

Appearances

IN THE MATTER OF
WILSON TOBACCO BOARD OF TRADE, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6262. Complaint, Nov. 9, 1954—Decision, Aug. 23, 1956

Order requiring an association of dealers in leaf tobacco, including warehousemen operating the 19 warehouses on the Wilson, North Carolina, market, which had, on Apr. 8, 1952, replaced the earlier floor place system by adoption of the "performance" system to cease collectively—

- (1) Allocating selling time for the ensuing year on a "poundage" rather than basket basis;
- (2) Limiting the amount of tobacco which might be resold by speculators or rehandlers other than warehousemen, and restricting the time in which such tobacco might be so sold; and
- (3) Allotting to a newcomer on the Wilson market for his ensuing first year of operation the same amount of time as the last previous entrant had for that year, providing he built as large a warehouse; otherwise, in proportion to the size built.

Mr. Rufus E. Wilson for the Commission.

Lucas, Rand & Rose, of Wilson, N.C. and *Sanders, Gravelle, Whitlock & Markey* and *Howrey & Simon*, of Washington, D.C., for Wilson Tobacco Board of Trade, Inc., Banner Warehouse of Wilson, Inc., Harriss Sales Corp., Big Dixie Warehouse Co., Inc., Clark's Warehouse, New Planters Warehouse, Cozart-Eagles and Co., Watson Warehouse Co., Inc., James I. Miller Tobacco Co., Inc., Wilson Tobacco Co., Inc., Smith-Carr, Wilson Warehouse Ass'n and various officers, directors and partners thereof.

Battle, Winslow & Merrell, of Rocky Mount, N.C., also represented Ula H. Cozart, Jr., Sydnor M. Cozart, Banner Warehouse of Wilson, Inc., Big Dixie Warehouse Co., Inc., New Planters Warehouse and various officers, directors and partners thereof.

Blackwell, Blackwell & Canady, of Winston-Salem, N.C., also represented Herbert H. Harriss and Harriss Sales Corp. and its officers and directors.

Mr. Chas. B. McLean, of Wilson, N.C., for Wainwright's, Inc. and its officers and directors.

Gardner, Connor & Lee, of Wilson, N.C., for S. Grady Deans, Stephen E. Griffin and Growers Cooperative Warehouse, Inc. and its officers and directors.

Carr & Gibbons, of Wilson, N.C., and *Diamond & Brylawski*, of Washington, D.C., also represented New Planters Warehouse and Smith-Carr and the partners thereof.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE PROCEEDINGS

This proceeding began on November 9, 1954, in a complaint which charged respondents with violating Section 5 of the Federal Trade Commission Act (15 U.S.C.A. 45). Stripped of the legalistic proliferation common to conspiracy complaints, the charge is that the warehousemen respondents, as dominant members of the Wilson Tobacco Board of Trade, Inc., adopted rules and regulations governing the sale at Wilson, North Carolina, of leaf tobacco which:

1. Excluded would-be traders on that market from trading thereon;
2. Prevented the erection of new tobacco auction warehouses thereon;
3. Prevented the expansion of existing warehouses thereon;
4. Changed the method of allocating selling time to the warehouses on that market to a system which is discriminatory and in restraint of trade;
5. Limited to an arbitrary figure the amount of resale tobacco which may be traded; and
6. Prevented the rental or lease of existing warehouse facilities on that market by the owners thereof without the approval of their competitors and then only if any rental be paid into the Wilson Tobacco Board of Trade, Inc.

The answers to these charges varied in detail, but in substance all admitted the adoption of the rules and regulations complained of, and alleged that they were necessary and reasonable and that any restraint imposed thereby was reasonable under the inherent conditions of the production and sale of leaf tobacco. Since all regulations necessarily restrain, the issue boils down to whether the restraints imposed are reasonable or unreasonable.

Twenty-two hearings were held at intervals in Wilson, North Carolina, from March 1955 to August 1955 resulting in 3,163 pages of transcript and 215 exhibits, the taking of proof being closed on August 11, 1955. Thereafter, proposed findings of fact and conclusions were submitted by all parties and the case closed on December 15, 1955.

Upon the record thus made and after consideration thereof, the Hearing Examiner concludes that this proceeding is in the public interest and makes the following:

FINDINGS OF FACT

The Respondents

1. Respondent Wilson Tobacco Board of Trade, Inc., hereinafter referred to as the Board, is a corporation under the laws of the

State of North Carolina, organized on May 22, 1936, with its principal office and place of business located in Wilson, North Carolina.

The membership of respondent Board is composed of corporations, partnerships and individuals, located in the various States of the United States, including warehousemen, who are generally engaged in either selling, buying, rehandling or otherwise dealing in leaf tobacco.

The rules and regulations adopted by said respondent Board classify the member buyers as either participating or non-participating.

There are nineteen warehouses presently operating on the Wilson market, as follows:

- Banner Warehouse of Wilson, Inc.
- Big Dixie Warehouse Company, Inc.
- Carolina Warehouse
- Clark's Warehouse
- Centre Brick Warehouses 1, 2 and 3
- Farmers Warehouse
- Growers Cooperative Warehouse, Inc.
- Big Star Warehouse
- Smith A-B-C (3 warehouses)
- Watson Warehouse Company, Inc. 1-2
- Wainwright's, Inc.
- New Planters Warehouses No. 1 and No. 2
- Liberty Warehouse

Each warehouse is entitled to vote on matters coming before respondent Board. Participating buying companies are also entitled to one vote and rehandlers (speculators) one-half vote each.

The following named individuals are now, or have been, officers of respondent Board, and in such capacity have directed, and are now directing, the affairs of said respondent Board, including the policies and practices as hereinafter referred to and set forth:

- James I. Miller—President
- Ula H. Cozart—Vice President
- Paul C. Darden—Secretary-Treasurer
- Alton B. Boswell—Assistant Secretary, Acting Secretary, Treasurer and Supervisor of Sales

2. Respondent Banner Warehouse of Wilson, Inc., hereinafter referred to as respondent Banner, is a corporation under the laws of the State of North Carolina, with its principal office and place of business located in Wilson, North Carolina, and is temporarily engaged in the operation of a tobacco storage warehouse in or near Wilson, North Carolina. Said respondent was formerly used as a

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tobacco auction warehouse and it still retains the selling time allocated to it, as such, by respondent Board as hereinafter set forth. Said respondent Banner is a member of the Board and of respondent Wilson Warehouse Association.

The following named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent Banner, and, in such capacity, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

Herbert H. Harriss—President

William Cecil Thompson—Vice President

Joseph C. Eagles, Jr.—Secretary

Ula H. Cozart—Treasurer

Ownership of said respondent Banner is divided among the following as follows:

Cozart-Eagles & Co._____	1/4 interest
Big Dixie Warehouse Co., Inc._____	1/4 interest
Harriss Sales Corporation_____	1/4 interest
Watson Warehouse Co., Inc._____	1/4 interest

The selling time to which it was entitled by virtue of its floor space and allotted in 1952 by respondent Board was, and is, used by the owners under the general rules and regulations of respondent Board in their respective tobacco auction warehouses. The said owners retain the right to conduct auction sales of tobacco on the floors of Banner Warehouse whenever in the conduct of their business they shall deem it to be in their best interest.

3. Respondent Harriss Sales Corporation is a corporation under the laws of the State of North Carolina with its principal office and place of business located in Wilson, North Carolina. Respondent Harriss Sales Corporation is a member of the Board and of respondent Wilson Warehouse Association. Said respondent operates three tobacco auction warehouses in the City of Wilson known and described as Smith A-B-C warehouses. In addition thereto, said respondent Harriss Sales Corporation owns one-fourth interest in respondent Banner Warehouse.

The following named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent Harriss Sales Corporation, and, in such capacity, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the said practices set forth herein:

Herbert H. Harriss—President-Treasurer

John R. Harriss—Vice President

John M. W. Crute—Secretary

4. Respondent Big Dixie Warehouse Company, Inc., hereinafter referred to as respondent Big Dixie, is a corporation under the laws of the State of North Carolina, with its principal office and place of business located in Wilson, North Carolina, and engaged in operating a tobacco auction warehouse in or near the said Wilson, North Carolina. Respondent Big Dixie is a member of the Board and of respondent Wilson Warehouse Association.

The following named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent Big Dixie, and, in such capacity, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

Elvin B. Hicks—President

William Cecil Thompson—Vice President

Robert P. Dew, former Secretary-Treasurer of respondent Big Dixie, was named originally in the complaint as a party respondent, both individually and as an officer, but died during hearings. On June 6, 1955, his name was stricken from the proceeding. Big Dixie owns $\frac{1}{4}$ interest in Banner.

Alvin B. Hicks was originally named as a respondent in the complaint as President of respondent Big Dixie. The correct name is Elvin B. Hicks and the complaint was ordered amended accordingly.

5. Respondent Wainwright's, Inc., is a corporation under the laws of the State of North Carolina, with its principal office and place of business located in Wilson, North Carolina. Said respondent is engaged in the operation of a tobacco auction warehouse in or near Wilson, North Carolina, commonly referred to, known and described as Wainwright's Warehouse. Said respondent also operates the Carolina Warehouse in this market under a leasing arrangement. Since the tobacco season of 1952, this warehouse has not been operated for the auctioning of tobacco, but the selling time and baskets allotted to this warehouse have been transferred to Wainwright's Warehouse. Said respondent Wainwright's, Inc., is a subsidiary corporation of Wainwright Tobacco Company, Inc., a corporation under the laws of the State of North Carolina. Said respondent Wainwright's, Inc., and the Carolina Warehouse are members of the Board and of respondent Wilson Warehouse Association.

The following named individuals are now, and have been during the time mentioned herein, officers and directors of respondent Wainwright's, Inc., and of Wainwright Tobacco Company, Inc., the parent company, and in such capacity, have controlled and directed, and are now controlling and directing, the affairs of both corporations, including the practices set forth herein:

George L. Wainwright—President

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Susan M. Wainwright—Vice President

H. S. Askew—Secretary-Treasurer

The officers of Wainwright Tobacco Company, Inc., are:

George L. Wainwright—President

H. S. Askew—Vice President

Susan M. Wainwright—Secretary-Treasurer

6. Respondents William Boyd Clark, Sr., William Boyd Clark, Jr., and Robert Clark are co-partners, trading under the name and style of Clark's Warehouse, a partnership, engaged in operating a tobacco auction warehouse with their principal office and place of business located in or near Wilson, North Carolina. Said respondents are members of the Board and of respondent Wilson Warehouse Association.

7. Respondent S. Grady Deans is an individual, operating a tobacco auction warehouse under the name and style of Farmers Warehouse and operating as a member dealer under the name and style of Boyette & Deans, with his principal office and place of business located in or near Wilson, North Carolina. Said respondent is a member of the Board and of respondent Wilson Warehouse Association.

8. Respondents Bryan W. Carr, Eliza Carr Smith and Will C. Smith are co-partners, trading under the name and style of New Planters Warehouse, a partnership, engaged in the business of operating tobacco auction warehouses commonly known, referred to, and described as Planters No. 1 and Planters No. 2, both of which are located in or near Wilson, North Carolina, where respondents have their principal office and place of business. Said respondents are members of the Board and of respondent Wilson Warehouse Association.

9. Respondents Joseph C. Eagles, Jr., Ula H. Cozart, Sydnor M. Cozart, and Fred M. Eagles, are co-partners, trading under the name and style of Cozart-Eagles and Co., a partnership, with their principal office and place of business located in or near Wilson, North Carolina.

Said respondents own and operate the three tobacco auction warehouses commonly known, referred to, and described as Centre Brick Warehouses 1-2-3. Respondents also own $\frac{1}{4}$ interest in respondent Banner Warehouse and 62.75 percent interest in respondent Watson Warehouse Company, Inc. Said respondents are members of the Board and of respondent Wilson Warehouse Association.

10. Respondent Watson Warehouse Company, Inc., is a corporation under the laws of the State of North Carolina, with its principal office and place of business located in Wilson, North Carolina, and

is engaged in operating tobacco auction warehouses, commonly known, referred to, and described as Watson Warehouses 1-2, in or near Wilson, North Carolina. Respondent Watson Warehouse Company, Inc., is a member of the Board and of respondent Wilson Warehouse Association.

The following named individuals are now, and have been during the time mentioned herein, officers of said respondent Watson Warehouse Company, Inc., and, in such capacity, together with the members of the Board of Directors, hereinafter named, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

Ula H. Cozart—President

J. Henry Thompson—Vice President

Paul C. Darden—Secretary-Treasurer

The following named individuals are now, or have been during the time mentioned herein, members of the Board of Directors of said respondent Watson Warehouse Company, Inc., and, in such capacity, together with the officers hereinabove named, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

H. W. Anderson, Chairman

D. W. Woodard

Fred M. Eagles

Sydnor M. Cozart

Joseph C. Eagles, Jr.

W. S. Lane, Jr.

J. R. Edmundson

T. P. Sharpe

G. C. Cobb

J. R. Hunt

S. E. High

M. V. Wilkerson

J. N. Whitley

N. G. Blackman, Jr.

Watson owns $\frac{1}{4}$ interest in Banner.

11. Respondent Growers Cooperative Warehouse, Inc., hereinafter referred to as respondent Growers, is a corporation under the laws of the State of North Carolina, and is engaged in operating tobacco auction warehouses commonly known, referred to, and described as Growers Cooperative and Big Star, with its principal office and place of business located in Wilson, North Carolina. Respondent Growers is a member of the Board and of respondent Wilson Warehouse Association.

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The following named individuals are now, and have been during the time mentioned herein, officers of said respondent Growers, and, in such capacity, together with members of the Board of Directors, hereinafter named, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

J. Roy Wilkerson—President

R. F. Speight—Vice President

Stephen E. Griffin—Secretary-Treasurer and General Manager

The following named individuals are now, or have been during the time mentioned herein, members of the Board of Directors of said respondent Growers, and, in such capacity, together with the officers hereinabove named, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

H. B. Nichols

Van D. High

Ray B. Williams

F. W. Scott

Robert S. Griffin

L. S. Farmer, Jr.

W. W. Taylor

W. O. Harrison was dismissed as a party respondent on February 11, 1955, in view of the fact that he is not an officer nor a director of respondent Growers but merely an employee and does not have, nor has he had, anything to do with the affairs and policies of respondent Growers.

12. Respondent James I. Miller Tobacco Company, Inc., is a corporation under the laws of the State of Virginia, with its principal office and place of business located in Wilson, North Carolina. Said respondent is engaged in buying leaf tobacco at auction at the various large tobacco markets in this country and in the redrying of tobacco. Said respondent is a participating member of the Board.

The following named individuals are now, or have been during the time mentioned herein, officers and directors of said respondent James I. Miller Tobacco Company, Inc., and, in such capacity, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

Thomas D. Miller—President

James I. Miller—Vice President

W. B. Waddill—Secretary-Treasurer

T. P. Thomas, Secretary of this respondent, being deceased, his successor, W. B. Waddill, has been substituted as Secretary-Treasurer, as such, and individually as a party respondent.

13. Respondent Wilson Tobacco Company, Inc., is a corporation under the laws of the State of Virginia, with its principal office and place of business located in Wilson, North Carolina. Said respondent Wilson Tobacco Company, Inc., is engaged in buying leaf tobacco on various tobacco markets in this country, including the Wilson market, for its own account and for others and, in addition thereto, is also engaged in the business of redrying tobacco. Said respondent is now a non-participating member of the Board, having given up its participating membership in the fall of 1954.

The following named individuals are now, and have been during the time mentioned herein, officers and directors of said respondent Wilson Tobacco Company, Inc., and, in such capacity, have controlled and directed, and are now controlling and directing, the affairs of said corporation, including the practices set forth herein:

Charles P. Lyles—President
John G. Boatwright—Vice President
Charles A. Carr—Vice President
Carl H. Lane—Treasurer
J. Wilber Turner—Secretary

14. Respondents Bryan W. Carr and Eliza Carr Smith are co-partners trading under the name and style of Smith-Carr, a partnership, engaged in the purchase and sale of tobacco on the Wilson market with their principal office and place of business located in Wilson, North Carolina. Said respondents are members of the Board, but are not speculators or rehandlers.

15. Respondent Wilson Warehouse Association, hereinafter referred to as the Association, is a voluntary, unincorporated association, with its office located in Wilson, North Carolina, and whose membership is made up of tobacco warehouse operators operating tobacco auction warehouses on the Wilson tobacco market. Membership is open in a respondent Warehouse Association to anyone who operates a warehouse used in the auction sale of tobacco. Each warehouse is entitled to one vote in respondent Warehouse Association. Of the nineteen tobacco warehouses in the Wilson market, fourteen are currently used for actual sale of tobacco at auction. Respondent Warehouse Association's present membership consists of the following named or described warehouses:

Banner Warehouse of Wilson, Inc.
Big Dixie Warehouse Company, Inc.
Carolina Warehouse
Clark's Warehouse
Centre Brick Warehouses 1, 2 and 3
Farmers Warehouse

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Growers Cooperative Warehouse, Inc.
Big Star Warehouse
Smith A-B-C (Harriss Sales Corporation)
Watson Warehouse Company, Inc., 1-2
Wainwright's, Inc.
New Planters Warehouses, No. 1 and No. 2
Liberty Warehouse

The following named individuals are now, or have been during the time mentioned herein, officers of said Association, and, in such capacity, have controlled and directed, and are now controlling and directing, the affairs of said Association, including the practices set forth herein:

H. H. Harriss—President
W. B. Clark, Jr.—Vice President
Alton B. Boswell—Secretary-Treasurer

TOBACCO

Its Culture and Curing

16. Flue-cured tobacco is grown in the five coastal states from southern Georgia and northern Florida as far north as central Virginia. This area is divided into five belts, each of which produces a type of flue-cured tobacco. Type 14, Georgia flue-cured tobacco, is grown in southern Georgia and northern Florida; Type 13, South Carolina and Border North Carolina flue-cured, is produced in eastern South Carolina and southeastern North Carolina; Type 12, Eastern flue-cured is produced in eastern North Carolina; Type 11b, Middle Belt flue-cured produced in central North Carolina; and Type 11a, Old Belt flue-cured in the Piedmont section of North Carolina and Virginia.

17. The flue-cured tobacco farmer plants his tobacco seeds early in the winter in sheltered, specially treated and well tended plant beds. They are covered with a very thin porous cotton cloth. Some three months later the individual plants, then about finger size, are taken from the plant beds and are set out in the growing fields in even, well spaced rows. The field growing season is about six to eight weeks. The leaves ripen from the bottom of the stalk progressively upward. The "lugs" or bottom leaves ripen first and the "tips" or top leaves ripen last. Each ripe leaf is plucked by hand. Those plucked leaves, still green in color and heavy in weight but having indications of ripeness plain to an expert "cropper," are taken to a curing barn where they are strung on sticks. The sticks are placed on racks so that there is ample space and free ventilation between each stick. The barn is then closed and heat is applied.

18. Flue-cured tobacco is commonly referred to as bright tobacco and derives its name from the curing process, the distinctive feature of which is that the barn in which the curing takes place is provided with a system of large pipes, or flues, that carry off the fuel gasses and radiate heat. Smoke does not come into contact with the tobacco. Furnaces suited to the fuel being burned are employed and while a barn temperature only a few degrees above the temperature prevailing outside is used at the beginning, a temperature of 170° F. or more is reached at the end of the process. One of the principal factors controlling the value of the leaf cured by this method is the color. In flue curing, as well as air curing, the main changes in composition must be brought about before the leaf is killed. Flue-cured tobacco at time of harvesting is riper than most tobaccos cured without use of heat. Partly on this account and also because of the character of the soil on which it is grown this type of leaf is richer in starchy matter and poorer in coloring. Flue-curing consists of speeding up and shortening the first stage in air curing which is the yellowing. Unlike the air curing process which goes through a second stage to develop the brown or red color of the leaf, the flue-cured process stops with the yellowing.

19. At this time the tobacco leaves are a light yellow or gold or lemon in color and are very dry and brittle. If handled in that condition they would crumble and their value would be destroyed. To get the tobacco in condition for handling the curing barn doors are opened and the tobacco absorbs moisture from the night and early morning air. When so moistened it can be moved from the curing barn to the pack barn and placed in storage, still on its curing sticks, and the barn doors and windows closed. In that closed barn the tobacco again dries out and becomes brittle. This is important because if moisture remains in the tobacco long the tobacco will spoil. After putting the tobacco in the pack barn the farmer goes out and gathers the additional tobacco which has ripened in the field during the past week. Then he cures another barn. An average barn will cure about one thousand pounds of tobacco, cured weight. The harvesting of a field of tobacco, the progressive ripening and plucking of the leaves and the curing of those leaves will cover a period of approximately six weeks. Tobacco can be left in a pack barn almost indefinitely if the barn is in sound condition.

20. When the farmer is ready to market his tobacco he then has the problem of getting the tobacco from the storage barn into the pack house. At this time the tobacco leaf is very brittle and it must be gotten into a pliant condition in which it may be handled without crumbling. Tobacco is hygroscopic in nature. In normal

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weather pliancy may be accomplished by opening the storage barn doors and windows and allowing the damp night and early morning air to come in. In very hot, dry weather it sometimes happens that a farmer will have to wait several days until the arrival of a moist evening or morning. Tobacco is ready for handling when it is pliant enough to fold by closing the hand on the leaf without breaking the stem or leaf. Getting the tobacco ready for the market is an operation of the entire family and in the industry it is called the "family machine." At this time, the family or such employees as the farmer may hire, sit down and grade the tobacco into different lots or grades and tie it into hands which contain 15 or 20 leaves. As a rule the different primings are handled separately and only a few lots are made of each. Six to ten different grades will usually be all that is made of the entire crop. On the farm, the leaf from the early priming may be separated in lots commonly called trash lugs, sand lugs, and good lugs. Lots from later primings are usually known as best leaf, second leaf, tips, and green tips. The separation is based mainly on the position of the leaf on the stalk, color, and extent of injury. Also, such other leaf characters as thickness, elasticity, and texture are highly important in the established market system of classification and are considered. After the tobacco is graded and tied into hands a pile is made of each grade up to a weight of 300 pounds and it is then ready to be loaded for conveyance to the market.

21. In eastern North Carolina tobacco is raised on farms with tobacco acreage allotments ranging from 3 or 4 acres to over 100 acres. The prevailing method of cultivating and marketing tobacco on farms having fairly substantial tobacco acreage is by tenant sharecroppers. Under the sharecropping system the tenant usually cultivates and prepares for market anywhere from five to eight acres. The tobacco raised by tenants of the same landlord is not commingled; the tobacco of each tenant is separately cured, prepared for market and separately marketed by the tenant. The farms in Wilson County are mostly "very small farms." More than 26,584 farmers patronize the Wilson tobacco market as sellers.

THE MARKET

Grading

22. The Secretary of Agriculture under the provisions of the Tobacco Inspection Act of 1935 is empowered to designate an auction market where tobacco is offered for sale at auction as a mandatory market where two-thirds of the growers voting in the referendum for that particular market favor the designation of such market. All

tobacco offered for sale at auction on such a designated market shall be certificated and inspected by representatives of the Secretary of Agriculture. The grading and certification of this tobacco comes under the direct supervision of the Tobacco Branch, Production and Marketing Administration, United States Department of Agriculture. Thus, every mandatory or designated market has a number of graders assigned to it for the purpose of grading the tobacco prior to its sale at auction. The auction market at Wilson, North Carolina, is a designated market. Flue-cured tobacco is classified on the market into six groups, which are determined mainly by the character of the leaf. Beginning at the lower part of the plant, the normal groups are lugs, cutters, and leaf. Another group, known as wrappers, consists of leaves that are almost perfect, selected from the leaf and cutter group. Finally, two sub-groups are made—primings in the lugs group and smoking leaf in the leaf group. The groups are further separated into three to six qualities, and each quality is again divided into colors. The most desirable colors, in order of preference, are lemon, orange, red, dark red, and green. The system of classification obviously provides for a large number of possible grades and so permits close grading of all lots marketed. The tobacco of the different groups is used for different purposes. In general that from the lower part of the plant is used in cigarettes, while that from the upper part is used in smoking and chewing tobacco. The prices obtained on the market are greatly influenced by the care and skill used in grading. This work requires experience and ability on the part of the grader to classify rapidly the colors and to determine accurately the other equally important but less easily recognized characters of the leaves.

Auction Warehouses

23. All auction tobacco warehouses operating in the five belts, with a few exceptions, are members of the Bright Belt Warehouse Association. This association was organized under the laws of North Carolina in June 1945. It is a non-stock, non-profit membership organization. It is a trade organization designed to provide a code of ethics and a pattern of performance for the organized tobacco auction warehousemen. Membership in the Bright Belt Warehouse Association is obtained by the local warehouses operating on a market through their belt association. For example, the warehousemen in Wilson, North Carolina, are members of the Eastern Carolina Warehouse Association. The Eastern Carolina Warehouse Association is a member of the Bright Belt Warehouse Association. Therefore, Eastern Carolina Warehouse Association members are

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members of the Bright Belt Warehouse Association. The Bright Belt Warehouse Association adopts various regulations for the conduct of the warehouses' operation on the auction market in the five belts. The Wilson Tobacco Board of Trade accedes to and adheres to the regulations promulgated by the Bright Belt Warehouse Association.

24. When the farmer drives into the auction Warehouse with a load of tobacco he is assigned laborers to pack the tobacco as he hands it off his truck. The tobacco is brought to market in hands or bundles strung on sticks about four feet long which have been used to pack the tobacco down. Those sticks are handed off to the laborers. The tobacco is then taken off the sticks and it is packed as neatly as can be in a basket, one grade to a basket, until such time as the farmer indicates that he has handed off the last stick of a particular grade of tobacco, which he made at the time he graded it back on the farm.

25. The tobacco is then trucked to the scales to be weighed by a licensed weighmaster. At that time a printed cardboard-backed ticket consisting of three duplicate originals is filled out by the weighmaster, containing the weighmaster's number, his identification mark as a weigher, and the name and initials of the grower. There is also a blank on this form for the poundage as well as a space for the Type 12 grade, or whichever it may be, to be inserted by an inspector of the U.S. Department of Agriculture under the Tobacco Inspection Act. The card is placed in the end of a cleft stick, which is pointed on the bottom, and, after the weight of the tobacco is indicated thereon, the ticket is then handed to an employee who inserts the cardboard form into the cleft end of the stick and the stick stuck into the pile of tobacco in an upright position of what will eventually be the farmer's bill.

26. The weighmaster continues to list those piles as they are unloaded and brought across to the scales until the farmer indicates that he has brought to the scales all of the tobacco he desires to sell on that particular bill. The piles of tobacco are then rolled out on the warehouse floor and placed on the floor in accordance with the specifications set up in the warehouse's contract with the Stabilization Corporation and the rules and regulations of the Warehouse Association. The Bright Belt Warehouse Association's regulations prescribe that baskets of tobacco displayed for sale on auction warehouse floors shall have a minimum space of 18 inches between rows and a minimum space of 24 inches at each end of the row between the basket and the wall, provided, however, where any warehouseman shall mark his rows and the widths of his baskets plus 26 inches

for the aisle between rows and shall place his baskets in accordance with those markings, he shall be deemed to be in compliance with this provision. The warehousemen are required to exercise every reasonable effort to insure that there shall be a space of not less than 6 inches in the row between butts at the nearest point and that the butts shall not touch at any point.

27. In the event the tobacco is placed on the warehouse floor in the afternoon and must lie over that night prior to sale, the warehouse furnishes a cover to keep it from fading out or to protect it from the sunlight or to keep it from acquiring an undue amount of moisture if the weather is hot and humid. The next morning, prior to the time the tobacco will be sold, the warehouseman uncovers the tobacco, straightens up the row, makes certain the tobacco does not touch other baskets of tobacco and gets it ready for sale. Before the sale the government grading service comes into the warehouse and grades each pile of tobacco, beginning with the first pile on the first row and grades right down the row and back up the next row until all of the tobacco is graded that is allotted to that particular warehouse for sale that day. The government grader indicates on the ticket the particular government grade assigned each pile of tobacco. That is taken from a sheet which is furnished daily by the government which also indicates the support price for that grade and the average selling price such grade has been bringing in the market. This sheet is a government-printed document, furnished by the government, and is distributed by the warehouse to the farmer for his information in selling his crop.

28. After the tobacco has been inspected and a grade placed on the tobacco by the United States grader the warehouse forms a sale at the beginning of the first row or first pile. The sales group is composed on one side of the row of a man representing the warehouse who walks just ahead of the auctioneer and starts the bid on each pile of tobacco. This man is known as the "starter." The first bid is not a "firm" bid. Following the auctioneer is another representative of the warehouse called the "man in the hole." Actually, he is the sales manager of the warehouse who carries the bidding on up after the starting bid has been put on by the starter. Behind him there are other buyers representing the various tobacco companies. A ticket marker is also in this group to mark the ticket when the tobacco is sold with the price it brought, the name of the purchaser and the company grade which the purchaser calls out to him. The company buyer has a symbol that represents the grade of tobacco that he is buying. On the other side of the row there are buyers from the various other buying companies who follow the

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sales and such speculators as elect to attend the sale and bid on the tobacco. After the sale of each pile of tobacco the ticket marker inserts the price the tobacco brought at the sale in the blank space provided on a ticket. This ticket also has the name of the warehouse, the name of the company buyer and company grade. After the ticket marker makes these notations on the ticket he drops it back on the pile of tobacco. If a farmer is dissatisfied with the last bid received for his tobacco he then has the privilege of "turning the ticket," which is rejection of the bid. This is done, ordinarily, by tearing off the name of the buyer or by folding the ticket or by just tearing the bottom part out of it.

29. Records are kept by the warehouse on what are known as floor sheets. This is a permanent record of the warehouse of all tobacco received from individual farmers, showing the date it is received, the lot number, and the weight of each individual pile of tobacco. This sheet is made out by the weighmaster at the time the tobacco is weighed. The number of items on the floor sheet correspond to the warehouse tickets placed on the different piles of tobacco. At the time of sale the floor sheets are delivered to the office where a clerk copies off this information onto what is known as a farmer's bill. The floor sheet and the farmer's bill are then placed on clip boards which are kept in numerical order. The farmer's bill is retained in the office. The floor sheet is turned over to what is known as a book man who follows the sale. The book man takes this floor sheet and, as the sale progresses, he inserts on the floor sheet the price at which the tobacco sold, its grade and the name of the buyer. When the bill is completed he adds the totals and hands these bills to what is called a bill carrier. They are then turned in to the billing room where they are verified to see that the figures are correct and to indicate on the farmer's bill any piles of tobacco that are delivered to the government. The farmer's bill is then turned over to a clerk who figures the warehouse charges. The farmer's bill has space thereon for warehouse charges, auction fees and commissions. After the sale the farmer presents a claim check which corresponds to the number on the bill and also presents his allotment book. If the sale of the farmer's tobacco is within his allotment or quota the clerk deducts from the amount due the farmer 10¢ per acre as a fee for "Tobacco Associates." At the same time the clerk also determines whether any cash loans are outstanding and whether there are any outstanding government loans to be collected. After this operation is completed, if there is no Stabilization tobacco on the bill, it is then turned over to a clerk representing the federal government who fills out the government warrants on

the tobacco. The government clerk then returns the bills to the warehouse clerk at which time checks are written and delivered to the farmer for the amount of tobacco sold minus the auction fees and warehouse charges and such other deductions as may be proper. The check, with farmer's bill and allotment card, is then turned over to the farmer.

30. One of the primary functions of the warehouse in its relation to the farmer is to try and obtain the best possible price for his tobacco. For that reason, the "man in the hole" who represents the warehouse and who is an expert judge of the grade of tobacco, will do everything possible to keep the bidding lively so as to get the top dollar for the producer's tobacco. In attempting to do this it is not infrequent that a pile of tobacco is "knocked down" or sold to the warehouse. This is charged to the warehouse's leaf account which is operated mainly for this purpose.

31. The auction tobacco market openings normally follow the seasons. The auction markets open about the time the tobacco in a belt is ready for sale. That means, usually, opening in the Florida-Georgia Belt a little after mid-July, opening in the South Carolina Border Belt later in July or about August 1st, opening in the Eastern Carolina Belt about mid-August, opening in the Middle Belt about the first of September, and opening in the Old Belt in middle or late September. As the openings move northward, the flow of tobacco over the auction floors to buyers and to their redriers increases. Eastern North Carolina markets, with the huge Eastern North Carolina crop to sell, will be in full swing at the same time that at least two other belts are also in operation. First, Eastern North Carolina will operate at the same time that the South Carolina and Middle Belts are operating. Later, as the South Carolina Belt closes, Eastern North Carolina will be in operation with the Middle Belt and the Old Belt. The simultaneous operation of auction warehouses in the three belts result in the movement of huge quantities of tobacco each day. This means that in the 91 flue-cured tobacco auction markets a great number are being operated simultaneously. The presence of buyers at these sales, representing the major tobacco manufacturing companies and independent buying companies, as well as speculators, is essential to the success of the auction sale. It is sometimes the practice to suspend operations of a market where the full set or quota of buyers are not present. Each auction market generally has from one to five sets of buyers purchasing on the market. A set of buyers consists of one buyer from each purchasing company.

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32. The number of "sets of buyers" purchasing tobacco on any given market, including the Wilson Tobacco Market, is determined solely by the number of buyers that each individual buying company chooses to send to that market. Since the buying companies each send five buyers to the Wilson Tobacco Market, that market has five sets of buyers and is referred to as a "five set" market. The Wilson market having five sets of buyers, can conduct five and only five simultaneous auction sales.

After tobacco is purchased by the buyers, it is removed from the warehouse floor by the purchaser and transported to processing plants.

Dealers are persons, firms or corporations who buy tobacco at auction for the account of manufacturers or purchase for their own account and resale to manufacturers. Such dealers do not purchase for resale on warehouse floors.

Another class of purchasers are speculators who purchase for resale at auction on the same or other warehouse floors.

33. There are seven major tobacco purchasers and a number of independent buyers. On the Wilson market there are some eleven or twelve companies represented. If the market is a five set buyer market, such as Wilson, then each purchasing company will furnish five buyers to that market. That means that in a one set buyer market only one sale is held at a time whereas in a five set buyer market five sales, at five different auction warehouses, are being conducted simultaneously.

34. The sale of every pile of tobacco by means of the auction system is encouraged. That is necessary so that there be competition in the bidding by the buyers for the producers' tobacco. It is the competition in bidding among the buyers that determines the prices received by the farmer for his tobacco. The contract entered into between the Stabilization Corporation and the warehouse discourages the selling of tobacco at private sales and contains provisions for suspension of the warehouse's contract where this practice is engaged in. The Wilson market is allotted 10,000 baskets or piles daily for a five hour selling day. The rate of speed of a sale is 400 baskets minimum per hour per set of buyers. This is determined and set by the Bright Belt Warehouse Association. The Wilson market, having five sets of buyers, can sell 2,000 baskets per hour or 10,000 per day. If the sale gets behind this prescribed rate of 400 piles per hour then under the regulations of the Wilson Board of Trade the sale can be taken away from that warehouse and it forfeits that sale for the remainder of the day.

35. The opening bid is put on the first pile of tobacco by the "starter" who represents the warehouse. The auctioneer takes this

figure up and begins to call or chant the bid and to accept bids from buyers on either side of the row or from the warehouse's "man in the hole." Some of the buying companies have particular spots that the buyer prefers to be in at the time the sale is progressing. Sometimes the bids by the buyers are made vocally, sometimes by a nod of the head or wink of an eye and, frequently, by the buyer continuing to look at the auctioneer so long as the auctioneer continues to cry the bid, and, when he drops his eye, the auctioneer knows he is no longer bidding and will cease taking bids from him. There are many ways that the buyers use to indicate their desire to bid and the amount they want to bid. After the tobacco is purchased at the auction it is then shipped to the redrying plants of the purchaser in its green state or hauled to local redrying plants and subsequent shipment to the tobacco manufacturing plants for further processing. Some of the buyers buy on contracts or on order for others as well as for themselves.

Price Support

36. The federal government, as a part of its aid to tobacco farmers through the Commodity Credit Corporation, a wholly owned government agency, has provided a price floor for the tobacco farmers' product. It has determined "parity" for tobacco—basically, a fair price compared with what the farmer pays for what he consumes. The government then lends or advances to the farmer 90% of that parity price so long as the farmer is subject to acreage control pursuant to a majority vote of 66⅔% of the tobacco farmers. Since 1946, the federal government has made price support to flue-cured tobacco farmers available through the Flue-Cured Tobacco Cooperative Stabilization Corporation, Raleigh, North Carolina, commonly known and referred to as "Stabilization." The foundation of the federal aid to tobacco farmers is acreage control. In any designated area where the farmers, by a majority of at least 66⅔% of their votes, have decided to limit the acreage to be planted in tobacco, the federal government implements that decision by providing a very stiff penalty for the sale of tobacco grown in excess of the federal allotment. By this program of federal allotments the acreage which can be devoted to the raising of tobacco is effectively controlled. Through this the government seeks to accomplish a fair balance between production and consumption. When production exceeds consumption (as in 1954) acreage is reduced. When production is less than consumption acreage is increased.

37. The Flue-Cured Tobacco Cooperative Stabilization Corporation was organized under the cooperative marketing laws of North

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Carolina in 1946. It is a non-profit farmer membership cooperative marketing association. Its objects are: (1) making available the government support price for flue-cured tobacco, and (2) marketing the tobacco which it receives. The corporation has a half-million tobacco farmer members—all of the tobacco growers in the area. The Corporation operates as follows: A farmer member first offers his tobacco for sale at an auction warehouse in one of the 89 flue-cured markets. These warehouses are under contract with the Stabilization Corporation. That tobacco has been graded by a government grader prior to the auction sale. If the highest bid at the auction sale is not as much as one bid above the support price, the farmer can then refuse the bid and cause the tobacco to be delivered to Stabilization. The warehouseman, through contract, is the agent of Stabilization to receive such tobacco, to immediately advance to the farmer the support price and to cause such tobacco to be delivered to the shipping point or to the redrier designated by Stabilization. Stabilization then reimburses the warehouseman for the support price advanced. Stabilization borrows the money needed for its operation from the Commodity Credit Corporation. The loan from Commodity Credit Corporation is a non-recourse loan with only the tobacco as security and is to cover the advances to members, costs of transportation, redrying and storage. Later, in the process of orderly marketing, Stabilization sells its tobacco to the trade. It then pays off Commodity Credit Corporation and distributes pro rata to the delivering members any excess of sales price over advances and expenses. Stabilization takes off the market only the tobacco which the other buyers do not wish to purchase at one bid above the support price and thus absorbs the daily market surplus. Since its organization in 1946, Stabilization has taken, on the average, about 100,000,000 pounds of tobacco per year. That is somewhat more than 5% of the crop yet somewhat less than 10%. Stabilization has successfully marketed its tobacco. It closed out the crops of 1946, 1947, 1948, 1949, and 1950 at a profit on an average of about 5% of the amounts advanced to growers. This profit belongs to and is distributed to the member grower who delivered the tobacco.

Market Structure

38. Tobacco, being a perishable commodity, must be heat treated (referred to in the trade as redrying) within a short period of time after purchase and removal from the warehouse floors. The aggregate facilities of the tobacco buying companies and dealers for the redrying of producers' tobacco in the flue-cured area have a maximum capacity of 120,000,000 pounds weekly. The limit of this

capacity is such that the volume of tobacco sold at auction in any one week must be regulated in order to prevent tobacco from deteriorating before it can be processed. In the final analysis the precise amount of tobacco which can be sold on any market in any one day is controlled by the number of sets of buyers on the market. The number of sets of buyers assigned to a market is determined exclusively by the buying companies and the Bright Belt Warehouse Association has nothing to do with the assignment of buyers to a market. Thus, if the buying companies choose to send another set of buyers to a particular market, that market would automatically be able to auction more tobacco per day.

39. The maximum combined redrying capacity of the buying companies is approximately 120,000,000 pounds weekly. Thus, the reason that sales on the market must be geared to the over-all redrying capacity is because there are redrying facilities on some markets and not on others and there is a cross movement of tobacco between markets for processing. In other words, for example, the American Tobacco Company may purchase tobacco on the Wilson market and ship it to some other locality for redrying. Of course, the Bright Belt Warehouse Association cannot tell a given buyer where to take his green tobacco for redrying nor on what markets to buy his tobacco.

40. The sales committee of the Bright Belt Warehouse Association obtains a daily report from the United States Department of Agriculture of the total pounds sold on all markets on the preceding day and in this way the sales committee does keep a check on tonnage flow of tobacco to see that it does not exceed maximum processing capacity. Also, a particular buying company may notify the sales committee that their purchases have been so heavy that their redrying facilities cannot handle the tobacco and may request a curtailment of sales hours for a period of time. The sales committee, of course, gives serious consideration to such a request because it is to the interest of the farmers and the auction market system as a whole that buyers of a particular company not be withdrawn from the market because of an inability of that company to process its purchases. When in the considered judgment of the sales committee the public interest requires a temporary curtailment of the volume of tobacco flowing through the warehouses to the processing plants because of inability of the plants to redry the tobacco, it takes remedial action by either reducing sales hours or suspension of all sales until processing can catch up. In this case the Bright Belt Warehouse Association is not charged with restricting the flow of tobacco or unreasonable restraint of trade. The authority of this

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Association derives from the consent of its membership and the farmers and industry generally. There is no statutory authority. The Association takes no action with respect to the internal allocations of selling time among warehouses on any market. The legal status and functions of this association are rather fully described and apparently approved in *Cooperative Warehouse, Inc., vs. Lumberton Tobacco Board of Trade*, 242 N.C.123, 87 S.E. 2d 18.

41. Respondent Board was organized for the purpose of associating together those persons, firms, and corporations engaged in tobacco marketing at Wilson, North Carolina, and for the purpose of prescribing reasonable rules and regulations for the more efficient, economic and orderly marketing of such tobacco at Wilson, North Carolina, among which is the allotment apportionment, adjustment and regulation of selling time among the warehouses. Sales on the Wilson market have been and are conducted in accordance with the Board's regulations. Its power to allocate selling time on the Wilson market derives from a North Carolina statute the validity of which has been repeatedly upheld against attack by the Supreme Court of North Carolina. *Cooperative Warehouse, Inc., vs. Lumberton Tobacco Board of Trade*, and *Day vs. Asheville Tobacco Board of Trade*, 242 N.C. 123 and 136.

Competition

42. Respondent warehousemen are in competition with each other in the purchase, sale, and handling of tobacco through the facilities owned or operated by them for the purpose of conducting auction sales of the tobacco brought to the market by the producers thereof, and buyers and speculators are in competition with each other on the Wilson market, and in competition with the warehousemen also, in the purchase and sale activities of the latter. There is no price competition among warehousemen for the farmer's patronage, since their uniform service fees have been fixed by North Carolina statute since 1895. Their competition is on services rendered and facilities furnished.

Commerce

43. Tobacco sold at auction on the Wilson market in the warehouses of these warehousemen respondents is transported thereto from North and South Carolina and Virginia—99.03% from North Carolina, 0.07% from Virginia and South Carolina in 1954. When sold, 65% of it is transported from Wilson to other states of the United States and to foreign countries for manufacture into smoking mixtures. There is a constant flow from the grower's farm to the tobacconist, and such a flow is found as a fact to be interstate com-

merce, and the sales at Wilson to be an integral part thereof and in interstate commerce.

Systems of Allocating Sales Time

44. There are and have been various systems of apportioning selling times among warehouses on individual markets by the various local Boards of Trade. These are wall-to-wall, unit, floor space and performance. Under the wall-to-wall system warehouses draw lots to determine at which warehouse on the market sales will commence. The buyers start purchasing at the warehouse drawing number one position and remain there as long as there is tobacco for sale. In other words, as long as a warehouseman can floor tobacco ahead of the buyers he can keep the sale and this may be for several days. When there is no more tobacco for sale at that warehouse, the buyers move to the next warehouse on the list. Under this system it is impossible for a warehouse to know when it will obtain a sale and it is likewise impossible for the farmers to know when their tobacco will be sold. Tobacco often rotted in the streets when this system was used on the Wilson market. Under the floor space system each warehouse firm on the market is allocated an amount of the total available selling time which is in direct ratio to its total square foot area to total market square foot warehouse area. By way of example—if there is 1,000,000 square feet of warehouse floor space on the market and Warehouse A has 100,000 square feet, it will receive 10% of the selling time. Under the unit system each warehouse on the market is counted as a unit. If there are 10 warehouses on the market, each gets one-tenth of the selling time. Under such system there is usually a provision with respect to what constitutes a warehouse in order for it to be counted as a unit.

45. It is obvious from the foregoing description of the tobacco auctioning market system that it is an organized and restricted process rather than an uncontrolled and completely free arrangement. The necessity for regulation is inherent and is recognized by the State and Federal Governments and conceded by all counsel, and is for the benefit of all concerned except possibly speculators. Thus, to insure the presence of the greatest numbers of buyers, the opening dates and duration of the markets in the various belts are set by the Bright Belt Warehouse Association by common consent, as are the maximum selling hours per day. Buyers cannot be dictated to nor controlled. Regulation, therefore, must be nicely balanced between redrying capacity and buyers resistance to inconvenience and the processing companies' need of supply. Similarly, the local Boards of Trade at each market, must for the same reason and with the

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same purpose, regulate selling hours, order of sales, rotation of unused time, and allocation of selling time, as well as myriad other details unimportant here. The crux of the whole system to the warehouseman of course, is allocation of selling time—without selling time he is bankrupt, with too little he is going bankrupt, with just enough he breaks even without profit, with more than that, he makes money. It is this allocation which is the core of this litigation, as it has been the Wilson migraine for years.

46. To allocate equitably for all other market elements, as well as the warehousemen, has been the aim over many years, and the various systems described above in paragraph 44 have been the result so far. It is obvious that all of these systems have structural or inherent defects. Thus under the wall-to-wall system, the warehouse drawing the lucky starting number could monopolize all selling for as long as it could replenish its floor space by keeping tobacco coming in, excluding all others. Tobacco brought to other warehouses spoiled and became worthless. The record shows that under it, tobacco rotted in the streets. Under the unit system, an operator need only build four 50,000 sq. ft. warehouses to secure four times as much selling time as the operator with the 200,000 sq. ft. warehouse. Under the floor space system, the only competition was in capital resources. One who could afford it, could build and build, increasing his selling time and, therefore his business, at the expense of those who could not afford to build in retaliation. Obviously, this favored the wealthy—the poor operator would soon be out. This produced an uneconomic waste of capital—and unnecessary and unused warehouse floor space so strikingly demonstrated on the Wilson market from 1939–1952 as hereinafter found. Furthermore, it discourages, if indeed, it does not kill, competition in service, which is all the warehouseman has to sell, and which is therefore, or should be, his sole competitive battlefield. The real control over the market then, is not where it should be—the farmer—but where it should not be, financial resources. Lastly, it is wasteful of selling time. The record shows that a warehouse, although having, for example, 7% of the selling time, sold only 5% or less of the marketed tobacco. The performance system allocates selling time to each warehouse on the basis of its individual last year's performance—each warehouse receives for the 1955 season, that proportion of the total selling time, which the pounds it sold in 1954 bears to the total poundage sold on the market. Thus if warehouse A sold ten million pounds out of a total market sale of one hundred million pounds, warehouse A for 1955 will have ten percent of the total selling time available. This system compels more intensive competition where it should be—

on service, instead of bankroll—and puts the control of time share on the producer rather than on the financially powerful warehouseman. However, it brings problems with it also, such as equitable provision of time for a new entrant, who has no previous experience of “performance” to serve as a base, the control of resale tobacco and the inherent impetus to discourage the lighter weight baskets, since poundage is the goal.

47. It is obvious then, that no system yet devised is free of restraints or inequities. It is therefore, a question of which is most equitable under all conditions—which restraints are least unreasonable—and for that conclusion, examination of how they have in fact operated, particularly the floor space system and the performance system, the latter directly under attack here, is necessary.

48. In 1940, the wall-to-wall system was abolished and the floor space system adopted. Just prior thereto in 1939 there were nine warehouses operating on the Wilson market with an aggregate of 624,579 sq. ft. In that year a new warehouse added 72,664 sq. ft. to the total, and in 1940 Planter's No. 2 enlarged by 76,407 sq. ft. War restrictions on building prevented any floor space additions until 1946 when Big Dixie entered the market with 89,989 sq. ft. and Watson No. 2 enlarged by 63,609 sq. ft. In 1947, two new firms entered the market—Clark's with 124,055 sq. ft. and Wainwright's with 136,624 sq. ft. To prevent loss of selling time thereby, existing firms on the market entered the building war. Centre Brick added 102,782 sq. ft., Smith C—61,501 sq. ft., Big Dixie 43,383 sq. ft. In 1948, a new firm, Growers, entered the market with 174,094 sq. ft. and New Planters No. 2, already on the market, enlarged by 15,343 sq. ft.

49. In the six years 1939–40 to 1946–50 when building was possible, then, total selling space increased from 624,519 sq. ft. to 1,595,030 sq. ft. of which new firms accounted for 534,762 sq. ft. and pre-existing firms accounted for 363,025. Total sales on the Wilson market in 1949 were 74,400,000 lbs., but in 1939 had been 91,000,000 lbs. It is thus obvious, that this more than doubling of floor space, on the false premise of supplying additional needed sales space, was unjustified by the facts, unnecessary, and, ergo, economically wasteful. The true and ulterior motive for the expanded building program, was the acquisition or retention of sales time under the system then in effect and with the inevitable results hereinafter delineated. The record shows that in 1949, there was from twice to four or five times as much floor space on the Wilson market as was necessary for its use. Government counsel's contention, and attempt to show, that this excess space was usable, and even necessary, for other

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normal and necessary functions of the market, such as storage after sale, is untenable on this record, which affirmatively shows that only a small and insignificant fraction thereof, is usable for such purposes.

50. The warehouse situation in Wilson remained in this surfeited, wasteful and unhealthy state of unused and unusable facilities from 1948 until 1952 when a new group of operators started construction of a new warehouse—Liberty—with 200,000 sq. ft.—or more than four acres under one roof. Once again the roof fell in—or rather, threatened to blow off. Such a large addition—nearly a fourth of what was needed or usable—an eighth of the existing floor space—meant a serious or ruinous loss of selling time to those warehousemen then on the market, and at least six, in retaliation, and to keep their allotted selling time, either announced plans to expand or made preparations therefor, and another “rat race” of “butting dollar against dollar” was in definite prospect. Three or more others, unable financially to thus compete, or for reasons of age, ill-health, or not thinking the risk of huge borrowing worth the candle, determined to sell if possible. The definite prospects were for 500,000 to 600,000 sq. ft. to be added, exclusive of the 200,000 of Liberty.

THE PERFORMANCE SYSTEMS

Its Adoption

51. To head off this, much discussion was had and many meetings were held among the Wilson warehousemen, informally in groups and collectively as the Wilson Warehouse Association and in the Board of Trade. A great proportion of the 3,000 plus page transcript in this case is taken up, by detailed inquiry of the many witnesses as to the individual motives of each, and the collective motive of all, in an effort to show that both were selfish, anti-competitive and subversive of the public weal with many “cloak and dagger” overtones. Government counsel contends first for a finding that the Association, being composed entirely in 1952 of the nineteen operating warehouses on the Wilson market, dominated and controlled the Board of Trade and hence its market regulations. The latter has also as members, buyers and speculators. The votes of all these amount to 11, those of the warehousemen 19, so the power to control through voting majority was present but only if exercised collectively as a unit, or nearly so. The record, however, shows no consistent unanimity among the warehousemen on controversial matters. The finding, accordingly, is that the warehousemen could and at times did control the Board’s actions, but not that this control was consistently exercised.

52. It would extend this decision to book length to rehearse the hundreds of pages of testimony as to motive and intention. This is not a case where a collective action has been voted or agreed upon but never put into effect—where the decisional authority can only examine the regulation or agreement for inherent defect or tendency, and speculate as to its effect in practical operation—a situation where necessarily purpose and motive have great weight in speculating as to effect. Here we have an adoption of a new system of allocation of sales time and its operation over at least two years, with that experience as the best guide to its effect, its reasonableness or unreasonableness. Although material it is not solely decisive whether, in agreeing to its adoption or pressuring for it, X expected it to put his competitor Y out of business, or seriously hamstringing him, or whether he expected it to shut out new competition, if in practical operation, these anti-social hopes were not realized.

53. There can be no doubt on this record, and respondents' counsel concede, that the floor space system was abolished and the performance system adopted to stop the building war—to prevent further expansion of warehouse space on the Wilson market. Counsel supporting the complaint equates this with a concerted and conspiratorial suppression of further competition. But this conclusion, while superficially plausible, will be found upon analysis to be unsound and specious, when it is borne in mind that the burden of proof necessarily to be borne by Commission counsel, must establish clearly that concerted interference or prevention of expansion of facilities to competitively capture actual or anticipated increased demand or business was of the essence of the acts charged. This burden has not been satisfactorily borne. The actual or threatened expansion here was not for the purpose of competing more effectively for the farmer's patronage—in the only social and competitive function which the warehouseman performs—service to the producer. The testimony is unanimous, that no warehouseman expanded or threatened to expand in order to furnish more or better facilities to the farmer. Not a single witness testified he needed or could use any additional space—the evidence is uncontroverted that none was needed—that there was too much already. Entire warehouses were unused.

54. The finding, therefore, is that pursuant to informal meetings between various warehousemen, formal and recorded meetings of the Association and the Board, the membership of the latter, unanimously voted to discontinue the floor space system of allocating selling time (Liberty was not then a member) and on April 8, 1952, adopted the performance system as a basis therefor—Liberty having

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been admitted that same day, voting for it as did all others present; that this was done, not solely for the purpose of preventing further expansion of floor space, but also to do away with other patent inequities of floor space time allocation, to accent selling effort rather than bankroll, and to prevent the imminent economic waste which a building war would engender. Nor was it done to prevent and discourage the erection of a new warehouse on the Wilson market or the entry thereon of a newcomer—if it had been, it would have been simple to therein exclude Liberty from membership or selling time, and the resolution of December 5, 1952, of which more later, would never have been adopted.

55. It must be noted here that in considering evidence on this point, as well as the entire case, there has been rejected for complete lack of credibility, developed by cross-examination, and from the hearing examiner's observation of the witnesses, the testimony appearing at pages 446–558, 591–670, 838–68, 1144–1338, 1664–1687, 2992–3011, 3024–3040 of the transcript.

56. The regulation of April 8, 1952, adopting the performance system, provided for its use for a minimum of five years, and provided that only 3½% of resold tobacco should count toward sales time allocation for the next year. On July 8, 1952, the Board reaffirmed this action by unanimous vote including the new market entrant Liberty—and proceeded thereat to allocate selling time in accordance therewith for the 1953 season. At this same time, July 8, 1952, the Board amended its regulation of April 8, 1952, to provide for a tolerance of 6.8% on resale tobacco. Resale tobacco means that which is bought at auction either by speculators or by the warehouseman himself for his so-called “leaf account.” Speculators are experts in judging the quality and probable value of any given lot of tobacco as are the “men in the hole” of the warehousemen. When either sees the bidding by the buyers slow or disinterested or well below what they believe the tobacco to be worth they buy it in, recondition or repack it, and put it out again for sale the following day or days. The warehousemen call these purchases their “leaf account.” The speculators, of course, do this purely as a gamble for profit. The warehousemen do it to some extent, at least, for advertising or public relations—to boost the price, thereby gain a reputation with the farmers of helping them, and to boost the average price of tobacco sold at their warehouse. Naturally farmers will patronize a warehouse with a reputation for high prices and efforts to boost the same. Nevertheless, these “leaf accounts” do make, as well as lose, money for the warehousemen. In such transactions, warehousemen are not furnishing services and facilities, but are buying and

selling in commerce. Some limit on these "leaf account" resales is required—otherwise a warehouse could acquire sales time the following year on "wash sales"—such a practice would harm rather than help the market as a whole.

57. The performance system as adopted made no provision for allocation of selling time to new entrants. Some provision was obviously necessary because new entrants would have no previous "performance." On December 5, 1952, the Board therefore adopted a resolution providing that any newcomer to the market would be allowed for his first year of operation thereon, the same amount of time which the last entrant upon the market had for the year of the newcomer's entrance. At least, this is how the hearing examiner construes that regulation. Specifically, this means that a new warehouse constructed in time to operate for the 1955 season would receive for that season the same time which the last entrant—Liberty Warehouse—has for the 1955 season. The effect of this will be later discussed. How, then, has this performance system worked in actual practice in its two years' operation—1953 and 1954? Is it wholly vicious and anti-competitive—or the opposite?

Its Advantages

58. On the credit side of the ledger, it has forced the warehousemen to get out and hustle for business—to contact farmers and sell them on bringing their tobacco to that particular warehouse. No longer could a warehouseman be indolent or careless, secure in his knowledge that next season he would have the same amount of selling time to start with, assuming no interim building, regardless of whether he had used the time allotted to him or had wasted it. The record shows that under the performance system the area of competition for producer's tobacco has been increased—there is a greater reaching out for business. Tobacco production in Wilson County is about 35 million pounds but the Wilson market has sold more than 80 million pounds each of the two years, although there are 17 other tobacco markets in the eastern North Carolina belt 18, 22, 25, 30 miles away—very few of which sell more tobacco than is raised in their own counties. Wilson warehousemen in 1953 and 1954 have gone, or sent solicitors, into South Carolina and Virginia after business, and to increasing distances in North Carolina since the adoption of "performance." Government witnesses testified that "performance" has made the Wilson market more competitive with other markets than it was before, that this has in turn made the warehouse business throughout the entire belt more competitive, and that this has benefited the farmers. Of 37 farmers' witnesses called

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21 testified that they have received more and better service from the Wilson warehousemen since "performance" was adopted than they did before. Advertising and solicitation both by the Association for the Wilson market as such, and by individual warehousemen, have increased considerably. Although much emphasis has been placed by Government counsel on the loss of sales time by some warehousemen under the performance system, the record also shows gains by others demonstrating what did not exist under the floor space system—opportunity for growth based on competition in service instead of bankroll. As a Government witness admitted "the end result of such an agreement is that under this system, the business initiative of members of the Warehouse Association is given its greatest freedom and the highest fruit of its success is to accomplish the effect of building a new warehouse within the walls of the old." There exist and operate then, under "performance," three requisites of competition: opportunity for competitors to grow; opportunity of competitors to appeal for patronage by improving or changing service; no restraint upon the farmer's freedom of election to patronize the competitor of his choice.¹ But are there artificial restraints on freedom of entry into the market, on freedom to sell as much as and when desired, or any other factor which cuts down opportunity for any market element, not imposed by or reasonably necessary under the exigencies of this market?

Its Evils

59. Counsel in support of the complaint lists 23 "evils" of the performance system which, he contends, unreasonably restrain trade and foster monopoly and are therefore illegal, and make the performance system illegal. Some of these can be grouped for discussion.

60. It is contended that the performance system makes no provision for acts of God, such as hurricanes, hail, drought, etc.; that if a warehouse is destroyed it will lose all its selling time for the next year; that if drought or hail destroys or cuts down the crop in those areas from which a particular warehouse draws much of its farmer patronage, it will also lose selling time the following year. Some of these have happened but the time lost has been minimal. Selling time may also be lost when there is a poor crop, a late crop, or insect or fungus devastation, although these are not mentioned in the contention. The theory seems to be that such ordinary business risks must be subsidized, that all risk must be taken out of this complicated industry before any concededly necessary regulation thereof be considered reasonable. Risk of failure is an indisputable

¹ Interesting here is *Day v. Asheville Tobacco Board of Trade*, 242 N.C. 136.

necessity to competition. It is only when that risk is artificially or arbitrarily channeled toward some only that unfairness appears. Here the risks are even—all take the same. There is nothing in the performance system or its operation to the contrary. Such disasters cannot be provided against by law. All those potentially affected have the same chance of disaster. Counsel seems impliedly to contend that the floor space system, with its guarantee of the same amount of sales time each year, assuming no interim building, would be more equitable. But the floor space system is an obvious subsidy for laziness, indifferent service, and lack of competition in service which defect, in this examiner's opinion, far outweighs any subsidy against disaster through no fault of the victim. Furthermore, so far as drought and crop failure are concerned in any given area, the obvious answer would seem to be, for each warehouseman to broaden his patronage base, and not concentrate on, or rely on one or two particular counties.

61. It is also contended that "performance" increases the warehouseman's overhead by making it necessary for him to get out and hustle for business, contacting farmers, hiring solicitors for that purpose, paying farmers their hauling charges and advertising. Just how a system which forces service competitors to compete in this way to survive is an unreasonable restraint of trade is much too esoteric for this examiner. All business, even those with patent protection, find it necessary these days to solicit business in expensive ways, with consequent increase in overhead. It is also claimed that these soliciting practices are unfair methods of competition. Since all are free to do so, since active solicitation of custom is a hallmark of competition, this contention must be rejected. The further argument that solicitation of business makes it possible for the financially strong warehouse to run out of business those without the resources to advertise, is too patently specious to do otherwise than reject. The next argument that the performance system makes it impossible for a cooperative to exist and grow, because, it cannot, without losing its tax-exempt status, handle resale tobacco, is answered by the record showing that Growers has. Its officer admitted that the arrangements made in this respect were fair and he had no complaint about them.

62. Counsel's next contention is that "performance" is unrealistic because of the limitation of 10,000 baskets of tobacco a day. But this limitation is forced on the industry by unchangeable factors. Because of the nature of the product, redrying and conditioning is essential to its preservation—these plants have only so much capacity. Without buyers there is no market and the latter will only work so

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many hours a day—their preferences cannot be controlled by any of these respondents. Hence there must be a limit fixed on each day's sales. Each basket takes nine seconds to sell and within the five hours when buyers will be present considering the five sets of buyers, it mathematically works out to this limit, which would apply regardless of what system of time allocation were used.

63. The remainder of counsel's contentions fall into four categories—(1) allocation on a poundage rather than basket basis, (2) the small basket issue, (3) the tolerance issue, and (4) the new entrant issue.

Selling time for the ensuing year is allotted on the basis of the proportion of pounds sold by each warehouse to the total pounds sold by all. Baskets may vary in weight from 20 to 300 lbs. Each basket takes up the same amount of space, and each takes the same amount of time to sell. Consequently one warehouse may sell the same number of baskets in the same amount of time as another, but have to its credit only one-half as many pounds. Overall Wilson market limit of sale is expressed in baskets. It seems to the examiner unrealistic and inequitable for the one man to receive only half as much credit toward time as the other, when both have performed the same service and furnished the same space and time. Respondents advance two reasons for this: that warehousemen are required to report sales to the Federal and State authorities in pounds, not baskets; and that a basket allocation basis would encourage "unscrupulous" warehousemen to split baskets. Neither of these seem to the hearing examiner to have validity. No reason appears in this record as to why a basket count cannot be made—as a matter of fact, Government graders are paid by the basket, and the floor sheets record this, hence there must already be a count record kept—or that such basket count be made by the weighmaster or some independent clerk at the door, so that splitting can be prevented. The finding, therefore, is that the poundage base for time allocation is inequitable, and unnecessary, and is an unreasonable restraint. This provision, however, being separable does not vitiate the performance system per se.

64. Closely related to this is the so-called small basket issue. Briefly it is this: with emphasis on poundage sold, there is naturally and inherently an impetus for warehousemen to seek only the heavier baskets, and to exclude the lighter ones. When a barn of tobacco is cured, grade separated, and brought in, there are inevitably a number of lightweight baskets—every farmer has them. Commission counsel contends that impetus has been translated into practice and farmers have suffered from having their lighter weight baskets

removed from the line of sale on the warehouse floor by the respondents, and the record shows such removals at two or more warehouses, and a number of farmers so testified. The record, however, gives a fuller picture—first of all this only happens when the market is blocked—that is, when every warehouse is full and can take no more tobacco for sale—53% of the selling season. Secondly, this practice has existed under every time allotting system and has not increased under, nor is it due to, the performance system; third, when it has occurred, it has always (except in one instance, the evidence of which has been heretofore rejected for lack of credibility) been with the farmer's prior consent; fourth, the price paid therefor by the warehouse was the same or better than the price obtainable by auction. In any event every one of the 36 testifying farmers was perfectly satisfied with both the price and the procedure; fifth, the Stabilization Corporation's contract with each respondent warehouseman for support price forbids it under pain of suspension, which means serious loss, and hence it could not, without consent of the farmer, be widespread; sixth, only two instances of complaint to the Stabilization Corporation have occurred in the marketing of nearly 200 million pounds over a two year period. Hence, the contention that the performance system has either spawned or stimulated the practice, or that it has resulted in injury to the farmer, is refuted. Lastly, if time allocation is based on baskets, instead of pounds, as suggested in the immediately preceding paragraph above, this "evil" automatically corrects itself.

65. The tolerance issue is simply that warehouses, not being allowed to count more resales than 6.8% of total sales toward next year's time allocation by the Board regulation of July 8, 1952, they will refuse to accept speculators' tobacco for resale when that figure has been exceeded. This ceiling applies to resales of "leaf accounts" also. As pointed out hereinabove (paragraph 56) a ceiling on the latter is imperative to prevent manipulation. When the performance system was first voted the tolerance was fixed at 2% on March 18, 1952, then raised to 3½% on April 8, 1952. These were arbitrary and compromise figures caused by the fact that Growers cannot handle speculators' resale tobacco without losing their tax-exempt status. The 3½% tolerance caused adverse publicity, protests from the speculators and from some of the warehouses. Finally, on June 18, 1952, the 6.8% figure was adopted because it represented the percentage of all resale tobacco to total tobacco sold, in 1951. To provide for the special status of Growers the same regulation also provided that if the total "leaf account" resales of that warehouse are equal to the average percent of leaf account resales of all

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other warehouses on the market, Growers is allowed to add the full tolerance of 6.8% to the producer's sales to determine total base sales. An official of Growers testified that his warehouse was satisfied with this provision as being fair and equitable. This 6.8% tolerance was protested by speculator members of the Board in an effort to raise it to 10% or higher but without success.

66. Speculators are not popular with the other market elements—the farmer, the buyer, or the warehouseman. Buyers have had sorry experiences with them, finding that some of them in repacking a basket of tobacco for resale have “nested” it, i.e.—put poor or spoiled tobacco in the center and hidden it with good tobacco. Since a basket is sold every nine seconds detection is difficult. It is this distaste on the part of the buyers, which leads speculators to “spot” their resale tobacco on the warehouse floor with farmers' tobacco—instead of putting all their resale baskets together, they prefer to insert them into a line of producers' tobacco in the hope that the buyer will not notice them. This causes resentment by farmers, who do not welcome the extra competition by one who has bought some other farmer's tobacco cheaply. Since speculators deal generally in cheap tobacco, the warehousemen's commissions are less from their trade than from producers. Speculators also reject sales far more frequently, with consequent loss of commission and time. Finally, the farmer is the warehouseman's mainstay and the backbone of his business—he cannot encourage anything which will displease or drive away the farmer. Hence the resale of speculator's tobacco has always been discouraged by warehouses, particularly when the market is blocked—about one-third of the sales days. If it is, or ever has been, a choice between farmer's tobacco or a speculator's getting his tobacco down on the floor, it has always been the farmer who was accommodated. Some warehouses have for years refused to permit speculators to operate.

67. The evidence as to whether this 6.8% tolerance feature of the performance system has increased the discouragement of speculators and hampered or prevented them reselling is in dispute. There is, of course, no claim that they have been hampered in buying. Nor is there any claim that they have been able to operate when the market is not blocked except by those warehouses who as a matter of individual policy refuse to deal with speculators. The testimony of the ten credible speculators shows six testifying that they were refused by various warehouses the opportunity to resell during the block and that this refusal has been more frequent and more consistent during the performance system, so their business had declined as a result. Four others testified that they had no more difficulty

than before the performance system was adopted, and that they were doing more resale business now than before.

68. In addition, statistics show that resales during the block have never amounted to more than 6.8% of producer's sales; that yearly average resales 1949-50-51 were 1,349,089 lbs. whereas yearly average resales in the succeeding three years increased to 1,844,927 lbs., the increase in 1952 being 24% over the 1949-50-51 triennium, and 50% in 1953; and 35% in 1954. It is also shown that speculator's sales averaged 1.613% of total sales in the triennium, and that in 1952 there was an increase of 16.5%, in 1953 an increase of 37.5%, and in 1954 of 17%. From this respondents argue that overall, the tolerance restriction of 6.8% had no effect of discouraging or preventing speculator's business, that it is the speculator's insistence on selling during the block that causes some of them to complain, that if they would resell when the market is not blocked they would not be hampered. This is beside the point. The speculator, any more than the farmer, should not be prevented, by any collective action such as this regulation, from selling when he desires and when it is most profitable for him. It does diminish his competitive opportunity and the finding is that this tolerance limit of 6.8% so far as it applies to speculator's resales is an unreasonable restraint. Further, that so far as it applies to "leaf account" resales it is reasonable and necessary.

69. The last major issue is whether the Board's regulation of December 5, 1952, is unreasonable. This provided that any newcomer on the Wilson market should be allotted for his ensuing first year of operation, the same amount of selling time as the last previous entrant (Liberty) had for that year, provided the new entrant built as large a warehouse as Liberty's; if not, then time is cut down in proportion to the size built. Counsel for the Government contends that this prevents profitable operation, therefore prevents any newcomers from entering the Wilson market, and therefore prevents new competition. There has been, since this regulation was adopted no newcomer on the Wilson market, nor any attempt to do so. Hence without actual experience to go by, we are left to the opinion evidence produced. Respondent Wainwright was of the opinion he could make money building a 200,000 sq. ft. warehouse with only 6.26% of the selling time (Liberty's time allotment for 1954). Griffin of Growers thought it would be unprofitable, that even though he voted for the regulation, he thought it unfair and unreasonable to a newcomer; Anderson, a former operator was not sure without figures of present costs, etc. Four warehouse operators from other tobacco markets in North Carolina all testified they would not

build a new warehouse on the Wilson market of 200,000 sq. ft. for 6.26% of the selling time, nor one of 100,000 sq. ft. for 3.13% of the selling time because it would be unprofitable. A fifth did not know. All of them were guessing.

70. In view of this, it is unfortunate that this record does not reflect the market experience of Liberty, the last entrant on the market, which entered with an allotment of 11.17% for the 1952 season, which allotment was determined on a floor space basis, and for the 1953 season was allocated 7.256% of the time based on its performance in 1952—that is, it did not sell 11.17% of total sales in 1952 but only 7.256%, so its allocation was cut down to that figure. For the 1954 season Liberty had 6.26%. To have in this record, Liberty's construction cost in 1952, its operating costs since then, its gross revenues and other details would most certainly shed considerable factual light on the contentions of counsel for the Government. Its operator, Carl Renfro, was not called as a witness for the Government. Hence we are left to speculate on the force of the deterrent. However, this evidence from Liberty is not vital, and the hearing examiner declines to draw the inference that such evidence would be adverse to the Government, contended for by respondents. Counsel for respondents in their proposed findings and brief concede, however, that if this regulation of December 5, 1952, is construed as the hearing examiner construes it, namely, the preceding season's allocation to Liberty, rather than the allocation for its first year under the performance system (1953), then the regulation is unreasonable. The difference in this instance is that between 7.256% and 6.26% for the same size warehouse. Regardless of this, however, the hearing examiner is of the opinion that the regulation is an unreasonable restraint, because it determines a new entrant's competitive opportunity by the energy and efficiency of another. Such an allocation can work both ways—up as well as down. Here Liberty lost time, but it is conceivable that Liberty might have gained considerably, and the new entrant would come in with more time than any other competitor. Hence the regulation in the one situation encourages entrance into the market, in the other discourages or prevents such entry, and to this latter extent tends to create, foster, and perpetuate a monopoly of the warehouse business thereon in those warehouses already operating. It is, in the hearing examiner's opinion, inherently unreasonable and unfair to fix a man's opportunity to engage in competition on the basis of the ability and performance of only one of his competitors. A broader base, such as an average of all, for one year, or over a period, would be more reasonable and, of course, some account should be taken of the entrant's initial investment, in relation to that of others, already operating. This is not to say, as counsel in support of the complaint seems to contend, that a new

entrant must not only be taken in on an equitable basis but must be comforted and wet-nursed, sheltered and protected for years thereafter. Guaranty against loss is necrotic of competition. Both hope of gain and risk of loss are needed to give competition its fullest virility.

71. Counsel also seems to contend that because Liberty lost sales time from 1952 of 11.17% to 6.63% in 1954, that this in and of itself is an indication of his claimed viciousness of the performance system and is proof that it is confiscatory. In the first place, the 11.17% of the time was secured under the floor space system then in effect, but if the performance system had not then been adopted, Liberty would have had much less selling time since with the addition of another 600,000 sq. ft. to the nearly 1,800,000 then in existence, Liberty would have wound up with a fourth to a third less. Secondly, all warehouses showed gains or losses under the performance system in response to fluctuations in producer preference, and behind that, to warehousemen's missionary efforts. Stasis would show an absence of competition. This pattern shows it to be active. Lastly, the good will of any business is just as much its intangible property as is selling time here, and it needs no discussion to point out that lack of competitive effort causes its destruction. Also, the same "property" was "confiscated" under the floor space system by the mere building of a new warehouse or the expansion of an existing one.

72. In summary, then, the Hearing Examiner is of the opinion and therefore finds:

1. That under the exigencies and unchangeable market conditions, generally, and at Wilson, North Carolina specifically, the performance system of allocating sales time is per se a reasonable regulation and therefore not illegal because,

- (a) it promotes rather than hinders competition among warehousemen by putting a premium on additional sales effort—solicitation, advertising, etc. and increases the area of that competition,

- (b) puts the competitive emphasis solely on the warehouseman's economic function—service,

- (c) penalizes laziness and other inefficiency in that service;

2. That such allocation on a poundage rather than a basket basis is an unreasonable restraint of trade;

3. That the tolerance limit of 6.8% or any other limit, on speculator's resale tobacco is an unreasonable restraint of their trade;

4. That the regulation of December 5, 1952, applying to a new entrant on the market is an unreasonable restraint of trade;

5. That these unreasonable restraints of trade are not necessarily

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an integral or inseparable part of the performance system but can be abolished or modified so as not to be unreasonable, as found.

73. Counsel for respondents James I. Miller Tobacco Company, Inc., and its officers, and for the Wilson Tobacco Company, Inc., and its officers moved for their dismissal at the end of the case on the ground that there has not been proved any case against them. Both are buyers and have no discernible interest in the charges here or the acts and practices reflected by the record. Their sole connection with this case is the fact that they are members of the Board. But there are other members of the Board during the time involved herein who are not charged as respondents—significantly, Liberty Warehouse and the other buyers and speculators—all of whom were likewise present at Board meetings from time to time and voting. No good reason being apparent for the presence of these respondents in this proceeding the motion will be granted.

74. The two motions made by counsel in support of the complaint, for reversal of rulings made on the record (Tr. 1885) during the hearings are denied for the reasons stated at that time.

CONCLUSIONS OF LAW

1. Respondents in their various answers, have denied that their acts and practices were in interstate commerce and, therefore, contend that there is no jurisdiction in this proceeding of such acts and practices. Their position has been consistently maintained, was the primary basis of their motion to dismiss at the close of the case in chief, and is again strenuously urged, each time being fortified with detailed and excellent briefs. Briefly their argument is that this case, being under the Federal Trade Commission Act, must show the acts and practices complained of are *in* commerce as distinguished from *affecting* or *burdening* commerce, *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, that, therefore, cases decided under the Sherman Act, or other laws, where Congress exercised its unquestioned power to regulate both, are inapplicable; that under *Hopkins v. U.S.*, 171 U.S. 578, the acts there, of live stock commission men cannot be factually distinguished from the warehousemen's activities here, that, therefore, that case is controlling; that the Tobacco Inspection Act (7 U.S.C.A. 511) applies only to "tobacco producers only generally and by persons engaged in the business of buying and selling tobacco in commerce" and not to auction warehousemen. Counsel in support of the complaint contends that although the Hopkins case cannot be factually distinguished from the present proceeding, it has been eroded or whittled away, although not overruled, by subsequent decisions; that,

in any event, the Tobacco Inspection Act and the cases of *Curriu v. Wallace*, 306 U.S. 1, and *Townsend v. Yeomans*, 301 U.S. 441, construing that Act, hold that the sale at auction is an integral and indispensable part of interstate commerce in tobacco, not a mere facility or dispensable adjunct to that commerce, affecting, but not, in commerce.

To discuss, analyze, analogize, and distinguish the many cases in their variant factual postures which are cited in the various briefs, would extend this decision beyond useful length—the Hearing Examiner's primary function is factual disposition, rather than legal dissertation, in view of the many reviews above.

Suffice it to say, then, that so far as the cases cited go, the language used in *Swift & Co. v. U.S.*, 196 U.S. 375, 398, 399; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 54; *Stafford v. Wallace*, 258 U.S. 495, 519; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, as descriptive of the nature of interstate commerce, even though these cases came up under different statutes, and even though they involved “affecting” as well as “in” interstate commerce, are persuasive of jurisdiction here. Furthermore, the Supreme Court's opinion, disposing of appellant's first contention in *Curriu v. Wallace*, *supra*, as well as the broad language of the Tobacco Inspection Act, convince this Hearing Examiner, that the auction transaction is an inherent part of interstate commerce in tobacco—certainly grading before sale is more of an “incident” than the sale itself, in which these warehousemen respondents consistently take an active part. Furthermore, they buy and sell for their “leaf account” as well as offer space for the sale, and directly participate therein. The conclusion here, is as indicated above, and as found in paragraph 43 in the fact findings.

2. The acts and practices of respondents as above found have hindered and prevented competition and have a dangerous and probable tendency to do so, and have unreasonably and unduly restrained trade on the Wilson tobacco market in the purchase, sale and distribution of tobacco in commerce and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning, and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. 45).

ORDER

“*It is ordered*, That respondents Wilson Tobacco Board of Trade, Inc., a corporation, and James I. Miller, Ula H. Cozart, Paul C. Darden and Alton B. Boswell, as officers; Banner Warehouse of Wilson, Inc., a corporation, and Herbert H. Harriss, William Cecil

Thompson, Joseph C. Eagles, Jr. and Ula H. Cozart, as officers and directors; Harriss Sales Corporation, a corporation, and Herbert H. Harriss, John R. Harriss and John M. W. Crute, as officers and directors; Big Dixie Warehouse Company, Inc., a corporation, and William Cecil Thompson and Elvin B. Hicks, as officers and directors; Wainwright's, Inc., a corporation, and George L. Wainwright, Susan M. Wainwright and H. S. Askew, as officers and directors; William Boyd Clark, Sr., William Boyd Clark, Jr. and Robert Clark, co-partners trading under the name and style of Clark's Warehouse, a partnership; S. Grady Deans, an individual operating under the name and style of Farmers Warehouse and Boyette & Deans; Bryan W. Carr, Eliza Carr Smith and Will C. Smith, co-partners trading under the name and style of New Planters Warehouse, a partnership; Joseph C. Eagles, Jr., Ula H. Cozart, Sydnor M. Cozart and Fred M. Eagles, co-partners trading under the name and style of Cozart-Eagles and Co., a partnership; Watson Warehouse Company, Inc., a corporation, and Ula H. Cozart, J. Henry Thompson, Paul C. Darden, H. W. Anderson, D. W. Woodward, Fred M. Eagles, Sydnor M. Cozart, Joseph C. Eagles, Jr., W. S. Lane, Jr., J. R. Edmundson, T. P. Sharpe, G. C. Cobb, J. R. Hunt, S. E. High, M. V. Wilkerson, J. N. Whitley and N. G. Blackman, Jr., as officers and directors; Growers Cooperative Warehouse, Inc., a corporation, and J. Roy Wilkerson, R. F. Speight, Stephen E. Griffin, H. B. Nichols, Van D. High, Ray B. Williams, F. W. Scott, Robert S. Griffin, L. S. Farmer, Jr. and W. W. Taylor, as officers and directors; Bryan W. Carr and Eliza Carr Smith, co-partners trading under the name and style of Smith-Carr, a partnership; Wilson Warehouse Association, an unincorporated association, and H. H. Harriss, W. B. Clark, Jr. and Alton B. Boswell, as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase or selling or offering for sale, leaf tobacco, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, participating, continuing, cooperating in, or carrying out, or directing or instigating any planned common course of action, agreement, understanding, combination or conspiracy between and among any two or more of said respondents or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts or practices:

1. Adopting, using, adhering to, or maintaining any system or plan for the allocation of selling time to tobacco auction warehouses on the Wilson tobacco market on a poundage rather than a "basket" basis.

2. Adopting, using, adhering to, or maintaining any system or plan for the allocation of selling time to tobacco auction warehouses on the Wilson tobacco market, which puts any limit, or otherwise restricts the amount of tobacco, which may be resold by speculators or rehandlers, other than warehousemen, or which restricts the time when such tobacco may be so resold.

3. Adopting, using, adhering to, or maintaining, or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice, which allots sales time to any new entrant warehouse on the Wilson market on the sole basis of the sales time allotted to any other single warehouse already operating on said market, or on the basis of the latter's size, or sales, or performance, on that market in any given year, or which has the purpose and effect of foreclosing or preventing any such new entrant or prospective entrant from participating in the tobacco business on the Wilson market, on a fair and equitable basis or opportunity.

4. Engaging in any act or practice, the purpose or intention of which is to effectuate any understanding, agreement or combination prohibited herein.

5. Effectuating or accomplishing any act, practice, policy or method, prohibited by any provision, or part of this order, through respondent Board or any other instrumentality, agent, agency, medium or representative.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to James I. Miller Tobacco Company, Inc., a corporation, Thomas D. Miller, James I. Miller, and W. B. Waddill, individually and as officers and directors thereof, and as to Wilson Tobacco Company, Inc., a corporation, and Charles P. Lyles, John G. Boatwright, Charles A. Carr, Carl H. Lane, and J. Wilbur Turner, individually and as officers and directors thereof.

ON CROSS-APPEALS FROM INITIAL DECISION

By MASON, Commissioner:

Both respondents and counsel supporting the complaint have cross-appealed from the initial decision of the hearing examiner which held, in effect, that the Wilson, North Carolina, Tobacco Board of Trade, Inc., legally may reasonably regulate trade in the Wilson tobacco auction market but that certain separable practices are unreasonable restraints on competition. Specifically, the order to cease and desist contained in the initial decision prohibits respondents on the Wilson market from collectively (a) allocating selling time to tobacco auction warehouses on a "poundage" rather than on a "basket" basis; (b) restricting the marketing time of, or the amounts

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of tobacco to be resold by, independent speculators or rehandlers; and (c) basing the sales time allowed a new warehouse on the past performance of only one other warehouse in the market.

Respondents' appeal is limited to inhibitions (a) and (b) above, on the merits. They assert also that the conclusion of the hearing examiner that the acts and practices of respondent warehousemen are "in" interstate commerce is in error.

Counsel supporting the complaint, in effect, appeals from the failure of the initial decision to find (with appropriate subsidiary findings) that respondents engaged in an over-all unlawful conspiracy to monopolize the Wilson tobacco auction warehouse business by discouraging construction of new warehouses or by preventing expansion of existing warehouse facilities, which over-all conspiracy counsel contends is illegal *per se*. Counsel in support of the complaint seeks reversal on the ground of such failure so to find and excepts to specified rulings by the hearing examiner on the admissibility of certain evidentiary matters and to dismissal of the allegations of the complaint as to certain respondents.

The facts in this case are not in dispute and reference is made to the initial decision containing exhaustive findings thereon, particularly with regard to the historical background of operation of the auction system of marketing tobacco, the varied methods of allocation of marketing time, the grading of the product, the technical detailing of methods of warehousing and conducting of auctions, the collateral effects of price supports, the description of the market structure, and consideration of other economic data and information, all in a highly technical field of product distributive practices. We refer but briefly to those facts here.

The Wilson Tobacco Board of Trade, Inc., is empowered and has the right, in the public interest, under the North Carolina statutes, to make reasonable rules and regulations governing the sale of leaf tobacco at auction, including the allocation of selling time among warehouses, but is not authorized to make rules and regulations for the control of prices or in restraint of trade.¹ As found by the hearing examiner, the necessity for such regulation, and that resulting from related activities of the Commodity Credit Corporation, the United States Department of Agriculture Inspection Service, and government support prices is inherent in the public interest and is recognized by both state and federal governments and conceded by

¹ *Gray v. Central Warehouse Company*, 181 N.C. 166, 106 S.R. 657 (1921); *Day v. Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E. 2d 18 (1955); *Cooperative Warehouse, Inc. v. Lumberton Tobacco Board of Trade*, 242 N.C. 123, 87 S.E. 2d 25 (1955).

all counsel. The immediate question before us, in this setting, is whether respondents, through their voting control on the Board of Trade, acted unreasonably in restraint of trade in 1952 in establishing the "performance" system under which a warehouse is allocated auction sales time for a given year on the basis of its proportion of sales in the past year compared to total market sales (all on a "poundage" basis).

Prior to 1952, various allocation systems had been tried with the latest in effect being the "floor space" system whereby each warehouse was allocated sales time on the ratio of its total square feet of floor space to total market square feet of warehouse area. Under the floor space system, the record discloses, and the examiner found, floor space more than doubled in the period from 1940 to 1950 "on the false premise of supplying additional needed sales space."² This situation the hearing examiner characterized as being unjustified by the facts, unnecessary and economically wasteful. He concluded that it was the acquisition or retention of sales time under the floor space system then in effect that motivated the expanded building program and pointed out that the record discloses that in 1949 there was from twice to four or five times as much floor space on the Wilson market as was necessary for its use.

Subsequent events, as delineated by the hearing examiner, resulted in the abolition of the floor space system and adoption of the performance system. The record discloses, and respondents' counsel concede, that this resulted in preventing further expansion of warehouse space on the Wilson market. In his initial decision the hearing examiner recognized that "the warehousemen could, and at times did, control the Board's actions, but not that this control was consistently exercised" and further found with regard to the adoption of the performance system:

* * * that this was done, not solely for the purpose of preventing further expansion of floor space, but also to do away with other patent inequities of floor space time allocation, to accent selling effort rather than bankroll, and to prevent the imminent economic waste which a building war would engender. Nor was it done to prevent and discourage the erection of a new warehouse on the Wilson market or the entry thereon of a newcomer—if it had been, it would have been simple to therein exclude Liberty from membership or selling

² From 1940 to 1946, restrictions prevented building. However, in 1946, new warehouse floor space construction was initiated by new firms coming into the market. To prevent loss of selling time thereby, existing firms entered the "building war." The net result was that in the period involved (1940 to 1950), total selling space increased from 624,519 sq. ft. to 1,595,030 sq. ft., with existing warehouses accounting for about 37% of the increase. Total tobacco sales on the Wilson market decreased during that time by about 17,000,000 lbs.

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time, and the resolution of December 5, 1952, of which more later, would never have been adopted.³

In effect the hearing examiner's ultimate finding is that the performance system is not an unreasonable restraint of trade in that it is promotive of competition and was adopted for that purpose; in that it was decided upon to prevent economic waste and not to deter entry of newcomers on the Wilson market; in that it is generative of competition in services rendered the farmer in handling his tobacco and getting the best price for him; and in that it "has forced the warehousemen to get out and hustle for business—to contact farmers and sell them on bringing their tobacco to that particular warehouse."

And, more specifically, in a graphic summary of the economic situation the hearing examiner found that:

The record shows that under the performance system the area of competition for producer's tobacco has been increased—there is a greater reaching out for business. Tobacco production in Wilson County is about 35 million pounds but the Wilson market has sold more than 80 million pounds each of the two years, although there are 17 other tobacco markets in the eastern North Carolina belt 18, 22, 25, 30 miles away—very few of which sell more tobacco than is raised in their own counties. Wilson warehousemen in 1953 and 1954 have gone, or sent solicitors, into South Carolina and Virginia after business, and to increasing distances in North Carolina since the adoption of "performance." Government witnesses testified that "performance" has made the Wilson market more competitive with other markets than it was before, that this has in turn made the warehouse business throughout the entire belt more competitive, and that this has benefited the farmers. Of 37 farmers' witnesses called 21 testified that they have received more and better service from the Wilson warehousemen since "performance" was adopted than they did before. Advertising and solicitation both by the Association for the Wilson market as such, and by individual warehousemen, have increased considerably. Although much emphasis has been placed by Government counsel on the loss of sales time by some warehousemen under the performance system, the record also shows gains by others demonstrating what did not exist under the floor space system—opportunity for growth based on competition in service instead of bankroll. As a Government witness admitted "the end result of such an agreement is that under this system, the business initiative of members of the Warehouse Association is given its greatest freedom and the highest fruit of its success is to accomplish the effect of building a new warehouse within the walls of the old." There exist and operate then, under "performance," three requisites of competition: opportunity for

³ Construction was initiated, in 1952, of a new warehouse (Liberty) with more than four acres under one roof. The resolution in question established an allotment of selling time for newcomers on the Wilson market, the same amount as the last previous entrant (Liberty) had for that year provided the new entrant built a warehouse equally as large as Liberty with proportionate reduction of time if smaller. The hearing examiner found it to be unreasonable and unfair to fix opportunity to compete on the basis of the ability and performance of only one competitor, suggesting some other broader basis such as an average of all competitors on the market. Respondents have not appealed from that finding.

competitors to grow; opportunity of competitors to appeal for patronage by improving or changing service; no restraint upon the farmer's freedom of election to patronize the competitor of his choice. * * *

The hearing examiner, and we think correctly so, evaluated the reasonableness and fairness of the performance system over almost three years of actual operation and found, on the basis of the above-mentioned considerations generally, that it could not be struck down as an unlawful restraint of trade except as to the minor separable mechanical operations hereinafter discussed in connection with disposition of respondents' appeal. He found that it (the performance system) was not adopted with the conspiratorial motive and intent to monopolize attributed to respondents by counsel supporting the complaint.

As the initial decision correctly recognizes, the burden of proof upon counsel supporting the complaint was to establish that concert of action in initiating the performance system had the effect of arrogating to existing warehouses, against new or prospective entries into the market, actual or anticipated increased business, and thus unreasonably restrain competition. This burden was not met in our view of the whole record. A great proportion of the more than 3,000 pages of testimony in this proceeding is taken up with exhaustive examination of witnesses as to the individual motives of each and the collective motive of all. We find no greater weight of evidence as a basis for the conclusion that establishment of the performance system unduly restrained competition. As we view it, competition on the Wilson market is restrained not by operation of the performance system but by the very nature of the tobacco marketing setup with auction sales being affected and limited automatically and inevitably by such factors as the number of "sets" of buyers available, the capacity of tobacco drying equipment, etc.

The record discloses the abnormal economic conditions obtaining in the Wilson market as a direct result of operation of the "floor space" system over a period of years. Initiation of the "building war" to acquire, or to retain, selling time under the floor space system and its actual, as well as further unfavorable potential, effect in restraining the selling conditions on the Wilson market, is clearly established as well on the record. The reasonable nature of respondents' plan (the performance system) for correcting the vicious derangement of the Wilson market also cannot be denied in the light of the factual record made in this proceeding. The reasons for adoption of the performance system are clear, as are the probable consequences of carrying out that plan in relation to market activities as they affect the public interest in interstate commerce in tobacco.

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Weighing and judging the reasonableness of the performance system in the light of its intent and effect, and in the framework of realities of the market place, as established on the record here, there remains no alternative but for us to conclude on the whole record that the initial decision is correct in upholding the reasonableness of the performance system.

The hearing examiner struck from the record all testimony and exhibits relating to action in 1947 by the respondent Board looking to adoption of a definition of the Wilson market in terms of a geographic area bounded by an imaginary line one-half mile beyond the city limits for the purpose of limiting membership on the Board to warehouses within the bounded area. This was five years prior to the adoption of the "performance system" and the hearing examiner's action in this respect is predicated on the ground that "* * * it resulted in nothing * * *." The record in this connection discloses a number of warehouses as having been built in 1947, some of which were outside the city limits. Also every warehouseman, including government witnesses, testified that no warehouseman ever had been excluded from the market. The hearing examiner also struck all evidence with reference to a nonexpansion agreement offered to establish an intent by respondent to monopolize the market by excluding new entrants therefrom. He did this on the ground that it was not in interstate commerce within the meaning of the Federal Trade Commission Act.

Counsel supporting the complaint contends both rulings were erroneous and that the testimony and exhibits on market area limits and on the nonexpansion agreement are material to the issue of whether respondents had engaged in a conspiracy illegal *per se*. The Commission has weighed and considered that evidence as being material as an aid in finding the effect of the alleged over-all *per se* conspiracy and has concluded on the basis of the whole record, that respondents' intent and purpose clearly was to promote competition and that that was the effect. The alleged over-all conspiracy has not been established by the evidence as illegal *per se*.

It is our opinion also that the hearing examiner properly dismissed the complaint as to the James I. Miller Tobacco Company, Inc., and its officers, and as to the Wilson Tobacco Company, Inc., and its officers. Both corporate respondents and their officers are engaged in the buying of tobacco as distinguished from warehousing. The record discloses, and the hearing examiner so found, that they have no discernible interest in the charges here involved or the acts and practices reflected in the record.

Respondents, on appeal, first attack the conclusion of the hearing examiner that allocation of sales time on performance, on a pound-

age rather than on a basket basis, is an unreasonable restraint. The record shows that baskets brought to warehouses from the farms vary from 20 to 300 pounds although each basket requires the same amount of space and time to sell. The hearing examiner reasoned, therefore, that one warehouseman "may sell the same number of baskets in the same amount of time as another, but have to its credit only one-half as many pounds." He further found that the over-all allocation to the Wilson market is expressed in terms of baskets.

The hearing examiner pointed out that respondents advanced two reasons in support of retention of the poundage basis, namely, that sales are reported to federal and state authorities in pounds; and that a basket allocation basis would encourage warehousemen to split baskets. These the hearing examiner rejected as being invalid, stating:

No reason appears in this record as to why a basket count cannot be made—as a matter of fact, Government graders are paid by the basket, and the floor sheets record this, hence there must already be a count record kept—or that such basket count be made by the weighmaster or some independent clerk at the door, so that splitting can be prevented * * *

Respondents on appeal admit that the "question relates only to a mechanical detail," but contend that it makes for considerable difference on a seasonal basis, including so-called "blocked-market" time. The record is not clear on this latter point and we are constrained to accept the hearing examiner's evaluation of the evidence thereon since he heard the pertinent testimony and had full opportunity to observe the demeanor of witnesses on the subject. Likewise, we are impressed by our observation that changing over to a basket from a poundage basis will discourage what appears to be, from the record, a fairly prevalent practice of warehousemen removing small baskets from the floor and reimbursing the farmers for them on a private basis, thus depriving the farmer of the benefit of the competitive auction system of selling his tobacco. There was considerable testimony on this so-called "small basket" issue and we think the benefit to be derived from resolving it weighs heavily in favor of a basket basis of time allocation. And, here again, the hearing examiner had the benefit of hearing the testimony and observing the demeanor of witnesses testifying on the small basket issue. We defer to his finding thereon. In conclusion, on this point, we agree with the hearing examiner's finding that the poundage basis for time allocation is inequitable, unnecessary, and unreasonable, and that, since it is a separable mechanical provision, it does not in and of itself vitiate the performance system *per se*. Respondents' appeal on this point accordingly is denied.

Secondly, respondents appeal from the hearing examiner's finding that the tolerance limit of 6.8%, or any other limit, on speculators' resale tobacco is an unreasonable restraint of trade. Speculators make selective bids at auction sales for tobacco that in their judgment will bring a higher price on resale. After purchase, the speculators rework the leaf, repack it and offer it for resale.

When the performance system of allocating selling time was inaugurated, respondents placed a limit on the amount of resale tobacco that could be counted in total sales figures used in computing next year's selling time. In July 1952, this was set at 6.8% of total sales. When that figure of total sales is reached, warehousemen will refuse to accept speculators' tobacco for resale preferring instead to sell the farmers' leaf and there is considerable respectable testimony that this occurred often, particularly at rush times. Some speculators had to haul their tobacco to other markets and some even had tobacco spoil because they were unable to get it down on the floor. Several speculators testified that the total amount of their sales under the performance system with the 6.8% tolerance had been considerably less than would have been the case under the floor space system and that they had been unable to sell all of their tobacco. And even warehousemen admitted that the tolerance operated to discriminate against speculators. The evidence with regard to the question of the effect of the 6.8% tolerance is detailed in the initial decision and we conclude that the weight of the evidence supports the hearing examiner in his finding that it is an unreasonable restraint.

The hearing examiner further found that the tolerance is "not necessarily an integral or inseparable part of the performance system but can be abolished or modified so as not to be unreasonable." Respondents fully agree with this further finding, as do we. Respondents' appeal on the question of "tolerance" is without merit.

Finally, respondents vigorously contended before the hearing examiner, and on appeal, that they are not engaged in interstate commerce and that the acts and practices alleged are not "in" interstate commerce and, therefore, the Commission has no jurisdiction in this proceeding over such acts and practices.

On this point, the hearing examiner made the following finding of fact:

Tobacco sold at auction on the Wilson market in the warehouses of these warehousemen respondents is transported thereto from North and South Carolina and Virginia—99.03% from North Carolina, 0.07% from Virginia and South Carolina in 1954. When sold, 65% of it is transported from Wilson to other states of the United States and to foreign countries for manufacture into smoking mixtures. There is a constant flow from the grower's farm to

the tobacconist, and such a flow is found as a fact to be in interstate commerce, and the sales at Wilson to be an integral part thereof and in interstate commerce.

and, in arriving at his conclusion of law on the point, the hearing examiner stated he was convinced:

* * * that the auction transaction is an inherent part of interstate commerce in tobacco—certainly grading before sale is more of an “incident” than the sale itself, in which these warehousemen respondents consistently take an active part. Furthermore, they buy and sell for their “leaf account” as well as offer space for the sale, and directly participate therein.

In *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927), the Supreme Court laid down the controlling principle of law when it stated:

Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. *Swift & Company v. United States*, 196 U.S. 375, 398. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama*, 218 U.S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 290; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 55.

It is our opinion that the hearing examiner's findings and conclusion are amply supported on the record and that the sale at auction is an integral and indispensable part of interstate commerce in tobacco, not a mere facility or dispensable adjunct to that commerce, affecting, but not in, commerce. This conclusion is inescapable in the light of the provisions of the Tobacco Inspection Act of 1955 (7 U.S.C.A. 511), and in view of the Supreme Court's holding in *Currin v. Wallace*, 306 U.S. 1 (1938). The Act authorizes the Secretary of Agriculture to inspect, grade, and certify tobacco in markets “designated” by him. The Wilson market is such a “designated” market. The Act provides that for its purposes that:

* * * a transaction in respect to tobacco shall be considered to be in commerce if such tobacco is part of that current of commerce usual in the tobacco industry whereby tobacco or products manufactured therefrom are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Tobacco normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. * * *

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Currin v. Wallace, supra, held that sales on the Oxford, North Carolina, tobacco auction market, also a "designated" market like the Wilson market here, were predominantly "in" interstate and foreign commerce. On this the Supreme Court said:

... *First*. Plaintiffs urge that tobacco "is not inherently an interstate commodity;" that the auction transaction is not a sale as title is not passed until the grower accepts the price; that after the auction the grower may, and often does, reject the bid and he may take his tobacco away; that the inspection required by the Act is done prior to the offering for sale; and that until sale and delivery to the purchaser the tobacco is not in interstate commerce and its control is reserved to the State. *These objections are untenable*. The record shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number and in the main are engaged in the export trade or in the manufacture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit, approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 percent of which were definitely destined for manufacture in North Carolina. About 14 percent were in part for manufacture in North Carolina and in part for other States, and about 62 percent moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co. v. United States*, 196 U.S. 375, 398, 399; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, 291; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 54; *Stafford v. Wallace*, 258 U.S. 495, 519; *Flanagan v. Federal Coal Co.*, 267 U.S. 222, 225; *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198; *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10.

As to the form of the order to cease and desist contained in the initial decision, we note that it is intended to run against certain respondents in their individual capacities, as well as in their capacities as officers and directors of corporate respondents. The complaint charges all these named respondents both in their individual and in their official capacities, but the initial decision contains no finding that these respondents acted in any capacity other than as officers and directors of the various corporate respondents. And, from our examination of the whole record, we are satisfied that there is no evidence to support any such finding. Moreover, there is nothing in the record to justify any conclusion that these individuals, as such, might induce evasion of the terms of the order by corporate respondents and no other circumstances appear pointing to the necessity of directing the order against these parties in their individual as distinguished from their official capacities.

Although this point was not pressed upon appeal we have concluded, in view of the record's deficiency in this respect, that the order should be modified so as to run against the aforesaid named respondents only in their capacities as officers and directors of the corporate respondents, and not against them in their individual capacities.

In view of the foregoing considerations, the appeals of counsel in support of the complaint and of respondents are both denied, and the hearing examiner's initial decision, modified as indicated in the last succeeding paragraph, is adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Kern did not participate in the decision herein.

FINAL ORDER

The respondents and counsel supporting the complaint having filed cross-appeals from the hearing examiner's initial decision and the matter having come on to be heard upon the whole record, including briefs and oral argument, and the Commission having rendered its decision denying the cross-appeals and adopting as its own decision the initial decision, as modified by the Commission's opinion:

It is ordered, That the preamble to the order to cease and desist contained in the initial decision be modified to read as follows:

"It is ordered, That respondents Wilson Tobacco Board of Trade, Inc., a corporation, and James I. Miller, Ula H. Cozart, Paul C. Darden and Alton B. Boswell, as officers; Banner Warehouse of Wilson, Inc., a corporation, and Herbert H. Harriss, William Cecil Thompson, Joseph C. Eagles, Jr. and Ula H. Cozart, as officers and directors; Harriss Sales Corporation, a corporation, and Herbert H. Harriss, John R. Harriss and John M. W. Crute, as officers and directors; Big Dixie Warehouse Company, Inc., a corporation, and William Cecil Thompson and Elvin B. Hicks, as officers and directors; Wainwright's, Inc., a corporation, and George L. Wainwright, Susan M. Wainwright and H. S. Askew, as officers and directors; William Boyd Clark, Sr., William Boyd Clark, Jr. and Robert Clark, co-partners trading under the name and style of Clark's Warehouse, a partnership; S. Grady Deans, an individual operating under the name and style of Farmers Warehouse and Boyette & Deans; Bryan W. Carr, Eliza Carr Smith and Will C. Smith, co-partners trading under the name and style of New Planters Warehouse, a partnership; Joseph C. Eagles, Jr., Ula H. Cozart, Sydnor M. Cozart and Fred M. Eagles, co-partners trading under the name and style of Cozart-Eagles and Co., a partnership; Watson Warehouse Company, Inc., a corporation, and Ula H. Cozart, J.

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Henry Thompson, Paul C. Darden, H. W. Anderson, D. W. Woodward, Fred M. Eagles, Sydnor M. Cozart, Joseph C. Eagles, Jr., W. S. Lane, Jr., J. R. Edmundson, T. P. Sharpe, G. C. Cobb, J. R. Hunt, S. E. High, M. V. Wilkerson, J. N. Whitley and N. G. Blackman, Jr., as officers and directors; Growers Cooperative Warehouse, Inc., a corporation, and J. Roy Wilkerson, R. F. Speight, Stephen E. Griffin, H. B. Nichols, Van D. High, Ray B. Williams, F. W. Scott, Robert S. Griffin, L. S. Farmer, Jr. and W. W. Taylor, as officers and directors; Bryan W. Carr and Eliza Carr Smith, co-partners trading under the name and style of Smith-Carr, a partnership; Wilson Warehouse Association, an unincorporated association, and H. H. Harriss, W. B. Clark, Jr. and Alton B. Boswell, as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase or selling or offering for sale, leaf tobacco, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, participating, continuing, cooperating in, or carrying out, or directing or instigating any planned common course of action, agreement, understanding, combination or conspiracy between and among any two or more of said respondents or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts or practices:"

It is further ordered, That the respondents named in the aforesaid preamble 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 contained in the initial decision as modified.

Commissioner Kern not participating.

Order

IN THE MATTER OF

E. F. DREW & CO., INC.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6126. Order, August 30, 1956*

Order modifying, as requested by the Commission and so as to accord with the decision of the Court of Appeals for the Second Circuit of July 13, 1956, the order to cease and desist of May 5, 1955, 51 F.T.C. 1056, prohibiting representations that oleomargarine was a dairy product.

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

Mr. Joseph Callaway for the Commission.

Mr. Samuel J. Loewenstein, of New York City, for respondent.

MODIFIED ORDER TO CEASE AND DESIST

This matter having been heard by the Commission on appeal from the initial decision and order of the examiner, on briefs and oral argument of counsel; and, the Commission having duly considered the record and the questions raised on appeal, and having thereafter, on the 5th day of May, 1955, rendered its decision in which it modified and as modified affirmed the findings of the examiner, the Commission issued its order modifying the initial decision and the order of the examiner, so as to conform with its decision; and, as modified, issued the order to cease and desist against respondent, its officers, agents, representatives and employees; and,

Respondent having filed in the United States Court of Appeals for the Second Circuit its petition for review of and to set aside said order to cease and desist; and the Court having heard the cause on briefs and oral argument, including the request of the Commission that the Court modify the order to cease and desist by striking therefrom the following language in the proviso to Paragraph 1 thereof: "or a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth"; and the Court having thereafter, on the 13th day of July, 1956, filed its decision in which it affirmed and sustained the findings and conclusions of the Commission, modified the aforesaid order to cease and desist as requested by the Commission and affirmed said order as modified; and

The Commission being of the opinion that its aforesaid order to cease and desist, issued on May 5, 1955, should be modified so as to accord with the decision of the United States Court of Appeals for