "Lavanesque." These various lines are sold by respondent to some 12,000 retail customers with places of business located throughout the several