

Decision

IN THE MATTER OF
TIDEWATER PAINT & OIL COMPANY, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6744. Complaint, Mar. 18, 1957—Decision, Sept. 26, 1957

Consent order requiring a Norfolk, Va., seller of paints under its labels of "Tidewater Marine Outside Paint" and "Tidewater Quality Exterior White" to shipyards and small industries, but mostly to farmers, tobacco growers, and other rural dwellers, to cease representing falsely in letters and advertising literature mailed to prospective purchasers that a limited quantity of its paint was available in the prospect's vicinity and was being offered for sale at a special reduced price, saving the purchaser \$2 per gallon, that it was high-quality all-purpose paint suitable for marine use, "guaranteed for many years outdoor exposure on every type of surface," and equal in durability to national brand paints; and to cease furthering such false representations by use in the brand names of the words "Marine" and "Quality."

Mr. Garland S. Ferguson for the Commission.

Breeden, Howard & MacMillen, by *Mr. Edward L. Breeden, Jr.*,
Norfolk, Va., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with violation of the Federal Trade Commission Act by falsely and deceptively advertising paint and allied products which they sell and distribute in commerce.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement identifies respondent Tidewater Paint & Oil Company, Inc. as a Virginia corporation, with its office and principal place of business located at the Flatiron Building, Norfolk, Virginia; and respondents Stanley D. Legum, Esther S. Legum and Alvin Legum as individuals and officers of said corporation, who formulate, direct and control the policies and practices of the corporate respondent. All individual respondents have their office and principal place of business at the same location as that of the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint and agree

that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged in the complaint as being in violation of the Federal Trade Commission Act. The agreement containing consent order to cease and desist is therefore accepted as part of the record upon which this decision is based, and this proceeding is found to be in the public interest. Accordingly,

It is ordered. That respondents Tidewater Paint & Oil Company, Inc., a corporation, and its officers, and Stanley D. Legum, Esther S. Legum, and Alvin Legum, individually and as officers of said corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined by the Federal Trade Commission Act, of its Tidewater Quality Exterior Paint, or any other paint containing substantially the same ingredients or possessing substantially the same characteristics, do forthwith cease and desist from:

1. Representing directly or by implication:

(a) That the customary or regular price of respondents' said paint is any price which is in excess of the price at which such paint is regularly or customarily sold by respondents in the normal and usual course of business;

(b) That the price at which respondents offer their said paint for sale constitutes a price below or a reduction in their customary price, when in fact such price is the usual and customary price at which respondents sell their paint in the normal and usual course of business;

(c) That respondents have any quantity of paint warehoused, or on hand, in the vicinity of prospective purchasers, when respondents do not in fact have such paint warehoused or on hand in the designated locality;

(d) That respondents' paint is a "high quality" or "all purpose" paint or may be successfully used on every type of surface or is suitable for marine use;

(e) That respondents' paint will withstand adverse weather conditions for any period of time that is not a fact or misrepresenting in any manner the period of time within which it will not deteriorate;

(f) That respondents' paint is equal in durability to national brand paints unless such is the fact;

(g) That purchasers of respondents' paint will save any amount from respondents' regular and customary price unless such is the fact;

2. Using the word "Quality" as a part of the brand name for its product now designated as Tidewater Quality Exterior Paint or representing in any manner that said paint is a quality or high-grade paint;

3. Using the word "Marine" as a part of the brand name for its product now designated as Tidewater Marine Outside Paint or representing in any manner that said paint is suitable for marine use.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day of September, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Tidewater Paint & Oil Company, Inc., a corporation, and Stanley D. Legum, Esther S. Legum, and Alvin Legum, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
FOOD FAIR STORES, INC.

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

Docket 6458. Complaint, Mar. 12, 1957¹—Decision, Sept. 27, 1957

Order dismissing—for the reason that respondent came within the definition of "packer" in the Packers and Stockyards Act of 1921 and as such was subject to the exclusive jurisdiction of the Secretary of Agriculture—complaint charging a supermarket grocery chain of 238 stores along the Atlantic seaboard from New England to Florida, with knowingly inducing and receiving from its suppliers, illegal advertising allowances which those suppliers had not made available on proportionally equal terms to all respondent's competitors.

Mr. Andrew C. Goodhope, Mr. Fredric T. Suss, and Mr. Alvin C. Edelson, supporting the complaint.

Stein, Stein & Engle, by Mr. Howard Engle, of Jersey City, N.J., Gravelle, Whitlock & Markey, by Mr. Louis A. Gravelle, and Howrey & Simon, by Mr. David C. Murchison, of Washington, D.C., for the respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

In the midst of proof taking to support the allegations of the complaint, and immediately subsequent to the issuance by the Commission of amended complaint, respondent, by counsel, moves for complete dismissal for lack of jurisdiction. Since jurisdiction can be questioned at any time and is not conferred by consent, waiver, or failure to raise the point, at any previous time, the motion is timely and proper. The ground of the motion is that respondent's acts and practices, including those challenged by the complaint herein, are in the exclusive jurisdiction of the Secretary of Agriculture because respondent is subject to the Packers and Stockyards Act of 1921, U.S.C. 191 et seq.

Respondent herein is a supermarket grocery chain of 238 stores located along the Atlantic Seaboard from New England to Florida, selling a full line of grocery and household products including fresh and canned meat and meat products. Its gross sales were about \$475,000,000 for the fiscal year ending April 28, 1956. It was organized about 1933. The charge against it in this proceeding is that it knowingly induced and received from suppliers advertising allowances which those suppliers had not made available on propor-

¹ Amended and supplemental.

tionally equal terms to all of their other customers competing with respondent in the retail sale of such suppliers' products and that respondent knew this. In short, that respondent knowingly induced a violation of section 2(d) of the Clayton Act by its suppliers.

On July 13, 1945, respondent acquired a meat packing plant at 406 Allen Street, Elizabeth, New Jersey, at which place it has since slaughtered livestock and prepared same for consumption, selling and shipping in commerce to the extent of \$25,000,000 or 95,000,000 pounds, for the fiscal year ending April 28, 1956. Respondent's investment in said plant is \$2,700,000. The products thereof are federally inspected and respondent is listed and licensed by the Department of Agriculture as a packer. Counsel supporting the complaint concedes that "to the extent it operates its meat packing plant in Elizabeth, New Jersey," respondent is a packer within the statutory definition set out in 7 U.S.C. 191, 42 Stat. 160, which reads as follows:

When used in this chapter—

The term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) of this section, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) of this section, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) of this section, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 percentum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 percentum or more of such power or control in any business referred to in clause (a) or (b) of this section. Aug. 15, 1921, c. 64 § 201, 42 Stat. 160.

Section 406(b) of the same statute (7 U.S.C. 227, 42 Stat. 169) provides "on or after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in

which, before the enactment of this Act, complaint has been served under Section 5 of the act entitled 'An Act To Create a Federal Trade Commission, to define its powers and duties, * * * and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case (August 15, 1921, Chapter 64, Section 406, 42 Stat. 169; 7 U.S. Code Section 227)." The two exceptions mentioned in the above code section are obviously inapplicable to this proceeding and it will be noted that jurisdictional exclusion is as "to any matter which by this Act, is made subject to the jurisdiction of the Secretary * * *."

The *matter* above referred to is obviously that which is contained in Section 202, 7 U.S.C. 192 of that Act which reads as follows:

Unlawful Practices Enumerated

It shall be unlawful for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or any live poultry dealer or handler, or buy or otherwise receive from or for any other packer or any live poultry dealer or handler any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person
(1) to apportion territory for carrying on business in commerce,

or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a)-(d) or (e) of this section.

Obviously the above broad proscriptions include the charge of the complaint here. There follows detailed provisions for complaint, answer, hearing, decision and order by the Secretary of Agriculture with right of appeal therefrom to the United States Circuit Court of Appeals—procedure closely following that of the Federal Trade Commission (7 U.S.C. 193-4-5) and indeed there is a separate general provision (7 U.S.C. 222) adopting for the use of the Secretary of Agriculture in the enforcement of the Act, all of the implementing provisions of the Federal Trade Commission Act. It was probably this which led to Fourth Circuit Court of Appeals in *United Corporation, et al v. F.T.C.*, 110 F. 2d 473 to say:

It was doubtless because plenary power over the unfair trade practices of packers had been vested in the Secretary of Agriculture by the Packers and Stockyards Act and the Meat Inspection Act, that Congress withheld jurisdiction over packers from the Federal Trade Commission. Only confusion could result from an overlapping jurisdiction, as this case well illustrates.

On the basis of the above, counsel for respondent contends that it has an in personam immunity from supervision, investigation or correction by the Federal Trade Commission, being, by reason of its packing activities, subject in all of its operations exclusively to the jurisdiction of the Secretary of Agriculture. In a word, once in grace always in grace. Counsel supporting the complaint, on the other hand, contends that the exclusive jurisdiction of the Secretary of Agriculture is not personal, but is only as to matters given to him exclusively, and that the acts and practices of respondent challenged in the instant proceeding are not such a matter. His argument, so far as the examiner understands it, proceeds as follows:

(a) The Packers and Stockyards Act was aimed directly against the five big packers who, in 1917, handled 70.5 of all animals slaughtered under federal inspection.

(b) That these same five packers were under a 1920 consent decree forbidding them to engage in the retail distribution of grocery products including meat or meat products.

(c) That, therefore, the Packers and Stockyards Act was and is confined in its operation to slaughtering, processing, preserving, selling, and shipping meat and meat products in commerce, and does not cover the retail distribution thereof.

(d) Therefore, there was never conferred on the Secretary of Agriculture any jurisdiction whatever over the retail activities of any business coming within the statutory definition of packer, and, therefore he has no jurisdiction over the great bulk of respondent's acts and practices.

The above quoted statutory provisions are clear and unambiguous and would seem to this hearing examiner to require no resort to legislative history for clarification. But all counsel seem to think the contrary, and quote extensively from that legislative history to sustain their conflicting contentions.

Without extensive quotations from that legislative history, it is plain therefrom that while the consent decree of 1920, which barred the five major packers from engaging in most retail operations, was in the mind of Congress in 1921, it is also clear that Congress was legislating for all businesses doing any meat packing whatsoever, that the bill was intended to reach and regulate all phases of the business of any person, firm or corporation engaged in meat packing to any extent whatever, that the problem of "unrelated activities" was squarely before Congress and thoroughly considered, that the statutory definition of "packers" in Section 201 of the Act (7 U.S.C. 191) was made designedly broad so as to include all within its terms, "whatever the ramifications of his business, and whatever the form of corporate organization adopted" or "if such person has *an interest* in a packing business, as [above] defined or if a packer has *any interest* in his business." It is apparent that Congress was not legislating in a 1921 vacuum, but was legislating for the future and for an industry, and was keenly aware of extensions into other fields, and of other firms entering into the packing field. There is no evidence in this legislative history, that the Act was intended to be confined to those whose sole or primary business was meat packing. On the contrary, the House of Representatives was pressured by the Farm Bureau to narrow the definition of "packer" to just manufacturing or preparing meats and meat products for sale—in other words, just to meat packing—but this was flatly rejected:—the expressed intention then being "to relieve from regulation (by the Secretary of Agriculture) those outside industries only when having *no affiliation* with a packer." "Affiliation" is a broad and significant word. Finally, on this point, it is most significant to this hearing examiner that in 1938 when Congress was enlarging the jurisdiction of the Federal Trade Commission by adopting the Wheeler-Lea Amendment, and then having before it the extensive hearings preceding the Robinson-Patman Act, and their disclosure of new and devious anti-competitive practices which had come to life in the intervening years, with the knowledge of backward and forward in-

tegration occurring during the 1920 decade, was most careful to except from the new grant of additional jurisdiction "persons, partnerships or corporations subject to the Packers and Stockyards Act, 1921, except as provided in Section 406(b) of said Act." This careful additional exclusion of jurisdiction, not there before and coming 18 years later in that setting, seems to this hearing examiner to refute any claim that Congress in 1921 was legislating only about five packers, was not legislating as to retail activities, or "unrelated operations." It seems a re-affirmation of a firm intent to have the Secretary of Agriculture regulate all phases of any business in whatever primary field, connected in any way, or operating to any degree, in meat packing. There is, therefore, no necessity for deciding whether the exemption is in personam or merely in rem.

This interpretation logically and inevitably leads, counsel in support of the complaint contends, to absurd results enabling any concern to choose at will the regulatory authority, by simply acquiring or divesting itself of a packing plant. Or, put more crassly, by the simple expedient of buying a load of chickens, wringing their necks, plucking their feathers and selling their carcasses in commerce, any business in the nation, even a tire or battery manufacturer, for instance, may escape regulation of its entire business by the Federal Trade Commission, whose "expertise" in the use, for instance, of brokerage, advertising allowances, service grants and other devious means of competitive favoritism, is widely recognized. Thus, in the instant case, alleged competitive discrimination in the use of advertising allowances to push such non-agricultural products as floor wax, chewing gum and cleaning fluid is left exclusively to the Department of Agriculture. No law, says counsel, should be interpreted to achieve an absurd result.

The answer, of course, is that where a law is clear and unambiguous in terms, command, and intent and where the latter is also clear from the legislative history, interpretation is uncalled for and no deciding authority may interpose his views and interpret it away from that intent, regardless of result. The responsibility for the latter, any duty to change, as well as the sole right to change, lies with the enacting authority, Congress. That this is recognized by that body is evidenced by the recent introduction for passage by Congress of S. 1356 to confer on the Federal Trade Commission the very jurisdiction contended for here, and by the statement of its sponsor:

I believe it is in the public interest that Federal Trade Commission's control be extended over packers who enter into other side-line businesses—businesses which now escape such control because of United States Department of Agriculture's inaction, but whose competitors are subject to Federal Trade Commis-

Opinion

54 F.T.C.

sion's control. The same need for public control applies to food firms, especially food chains, which can now acquire packing plants, or a substantial interest in one, and thus escape Federal Trade Commission's supervision over their entire operations.

Despite distinctions of counsel, which are really not actual differences, the views expressed, and the language used in *United Corporation, et al v. F.T.C.* 110 F. 2d 473 (C.C.A. 4) (1940) and Docket 6409, *Armour and Company* (March 30, 1956) are consonant with, and, it is believed, fully support the views expressed, and the conclusion reached here, and these are precedents by which this hearing examiner is, of course, bound.

Express findings of this motion then are:

1. Respondent comes within the definition of "packer" as set out in 7 U.S.C. 191, not only as to its Elizabeth, New Jersey plant but as an entity.

2. As such, the Secretary of Agriculture has exclusive jurisdiction of the acts and practices charged in the complaint to be illegal.

3. The Federal Trade Commission has no jurisdiction thereof.

It follows that the motion of respondent to dismiss should be and the same hereby is granted.

Any and all requests for time to brief further the motion are denied.

ORDER

It is ordered, That the complaint and the amended and supplemental complaint in this proceeding be, and the same hereby are, dismissed for lack of jurisdiction.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The amended and supplemental complaint filed under Section 5 of the Federal Trade Commission Act charges respondent with seeking and obtaining special discriminatory advertising allowances from certain of its suppliers, while knowing, or having reason to know, that such allowances were discriminatory, and with failure to use all of such allowances for advertising purposes.

During the trial, respondent moved for dismissal on the ground that the acts and practices complained of are under the exclusive jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act (U.S.C. Title 7, Sec. 181 et seq.). From an order sustaining this motion and dismissing the complaint, this appeal has been taken.

The jurisdictional facts are substantially as follows:

Respondent is a supermarket grocery chain operating 238 stores in the eastern part of the country, and selling a full line of grocery and household products including meat and meat products; its operations date from about 1933; on July 13, 1945, respondent acquired a meat packing plant in Elizabeth, New Jersey, and engages there in the preparation and distribution of meat products; respondent's investment in the plant is \$2,700,000; the plant is licensed by the U.S. Department of Agriculture as a packer and its products are Federally inspected; during the fiscal year ending April 28, 1956, this plant prepared and shipped 95,000,000 pounds of product of a total sales value of \$25 million, based on prices at the plant; about 1/10th of 1% of this product was sold through respondent's own retail stores, the balance being sold to independent jobbers; the total of \$25 million of sales represents about 5% of respondent's total retail sales.

The jurisdictional issue presented involves the following questions:

(1) Does the complaint cover *matters* over which the Secretary of Agriculture has been given jurisdiction?

(2) Does the definition of commerce contained in the Packers and Stockyards Act exclude from the Act the operations of respondent here involved, except as to certain specific products hereinafter referred to?

(3) Does respondent come within the definition of "packer" laid down in the Act?

(4) If so, is the jurisdiction of the Secretary limited to those products traditionally included in the meat packing business?

I.

The Federal Trade Commission Act, as originally adopted in 1914, contained the following provision in Section 5:

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

After the adoption of various amendments, Section 5(a)(6) now provides:

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers, and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in Section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Packers and Stockyards Act was adopted in 1921, following an extensive investigation by the Federal Trade Commission and also hearings by several Congressional committees. The Act is comprehensive, covering certain activities of packers, stockyard owners and operators, market agencies, dealers, poultry dealers, handlers, etc. Section 192 of Title 7 enumerates certain activities on the part of packers and live poultry dealers or handlers which are declared to be unlawful. It is declared unlawful to:

(a) Engage in or use any unfair, unjustly discriminatory or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or any live poultry dealer or handler, or buy or otherwise receive from or for any other packer or any live poultry dealer or handler any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivision (a), (b), (c), (d), or (e) of this section.

Machinery is then set up by which the Secretary is to enforce the law. Section 227 of Title 7 provides:

So long as this chapter remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this chapter is made subject to the jurisdiction of the Secretary except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case.

Congress has not removed all activities of packers from the jurisdiction of the Federal Trade Commission, as has been done in the Federal Trade Commission Act in the case of banks. It denied jurisdiction only as to any matter made subject to the jurisdiction

of the Secretary by the Packers and Stockyards Act. The Wheeler-Lea Act, passed in 1938, did not change the jurisdictional framework set up by the Packers and Stockyards Act. Prior to the Wheeler-Lea Amendment, packers were subject to the Act only as to certain matters specifically set out therein. There is nothing in the Wheeler-Lea Act, or in its history, to indicate that Congress intended to confer other powers on the Secretary in addition to those given in the Packers and Stockyards Act.

An examination of the matters placed under the jurisdiction of the Secretary by Section 192 indicates that such jurisdiction includes the matters which are the subject of the complaint in this case.

II.

The Packers and Stockyards Act contains two sections relating to the definition of commerce. Title 7, Section 182(6) states:

The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any territory, or possession, or the District of Columbia.

This is a familiar definition, and from a geographical standpoint, covers substantially every movement of goods over which Congress has jurisdiction under the commerce clause. From the standpoint of character of product, the definition is also all-inclusive and covers every product capable of being the subject of commerce.

Section 183 states:

For the purpose of this chapter (but not in any wise limiting the definition in section 182 of this title) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or devices intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this section the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

From this it is argued that the grant of power to the Secretary of Agriculture covers only the products specifically named, "livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs." In other words, Section 183 is a limitation on the broad grant of power in Section 182(6).

One difficulty with this argument is that it ignores the fact that Section 183 expressly says it is not a limitation on the previous definition.

Furthermore, the history of the legislation indicates rather clearly why Section 183 was adopted. It was designed to meet a situation peculiar to the meat producing industry as it existed in 1921. This same situation, although in a lesser degree, exists today. The process begins with the animal, which has been raised on grass, being shipped to commission merchants at various stockyards throughout the country. There the cattle are unloaded, cared for, and sold either to packers for slaughter, to feeders who fatten them further on grain in their own yards, or to dealers at the stockyard centers. In this chain of events, the stockyards and all who operate there play an important part. In its attempt to control the monopolistic practices of the big packers both as to cattle producers and as to meat consumers, Congress concluded that it was necessary to bring stockyards under effective control. Inasmuch as many of the activities carried on at the stockyards were local or intrastate in character, this posed an important constitutional question. Various committee reports indicate the attention that was given to this problem.

In *Swift Company v. U.S.*, 196 U.S. 375, the Supreme Court had before it the question of whether the business done in the stockyards between the receipt of the livestock in the yards and the shipment of them therefrom is a part of interstate commerce or is so associated with it as to bring it within the power of national regulation. In commenting on this decision, the House Committee on Agriculture in Report No. 77, 67th Congress, 1st Session, which accompanied H.R. 6320 (the basis of the Act), had this to say:

The bill makes it clear that Congress in treating this question is attempting to regulate evils which it has found to exist in respect to exorbitant charges and unreasonable practices on the stockyards, resulting in a direct burden upon interstate commerce, and that in the whole bill it is treating the entire slaughtering and meat-packing industry in all its ramifications as part of the "current of commerce" referred to in the Swift case. The bill in its definitions in section 2 repeats the language of the Swift case and contains a declaration "articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this act." This clearly expresses the intention of Congress that all devices, whether skillful manipulation of corporate organization, or the setting up of dummies, or otherwise, should not result in an evasion of the act. If this great industry, bearing so important a relation to the welfare of the Nation, and constituting so large a part of interstate commerce, can escape the power of Congress by such devices, the power granted by the Constitution to regulate interstate commerce means nothing, a conclusion which the committee can not bring itself to believe is true.

In *Stafford v. Wallace* (1922) 258 U.S. 495, the Supreme Court upheld the constitutionality of the Packers and Stockyards Act. In the decision (p. 520) the Court said:

It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift case. The recital in Section 2, Paragraph (b), Title 1, of the Act quoted in the margin leaves no doubt of this. The Act deals with the same current of business and the same practical conception of interstate commerce.

Set out in the margin of the opinion is the substance of Title 7, Section 183.

It thus appears that the purpose of Section 183 was not to limit Section 182, Subparagraph (6) but to explain and strengthen it. Its purpose was not to limit the operation of the Act to certain specified products but to make certain that it applied to the entire slaughtering and meat packing industry in all its ramifications as part of the current of commerce referred to in the Swift case.

III.

The term "packer" is defined in Section 191 as follows:

When used in this chapter—

The term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) above, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) above, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) above, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) above.

Thus, the term "packer" includes any person engaged in the business:

- (1) of buying livestock in commerce for slaughtering, or
- (2) of manufacturing or preparing for sale or shipment in commerce meats or meat food products (all edible by-products).

The inclusion of such persons is without condition or reservation. Then the definition includes additional persons engaged in the business:

- (3) of manufacturing or preparing for sale or shipment in commerce of livestock products (non-edible products), or
- (4) of marketing meats, meat food products, livestock products, dairy products, poultry products, or eggs.

The above persons are not included unconditionally and without reservation. They come under the definition only if certain other conditions exist, as set out in Subparagraphs (1), (2), (3) and (4).

What Congress had in mind by this somewhat complicated definition is indicated by the legislative history. For example, on February 5, 1921, the House Agriculture Committee filed Report 1297, 66th Congress, 3rd Session, to accompany S. 3944, which the House Committee had amended. Speaking of the definition of packer, the report states:

The Senate bill in section 2 declares that the term "packer" means "any person engaged in the business of slaughtering livestock or preparing livestock products for sale in commerce, or of marketing livestock products as a subsidiary of or an adjunct to any such slaughtering or preparing business." This definition so drawn would apparently leave outside of all regulation many branches of the slaughtering and meat packing industry. It would seem that skillful reorganization of the existing forms of corporation organization would result in escaping the provisions of the Act, as for example the organization of a marketing corporation which owns the majority of the stock of a corporation engaged in the slaughtering business. Such marketing corporation would not seem to be within the definition of the act, inasmuch as it is not "a subsidiary of or an adjunct to" the slaughtering corporation, but the reverse is true, since the marketing company is the parent corporation.

Nor does the definition in the Senate bill include cases where neither corporation owns or controls a dollar of stock in the other, but the control of each is in the hands of common stockholders. Thus, if all the stock of corporation A, engaged in the slaughtering business, and corporation B, engaged in the marketing business, were owned by X, Y, and Z, individuals, corporation B would clearly not be a "packer" since in no sense can it be said to be a "subsidiary of or an adjunct to" corporation A.

These defects are remedied in the committee amendment (sec. 201).

In Report No. 77, 67th Congress, 1st Session, of the House Committee on Agriculture to accompany H.R. 6320, the Committee said:

Section 201 defines the term "packer" in such manner as to include all persons engaged in the business of buying livestock in interstate or foreign com-

merce for purposes of slaughter, or of manufacturing or preparing meats or edible meat-food products for sale or shipment in such commerce.

In order to bring within the terms of the bill the packer as thus defined, whatever the ramifications of his business and whatever the form of corporate organization adopted and at the same time to avoid interference with businesses having no packer affiliations, it is provided that a person engaged in the business of manufacturing or preparing, for sale or shipment in interstate or foreign commerce, livestock products, or of marketing such products in such commerce, shall be considered a packer if such person has an interest in a packing business as above defined, or if a packer has any interest in his business, or if a common control amounting to 20 percent exists in each business. In this manner an independent tannery would not be a packer, but if a packer sets up a tannery business as a separate corporation it would be controlled.

It seems clear from the language of the Act and from the legislative history that Congress designedly made the definition of packer a very broad one. The general purpose was to regulate certain practices of the meat packing business in all its ramifications regardless of its organization or unrelated activities. About the only persons Congress seemed to exempt were those having no packer affiliations. Thus, an independent tanner would not be a packer, merely because of being in the tannery business. Nor would an independent marketer, simply because he marketed meats, meat food products and livestock products, etc. But if either engaged in certain activities traditionally connected with the packing business, or had a designated degree of affiliation therewith, they were included in the definition of packer.

It should be noted also that the definition applies only to persons "engaged in the business," etc. The general meaning of this language has frequently been explained by the courts. For example, in *Dane v. Brown*, 70 F. 2d 164 (1934), the court pointed out that such expressions as "pursue the practice of architecture," "engaging in the practice of law," contemplate a course of business and not single isolated instances arising from unusual circumstances. So also an isolated instance of the driving by a corporation of a motor truck through Alabama in interstate commerce was not engaging in such business within the meaning of the constitutional provision in question. *Dealers' Transport Co. v. Reese* (1943) 138 F. 2d 638. There are many cases pointing out that engaging in business or in a specified business implies a bona fide element of continuity or habitual practice—it means to be employed in the business—conducting, prosecuting and continuing a business by performing progressively all the acts normally incident thereto, not from time to time, but all the time.

In the instant case, it appears that respondent acquired possession of the packing plant in 1945 some years prior to the present contro-

Opinion

54 F.T.C.

versy; that it has been recognized by the Department of Agriculture as being a packer and subjected to inspection as a packer; that it regularly carries on the business of preparing meat products and selling same in commerce. We conclude that its activities, as appearing in the record, bring it within the definition of "packer" as that term was intended by Congress in the Packers and Stockyards Act.

It is also argued that, even assuming that respondent is a packer, nevertheless, the jurisdiction of the Secretary of Agriculture does not extend to those products not associated with its packing business, which in this case cover the predominant share of the products handled by respondent.

The construction here urged would seem reasonable in the light of present day conditions. Nevertheless, the law must be considered in the light of the problem existing in 1921 rather than the one in 1957.

The investigation of the meat packing business, particularly the activities of the five large packers disclosed evils in the entire industry which Congress seemed determined to remedy. This posed serious problems, as the legislative history clearly demonstrates. Even in 1921, the industry which produced meat food products and livestock products was an extensive and complicated one. This was true not only as to the stockyards feature, but also as to those allied industries which processed or used livestock products. That this matter was given attention clearly appears in the legislative record. For example, Congressman Haugen, Chairman of the House Agriculture Committee, in explaining the conference report, said:

The next amendment referred to was to amend the definition of the term "live-stock products" so as to remove the objection that the bill subjected to regulation many industries never engaged in the slaughtering of animals, such as tanneries, fertilizer plants, woolen mills, automobile manufacturers, and many others using by-products of the packing industry.

Although supporting the amendment for this limited purpose, Chairman Haugen expressed the opposition of his Committee to an additional amendment urged by the Farm Bureau.

At the same time, the Farm Bureau suggested that the definition of the term "packer" be so amended as to confine packers to those manufacturing or preparing meats as meat-food products for sale and shipment in commerce. While recognizing the justice of the complaint that the definition in the original Haugen Bill might be construed to include independent tanneries, fertilizer plants, and other industries using by-products of the packing industry, but the Committee at once perceived that the adoption of the suggestion of the American Farm Bureau Federation would be to leave outside of all regulation such industries when conducted as subsidiaries of the packing industry. It therefore amended the Haugen Bill in such manner as to relieve from regulation these outside industries when having no affiliation with a packer, but leaving

392

Opinion

the packer to complete regulation, no matter what line of business he goes into. 61 Congressional Record, p. 4781.

As to the matters referred to in Section 192, it was the intention of the Congress to give the Secretary broad powers so that the unlawful practices therein outlined could be effectively and efficiently handled. This is well expressed in the following from the Committee report:

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

After setting forth the various powers granted to the Secretary, the report states:

The bill further coordinates the duties of the Secretary of Agriculture so that it prevents overlapping of authority and duplication of jurisdiction of other departments of Government having regulatory powers which previously existed. It provides for ample court review for any of the orders or regulations of the Secretary of Agriculture so as to protect the industry from any mistakes of judgments or unwarranted use of the power thus delegated.

In *United Corporation v. Federal Trade Commission* (1940) 110 F. 2d 473, the order of the Commission required respondent to cease and desist from:

Representing that the corned beef hash and deviled ham which it sells are made from products originating in Virginia, and using the trade name "Virginia Products Company" and using labels containing the words "Virginia" and from invoicing its sales from Richmond or other places within the State of Virginia.

Prior to the entry of the order by the Commission, respondent acquired 20% of the stock of the suppliers who canned the products for it. The court held that upon the acquisition of this stock, respondent became a packer whose business was subject to the control of the Secretary of Agriculture under the Packers and Stockyards Act. The court pointed out that the complaint charged an unfair practice in the marketing of meat food products by a packer and was a matter made subject to the jurisdiction of the Secretary by Title 7, Sections 192 and 193. While the case involved only meat food products, we think the same rule would have applied to other commodities marketed by this respondent packer. In *the Matter of Armour and Company*, Docket No. 6409, the Federal Trade Commission held that claimed false advertising of oleomargarine by the respondent packer came under the jurisdiction of the Secretary of Agriculture and accordingly dismissed the complaint. Insofar as

Order

54 F. T. C.

Sections 192 and 193 are concerned, there is no evidence that Congress meant to draw any distinction between meat food products and other products marketed by a packer. Such a conclusion would make the law very difficult of enforcement.

Based on the facts in this case, we conclude:

(1) The matters involved in the complaint are matters over which the Secretary of Agriculture was given jurisdiction by the Packers and Stockyards Act.

(2) The definition of "commerce" in the Packers and Stockyards Act does not limit such jurisdiction to livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs.

(3) Respondent comes within the definition of "packer" as announced in Section 191, Title 7.

(4) The jurisdiction of the Secretary as to matters involved in this case is not limited to meat food products marketed by respondent.

The appeal of counsel supporting the complaint is denied and it is ordered that the complaint and the amended and supplemental complaint be, and the same hereby are, dismissed for lack of jurisdiction.

Mr. Tait did not participate in the decision herein.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision granting the respondent's motion to dismiss this proceeding for lack of jurisdiction; and the matter having come on to be heard upon the record, including the briefs and oral arguments of counsel, and the Commission having determined, for reasons stated in its accompanying opinion, that such appeal should be denied:

It is ordered. That the order contained in the initial decision, which duly provides for dismissal of this proceeding for lack of jurisdiction, be, and the same hereby is, affirmed.

Commissioner Tait not participating.

Decision

IN THE MATTER OF
UNITED CIGAR-WHELAN STORES CORPORATION
CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6808. Complaint, May 23, 1957—Decision, Sept. 28, 1957

Consent order requiring a corporation in Brooklyn, N.Y., operating a large number of company-owned retail stores and selling also to individually owned stores operating under franchise agreements, to cease representing falsely in advertising in newspapers and on display cards and circulars furnished its said dealers that its "Imported Precision-made Food Slicer" was of a value greatly in excess of the advertised selling price and was unexcelled for safety.

Mr. Harry E. Middleton, Jr., for the Commission.

Mr. Alvah K. Parent, of Brooklyn, N.Y., and *Aranow, Brodsky, Bohlinger, Einhorn & Dann*, by *Mr. Herbert A. Einhorn*, of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On May 23, 1957, complaint herein was issued, charging Respondent with the use of false, misleading and deceptive representations in connection with the distribution and sale in commerce of its "Imported Precision-made Food Slicer," which representations constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

On August 14, 1957, Respondent, its counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent is identified in the agreement as a Delaware corporation, with its office and principal place of business located at 82 39th Street, Brooklyn, New York.

Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondent, in the agreement, waives any further procedure before the Hearing Examiner and the Commission; the making of findings