

Decision

IN THE MATTER OF
FLORIDA CITRUS MUTUALORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 6074. Complaint, Dec. 15, 1952—Decision, May 6, 1957*

Order requiring a Florida non-profit cooperative marketing association and its 7,000 member producers of citrus fruit to cease cooperating with handlers, shippers, or processors, to fix price at which the latter sold citrus fruit and citrus fruit products, and to restrict the quantity of citrus fruit and products to be shipped in interstate commerce.

Mr. Fletcher G. Cohn and Mr. Lewis F. Depro for the Commission.

Mabry, Reaves, Carlton, Anderson, Fields & Ward and Mr. Counts Johnson, of Tampa, Fla., and *Mr. Robert E. Freer*, of Washington, D.C., for respondents.

Mr. A. Y. Milam, of Jacksonville, Fla., for Florida State Chamber of Commerce, intervenor.

Mr. William H. Dial, of Orlando, Fla., for Florida Bankers Association, intervenor.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

STATEMENT OF THE CASE

The respondent Florida Citrus Mutual, hereinafter referred to as FCM, is a non-stock, non-profit cooperative marketing association, organized and existing by virtue of the Agricultural Cooperative Act of Florida, with its office and place of business in the Florida Citrus Mutual Building in Lakeland, Florida. It received its charter in February, 1948, and reached its required membership in February, 1949, and began functioning at the commencement of the 1949-50 citrus fruit season.

On December 15, 1952, the Federal Trade Commission issued its complaint against the said respondent FCM, its directors, officers and members, charging them with unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Among other things, it was alleged that the respondent FCM and its members represent in the aggregate approximately 85 percent of the citrus fruit grown in the State of Florida and are in a position to dominate and control the channels, extent and methods of distribution and the prices of citrus fruit and citrus products shipped from the State of Florida to the various other States of the United States and to the District of Columbia. It was also alleged that

in the aggregate handlers who have contracts with FCM control and handle more than 75 percent of the total of the citrus fruit and citrus products sold and distributed from the State of Florida to the various other States of the United States.

The principal allegation of the complaint, however, is that for more than three years last past respondents have been parties to a combination and planned common course of action beyond the protection and immunity provided for by the Capper-Volstead Act or any other Federal statute "to fix prices and control the distribution of citrus fruits and citrus products moving in interstate commerce from the State of Florida," and that pursuant thereto and in furtherance thereof the respondents have performed and engaged in certain acts, practices and methods, such as acting to fix prices of citrus fruit, grown by the members of respondent FCM, through arrangements and agreements with handlers, and otherwise to interfere with the free play of competition in the pricing of citrus fruit, and, further, to fix prices by requiring handlers engaged in processing, canning, packing, selling, and shipping of their products, to establish and maintain prices which would not adversely affect the maintenance of prices established for the citrus fruit by the respondents. In this connection, it was alleged that respondent solicited the participation of handlers in the matter of the establishment of "floor prices" for citrus fruit and in the matter of shipping schedules for citrus fruit and had agreed with said handlers on such matters. Another such practice alleged to have been entered into by respondents with handlers were agreements to handle in and from the State of Florida only citrus fruit and citrus products of members of FCM and to devote their packing, processing, and canning facilities to the citrus fruit members only of FCM, subject to such exceptions as might be permitted by FCM.

The respondents in their answer filed January 12, 1953, admitted that the members of respondent FCM represented in the aggregate approximately 85 percent of the citrus fruit grown in the State of Florida but denied that FCM and its members are in a position to "dominate and control" the channels, extent and methods of distribution and the prices of citrus fruit and citrus products as alleged. Respondents also denied that the handlers controlled more than 75 percent of the total of the citrus fruit and citrus products sold, shipped and marketed as alleged.

Respondents affirmatively alleged in their answer that all the activities of FCM since its creation and organization have been lawful and legitimate efforts of a lawful bargaining association, acting for and on behalf of its members to aid

* * * (1) in relieving a depressed industry by mitigating recognized evils in marketing conditions and promoting and fostering fair and unimpaired competitive opportunities for citrus fruit growers and handlers alike, and (2) in promoting the public interest and the welfare of the entire State of Florida by stabilizing to the fullest extent possible its paramount industry through mutual help.

Respondents specifically denied the allegations of the complaint with respect to the combination and planned common course of action beyond the protection and immunity provided for by the Capper-Volstead Act and the Clayton Act or any other Federal statute to fix prices and control the distribution of citrus fruits and citrus products moving in interstate commerce from the State of Florida, and all of the acts and practices alleged to have been engaged in by the respondents pursuant to the said combination and planned common course of action.

The State of Florida, through its Governor, Secretary of State, and other officers, on February 6, 1953, filed a petition with the Commission for permission to intervene in this proceeding, and on February 20, 1953, filed its answer to the said complaint, denying most of the allegations and calling attention to a special report of Mr. Hugh C. Kiger, Agricultural Economist, Farm Credit Administration of Agriculture, made in June, 1952, on the "Application of Industry-Wide Marketing Associations and Programs of the Florida Citrus Industry," summarizing the history of the citrus industry and the respondent FCM; and asking the Commission to dismiss the complaint.

Petitions to intervene were also filed by the State of Florida on February 6, 1953, by the Florida State Chamber of Commerce on February 17, 1953, and by the Florida Bankers Association on February 17, 1953.

The Commission on February 12, 1953, granted the petition of the State of Florida, and on February 19, 1953, granted the petitions of the Florida State Chamber of Commerce and the Florida Bankers Association to the extent that written briefs on the merits before the hearing examiner and the Commission might be filed.

A hearing was scheduled to be held in this matter in Lakeland, Florida, in February, 1953, by Hearing Examiner J. Earl Cox. At that time an unsuccessful attempt was made to settle the case before taking testimony, by an agreement between counsel, to dismiss the complaint. The Commission on March 20, 1953, denied respondents' motion to dismiss.

During May, 1953, some evidence was taken at hearings held in Washington, D.C., by Hearing Examiner Cox on the sole issue of whether the Commission was proceeding in the public interest

when it issued its complaint, on another motion to dismiss, with affidavits attached, filed by the respondents. It was then contended by the respondents that in May, 1952, the alleged unlawful practices were abandoned and that the subject matter of the complaint was moot.

On June 12, 1953, Hearing Examiner Cox filed his initial decision dismissing the Commission's complaint without prejudice, because in his opinion "the public interest does not require further prosecution of this proceeding."

The Commission on May 10, 1954, sustained the appeal of counsel in support of the complaint from the initial decision; vacated and set aside the hearing examiner's initial decision, and ordered the case remanded to the hearing examiner with instructions to proceed in accordance with the Commission's opinion. The Commission in its opinion, among other things, decided that the respondents' motion to dismiss on the ground of a lack of public interest did not present an issue on which a hearing examiner has authority to rule and that whether or not the public interest requires a cease and desist order, or may be satisfied with a dismissal, rests not on the present existence or nonexistence of an illegal restraint so much as it does on the entire context surrounding all actions of the respondents, and that this context can be determined only through a complete disclosure of the facts encompassed in the complaint.

On July 30, 1954, the undersigned hearing examiner was designated and appointed by the Commission to take testimony and receive evidence in this proceeding in place of J. Earl Cox who was then engaged on other matters.

The Commission thereafter, on October 25, 1954, denied petition for disposition of the case by dismissing the complaint theretofore filed on September 7, 1954. On December 10, 1954, the Commission denied motion of respondents for reconsideration of its order of October 25, 1954.

Finally, on December 13, 1954, hearings were begun at Tampa, Florida, to take testimony in support of the allegations of the complaint, which were completed December 17, 1954. Thereafter, on January 24, 1955, motion to dismiss, filed by respondents January 14, 1955, was denied by the hearing examiner.

Hearings were held in Tampa, Florida, beginning February 1, 1955, to take testimony offered by respondents in opposition to the allegations of the complaint, which hearings were concluded on February 8, 1955. Thereafter, proposed findings and conclusions were submitted by counsel and oral argument was had thereon before the undersigned hearing examiner on May 20, 1955. Consid-

eration having been given by the undersigned hearing examiner to all the reliable, probative and substantial evidence in the record upon all material issues of fact, law or discretion, the following findings, conclusions and order are hereinafter set forth:

FINDINGS OF FACT

I. Historical Background of Florida Citrus Fruit Industry

Citrus fruit as mentioned herein refers collectively to oranges, grapefruit, tangerines and other citrus fruit produced for commercial purposes.

Citrus products refer collectively to single strength, blended and concentrated citrus juices, citrus sections and solids processed and canned from citrus fruit for commercial purposes.

The Florida citrus industry has a number of characteristics which make their marketing problem more difficult than exists in many industries, namely: (1) Florida citrus consists of oranges, grapefruit and tangerines which have different characteristics but are competitive; (2) there are early, midseason, and late varieties of oranges as well as several sub-varieties all of which have somewhat different characteristics and in grapefruit, seedless and seeded varieties of white grapefruit as well as the pinks and reds of both types; (3) Florida citrus is sold in several outlets (fresh, single strength and concentrate) which are competitive; and (4) there are cash buyers, grower-processors, grower-shippers and cooperatives who are large segments of the industry and have different interests in any over-all marketing program.

During the years 1946, 1947 and the major portion of 1948 the growers of citrus fruit in Florida were not averaging cost of production. In 1947 and through December of 1948 they received an average of 63 cents per field box (2 bushels) of oranges and 26 cents per box of grapefruit. During that period the average actual cost of production alone was 50 cents per box for oranges and 35 cents per box for grapefruit. In the 1947-48 season the Florida citrus crop sold for one hundred and twenty million dollars less than it had brought for the season just three years prior. Since, as respondents claim, every dollar the citrus grower receives has a "turn-over" of from six or seven times, it must be admitted that the economy of the State of Florida itself was seriously threatened. So critical and desperate were conditions in the Florida citrus industry that the Florida Bankers Association spent several months in 1948 making a study of the industry and reported that:

The brokers and dealers in the markets have no confidence in the stability of Florida citrus prices or the system under which our fruit is sold. As a result

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markets are frequently and almost regularly overloaded with disastrous results to the price structure. The industry is a loose, sprawling, rapidly expanding, unorganized, unhappy and sick industry.

During 1950 and again in 1952 the United States Department of Agriculture, acting under and pursuant to the provisions of the Federal Agricultural Marketing Act, made studies of and reported on the operations of FCM and the conditions that impelled its creation. In substance those reports say:

Citrus production in the United States increased from 35,644,000 boxes in 1919-20 to about 189,180,000 boxes in 1947-48. Over the same period citrus production in Florida increased from about 13,928,000 boxes or about 39 percent of the United States total to 95,570,000 boxes or more than 51 percent of the United States total. This represents an increase of approximately 686 percent in about a quarter of a century.

It would appear from these production figures that, on the average, citrus growing has been profitable. However, the industry's history has been characterized by cycles of "feast and famine." In addition, prices have frequently fluctuated widely from day to day and week to week during the marketing seasons. As previously indicated several attempts have been made in the past to smooth out these cycles and fluctuations somewhat by coordinating the activities of the agencies marketing the rapidly increasing production of citrus. However, conditions apparently never became chaotic enough to force individual growers and handlers to submit their operations to a real control program. These attempts failed to achieve their aims and were abandoned.

During World War II, growers enjoyed relatively high prices. With the end of hostilities, however, Government purchases tapered off and the citrus industry was faced with marketing the production from an expanded acreage through normal trade channels. By the 1946-47 season the industry was at the bottom of its economic cycle. The season average on-tree price per box for oranges for all uses was down to 95 cents from the previous season's average of \$2.37. Grapefruit dropped from \$1.27 to 63 cents on the tree. Prices remained near or below average cost of production during the 1948-49 season until a severe freeze in California and Texas during January 1949 reduced the available citrus supplies in the United States. (Rx-103—Pages 56, 57)

To cope with the chaotic marketing situation and depressed citrus prices existing in 1947-48, the growers, shippers and processors took cooperative action. A committee representing all segments of the industry, appointed by the Florida Citrus Commission, recommended that an industry-wide cooperative with marketing controls was needed to improve the depressed price situation. This committee recommended that the association should have 75 percent of the Florida citrus production under contract before it was placed into operation. Florida Citrus Mutual was originally setup as a facility cooperative; however, it could not get the required membership for this type of organization. In December, 1948, the association was set up with direct grower membership; however, the shippers and

concentrators signed contracts with the association. The necessary sign-up was accomplished in February, 1949, and Florida Citrus Mutual was activated on March 25, 1949.

The Florida citrus industry includes two principal groups: (1) growers, and (2) handlers. The latter may be (a) intermediate handlers (sometimes called "bird-dog" handlers) who buy from the grower and resell to shippers or to processors; or (b) shippers, who buy from the growers or intermediate handlers and ship the fresh fruit in boxes or bags or in bulk; or (c) the processors, who buy their fresh fruit from intermediate handlers or from the grower and process it and sell the processed product. Most of the production of Florida citrus fruit, both fresh and processed, is shipped and marketed in interstate commerce. In the 1949-1950 season over half of the crop was so marketed in the form of citrus products, and approximately 24 percent as fresh fruit. More than 50 percent of the annual consumption in the United States of citrus products, and approximately 50 percent of the fresh citrus fruit, is produced in the State of Florida.

II. Organization and Operation of Respondent FCM

(A) *Prior to May, 1952*

1. The Price-Fixing Program

Respondent FCM now has over 7,000 members, who produce approximately 85 percent of the citrus fruit grown in Florida, and who are persons, natural or otherwise, engaged in the production of citrus fruits in Florida, who have signed a uniform marketing contract presented by FCM and who have been approved by the Board of Directors of FCM. Each member is allowed one vote regardless of the quantity of fruit grown.

Respondent FCM functions through its Board of Directors, consisting of three members elected from seven districts, or a total of twenty-one members; an Executive Committee, an Advisory Committee of seven members; a staff of officers consisting of a president, several vice presidents, a secretary, a treasurer, and a general manager. The powers and duties of the general manager are to "direct, supervise and control all of the activities and business of the association."

The Advisory Committee was created to represent the citrus fruit industry so as to enable FCM to get the viewpoint of the other segments of the industry. Each member of this Committee, in addition to being a grower, represents the "shipping, marketing and/or canning of citrus fruits." For instance, the cash-buying in-

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intermediate handlers, canners and processors are represented as well as the cooperative groups in fresh-fruit handlers, canners and processors.

Some of the stated purposes of FCM, as set forth in its amended articles of incorporation, are:

(1) to promote and provide a medium for cooperative unity of effort of producers of citrus fruit in the handling and marketing of same and any and all derivatives and products thereof * * *;

(2) to provide the facilities and agencies through which Florida citrus fruit produced and/or handled by its members and non-members and the by-products thereof, may be marketed throughout the United States and other countries through establishing a stable and systematic flow and distribution of such fruit * * *;

(3) to promote and secure a more adequate method of regulating and stabilizing the citrus fruit industry to meet the consumptive demands thereof.

The foregoing purposes were simplified and explained by FCM in July, 1951, in a brochure as follows:

(3) to provide for orderly distribution of the crop to achieve the true value of the fruit at the market place, (4) to achieve price stability so that unfair and unwarranted competition within the industry will not disrupt prices and cause loss to grower and handler alike and (5) to provide the entire industry—growers, shippers, canners, concentrators, and the trade—with accurate, up-to-the-minute information on marketing problems and conditions that affect prices and market stability.

Each member of the FCM is required to enter into a contract wherein he agrees that all of the citrus fruit and products thereof produced, acquired or controlled by him will be marketed on an agency or sale basis only through handlers that have entered into contracts with the FCM, and the latter agrees in turn that it will notify the growers of the names of the handlers that have entered into contracts with FCM to enable them to market and handle fruit for members of FCM. It is further agreed that if the member (grower) should market any part of the citrus fruit or products covered by the contract other than through a handler that has entered into a contract with FCM, the member shall pay FCM, as liquidated damages, at the rate of 50 cents per box for all citrus fruit or products thereof so marketed.

Respondent FCM enters into three types of contracts with handlers. The "A" handler contract is entered into for a period of one year between FCM and a handler who is "a buyer, processor or canner engaged in handling, buying, processing, canning, shipping and/or marketing of citrus fruit." This contract provides

* * * prices for fruit purchased by *Handler* under the provisions of this *Agreement* shall be as may be mutually agreed upon by *Association and Han-*

der. The *Handler* and the individual *Association* members shall agree among themselves, subject to the right of the *Association* to require reports with respect thereto as to whether such prices shall be at the date of purchase or at the time of delivery.

This type of contract is intended to be used by those handlers who are processors and who rarely buy their fruit directly from the growers, but deal through intermediate handlers who may or may not buy from FCM members.

The "B" handler contract is entered into for a period of ten years between FCM and the handlers of fresh fruit who primarily ship it in interstate commerce. Under this contract the handler agrees to ship or pack only fruit of members of FCM except as may be permitted by the Board of Directors of FCM. This contract also provides that the handler in the "sale, shipping and distribution of all fresh fruits" marketed by him be governed "by the rules, regulations, orders and instructions" issued by FCM. The Board of Directors of FCM, since 1951, has authorized "B" contract handlers to handle fruit of nonmembers under certain rules and regulations.

The "C" contract is entered into between FCM and the intermediate handler ("Bird Dog") who is a handler of citrus fruit having no packing, shipping or processing facility, but who performs a harvesting service, sometimes on an agency basis and sometimes on a purchase-and-sale basis. This contract, by its terms, permits the handler to purchase from FCM members and requires him to collect FCM's assessments on the members' fruit handled by him and remit same to FCM.

The last official action respecting the foregoing-described contracts was on July 9, 1953, when the Board of Directors voted to continue the use of all these handler contracts.

The fresh-fruit shippers affiliated with FCM handle approximately 92 percent of the Florida fresh citrus fruit shipped in interstate commerce.

In 1949, FCM began to fix minimum or floor prices on fresh fruit f.o.b., that is, the price the handler received on the boxes of fruit shipped in interstate commerce, and all "delivered-in" prices, that is the prices to be paid by processors for the fruit delivered to the processing plant. These prices were fixed by the Board of Directors after consulting with the Advisory Committee. The record does not contain evidence of the actual prices fixed at that time but there is testimony that the program was successful in that the prices were maintained (Tr. 840, 881, Rx-104-D, pp. 9-10).

The weekly average price of fresh oranges per box f.o.b. Florida advanced from approximately \$2.25 on December 1, 1949, to \$3.25

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on January 7, 1950, and to a peak of \$4.50 in March, 1950, and then began to decline to a low of approximately \$3.50 on April 22, 1950. The price advanced again to a peak of \$4.90 in June, 1950. The average on-tree price during the same period followed generally the pattern of the f.o.b. price, advancing from a monthly low of \$1.05 in November, 1949, to a high of \$3.00 in March, 1950. However, the on-tree price did not follow the high f.o.b. price of June, 1950, its peak being approximately \$2.50 on that date. The average retail price of all types of Florida oranges advanced during the same period from a low of \$5.25 in November, 1949, to about \$8.00 in April, 1950, and to a peak of \$8.50 in June, 1950 (Rx-114).

There is a normal historical pattern in the citrus fruit market where early in the season, in October for instance, there are a few shipments and the prices are high. As the shipments increase through the middle of November until the second week in December, there is a period of low prices, and then they start up with a lag sometimes along in January, and then go up throughout the remainder of the season. Sometimes there is a lag or let-down late in March when the midseason oranges run out and the winter oranges are not quite ready and because of the poor condition of the midseason oranges the prices sometimes decline. The FCM policy was to establish floor prices slightly below the economic price projected for the season so that such prices will assure the movement of the entire crop at or above such prices (Cx-255-E).

In the fall of 1950, FCM's Board of Directors again established minimum or floor prices on oranges and grapefruit, both f.o.b. and "delivered-in," at a meeting on October 4 held jointly with the Advisory Committee. These higher prices were maintained until the spring of 1951, when the Board of Directors, in a joint meeting with the Advisory Committee and attended by other canners and concentrators, set a new minimum "delivered-in" price at a point slightly below the peak of the season—but this "delivered-in" price was not maintained, and was revised downward during the summer, and growers were allowed to sell fruit for single-strength processors at a discount. This lower "delivered-in" price was not fully maintained, and some of the processors purchased fruit at various prices below the minimum "delivered-in" price thus fixed for the remainder of the season. The failure of some of the concentrators to cooperate in observing the established "delivered-in" prices was the cause of criticism of the program by the Citrus Committee of the Florida Bankers Association. The f.o.b. price ranged from a low of about \$2.50 in November, 1950, to a peak of about \$3.60 in February or

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March, 1951. The on-tree price ranged from about \$1.50 in November, 1950, to a peak of \$2.00 in March, 1951 (Rx-114).

On October 31, 1951, the Board of Directors of FCM, after discussion with the Advisory Committee and other members of the canning industry, established f.o.b. and delivered-in prices for the 1951-52 season. However, some of the processors did not cooperate in the program, and prices fell again below the established minimum prices.

On November 30, 1951, FCM addressed a letter "To The Florida Citrus Industry," in which it was stated that:

Mutual established its floor price policy and minimum prices for oranges only after thorough economic study and complete discussion and consideration of all the facts and opinions of all parts of the industry. * * *

All contract handlers as well as growers are party to this stabilization program and we must depend upon all of them to see that the floor prices are maintained. * * * (Cx-322)

On January 21, 1952, FCM sent identical telegrams to all growers and cooperative single-strength juice processors, in the following language:

To support the one dollar floor we must have a commitment from you to withdraw any quotations for single strength canned orange juice you may have in effect at prices which will reflect less than the floor. We request a telegraphic reply by ten A.M., Wednesday, January twenty-third, that you will do this, and come out with new selling prices by Friday, January twenty-fifth, that reflect the floor prices or higher. It will take your positive action to restore stability. Failure to reply will be an indication that you will not support our program. Our members will be advised of this telegram and the replies or lack of replies thereto. This message is being sent to you and all other grower processor and cooperative single strength canners. (Cx-263-B)

On the same date FCM sent the following telegram to all the cash-buying single-strength processors:

Mutual is wiring a request for a telegraphic reply by ten A.M., Wednesday, January twenty-third, to all grower canners and cooperative canners for a commitment to restore their selling prices on Friday, January twenty-fifth, to prices that will reflect the one dollar floor. By the same token we must have a definite commitment from you by telegram before ten A.M., Wednesday, January twenty-third, stating that you will pay the one dollar floor price for oranges and for the purpose of dispelling rumors regarding the cutting of prices on the finished product that you furnish us daily with a record of your sales prices. Failure to reply will be an indication that you will not support our program.

Our members will be advised of this telegram and the replies or lack of replies thereto.

This message is being sent to you and all other independent single strength canners. (Cx-263-B)

Many replies to the foregoing telegrams were to the effect that the FCM request could not be complied with.

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On February 1, 1952, the general manager of FCM sent the following letter "To All Mutual Fresh Fruit Shippers":

The Board of Directors at its meeting on January 30, 1952, following the conference with a representative group of shippers who pledged their support to the \$2.15 F.O.B. floor price for oranges, directed that the records of Mutual handlers be checked for compliance. Therefore, in accordance with the terms of your "B" Handler's Contract, they request you to furnish Mutual with a record of your sales of oranges for the week January 23, 1952, through January 30, 1952.

Please use the attached form which will show prices obtained for all F.O.B. sales * * *.

Your prompt cooperation will greatly assist in running down the reports of price cutting and other actions that have contributed to the present unsettled fresh orange market. Many of you are being unfairly reported as selling below the floor and this record should be of material benefit to all shippers on whom we must count for support of Mutual. (Cx-326-A & B)

Thus, the foregoing attempts to maintain the minimum prices fixed by FCM were not successful, and the minimum floor prices were soon suspended.

It is contended by counsel for respondents that FCM had a right to insist that handlers' sales should be at prices indicating they could and would pay a floor price to the grower. It is asserted that the processors to whom the first telegram was sent were those who were marketing agents of the growers who handled products, title to which was still vested in the grower; and that the second telegram was sent to cash-buying nonproducer processors who had executed Mutual's form "A" contract, which is in essence a purchase-and-sales agreement. They contend, in this connection, that the foregoing activities of FCM are legal within the immunity granted growers by Section 6 of the Clayton Act and the Capper-Volstead Act, and cite the following decisions in support of their position: *United States v. Borden Company, et al.*, 308 U.S. 188 (hereinafter referred to as the *Borden case*) and *United States v. Maryland & Virginia Milk Producers Ass'n., Inc., et al.*, 179 F. 2d 426 and 193 F. 2d 907.

The pertinent language of the Capper-Volstead Act, upon which counsel for respondents rely, is as follows:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. *Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes:* Provided, however, That such associations are operated for the

mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. Feb. 18, 1922, c. 57, §1, 42 Stat. 388. [Emphasis supplied.]

Although the respondent FCM is organized under the laws of the State of Florida as a cooperative marketing agency, it actually functions more as a trade association for the benefit of the entire citrus fruit industry. It does not attempt to market the fruit of its members; it operates on a much broader scale. At the present time it admittedly operates for the benefit of handlers and processors, independent cash handlers as well as cooperatives. In order for the activities of FCM to come within the immunity created by the Capper-Volstead Act or the Clayton Act for common selling or marketing agents, it must operate for the mutual benefit of the grower members "as such," and FCM does not come within that requirement. FCM activities in 1949, 1950 and 1951 to fix and enforce minimum or "floor" prices on fresh fruit f.o.b., as well as the "delivered-in" prices to be paid by processors, and the prices to be obtained by the processors for their citrus products as hereinbefore found, restrained and suppressed competition between the handlers and between the processors and are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, and, since they involve the prices to be received by the handlers and the processors, as well as the prices to be paid by the processors to handlers for the fresh fruit, they are outside of the immunity of the Capper-Volstead Act.

It was contemplated by Congress when the Capper-Volstead Act was passed to provide a medium for growers of farm products, including fruit, to combine their efforts in selling their products, but it was not contemplated that they would combine with dealers and distributors, such as the handlers involved in this case, in the fixing of prices at which such handlers should resell the products which they purchased from the growers, where such price-fixing activities were in violation of either the Sherman Act or the Federal Trade Commission Act. In this case even though the respondents were not entirely successful in carrying out their price-fixing program in the 1951-1952 season because of their inability to control all of the handlers and processors during the time that the program

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was in effect, the extent to which competition was restrained before the program broke down, was sufficient to bring the program within the condemnation of the antitrust laws. The program had been quite successful in the 1949-1950 season and could be again under similar conditions.

Mr. Hugh C. Kiger, in a study made by him under the auspices of the Farm Credit Administration, in commenting on the experiences of FCM with minimum prices from a marketing standpoint, stated with respect to the attempts to stabilize prices by using minimum prices in November, 1949, when orange prices were declining: "These minimum prices held and increasing purchases caused prices to gradually increase to a relatively high level and remain there until April" (1950). Referring to the price decline which began in the spring of 1950 on Valencia oranges, he reported: "The Board again set minimum prices which held." With respect to the 1950-1951 season, he reported:

In the fall of 1950 the board of directors again felt that prices would drop to unjustifiably low levels and established grapefruit and orange price minimums. Following this, citrus prices increased steadily until March at which time they leveled off and remained at this peak level until late April. In late April there were indications that prices might decline.

In commenting on the situation in the spring of 1951, he reported that the "board [meaning FCM], in an effort to prevent the anticipated decline, established new minimum prices at a point slightly below the peak price of the season," which were later revised downward by allowing producers to sell fruit for single strength processing at a discount. "This price continued unsteadily for a few weeks and then dropped substantially below the new minimum and remained there for the balance of the marketing season."

Mr. Kiger explained the 1951-1952 crop situation by pointing out that the trade as well as the processors were not willing to purchase freely until they were convinced that they could sell the finished product at a price that would meet the minimum prices set by FCM. However, a large number of grower canners and cooperatives continued to build inventory based on this minimum price, but these firms were not able to get orders primarily due to the lack of trade confidence and because some of the smaller canners were making sales at discounts from the price which would reflect FCM's minimum price.

* * * This situation coupled with the heavy deluge of packing house eliminations after the holiday caused some of the large holders of the inventory to reduce their prices to a level which would reflect a price which was 35 cents below Mutual's minimum. On January 21 Mutual sent telegrams to all processors requesting that they sell at prices which would reflect the minimum price

set in October 1951. Most replies indicated that they would be unable to comply with Mutual's request.

On January 23, 1952, the board suspended the floor price on early and mid-season oranges for processing. This was the second time that Mutual's minimum price had failed to hold.

In making a recommendation for the Florida citrus industry, Mr. Kiger in his report gave as his opinion that the only successful minimum price programs in United States agriculture were those administered by the Government. "The Florida citrus industry could operate a program whereby it could attain certain minimum prices for its fresh and processed citrus if growers owned and operated a central sales agency which had complete control of the entire crop." (Rx-104) He finally suggested that FCM discontinue its minimum price program because the vast differences of ownership and ways of doing business in his opinion made it impossible for FCM's minimum price program to succeed.

Counsel for respondents apparently rely upon this opinion as a justification for their contention that they have abandoned the minimum price program and that there is no probability that it will not again be renewed. However, if the time should ever come that a board of directors of FCM, because of a change of administration and economic conditions and economic advice, should come to the conclusion that the fixing of minimum prices would succeed as well as it did in the 1949-50 and 1950-51 seasons, the machinery for putting into effect such a program would still be in existence, namely, the contracts between respondent FCM and its member growers on the one hand, and with handlers, shippers, and processors on the other. If respondent FCM, in reliance upon the opinion of Mr. Kiger or other marketing economists who may agree with him, had determined to permanently abandon the fixing of minimum prices to be observed by handlers and processors, the board of directors could and should have passed resolutions to that effect and canceled all contracts with growers and handlers, but this has not been done. In fact, the only action taken with respect to the handler contracts was taken on July 9, 1953, when the Board of Directors, on the recommendation of the Executive Committee, voted to continue the using of all the handler contracts (Cx-125-B).

The decisions cited by counsel for respondents do not support the contention of respondents that their price-fixing activities were immune from the antitrust laws. Certainly the *Borden* case is not authority for such a proposition—in that case, the Court said (at page 204) :

The right of these agricultural producers thus to unite to preparing for market and in marketing their products, and to make the contracts which are

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necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. * * *

In that case, the U.S. Government appealed from a judgment of a district court sustaining the defense and dismissing an indictment charging a combination and conspiracy in violation of the Sherman Antitrust Act. It appears that the Borden Company, a distributor of milk, had entered into agreements with a cooperative dairy organization and a labor union. They were charged with resale price-fixing, boycotts, and control of the milk market. The district court had held that the production and marketing of agricultural products, including milk, were removed from the purview of the Sherman Act by the Agricultural Marketing Act of 1937, and that the cooperative association, its officers and agents, were made exempt from prosecution under Section 1 of the Sherman Act, by Section 6 of the Clayton Act, and Sections 1 and 2 of the Capper-Volstead Act. The district court had further held that the Secretary of Agriculture had full, complete and plenary power over the production and marketing in interstate commerce of agricultural products and that the existence of this authority vested in the Secretary of Agriculture, although unexercised, wholly destroyed operation of Section 1 of the Sherman Act with respect to the marketing of agricultural products.

The U.S. Supreme Court said with respect to this district court decision (308 U.S. 188):

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. * * *

* * * * *

The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid

milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, * * * "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." * * * Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in §1 of the Capper-Volstead Act.

The Supreme Court, also, after reviewing the procedure of the Secretary of Agriculture under the Capper-Volstead Act, found no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act or has the result of permitting the sort of combinations and conspiracies as charged in that proceeding unless or until the Secretary of Agriculture takes action.

The United States Court of Appeals in the *Maryland-Virginia* case cited this language of the *Borden* case, and held, in applying it to the facts in the former case,

* * * that "full-supply contracts" are illegal when made for the purpose of eliminating and suppressing competition; and that a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of milk is also illegal.

It was found, however, that the full-supply contracts between the association of producers and the two convicted distributors were not made for the purpose of eliminating and suppressing competition. The contracts in question fixed the price of milk to be paid by the *distributors* to the *producers*, and did not in any way fix the price of milk to be charged by the *distributor* in selling it to the *trade* or *public*, whereas in the present case the FCM did not stop at fixing the price of citrus fruit to the grower, but attempted to fix, by agreement with the handlers, the price the handlers received for their fresh fruit, and even to control the price the processors were to receive for the processed citrus product in selling to the public. In other words, the FCM went at least one step too far in its price-fixing activities to receive the benefit of immunity under the Clayton Act or the Capper-Volstead Act.

It is also contended by counsel for respondents that the activities of FCM with respect to fixing of minimum or "floor" prices and the "proration" or allotment programs prior to May, 1952, should not be declared unfair methods of competition in violation of the Federal Trade Commission Act if the principles enunciated by the U.S. Supreme Court in *Appalachian Coals, Inc., et al. v. United States*, (288 U.S. 344) were applied. They do not, however, indicate how the facts in the present case would bring it within the rule laid down by the Supreme Court in the *Appalachian Coals* case. It will be recalled that it was well established in that case that because

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of certain distressed conditions during the depression the appointment of a common selling agency by normally competing coal-producing areas was not a combination in restraint of trade in violation of the Sherman Act where the coal sold by this selling agent was sold in territories and areas where it had to compete with coal from other producing areas. It is not believed that there is sufficient similarity between the facts in this case and the facts in the *Appalachian Coals* case to remove the practices of respondent from the jurisdiction of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act.

2. The Allotment Program

FCM adopted its first allotment program for the season of 1949-50 on a voluntary basis. Under this program, FCM, upon the recommendation of the Advisory Committee, fixed the quantity of citrus fruit to be shipped weekly by each shipper based upon quantity during a previous selected period. The purpose of this program was to keep the f.o.b. prices of citrus fruit from going lower than they were at the time of the allotment. The allotment program was promulgated in each instance at the season of the year when it was normally expected that the f.o.b. price of fresh fruit would be at its lowest point. For instance in 1949, the allotment program was put into effect on November 26 and again on December 3. The next allotment was made on April 22, 1950. No further allotment was necessary until November 25 and December 2, 1950. The next allotment was put into effect in March, 1951. The cooperation of the shippers in these programs was solicited and received in 1950, and, to a limited extent, in 1951. However, on February 1, 1952, a joint meeting of the Executive and Advisory Committees was called for the purpose of inaugurating an allotment program for oranges and grapefruit, and it was recommended that a "prorate" be established for the week of February 4, 1952. Also, on that date, the general manager of FCM addressed a letter "To All Fresh Fruit Shippers," announcing "Florida Citrus Mutual Compulsory Allotment for Week Ending February 9, 1952."

This letter stated:

At a joint meeting, today, February 1, 1952, of the Executive and Advisory Committees an allotment of 1,100 cars of oranges and 700 cars of grapefruit for interstate shipment was authorized, effective 12:01 a.m., February 4, 1952 to 12:00 p.m. February 9, 1952 * * *. All handlers must stay within the limits indicated by their allotments so that the industry will achieve the full benefits intended by this action. The results will depend upon your compliance.

Enclosed is an allotment list showing each handler's proportion of the 1,100 cars of oranges and 700 cars of grapefruit, which the Committee determined

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to be the advisable quantity for the week, based on each handler's past performance percentages as indicated on the attached schedule. (Cx-327-A)

A similar allotment was promulgated for the following week, ending February 16, 1952. On February 8, 1952, the general manager of FCM addressed a letter to the fresh fruit shippers, announcing the compulsory allotment for that week, and stating:

Please bear in mind this is a *compulsory* allotment and the individual performance of each shipper will be a matter of record and checked by us. Therefore it is extremely important that each shipper stay within the limits indicated. * * * To help you keep your records accurate, we are enclosing a form for you to use in reporting transactions, whether borrowed or loaned, to this office immediately. It is *your* responsibility to see that this is done without fail. (Cx-329-A)

On February 11, 1952, the general manager of FCM addressed another letter to the fresh fruit shippers, again reminding them that the

* * * prorate this week is still *compulsory* and that we expect all Mutual Handlers to comply. The allotments are more liberal this week and the base is more equitable, so there should be no valid reason for any violations. However, all shipments in violation of these regulations will be subject to the terms of the contract. (Cx-330)

This compulsory allotment was continued for another week, or until February 23, 1952. In a letter dated February 15, 1952, the general manager set forth the formula upon which the allotment was based, and the share each shipper was allotted, and again reminded the shippers that it was a compulsory allotment.

On February 22, 1952, the FCM voted to suspend the weekly allotments for the time being. At a joint meeting of the Executive and Advisory Committees, on March 13, 1952, the results of a poll taken among the shippers was reported, showing more shippers opposed than favored the allotment program. At this meeting it was decided to recommend a *voluntary* allotment for the week ending March 22, 1952. This was done in a letter dated March 13, 1952. A further voluntary allotment until April 3, 1952, was also promulgated. This apparently was the last allotment program of the FCM, and the prorating of fresh fruit shipments in this manner was never again authorized by its Board of Directors.

It is quite apparent from the foregoing that respondent FCM demanded and in some instances received the cooperation of the handler-shippers of fresh fruit in limiting the quantity of fresh citrus fruit shipped in interstate commerce. Such action on the part of respondent FCM unduly interfered with and suppressed competition between such shippers in the interstate sale and shipment

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of citrus fruit, in violation of the spirit of the Sherman Act, and is not protected by the immunity to growers in the Capper-Volstead Act. Here, as in the price-fixing program, these cooperative activities are not between the growers alone, but between the growers and the handler-shippers, and relate not to the quantity of fresh citrus fruit which may be sold by the growers to the distributors (handler-shippers), but restrict the quantity of fresh citrus fruit to be shipped by the handler-shipper to the trade.

(B) *Subsequent to May, 1952*

1. Price-Fixing Activities

In November, 1952, FCM began its price-guide information program, by which it publishes daily in its marketing bulletin, circulated among the trade, the prices at which fresh citrus fruit is sold "delivered-in" at processing plant and f.o.b., and also in various northern markets in Philadelphia, Chicago, and New York, and which is obtained by representatives of FCM from shippers, processors and buyers at markets and sent by teletype to FCM for publication in market bulletins. The prices paid by processors "delivered-in" for fresh fruit are also sent by teletype to the representatives at the northern markets, who in turn furnish this information to the buyers at the terminal markets.

Weekly summaries and averages of the prices published by FCM in the bulletin are also published in the weekly publication "Triangle" circulated among only the members of FCM.

The following is a sample of the price information contained in the bulletin:

F.O.B. PRICES ON TODAY'S SHIPMENTS REPORTED
BY MUTUAL HANDLERS

PRICES ON U.S. #1 INTERIOR BRUCE BOXES UNLESS STATED OTHERWISE
ORANGES—

Valencias—60 cars reported—Mostly 2.50, few hier.

Midseason—60 cars reported—Mostly 2.50, 10 cars ranging 2.25-2.40.

DUNCAN GFRT.—

Mostly 2.00/46-54s, 1.75/64s, 1.50-1.75/70s. Some 2.15-2.25/46-54s.

MARSH GFRT.—

Mostly 2.00-2.25/70s & lgr, 2.00/80s, 1.85-2.00/96s. Some 1.85-1.90/80s.

West Cost—7 cars reported—ranging 2.50-2.75/70s & lgr, 2.25/80s, 2.00-2.10/96s.

PINK & RED GFRT.—

Mostly 2.50-2.75/70s & lgr, 2.25/80s, 2.00/96s.

TEMPLES—

Mostly 1.75/66s, 2.00/smlr. Few 54s 1.50.

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CASH DELIVERED—IN CANNERY PRICES

ORANGES—

Concentrate—Mostly 1.25.

Juice—Mostly 1.15–1.25 depending on acid. Few 1.10.

GRAPEFRUIT—

Juice—.25–.30, Mostly .25 packing house eliminations.

Field run Grapefruit for sections:

Mostly .50–.55 all, or, .70 on sizes suitable for sections, .30–.40 balance.

Few field run Tangerines for Concentrate—1.00.

TOTAL AUCTION AVERAGES—WED. FEB. 3RD

ORANGES—

Int. 49 cars—Avg. 3.50; I.R. 15 cars—Avg. 4.26; Calif. 35 cars—Avg. 5.79.

TANGERINES—

6 cars—Avg. 2.99; TEMPLES—27 cars—Avg. 2.27.

GRAPEFRUIT—

White Marsh Seedless—Int. 13 cars—Avg. 2.81; I.R. 19 cars—Avg. 3.96.

Pink Marsh Seedless—Int. 8 cars—Avg. 2.90; I.R. 10 cars—Avg. 4.18 (Rx-169-Z-150)

This program was in effect during 1953 and 1954. The market information is prepared by the FCM staff and furnished to growers, handlers and processors. More than 88,000 copies of the daily market bulletin are mailed out annually.

It is contended by attorneys in support of the complaint that FCM continued its agreements in cooperation with concentrators and fresh fruit handlers to fix “delivered-in” and f.o.b. prices and to control the prices which concentrators received for their finished products after May, 1952, and they cite in support of this contention an incident which occurred in September, 1952, when the general manager of FCM questioned a large citrus fruit canner, Libby-McNeill & Libby, as to its selling prices on canned citrus fruit to its retail distributors for resale, and was “reassured” that certain reduced prices were temporary and were restricted to a limited territory, after which he wired this information to all Florida citrus fruit concentrators. It is not believed that this isolated instance of such activity is sufficient to support a finding that respondent FCM was continuing its price-fixing activities beyond May, 1952.

2. The Allotment Program

At a meeting of the board of directors of FCM on May 13, 1952, a committee was appointed by the president to go over the FCM program and to report to the Board on May 21 (Rx-107-C). At the meeting on May 21st, 1952, the report of the program committee was read, discussed, and adopted (Rx-109-D), including the use of a voluntary allotment program as needed to assist in orderly movement to the fresh fruit market.

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Although a voluntary allotment program for the 1952-1953 season, similar to the one in effect before May, 1952, was presented to the Board of Directors of FCM at its meeting October 16, 1952, it does not appear that any action was taken by the Board of Directors or the FCM to put such program into effect.

On October 14, 1952, the Board of Directors recommended the adoption of a "Supply Adjustment Program" worked out by the new general manager, who had taken office in September, 1952. Under this program, the Advisory Committee and the Board of Directors, upon the recommendation of the general manager, recommended to the fresh-fruit shippers that a lesser quantity of fresh fruit be shipped into the northern markets during certain times of the year.

The first recommendation was made at the meeting of the Board of Directors of FCM on November 20, 1952, and was as follows:

Using the base period of November 15 for both oranges and grapefruit, *all shippers* for the week ending November 29 should not ship more than 70% of their orange shipments during the base period; for the week ending December 6 all shippers should not ship more than 90% of their orange shipments during the base period.

The foregoing recommendation was the result of a study made by a committee appointed by the president of FCM, the actual figures being prepared by the staff of FCM working under the general manager, who presented the recommendation.

The Supply Adjustment Program was followed in the succeeding years, particularly in the fall of 1953-1954 and 1954-1955, being used for the Thanksgiving and Christmas periods, and was in effect in the first week in January, 1955.

At the Board of Directors' meeting of FCM held on July 9, 1953, the following program was adopted for that crop year:

2. DEVELOP AND INFORM ITS MEMBERSHIP ABOUT THE TRUE ECONOMIC VALUE OF THEIR CROPS AND, OF EQUAL IMPORTANCE, WORK FOR REALIZATION OF THIS VALUE. (SUPPLY AND DEMAND FACTORS EQUAL ECONOMIC VALUE.)

(a) Expand and refine the material used in the weekly TRIANGLE so that it more completely informs the grower member on matters which will enable him to make intelligent decisions on disposition of his crops.

3. WORK FOR MORE STABLE MARKET CONDITIONS.

(a) Compile and distribute daily factual information on shipments and prices.

(b) Periodical issuance of an informative bulletin to the trade.

(c) Work with jobbers and receivers in Northern markets through Mutual's representatives in those markets.

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(d) Operation of a voluntary Supply Adjustment Program when needed and providing shipping schedules as an over-all seasonal guide for orderly movement of the volume of fruit required by the fresh fruit market. (Rx-125-L)

On November 18, 1954, the FCM bulletin, giving daily market information carried the following item:

SUPPLY ADJUSTMENT PROGRAM

For

THANKSGIVING WEEK

(Week Ending Nov. 27, 1954)

IN AN EFFORT TO RELIEVE THE PRESENT CONDITION OF OVER-SUPPLY AND TO PREVENT THIS CONDITION FROM CONTINUING INTO THANKSGIVING WEEK, MUTUAL'S ADVISORY COMMITTEE AND BOARD OF DIRECTORS HAVE PLACED THE SUPPLY ADJUSTMENT PROGRAM INTO EFFECT FOR THANKSGIVING WEEK, AS PART OF MUTUAL'S INFORMATION SERVICE. AS A FRESH FRUIT SHIPPER THIS MEANS—

(1) That your orange shipments for Thanksgiving week should not exceed 70% of your orange shipments during the week ending November 13 (base week).

(2) That your grapefruit shipments for Thanksgiving week should not exceed 100% of your grapefruit shipments during the week ending November 13.

IN TOTAL VOLUME THIS MEANS THAT FOR THANKSGIVING WEEK, SHIPMENTS SHOULD NOT EXCEED 1,000 CARS OF ORANGES AND 750 GRAPEFRUIT.

ALL SHIPPERS ARE URGED TO IMMEDIATELY CURTAIL THEIR PICKING OPERATIONS SO THEY MAY BE IN POSITION TO COOPERATE IN THIS SUPPLY ADJUSTMENT PROGRAM. THE MARKETS ARE WHAT YOU MAKE THEM. THIS IS YOUR OPPORTUNITY TO WORK TOWARDS BUILDING A STABLE F.O.B. MARKET.

As all of you know, Mutual's Supply Adjustment Program is part and parcel of the basic policy of Mutual to disseminate the most reliable crop and marketing information, and economic data relevant thereto. (Rx-170-Z-73)

The steps taken in effectuating the program, as described by the general manager of FCM, are as follows:

Well, let me take you step by step—let's take a week around Thanksgiving, where we usually have a very bad price situation. We look at what has happened during the past four or five years, the number of cars that had been shipped; we analyze what California is going to have in those markets; we analyze the sale of concentrate; we analyze all the other competing factors, and then we will set on a number of cars, let's take a thousand for example. We will then submit a recommendation, usually to the Advisory Committee, and then it goes to the Board of Directors along this line that we—and, Your Honor, this always originates as a staff recommendation, it is something I usually do myself with the aid of my staff—we will come up before the members of the Advisory Committee and the Board with something like this:

We recommend that for the week of Thanksgiving that the industry ship a thousand cars. This would represent approximately 70 percent of the ship-

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ments during the base period, which was two weeks earlier than that. We do that with oranges, and sometimes we will do it with grapefruit, and then that recommendation that goes to the Board, and if the Board adopts it, then we in turn will take that recommendation, and I don't think there is any instance that you can find where we have used the exact wording, I mean, it has been a progressive thing, we have more reasoning. When we put in a supply adjustment program now, we will give the recommendation, we will give California information, we will give competitive reasons, we will give what they shipped last year, what happened to the market last year in an endeavor to not have an oversupply condition happen that historically happens during that period. (Tr. 1284-5)

This program is followed only when there appears to be danger of a market glut—such as Thanksgiving and Christmas—between these times FCM merely compiles and publishes the current market price information in its bulletins.

When the "Supply Adjustment Program" was first promulgated by FCM in the fall of 1952, it was recommended by the general manager, and adopted by the Board of Directors, that:

Mutual will give all possible credit to shippers who cooperate in its effort to stabilize the Christmas market. It will give widespread publicity to the names of the shippers who stay within their allotments and furnish their names to officers of its grower Councils. In this way all grower members of Mutual can know who cooperated in this effort. It is information they are entitled to and should have.

The general manager also recommended at a meeting of the Executive and Advisory Committees on January 8, 1953:

In view of the fact that the Supply Adjustment Program was successful and had received wide compliance, he would like the Committee's ideas on the advisability of publishing the names of the cooperating shippers in the newsletter.

However, the Executive and Advisory Committees vetoed this suggestion and recommended to the Board of Directors that FCM not publish the names of the shippers who complied with the Supply Adjustment Program, which recommendation was accepted by the Board.

In practice the publicity given by FCM to the results of its Supply Adjustment Program is illustrated by the following quotations from a news publication, FCM's "Triangle":

Mutual Effort Keeps Fresh Market Stable.

Florida orange and grapefruit shippers, heeding the advice of Florida Citrus Mutual, kept the movement of fruit into the fresh markets comfortably within Mutual's recommendations last week (December 4, 1953). (Rx-156-A)

BEST CHRISTMAS MARKET IN FIVE YEARS SEEN AS SHIPPERS COOPERATE IN PREVENTING MARKET GLUT.

Florida fresh fruit shippers again last week responded excellently to the suggestion by Mutual that they keep the movement of oranges and grapefruit

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within reasonable bounds, and as a result it appears that they will enjoy the best Christmas market in five years (December 11, 1953). (Rx-157-B)

FLORIDA SHIPPERS COMPLY WITH MUTUAL REQUEST ON CITRUS MOVEMENT.

Florida orange and grapefruit shippers complied excellently with Mutual's request that the interstate movement of these two varieties be held down drastically last week, to permit the fresh fruit market an opportunity to clean up supplies after the traditionally heavy pre-Christmas shipments (January 1, 1954). (Rx-158-A)

SUPPLY ADJUSTMENT PROGRAMS MEET WITH EXCELLENT COMPLIANCE.

Excellent cooperation was evidenced on Mutual's two recent Supply Adjustment Programs initiated to aid orderly marketing during historic periods of over-shipment.

* * *

This year's programs met with such excellent compliance that Northern merchandisers report supplies to be in good shape for this time of year.

ALTHOUGH THE MARKETS SUFFER A TRADITIONAL SLUMP IN THE WEEKS FOLLOWING CHRISTMAS, INDUSTRY SPOKESMEN ALMOST UNANIMOUSLY AGREE THAT WITHOUT THE MUTUAL SUPPLY PROGRAMS, NEAR CHAOS WOULD RESULT (January 8, 1954). (Rx-159-D)

There is no evidence in the record indicating that the respondent FCM has attempted to compel or coerce the fresh-fruit shippers to follow the suggested curtailment of shipments, or otherwise to cooperate in its Supply Adjustment Program; nor is there any evidence that respondent FCM has required these shippers to report to it the extent to which they have followed the program. However, FCM obtains data as to shipments on an industry basis from the Growers Administration Committee, acting under the Federal Marketing Agreement, and publicity is given to the extent to which the program has been followed or observed by the shippers as a group.

It is not believed the present activities of FCM in the promulgation of its Supply Adjustment Program, as hereinbefore described, is a violation of any law under which the Federal Trade Commission exercises jurisdiction. In the absence of agreement, express or implied, or the use of coercion to obtain cooperation, respondent FCM may inform the trade as to economic and market conditions and recommend a course of conduct which will tend to relieve or prevent market gluts in citrus fruit.

No adverse finding is made with respect to the practice alleged in the complaint of respondent FCM requiring handlers with whom it has contracts to handle or process the fruit of members of FCM only as it is believed that this practice comes within the immunity granted citrus fruit growers by the provisions of the Capper-Volstead Act, *supra*.

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CONCLUSION

In conclusion, therefore, it is found that the activities of the respondent FCM before May, 1952, in fixing floor prices below which fresh-fruit shippers and processors shall not sell to the trade, and its allotment program fixing the quantity of fresh citrus fruit to be shipped by each shipper as herein found, are in violation of Section 5 of the Federal Trade Commission Act; but that the activities to stabilize the market since May, 1952, and followed consistently during the 1953-1954 and 1954-1955 seasons, are not.

Although respondents contend they have abandoned the practices engaged in by them before May, 1952, no official action has been taken by the respondent FCM, and counsel for respondents has argued before the Hearing Examiner that those activities are legal. The contracts between respondent FCM and the processors and shippers utilized by respondents FCM in its efforts to compel these distributors to observe the price-fixing and allotment programs are still in effect, and a change in policy or administration could bring them into use. In view of these facts, as well as the duty on the part of the Federal Trade Commission to protect the public from such restrictive activities, it will be necessary for an order to cease and desist to be entered in this case, to prohibit those practices found to be illegal.

In arriving at this conclusion, due consideration has been given to the economic conditions existing in the citrus fruit industry in Florida; to all the facts and arguments set forth in the answers of the intervenors; to the testimony of U.S. Senator Holland, and to the reports of members of the staff of the U.S. Department of Agriculture contained in the record. The citrus fruit industry of Florida has the opportunity of allowing the U.S. Department of Agriculture to control the prices of its products under a price-support program such as is being done with other commodities and with citrus fruit in California. However, since the Florida citrus industry has decided to operate independent of such a program, it necessarily must conform to the antitrust laws which control the interstate shipment of Florida citrus fruit and citrus products. The Federal Trade Commission has the duty of preventing unfair methods of competition in the interstate sale and distribution of all products shipped in interstate commerce, in the interest of protecting the general public from those practices which tend to suppress or restrain competition between and among distributors of such products to the end that the consuming public, as well as the trade handling such products, shall have the benefit of free and open

competition at all stages after the product has entered interstate commerce. The Commission, therefore, must take into consideration not only the welfare of the growers and handlers of citrus fruit in the State of Florida but also the distributors and consumers of Florida citrus fruit products in the various markets throughout the United States where Florida citrus products are sold.

ORDER

It is ordered, That respondent Florida Citrus Mutual, its officers, directors and members, in, or in connection with, the offering for sale, sale, shipping, marketing or distribution of citrus fruit or citrus fruit products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, or combination, with shippers, handlers, processors or others, to do, perform, engage in, or carry out any of the following acts, practices or methods:

1. Fixing, or attempting to fix, establish or maintain prices at which handlers or processors of citrus fruit or citrus fruit products resell such fruit or products to the purchasers thereof in interstate commerce.

2. Restricting or limiting, or attempting to restrict or limit, the volume or quantity of citrus fruit or citrus fruit products to be shipped by handlers or processors thereof from the State of Florida to purchasers in other States of the United States or in the District of Columbia.

ON CROSS-APPEALS FROM INITIAL DECISION

By the Commission:

Complaint herein issued on December 15, 1952, charging respondents with violation of Section 5 of the Federal Trade Commission Act through having been parties to a combination and planned common course of action beyond the protection and immunity provided for by the Capper-Volstead Act¹ or any other Federal statute "to fix prices and control the distribution of citrus fruits and citrus products moving in interstate commerce from the State of Florida." Pursuant to, and in furtherance of, the alleged combination the complaint further charged respondents with having engaged in certain acts, practices and methods through fixing prices and otherwise interfering with the free play of competition in the

¹⁷ U.S.C.A. 291, 292. This Act guarantees immunity from prosecution under Federal antitrust laws to cooperative associations to act collectively in the handling and marketing of agricultural products in interstate commerce.

pricing of citrus fruits grown by members of respondent Florida Citrus Mutual through arrangements and agreements with handlers whereby the latter were obligated to follow rules, regulations, orders and instructions of respondents concerning prices and shipping quotas and, further, to fix prices by requiring handlers engaged in processing, canning, packing, selling, and shipping citrus products to establish and maintain such prices (for citrus products) as would not adversely affect maintenance of prices established by respondents for citrus fruits.

The complaint also alleged respondents sought participation by handlers, and did agree with them, in establishing floor prices and shipping schedules for citrus fruit. Finally, respondents were alleged to have required handlers under contract with Florida Citrus Mutual to handle only citrus fruit and citrus products of Mutual's members and to devote the handlers' packing, processing and canning facilities only to citrus fruit of members of Mutual subject to such exceptions as might be permitted by Mutual.

The acts, practices and methods summarized above all were charged in the complaint to "have a dangerous tendency unduly to hinder competition and create monopoly and constitute unfair methods of competition and unfair acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended."

Respondents filed their answer January 12, 1953. And, in February, 1953, the Commission granted permission for the State of Florida to intervene and granted petitions of the Florida State Chamber of Commerce and the Florida Bankers Association to the extent of permitting the latter two organizations to file written briefs on the merits herein.

Thereafter, on June 12, 1953, an initial decision was filed dismissing the complaint without prejudice for lack of public interest. On appeal this was vacated and set aside and the matter remanded for the taking of further evidence. Hearings were concluded and the hearing examiner's initial decision on a full record on the merits was filed July 26, 1955.

The hearing examiner's initial decision on the merits concluded that the activities of respondent Florida Citrus Mutual before May, 1952, in fixing floor prices below which fresh fruit shippers and processors should not sell to the trade, and its allotment program fixing quantities of fresh fruit to be shipped by each shipper were in violation of Section 5 of the Federal Trade Commission Act; but that the activities to stabilize the market since May, 1952, and followed consistently during the 1953-1954 and 1954-1955 seasons, were not.

The proceeding is now before the Commission for final decision on the merits on the cross-appeals of respondents, and of counsel in support of the complaint, from the findings, conclusions and order to cease and desist contained in the July 26, 1955, initial decision.

Florida Citrus Mutual was organized as a cooperative association, and has a membership of over 7,000 growers representing 85% of the citrus fruit grown in the State. It commenced operation in March, 1949, and functions through its Board of Directors, which selects officers and customarily operates through an Executive Committee acting for it. It also meets with an Advisory Committee of growers and handlers, some of the latter of which are not members of the association.

Mutual requires each grower member to execute a uniform marketing contract agreeing, among other things, to market his entire production of citrus fruit exclusively through handlers who must execute a Handler's Contract with Mutual. Growers marketing their own citrus fruit also may execute a Handler Contract. Liquidated damages are provided for in the event citrus fruit is marketed through a handler other than one who has entered into a Handler's Contract with Mutual. The grower's contract is for ten years with the privilege of withdrawing in June of any year.

Mutual also contracts with handlers who are fresh fruit packers and shippers, canners and concentrators, and intermediate handlers. The latter are cash buyers who buy from growers and resell to the other two types of handlers. In this regard the hearing examiner found:

Respondent FCM enters into three types of contracts with handlers. The "A" handler contract is entered into for a period of one year between FCM and a handler who is "a buyer, processor or canner engaged in handling, buying, processing, canning, shipping and/or marketing of citrus fruit."

* * * * *

This type of contract is intended to be used by those handlers who are processors and who rarely buy their fruit directly from the growers, but deal through intermediate handlers who may or may not buy from FCM members.

The "B" handler contract is entered into for a period of ten years between FCM and the handlers of fresh fruit who primarily ship it in interstate commerce. Under this contract the handler agrees to ship or pack only fruit of members of FCM except as may be permitted by the Board of Directors of FCM. This contract also provides that the handler in the "sale, shipping and distribution of all fresh fruits" marketed by him be governed "by the rules, regulations, orders and instructions" issued by FCM. The Board of Directors of FCM, since 1951, has authorized "B" contract handlers to handle fruit of nonmembers under certain rules and regulations.

The "C" contract is entered into between FCM and the intermediate handler * * * who is a handler of citrus fruit having no packing, shipping or

processing facility, but who performs a harvesting service, sometimes on an agency basis and sometimes on a purchase-and-sale basis. This contract, by its terms, permits the handler to purchase from FCM members and requires him to collect FCM's assessments on the members' fruit handled by him and remit same to FCM.

The hearing examiner further found in effect that through the operation of these contracts, and by means of other practices, hereinafter explained in more detail, Mutual, acting for its grower members, was enabled to secure the cooperation of handlers in establishing and maintaining prices at which the latter resold citrus fruit and citrus fruit products, or prices which handlers paid therefor to other than Mutual's grower members.

The hearing examiner also found that in 1949, 1950, and 1951, and to some extent in 1952, respondent Mutual's activities in fixing and enforcing minimum or "floor" prices on fresh fruit f.o.b. (prices received by handlers for fresh fruit shipped out of Florida), as well as "delivered-in" prices (those paid by canners and processors to intermediate handlers), and the prices obtained by canners and processors when they in turn sold citrus products, restrained and suppressed competition between handlers and between processors and that, since such prices were those to be obtained by handlers and processors, as distinguished from prices obtained by Mutual's grower-members, they were outside the immunity of the Capper-Volstead Act. He concluded that the price-fixing program came within the condemnation of the antitrust laws. He pointed out that in the 1949-50 season the program had been quite successful (although it had broken down somewhat in 1952) and that it could again be resorted to in the future under similar conditions.

Similarly, with regard to the so-called allotment program over the same period, he found that through both voluntary and compulsory allotments, Mutual had successfully controlled, prorated and restricted the quantity of fresh fruit shipped in interstate commerce by handler-shippers and thus unduly interfered with and suppressed competition between such handler-shippers.

In November of 1952, the hearing examiner found, respondent Mutual initiated a price-guide information program including a daily marketing bulletin and a weekly report "Triangle" containing weekly summaries and averages of prices obtained by handler-shippers and handler-processors as well as auction prices. Also, in the Fall of 1952, Mutual initiated a "Supply Adjustment Program" which the hearing examiner found was in effect as late as the first week in January, 1955. He concluded that there is insufficient evidence to support a finding that Mutual was continuing its price-fixing activities beyond May 1952.

Respondents' appeal relates only to the period prior to May, 1952. They argue first that Mutual never set prices for fruit, title to which had passed to handlers; and they claim that such prices as were set were minimums to be obtained by handlers, as selling agents, for the account of growers. As to whether the three types of handler contracts constituted the handlers' agents of the growers, the hearing examiner made no detailed specific finding. And, as will hereinafter appear in the light of the whole record of Mutual's price-fixing activities, it was not necessary for him to do so. Since, however, the point is made on this appeal we will dispose of it in passing.

The "A" contracts were between Mutual and canners, or concentrators, who rarely bought direct from growers. Practically all of their purchases of fruit were from intermediate handlers. The specific question of the agency relationship as it is purported to have existed between growers and handlers, therefore, is not involved in the consideration of activities under the "A" contracts.

As to the situation under the "B" contracts between Mutual and handlers of fresh fruit who shipped in commerce, we think the record establishes that the persons executing these contracts seldom, if ever, handled the fruit of Mutual's grower members on an agency basis. The evidence is that customarily such fruit was purchased "on the tree." And the record discloses that in 1951 "of the 186 'B' contracts presently effective, there are 135 contracts that could be classified as independents; in other words, handlers who purchase part or all of their supplies for cash."² Also, in 1952, about 60% of Mutual's grower members moved their fruit through cooperatives who in turn *sold* the fruit to the handlers or processors. The other 40% *sold* directly to handlers for cash.³ Finally, as late as December, 1952, Mutual grower members were advised by letter to make certain that they "sold" their fruit to Mutual handlers only.

As to the "C" contracts with intermediate handlers, the hearing examiner did refer to the fact that those executing the contracts performed a harvesting service for growers, sometimes on an agency basis and sometimes on a purchase-and-sale basis. There is respectable evidence that a substantial portion of the "C" contract handlers' business was on a strict cash basis.

In view of the foregoing, we conclude that respondents' contention that there was an agency relationship existing between Mutual's grower members and the handlers, thus justifying the fixing of prices

²Comm. Ex. 371-C.

³Comm. Ex. 385.

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at which handlers resold fruit grown by Mutual members, is without merit and it is rejected.

It was contended by respondents before the hearing examiner and renewed vigorously on appeal that Mutual sought only to establish the prices which its grower-members received for the fruit grown by them. The hearing examiner found, however, as previously indicated, that Mutual's price-fixing activities extended beyond that point to include establishing the prices at which purchasers (handlers) from the growers resold citrus fruit and citrus products. We are of the opinion that there is substantial evidence in the record to support that finding. We are further of the opinion that the record establishes, in addition to actual price-fixing, that Mutual policed the industry to control prices charged by processors for their finished products through its efforts to maintain "delivered-in" prices and that this is equally true with regard to prices obtained by fresh citrus fruit shippers. For example, Mr. A. V. Saurman, General Manager of Mutual, in 1952, admitted that on authority of Mutual's Board of Directors he sent the following telegram to all growers and cooperative single strength juice processors on January 21, 1952:

To support the one dollar floor we must have a commitment from you to withdraw any quotations for single strength canned orange juice you may have in effect at prices which will reflect less than the floor. We request a telegraphic reply by ten A.M., Wednesday, January twenty-third, that you will do this, and come out with new selling prices by Friday, January twenty-fifth, that reflect the floor prices or higher. It will take your positive action to restore stability. Failure to reply will be an indication that you will not support our program. Our members will be advised of this telegram and the replies or lack of replies thereto. This message is being sent to you and all other grower processor and cooperative single strength canners.

On cross-examination of Mr. Saurman regarding the circumstances surrounding dispatch of this telegram and its purpose, the following colloquy took place:

Hearing Examiner HAYCRAFT. * * * I am not going to take your interpretation, but you certainly are trying to influence the price at which the processors are going to sell.

The WITNESS. * * * We did try to influence. We did not set it.

Hearing Examiner HAYCRAFT. You tried it according to that telegram.

The WITNESS. Yes, Sir. (R. 899.)

We think the telegram speaks for itself and are of the opinion that the hearing examiner's characterization of its import is both apt and accurate.

Further, while testifying with regard to a January 21, 1952, telegram to all cash-buying single strength processors,⁴ Mr. Saurman,

⁴Initial Decision, p. 10. See also Comm. Ex. 263-B and Comm. Ex. 264-B.

when asked by the hearing examiner whether the telegram's purpose was to hold independent processors, as distinguished from cooperative single strength processors, in line price wise, stated:

The WITNESS. Certainly, I think we were trying to influence them. There wasn't any question about that in my mind, Your Honor. (R. 952.)

And Mr. Saurman, with regard to "B" contracts with fresh citrus fruit shippers, and rules, regulations and orders issued by Mutual thereunder, stated in effect that he, as General Manager, attempted by a letter of February 1, 1952,⁵ to get the cooperation of fresh fruit shippers in maintaining prices.

Respondents contend also on their appeal that all of their arguments with respect to minimum pricing applies with equal force and effect to Mutual's efforts to regulate the volume of fresh fruit shipped out of Florida in interstate commerce. In this regard, the hearing examiner found that respondent Mutual demanded and received the cooperation of handler-shippers of fresh fruit in limiting quantities shipped in interstate commerce. He further found that such activities unduly interfered with and suppressed competition between such shippers in violation of the spirit of the Sherman Act and outside the scope of the immunity granted to growers under the Capper-Volstead Act. And, in this connection, the hearing examiner concluded that:

The purpose of this program was to keep the f.o.b. prices of citrus fruit from going lower than they were at the time of the allotment.

The initial decision reviews in detail the evidence supporting these findings and conclusions and we will not recite it here. Suffice it to say that we have examined the whole record on this phase of the case and are of the opinion that the hearing examiner had no alternative but to find as he did with regard to Mutual's allotment program.

Before proceeding to consideration of respondents' other contentions we add, in connection with the foregoing, that we have concluded that both the price-fixing activities and the allotment program were the result of decisions arrived at by Mutual's Board of Directors, directly or through its Executive Committee, after consultation, or in joint meetings, with the Advisory Committee.

Reference should be made here to the Advisory Committee which is elected by the Board of Directors. The record discloses it was created to represent the professional part of the citrus industry (handlers and processors) apart from the growers. It always meets with the Board or its Executive Committee from the Board of

⁵Comm. Ex. 326-A quoted at length—Initial Decision, p. 10.

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Directors never has refused to follow recommendations, as to prices or allotments, of the Advisory Committee. And, although Mutual's by-laws provide that members of the Advisory Committee be growers, in actual practice that has not always been the case. As Mr. Saurman, Mutual's General Manager, testified:

I want to touch on the Advisory Committee, because it is probably the most important committee to the Mutual Board, and it is selected from leaders in the industry who represent fields of interest in the industry, no organization or no particular individual group as one particular organization, but, for instance, the cooperative group in fresh fruit handlers are represented; cooperative processors are represented; the cash-buying intermediate handler is represented; the canner who buys for cash, the cooperative canner; the concentrator who buys for cash, the cooperative concentrator, all of the various segments of the handling industry, all experienced people.

I would say 90 per cent or more of the number selected to serve on that advisory committee are in effect as individuals, are grower members of Mutual. In some cases they are not, because there are some operations in the industry that actually do not produce, and they buy their whole supplies from Mutual members and others, but that is the nature of this advisory committee. * * * (R. 834, 835).

The record is replete with the above and other evidence substantiating the charge that the growers, through Mutual's contracts with handlers, have been parties with the handlers, through the Advisory Committee, in fixing prices at which the handlers have resold citrus fruits and citrus products and in restricting interstate shipments of such fruit and products. The hearing examiner in his initial decision treats at some length the decisions in *United States v. Borden Company, et al.*, 308 U.S. 188 (1939) and *United States v. Maryland and Virginia Milk Producers Association, Inc., et al.*, 179 F. 2d 426 (C.A.D.C., 1949) and 193 F. 2d 907 (C.A.D.C., 1951) and found the holdings there to be fully applicable to the facts in the present proceeding, correctly stating that:

* * * in the present case the FCM did not stop at fixing the price of citrus fruit to the grower, but attempted to fix, by agreement with the handlers, the price the processors were to receive for their fresh fruit, and even to control the price the processors were to receive for the processed citrus product in selling to the public. In other words, the FCM went at least one step too far in its price-fixing activities to receive the benefit of immunity under the Clayton Act or the Capper-Volstead Act.

Respondents also argue that there is a lack of jurisdiction. Apparently, respondents' position is that since Mutual does not handle or sell any fruit, it is not engaged in commerce within the meaning of the Federal Trade Commission Act and, therefore, the Commission is without jurisdiction over it. It is our opinion that respondent Mutual is so inextricably involved through its contractual relations,

both with the growers and handlers, that it cannot seriously question the Commission's jurisdictions. The fact that Mutual itself is not directly engaged in interstate commerce is of no legal consequence. *Minneapolis Chamber of Commerce v. F.T.C.*, 13 F. 2d 673 (C.A. 8, 1926), where the court in a situation on all fours with the instant proceeding held:

Although the Chamber is not itself engaged in any commerce in the sense of being a trader or shipper, yet it is an instrumentality in the current of interstate commerce * * * and is within the regulatory power of Congress.

Practically all citrus fruit grown in Florida is shipped interstate as fresh fruit, concentrate, or citrus products. Fresh fruit handler-shippers under contract to Mutual account for 92% of fresh Florida citrus fruit shipped in commerce and, in fact, there are only about ten, or less, fresh fruit shippers in Florida who do not have handler contracts with Mutual.

Mutual is the instrumentality used to bind the handlers who buy fruit from Mutual's grower members for the purpose of interstate shipment. Mutual is the medium used by member growers and handlers to effectuate Mutual's purposes and to carry out the practices, attacked in this proceeding, connected with the illegal agreements, combinations or conspiracies at the root of the price-fixing and allotment programs.

Associations used as instrumentalities to effectuate illegal restraints on competition clearly are amenable to the jurisdiction of the Commission. *F.T.C. v. Pacific States Paper Trade Assn., et al.*, 273 U.S. 52 (1927); *Minneapolis Chamber of Commerce v. F.T.C.*, *supra*. And, see particularly *National Harness Manufacturers Assn. v. F.T.C.*, 268 F. 705 (C.A. 6, 1920), which held specifically that where many members of an association are in interstate commerce the Commission has jurisdiction over the voluntary association.

Respondents also argue that jurisdiction does not lie because the acts and practices charged in the complaint and included in the findings in the initial decision are not "unfair acts, practices or methods in commerce." It is our opinion that price-fixing such as is present here, together with the restriction of interstate shipments through allotment programs, clearly comes within the ambit of Section 5 of the Federal Trade Commission Act. *F.T.C. v. Cement Institute, et al.*, 333 U.S. 683, 689-693 (1948); *F.T.C. v. Pacific States Paper Trade Association, et al.*, *supra*; *F.T.C. v. Motion Picture Advertising Service*, 344 U.S. 392, 395 (1953).

Finally, on the question of jurisdiction, respondents argue that the present action no longer is in the public interest, apparently

on the ground that all alleged illegal activities were discontinued by Mutual in May, 1952, in good faith and with no reasonable probability that they will be resumed. In this connection the record discloses, and the hearing examiner found, that the last official action taken with respect to the handler contracts was on July 9, 1953, when Mutual's Board of Directors, on the recommendation of its Executive Committee, voted to continue the using of all the handler contracts. The continued existence of these contracts can lead to no other conclusion but that arrived at by the hearing examiner to the effect that:

* * * The contracts between respondent FCM and the processors and shippers utilized by respondent FCM in its efforts to compel these distributors to observe the price-fixing and allotment programs are still in effect, and a change in policy of administration could bring them into use. In view of these facts, as well as the duty on the part of the Federal Trade Commission to protect the public from such restrictive activities, it will be necessary for an order to cease and desist to be entered in this case, to prohibit those practices found to be illegal.

The Commission is of the opinion that on the basis of the facts presented by the record in this case, the hearing examiner correctly concluded that an order to cease and desist should issue in the public interest.

Respondents in their appeal have presented fourteen exceptions to certain procedural and other aspects of this case.

First, exceptions numbered 1 and 5 attack the Commission's alleged failure itself to receive and act upon respondents' proposal for adjustment. To state these propositions as respondents have, in the light of the whole record herein, is but to answer them. By its order dated October 25, 1954, the Commission itself disposed of, adversely to respondents, and clearly upon its merits, respondents' "Proposal for Disposition of Docket No. 6074," filed September 7, 1954. Subsequently, on December 10, 1954, in the same connection, the Commission entered its "Order Ruling on Respondents' Motion for Rehearing and for Interpretation of Their Rights Under the Administrative Procedure Act." And, on April 29, 1955, the Commission entered an "Order Denying Respondents' Renewed Proposal for Adjustment." Finally, on May 12, 1955, there was entered by the Commission an "Order Denying Respondents' Appeal from Hearing Examiner's Ruling of April 20, 1955." The ruling denied respondents' motion for renewal of proposal for adjustment and request for certification theretofore filed with the hearing examiner.

It is our opinion that the record speaks for itself in regard to respondents' contentions relative to their proposals for adjustment,

and that exceptions numbered 1 and 5 are without merit. They should be, and hereby are, rejected.

Second, exceptions numbered 2 and 3 are to the effect that the complaint should be dismissed for lack of public interest, presumably on the ground that, because of abandonment of the alleged illegal practices covered by the complaint, the subject of the complaint is moot. Exception No. 3 particularly attacks the Commission's ruling of May 10, 1954, that the hearing examiner had no authority to decide the issue of public interest in the then posture of the case. Certain of our foregoing determinations have resolved the question of abandonment and we see no valid reason to reserve the Commission's May 10, 1954, action in remanding the case for trial, especially since that action was reconsidered and affirmed on the question of abandonment in the Commission's order of October 25, 1954. Respondents' exceptions numbered 2 and 3 hereby are rejected.

Respondents' exceptions numbered 4 and 6-12, inclusive, are closely interrelated and are concerned largely with the question of the legality of the appointment of a substitute hearing examiner, his actions and rulings and with subsidiary related questions. We are of the opinion that the Commission's action of December 10, 1954, in entering its "Order Denying Respondents' Objection to Hearing" and its "Order Denying Motion to Cancel Scheduled Hearing" was an appropriate disposition of respondents' contentions in this regard and they are without merit. Accordingly, they are hereby denied in their entirety.

Respondents' exceptions numbered 13 and 14 are rerestatements in general of respondents' appeal from the hearing examiners' initial decision. The disposition heretofore made of the appeal renders further comment on the subject matter of these exceptions unnecessary.

The appeal of counsel supporting the complaint relates to the period subsequent to May, 1952, and questions the scope of the order to cease and desist contained in the initial decision.

The hearing examiner found that in 1952 Mutual began its price-guide information program, publishing daily and weekly market bulletins and that this program was continued during 1953 and 1954. He further concluded that:

There is no evidence in the record indicating that the respondent FCM has attempted to compel or coerce the fresh-fruit shippers to follow the suggested curtailment of shipments, or otherwise to cooperate in its Supply Adjustment Program; nor is there any evidence that respondent FCM has required these shippers to report to it the extent to which they have followed the program. However, FCM obtains data as to shipments on an industry basis from the Growers Administration Committee, acting under the Federal Marketing Agree-

ment, and publicity is given to the extent to which the program has been followed or observed by the shippers as a group.

The record indicates that respondents' price-guide information and supply adjustment program merely inform the trade as to economic and market conditions and recommend a course of conduct tending to relieve market gluts in citrus fruit. Such a program unaccompanied by concerted activity by respondents tending toward unlawful fixing, establishing or maintenance of prices or fostering or effectuating illegal restraints on competition in the citrus fruit industry, is not in contravention of any of the laws administered by the Federal Trade Commission.

Counsel supporting the complaint also have appealed from the hearing examiner's failure to make an adverse finding with respect to Mutual's practice of restricting handlers, with whom it has contracts, in handling and processing fruit grown by non-members of Mutual. The hearing examiner held in effect that this practice comes within the immunity granted citrus fruit growers by the Capper-Volstead Act. With this holding, we are in agreement.

Finally, counsel supporting the complaint question the scope of the order to cease and desist contained in the initial decision. It is their position that respondents should be enjoined from "fixing or attempting to fix, establish or maintain" *any prices* at which the handlers purchase, sell or resell citrus fruit or citrus fruit products in interstate commerce. In effect, they question whether the examiner was justified in limiting the first inhibitory provision of the order to cease and desist to "f.o.b. prices."

The Commission is of the opinion that any order herein should prohibit the respondents from fixing, in addition to "f.o.b." prices, the so-called "delivered-in" prices at which handlers resell fruit to processors. To that extent, the contention of counsel supporting the complaint is accepted. The Commission does not agree, as urged by counsel supporting the complaint, that the price-fixing inhibitions of the order should extend to "*any prices*." As we have found above, respondents, for example, operate within the immunity of the Capper-Volstead Act insofar as their pricing activities are limited to establishing, cooperatively, prices which should be paid to their grower members by handlers. The first prohibition of the order will be modified in accordance with the foregoing. Likewise, the Commission is of the opinion that the second inhibition of the order, with regard to the fixing of shipping quotas, should be modified in minor respects for purposes of clarification and to delete language that might be subject to misinterpretation.

In connection with these modifications as to paragraphs 1 and 2 of the hearing examiner's order contained in the initial decision, the Commission is further of the opinion that the revisions indicated will result in an effective order in the public interest and that, as so modified, the order unequivocally will inform respondents, as they are entitled to be, of exactly what practices the order prohibits.

In conclusion, for the reasons stated in the foregoing opinion, the appeal of respondents from the initial decision of the hearing examiner is denied in its entirety. Insofar as the appeal of counsel supporting the complaint seeks reversal of the initial decision's conclusion that the activities of FCM beyond May, 1952, in initiating its price guide and supply adjustment programs, are not in violation of any law under which the Commission exercises jurisdiction, that appeal is denied. To the extent that the Commission has in effect ruled favorably upon the contentions of counsel supporting the complaint with regard to the scope of the prohibitions of the order to cease and desist directed to respondents' price-fixing and allotment programs, the appeal of counsel supporting the complaint is granted in part. Where not so specifically ruled upon favorably by the Commission, the remaining contentions of counsel supporting the complaint are overruled.

An order will be entered modifying the initial decision in accordance with this opinion and substituting for the order contained in the initial decision a cease and desist order framed in accordance with the foregoing considerations.

Commissioners Kern and Tait 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 dated and filed July 26, 1955, 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 appeal of respondents and granting in part and denying in part the appeal of counsel supporting the complaint and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

"It is ordered, That respondent Florida Citrus Mutual, its officers, directors and members, in, or in connection with, the offering for sale, sale, shipping, marketing or distribution of citrus fruit or citrus fruit products in commerce, as 'commerce' is defined in the Federal

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Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, or combination, with shippers, handlers, processors or others, to do, perform, engage in, or carry out any of the following acts, practices or methods:

"1. Fixing, or attempting to fix, establish or maintain prices at which handlers or processors of citrus fruit or citrus fruit products resell such fruit or products to the purchasers thereof in interstate commerce.

"2. Restricting or limiting, or attempting to restrict or limit, the volume or quantity of citrus fruit or citrus fruit products to be shipped by handlers or processors thereof from the State of Florida to purchasers in other States of the United States or in the District of Columbia."

It is further ordered, That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent Florida Citrus Mutual shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the initial decision as modified.

Commissioners Kern and Tait not participating.

Decision

IN THE MATTER OF
GENERAL HOME IMPROVEMENT CO., INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6674. Complaint, Oct. 31, 1956—Decision, May 7, 1957*

Consent order requiring sellers in Brooklyn, N.Y., to cease "bait" advertising of aluminum storm windows by radio and television when the offer was not bona fide but actually made only to obtain leads to prospective customers; and falsely representing that offers were limited "to ONLY ONE HOME OWNER in each neighborhood"; and that those guessing the "mystery melody" on a radio program would receive a credit of \$100 toward the purchase of their storm windows.

Mr. Edward F. Downs supporting the complaint.

Mr. Charles Goldenberg, New York City, for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the respondents herein on October 31, 1956, charging them with violation of the Federal Trade Commission Act as set forth in said complaint. After service of the complaint respondents and their attorney entered into an agreement with counsel supporting the complaint for a consent order to cease and desist from the practices complained of, which agreement purports to dispose of all the issues in this proceeding. This agreement has been duly approved by the Assistant Director and Director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein for his consideration in accordance with Rule 3.25 of the Rules of Practice of the Commission.

Respondents General Home Improvement Company, Inc., a corporation and Nathan Muroff and Ruby Friestat individually and as officers of said corporation in the aforesaid agreement have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered into accordance with the agreement. It has also been agreed that the record herein shall consist solely of