

Decision

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

Docket 6490. Complaint, Jan. 11, 1956—Decision, Feb. 14, 1958

Order requiring the Tobacco Board of Trade in Asheville, N.C., and its member-dealers in leaf tobacco, including owners of the 12 auction warehouses operating on the Asheville burley tobacco market and independent tobacco buyers in the area, to cease restricting the establishment of competitive warehousing on the Asheville market by unreasonable limitations on the selling time allotted to new entrants, specifically failing to give reasonable credit for the full size and capacity of new entrants, and limiting the possible gain or loss in selling time allotted to any warehouse for any one selling season to any specific percentage of the selling time allotted for the preceding selling season.

Mr. Rufus E. Wilson and Mr. R. D. Young, Jr., for the Commission.
Williams and Williams, by *Mr. Robert R. Williams and Mr. Silas G. Bernard*, of Asheville, N.C., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On January 11, 1956, the Federal Trade Commission issued its complaint in the above-entitled proceeding, charging the Asheville Tobacco Board of Trade and the individual members thereof with conspiring together to follow, and following, since 1954, a common course of action designed for, and which resulted in, hindering, restricting and preventing, unreasonably, the establishment and operation of market facilities, market opportunities and competition in the purchase and sale of leaf tobacco in the Asheville tobacco market, in violation of § 5 of the Federal Trade Commission Act.

THE ANSWERS

On March 20, 1956, answers were filed by counsel on behalf of all the Respondents except Henry B. Duncan, A. R. Johnson, Jr., Sherrod N. Landon, J. W. Moore, E. G. Anderson, and J. E. Godwin.

Respondent Henry B. Duncan, who is designated in the record as H. B. Duncan, was never served with the complaint, and did not submit an answer thereto nor appear in this proceeding. Accordingly, the complaint herein, as to him, should be dismissed.

Respondent A. R. Johnson, Jr., upon whom, likewise, service of the complaint was unobtainable, is reported to have died in October

1954. Accordingly, the complaint herein, as to him, should be dismissed.

The respondents who submitted answers reserved the right to question the jurisdiction of the Commission, and made various factual admissions, but denied all charges of unlawful acts or practices.

HEARINGS AND PROPOSED FINDINGS

Hearings were held in Asheville, N.C., at which evidence was presented in support of and in opposition to the allegations of the complaint. Thereafter counsel rested their cases and submitted proposed findings as to the facts and proposed conclusions, on which oral argument was heard by the hearing examiner on January 15, 1957, in Washington, D.C.

IDENTITY AND ORGANIZATION OF RESPONDENTS

Respondent Asheville Tobacco Board of Trade, Inc., hereinafter referred to as Respondent Board, is a nonprofit North Carolina corporation with its principal office and place of business located in Asheville, N.C., duly authorized by the North Carolina General Statutes 106-465 " * * * to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors" in the tobacco auction market of Asheville, N.C.; but the "making of rules and regulations in restraint of trade" is expressly excepted from this authorization. Membership in Respondent Board is open to those who are engaged in producing, selling, buying, rehandling, or otherwise dealing in leaf tobacco.

There are 12 auction warehouses presently operating as members of Respondent Board on the Asheville burley tobacco market, as follows:

- Bernard-Walker Warehouse No. 1,
- Bernard-Walker Warehouse No. 2,
- Bernard-Walker Warehouse No. 3,
- Dixie Warehouse No. 1,
- Dixie Warehouse No. 2,
- Planters Warehouse No. 1,
- Planters Warehouse No. 2,
- Carolina Warehouse,
- Walker Warehouse,
- Liberty Warehouse,
- Big Burley Warehouse, and
- Day Warehouse.

The operator of each warehouse is entitled to one vote in the deliberations of Respondent Board. Buyer and seller members may hold either participating or nonparticipating memberships, and participating buying, participating selling and participating buying and selling members are also entitled to one vote each. The following named individuals are now, or have been during the time mentioned herein, either officers or members, or both officers and members of the board of directors of Respondent Board:

Max M. Roberts, president;
J. Carlie Adams, vice president;
Fred D. Cockfield, secretary-treasurer;
Jeter P. Ramsey, ex officio assistant to the secretary, supervisor of sales and general director of the Asheville market;
L. G. Hill, director;
James E. Walker, Jr., director; and
James W. Stewart, director.

Respondents James E. Walker, Jr., and John B. Walker are engaged, as part owners and comanagers, in the business of operating tobacco auction warehouses commonly known as Bernard-Walker Warehouses Nos. 1, 2, and 3 and Walker Warehouse, all of which are located in or near the city of Asheville, N.C., where respondents have their principal office and place of business.

Respondents J. Carlie Adams and Luther Hill are copartners trading under the name and style of Adams & Hill Warehouses, and are engaged in the business of operating three tobacco auction warehouses commonly known as Dixie Warehouses Nos. 1 and 2 and Big Burley Warehouse, all of which are located in or near the city of Asheville, N.C., where respondents have their principal office and place of business. Said respondents are members of Respondent Board.

Respondent Farmers Federation Cooperative, Inc. is a North Carolina corporation, and is engaged in the business of operating a tobacco auction warehouse commonly known as the Carolina Warehouse, located in or near the city of Asheville, N.C., having its principal office and place of business at 131 Roberts Street, Asheville, N.C. Said respondent is a member of Respondent Board, and its Carolina Warehouse is operated by Respondent Max M. Roberts as manager.

Respondents Fred D. Cockfield and James W. Stewart are copartners trading as Planters Warehouses, and engaged in the business of operating two tobacco auction warehouses commonly known as Planters Warehouses Nos. 1 and 2, both located in or near the city of Asheville, N.C., where respondents have their principal office and

place of business. Respondents Cockfield and Stewart are members of Respondent Board.

Respondents H. B. Duncan, Route 1, Timber Lake, N.C.; Sherrod N. Landon, Rocky Mount, N.C.; J. W. Moore, c/o Banner Tobacco Warehouse, Wendell, N.C.; E. G. Anderson, Robersonville, N.C.; J. E. Godwin, Smithville, N.C.; Beverly G. Connor, Cluster Springs, Va.; and W. G. Maples, Lenoir City, Tenn., are independent tobacco buyers engaged in the buying and selling of burley leaf tobacco at auction on the floors of the various tobacco auction warehouses which comprise the Asheville tobacco market, and are members of Respondent Board.

BURLEY TOBACCO

Burley tobacco, the only tobacco sold on the Asheville tobacco market, is grown in eight States, namely, Tennessee, Kentucky, Ohio, Indiana, Illinois, Missouri, Virginia, and North Carolina. Although burley tobacco is subjected to a curing process by the farmer, it remains a perishable product while in his possession. For that reason, and because its sale is the principal source of cash income for many farmers, quick sales during the marketing season are always desired by such farmers. When the tobacco is ready for sale, it is graded by the farmer, and approximately 95 percent of it is transported to the market in baskets.

MARKETING OF TOBACCO

For many years the prevailing system of selling burley tobacco has been by auction, and there are now three auction markets in North Carolina, including one at Boone, one at West Jefferson, and the largest at Asheville, N.C. The Asheville market has been designated as being engaged in commerce by the United States Secretary of Agriculture, for the purpose of inspecting, grading, and certifying the tobacco therein in accordance with the Tobacco Inspection Act of 1935. The marketing season for burley tobacco generally opens on the last day of November in Asheville, and closes on or about February 1st of the following year.

The auction warehouse in which burley tobacco is sold is generally a large building with ample floor space on a single floor, for conducting the auction in the traditional manner herein described. In Asheville the warehouses vary in size from 9,640 to 125,000 square feet. The farmers deliver their tobacco to these warehouses, where it is weighed and a ticket prepared showing the grower's name, the serial number of the lot, and the number of pounds contained therein. The ticket also has blank spaces for inserting the name of the buyer, his private

grade mark, the price paid per pound, and the grade mark to be inserted by the representative of the Secretary of the United States Department of Agriculture. The tobacco is placed in baskets, the contents of which vary in weight from a few to seven hundred pounds. These baskets are arranged in long rows on the warehouse floor, with 20 square feet of space allotted to each basket. At the opening of the tobacco auction season, buyers representing the large tobacco-processing companies come to the market for the purpose of selecting and buying tobacco. Each company generally sends one or more buyers, and a group of buyers composed of one buyer from each prospective purchaser is known as a "set" of buyers. If each prospective purchaser has sent more than one buyer, there are then two or more "sets," and that number of auctions may be simultaneously conducted. The tobacco companies determine the number of buyers which they will send to any given market, so that the number of buyers, and consequently the number of simultaneous auctions that may be conducted, is beyond the control of Respondent Board and of the owners of the various warehouses. For the last several years, two sets of buyers have been assigned to the Asheville market.

After the tobacco has been inspected and graded by a representative of the United States Department of Agriculture and placed in the warehouse as above described, the stage is set for the sale. The sale group is composed of a representative of the warehouse owner; the auctioneer, who is an employee of the warehouse owner; the buyers from the large tobacco-processing companies; clerks to record the purchases; a sale supervisor, who is an employee of Respondent Board, and who is charged with the responsibility of enforcing the numerous rules regulating the conduct of the auctions; possibly a number of independent buyers who purchase tobacco for resale; and a few farmers. The bidding is begun by a representative of the warehouse, who is referred to as the "starter." The bidding is then carried on by the buyers, with the auctioneer chanting the bids as they are made and indicated to him by various signs or gestures. If the representative of the warehouse considers that the highest bid offered for any particular lot of tobacco is unreasonably low, he may bid for and buy the tobacco himself. He will later resell such tobacco, and may or may not make a profit thereon. His primary purpose in so buying tobacco is to keep the goodwill of the farmers by insuring them the best possible price for their tobacco. In the last analysis, however, if the farmer is displeased with the final bid on his tobacco, he may reject it and again offer his tobacco for sale at a subsequent auction or in a competing warehouse. This is, however, very seldom done.

Because of the practical limitations on the time the buyers can spend in any one warehouse, auctions are conducted very rapidly. Selling is done at the rate of 360 baskets or piles per hour, or an average of 6 baskets per minute. At this rate, with 2 auctions proceeding simultaneously, 2,880 baskets may be sold in a 4-hour day. The length of the selling day is set by the Burley Auction Tobacco Association, as hereinafter more fully discussed.

After the tobacco has been purchased by the buyers for the large tobacco companies, it is removed from the warehouse floor and transported to their processing plants in North Carolina and other states of the United States, and the tobacco, after processing, is shipped throughout the United States and the District of Columbia, and to foreign countries. There is a constant current and course of trade in interstate commerce in tobacco from the growers' farms to the tobacco-processing companies, and of tobacco products produced therefrom through their outlets into all the states of the United States and the District of Columbia, and into foreign countries. The sales of tobacco in the tobacco auction warehouses in Asheville, N.C., are an integral part of such course of trade in commerce.

If the tobacco is purchased by an independent speculator or by the warehouseman, it will again be offered for sale at a subsequent auction.

ROTATION OF SELLING TIME

Sales are thus held in the various warehouses of Asheville according to a sales card, which is prepared by the sales committee of Respondent Board and the supervisor of sales each year not later than the first Saturday in April, prior to the opening of the selling season. This sales card indicates the first and second sales position of each warehouse. This sales schedule is then furnished to each member warehouse, and reflects the selling time accorded each warehouse, by Respondent Board. The 3½ hours' selling time per day which was allotted to the Asheville market for the 1954-55 season was divided among the 12 warehouses operating therein during that year. Actually, however, since the 12 warehouses are owned by only 5 individual interests, the selling time has actually been divided into 5 parts instead of 12.

It was also provided by Respondent Board that if one of the warehouses sold all the tobacco on its floor before the expiration of its allotted selling time, the sale would move to the warehouse whose position on the sales card was next in line. This is termed the "squirrel-cage" or "rotation" system, and results in what is known as a "second sale." The surplus selling time thus made available has also been referred to as "free" selling time.

THE IMPORTANCE OF SELLING TIME

A consideration of the strictly-regulated methods of buying and selling tobacco at auction reveals the fact that the amount of selling time available to an auction warehouse is perhaps the most important factor in the success of such a warehouse. Farmers must sell their tobacco promptly when they bring it to the market, because, if there is insufficient selling time available for their tobacco to be sold within a few days, the tobacco deteriorates, so that when it is eventually sold, the farmer may have to accept a lower price than he would have obtained, had the tobacco been sold promptly upon its arrival at the warehouse. Farmers therefore prefer not to patronize any warehouse which does not have enough selling time to insure the prompt sale of their product. If the farmer is compelled to wait, he tends to seek another warehouse or another market where quicker sale is possible. These circumstances naturally give rise to keen competition between tobacco auction warehouse owners for as large a share as possible of the selling time allocated to their market. The length of the selling day on the Asheville tobacco market is determined by the Burley Auction Warehouse Association, a trade association of burley tobacco warehousemen in North Carolina, to which a number of other tobacco markets also belong. Respondent Board has no control over the determination of the length of the selling day in the Asheville tobacco market. It does have the authority, however, under the General Statutes of North Carolina, to allocate or ration the time available in such selling day among the various warehouse owners in the Asheville tobacco market.

MEMBERSHIP IN RESPONDENT BOARD

Not only does Respondent Board thus control the distribution of selling time on the Asheville market, but the statute authorizing its incorporation contains a provision that

Membership in good standing in a local board of trade shall be deemed a reasonable requirement of such board of trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction therein.

Accordingly, no one may operate a tobacco auction warehouse or buy tobacco at auction on the Asheville market without first becoming a member of Respondent Board.

There are two types of membership in Respondent Board, namely, participating and nonparticipating. The buyers representing the tobacco-processing companies comprise the nonparticipating members, and the warehousemen and speculators or independent buyers comprise the participating members. Each participating member is en-

titled to one vote, whereas the nonparticipating members are not so entitled. However, votes are granted to the warehousemen on the basis of one for each tobacco warehouse owned or operated by them on the Asheville tobacco market, so that warehousemen may exercise their voting privilege once for each warehouse they so own and operate. The initiation fee for membership in Respondent Board is \$500, and the yearly dues thereafter are \$75. In addition, other special assessments may be made from time to time. Farmers are eligible for membership, but no farmer is now or has ever been a member of Respondent Board.

Respondent Board is chiefly controlled by the warehousemen by virtue of their voting strength, and because, under the board's by-laws, only warehousemen or their general managers are eligible for membership in the board of directors, the governing body of Respondent Board.

ADOPTION OF THE PERFORMANCE SYSTEM

In 1954, respondents, as members of Respondent Board, adopted a new set of by-laws which inaugurated a new system for allocating selling time among the tobacco warehouses of Asheville. This new system, known as the "performance system" and sometimes as the "historical system," is described in the by-laws as follows:

(b) In the event no unanimous agreements of all such warehouses shall be entered into far enough in advance of any selling season for the Asheville Tobacco Board of Trade to put such agreement into effect by allocating selling time in accordance with such agreement, selling time of the warehouses on the Asheville Market shall be allocated according to a schedule prepared and adopted by the board of trade in accordance with the following requirements, to-wit: *selling time shall be allotted to each warehouse on the Asheville market in such proportion as the sales of tobacco of producers thereof in such warehouse were to the total sales of producers on the Asheville market for the year preceding the allocation; * * ** [Italics supplied.]

The italicized portion of the above quotation comprises, in substance, the entire structure of the performance system itself.

Substantially the same "performance system" was adopted by the Wilson Tobacco Board of Trade, Inc., of Wilson, N. C., in 1952, and has recently been the subject of extensive litigation before the Federal Trade Commission in the proceeding entitled "In the Matter of *Wilson Tobacco Board of Trade, Inc., a corporation, et al.*," Docket No. 6262. The hearing examiner in that proceeding approved the Wilson performance system, finding as follows:

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

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

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

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

The Commission, in its decision of August 23, 1956, approved the above finding. The Commission also approved the hearing examiner's finding that the regulation adopted by the Wilson Tobacco Board of Trade, Inc., restricting the allocation of "selling time" to new entrants on the Wilson market to

* * * the same amount of selling time as the last previous entrant (Liberty) had for that year provided the new entrant built as large a warehouse as Liberty's was "an unreasonable restraint of trade." The Commission further approved the finding that the above-quoted regulation, which was found to be in restraint of trade, and certain other regulations also so characterized, were " * * * not necessarily an integral part of the performance system * * * ", but could be abolished or modified " * * * so as not to be unreasonable * * * ".

Counsel supporting the complaint herein recognizes, of course, the authority of the above-cited precedent, and, in the light thereof, now concedes that the performance system in the instant proceeding, if separated as in the *Wilson* case, *supra*, from unreasonably restrictive and therefore illegal provisos, may be considered a reasonable method of allocating selling time on a tobacco auction market.

THE PROVISO IN ISSUE

The two provisos which have been appended to the performance system adopted by Respondent Board are not necessarily an integral or inseparable part thereof. Furthermore, the decision of the Commission in the *Wilson* case cannot be interpreted as approving these two provisos. The principal issues here in controversy arise, therefore, from the adoption of such provisos.

The first of these two provisos, which, for convenience, will hereinafter be referred to as the "gain-or-loss proviso," restricts and limits the amount of selling time a warehouse may gain or lose in any particular selling season as a result of the individual degree of success or failure achieved in the preceding season. This proviso is as follows:

* * * provided, however, regular selling time in each warehouse shall not vary more than three and one-half percent from the selling time allocated to a warehouse for the preceding season.

The second proviso, which we will call the "new warehouse proviso," prescribes, for the purpose of allocating selling time to new entrants on the Asheville market, a formula based on the size of the new warehouse in relation to the average size of all warehouses already established, whereby a new warehouse larger than such average size may not receive selling time in excess "of the average of all warehouses." This proviso is as follows:

Provided that in the event of a new warehouse and/or a warehouse which did not operate on the Asheville tobacco market during the preceding season claiming selling time, then the selling time allotted to such new warehouse or warehouses not operating the preceding season claiming selling time shall be allotted on an average and in proportion with the amount of selling time available to all warehouses operating on the Asheville tobacco market; provided further each such new warehouse and/or warehouses which did not operate the preceding season is smaller in size than the average of all warehouses comprising (sic) the Asheville tobacco market, then the said selling time shall be allocated according to the proportion of its size in relation to all other warehouses; provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the average of all warehouses operating on the Asheville tobacco market, such warehouse or warehouses shall not receive any consideration and be allocated selling time for the size thereof in excess of the average of all warehouses and shall in no event be allocated more than its equal prorata share of selling time as is determined by the number of warehouses operating on the Asheville tobacco market.

Although these two provisos may appear to be separate and distinct provisions and designed to regulate different phases of allocation, actually they intermesh so closely as to have only one effect, that of restricting selling time. While the gain-or-loss proviso imposes certain percentage restrictions upon established warehouses as well as upon new entrants, the weight of both provisos, in actual practice, falls most heavily upon new entrants to the Asheville market, and the restrictions thus imposed are particularly severe against any new entrant who builds a warehouse larger than the average size of the warehouses already established.

MARKET PRIOR TO ADOPTION OF PRESENT PERFORMANCE SYSTEM

Prior to the 1954-55 tobacco-selling season, there were eleven warehouses on the Asheville tobacco market, containing a total floor space of 475,182 square feet. Previously selling time had been allocated among the existing warehouses by what was called the "floor-space system." Under that system, a warehouse was allocated selling time in the ratio its square footage of floor space bore to the total square footage of all the warehouses combined. As a result, selling time was divided among Asheville's 11 warehouses as follows:

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<i>Warehouse</i>	<i>Square feet</i>	<i>Percentage allotment of selling time</i>
Carolina.....	55, 072	11. 58
Bernard-Walker No. 1.....	91, 941	19. 35
Dixie No. 2.....	17, 275	3. 64
Planters No. 1.....	67, 450	14. 20
Walker.....	46, 124	9. 71
Bernard-Walker No. 2.....	31, 157	6. 55
Dixie No. 1.....	33, 484	7. 05
Bernard-Walker No. 3.....	38, 270	8. 05
Planters No. 2.....	46, 040	9. 69
Liberty.....	9, 640	1. 81
Big Burley.....	39, 729	8. 37
Total.....	475, 182	100. 00

Although the selling time was allocated on the basis of the square footage of the 11 warehouses, actually, since 4 warehouse owners controlled the 11 warehouses, this resulted in the selling time being apportioned among 4 interests rather than among 11. It will be seen, therefore, that the Asheville tobacco market, prior to the 1954-55 season, was closely controlled by a very small group of individuals, all of whom had been long established in business there.

THREAT OF BUILDING WAR

During 1953 and the early part of 1954, there was much discussion among Respondents and others in Asheville relative to the need to change the method of regulating the Asheville tobacco market, and in particular, the method of allotting selling time, because many of the members believed that there was already more warehouse space available on the Asheville market than was needed to handle the amount of tobacco sold there, and they feared that if selling time continued to be allotted on the basis of warehouse space, a building war would result, for the purpose of obtaining a larger share of the limited selling time available. Such a building war, it was believed, would be very detrimental to the interests of the Asheville market in general and to the warehouse owners in particular. In this connection Mr. Charles T. Day, an experienced, independent tobacco buyer, a former tobacco warehouse operator, and one of the founders of the Respondent Board, is quoted as having said that he intended to gain 25 percent of the selling time if it cost him half a million dollars. Respondent Walker is quoted as having replied that "Every time he (Day) drove a nail, he would drive one too."

NOTICE OF INTENTION TO BUILD

In January 1954, the Mr. Day referred to above notified Respondent Board that he intended to build a new tobacco auction warehouse in Asheville. It was to contain, and when completed did contain, 125,000 square feet of floor space, and, under the system of allotting selling time then in effect, would have entitled Mr. Day to 20.83 percent of the available selling time on the Asheville market.

AGREEMENTS AND RESOLUTIONS

On January 2, 1954, the warehouse members of Respondent Board entered into a written agreement, as follows:

First: That for the 1954 and subsequent tobacco season, the selling time allocated or to be allocated to the Asheville tobacco market, shall be prorated among the various firms as follows:

	<i>Percent</i>
Planters Warehouses.....	22.6
Carolina Warehouse.....	14.0
Walker Warehouses.....	43.0
Hill and Adams.....	20.4
	100.0

Second: We further agree that neither of us, or our heirs or assigns, shall build, rent, purchase, or in any way acquire additional floor space for the purpose of increasing our selling time beyond the figures above agreed to.

Third: Should an outside firm come into the Asheville tobacco market as a new operator, this agreement would be null and void.

* * * * *

Fifth: We hereby petition the Asheville Tobacco Board of Trade, in a meeting to be called for this express purpose, to adopt as one of its by-laws, substantially the following resolution:

Resolved: That from and after the ratification of this by-law, any warehouse erected for the sale of leaf tobacco at auction on the Asheville tobacco market, shall be allowed during the first year of its operation fifty percent of its floor space; During the second year, seventy-five percent of its floor space, and during the third and subsequent years, one hundred percent of its floor space.

The above resolution was the first of several definite acts by which the respondent warehousemen agreed together not to expand the Asheville market, not to build new warehouses themselves, and to make the entry of new warehousemen into that market more difficult.

Thereafter, on January 14, 1954, the agreement quoted above was adopted by Respondent Board. A part of the preamble to such adoption reads:

* * * * *

And whereas the present method of allocation of selling time by considering floor space as a factor has been justly criticized as being unwise and inequitable

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in two respects, first, for that it offers a fictitious inducement for the erection of additional warehouses which meet no economic need, but which, judging from the experience of other markets, are likely to be built for the mere purpose of increasing participation by their owners in the allocation of selling time; and, second, for that *the present arrangement deprives experienced operators of the advantage which they would naturally have in holding customers and acquiring new customers by their past record of efficient and courteous treatment, and thus deprives the operators of any value of the good will which would normally flow from such operations, [Italics supplied.]*

* * * * *

And whereas it is essential that the warehousemen who are members of the Asheville Tobacco Board of Trade have notice in advance of the approximate amount of selling time they will have during the next season, *to the end that they may take steps to protect their established business if it is threatened by competition, if they so desire, without being taken by surprise,* the undersigned do further petition the Asheville Tobacco Board of Trade to amend the By-Laws to read as follows: [Italics supplied.]

* * * * *

It will be observed that this regulation of January 14, 1954, pertains only to the entry of new warehouses on the Asheville market, and, by the declaration of its preamble, was designed “* * * to protect their established business if it is threatened by competition * * *.” Under that regulation, new warehouses were to be penalized 50 percent of their floor-space area during the first year of their operation, and 25 percent of their floor-space area during the second year of their operation.

Instead of providing only partial protection of the status quo in Asheville, it would have been much simpler to have provided against any new entries on the Asheville market. Such a regulation of exclusion, however, would have been clearly illegal, and we must assume that the respondents had knowledge of that fact. In the case of *American Federation of Tobacco Growers v. Neal*, 183 F. 2d 869, the court ruled that the entrance of new warehouses on a tobacco market cannot be legally precluded; and, in so doing, quoted from the Supreme Court's decision in *Associated Press v. United States*, 326 U.S. 1, to the effect that—

The Sherman Act was specifically intended to prohibit independent businesses from becoming associated in a common plan which is bound to reduce their competitors' opportunity to buy or sell the things in which the group competes.

Following the adoption on January 14, 1954, of the resolution above described, Respondents James E. Walker, Jr., Fred D. Cockfield, J. C. Adams, and Max M. Roberts entered into their second agreement for 1954. The most pertinent parts of this agreement are as follows:

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1. That the Asheville Tobacco Board of Trade, in preparing the schedules of sales for the years 1954 through 1958 inclusive be, and it is hereby requested to allot the selling time allowed to the market according to the following schedule of percentages of said selling time, and number of baskets for each warehouse, based on the time allowed daily for two sets of buyers, each buying the time allocated by the Burley Warehouse Association:

<i>Firm</i>	<i>Percent- age of selling time</i>
Bernard-Walker, Walker and Liberty	43. 0
Planters 1 and 2	22. 6
Dixie 1, 2, 3, and Big Burley	20. 4
Carolina	14. 0

* * * * *

2. Each of the parties hereto further agrees not to build, rent, purchase, lease, or in any way acquire, directly or indirectly, either as person, firm or corporation, any property for the purpose of securing additional selling time on the Asheville tobacco market, for any of the years 1954, 1955, 1956, 1957, or 1958 tobacco selling season, subject to the conditions set out in paragraph 4 of this agreement.

* * * * *

4. In the event any person not a party to this agreement, whether individual or corporate, singly or with others, shall build one or more tobacco sales warehouses during the term of this agreement, with the bona fide purpose of participating in the business of Asheville tobacco market as a warehouseman, and shall apply to the Asheville Tobacco Board of Trade for an allotment of selling time in the manner provided by its regulations and thereby become entitled to an allotment of selling time, the parties hereto shall be thereafter released from all the provisions of this agreement. * * *

EVENTS WHICH PRECEDED THE PERFORMANCE SYSTEM

By August 1954, respondents appear to have become dissatisfied with the agreements and regulations which they had adopted in January. This is revealed in part by a letter written on August 28, 1954, by Respondent James E. Walker, Jr., to Mr. Godfrey Vann, of the tobacco market at Greeneville, Tenn., in which we find the following statement:

I might add that we are going to adopt the historical system in Asheville for the coming tobacco season. This method certainly protects the values of property of the firms who have all these years spent their time and money in building up a business, and *will tend to discourage further building expansion*. Do hope you will get busy and take action for the preservation of all concerned on the Greeneville tobacco market. [Italics supplied.]

Furthermore, the respondents knew in 1954 that the Asheville market was on the "upswing," and had shown a steady growth for the past 2 years. A second set of buyers had been added the previous season. Some of the warehouses were old. Mr. Day had referred to

some of them as chicken-coops, which permitted rain and snow to fall on some of the tobacco. These circumstances seem to have justified substantial improvement, either by the repairing of existing warehouses or by the building of new ones. Mr. Day was in the process of building his new 125,000-square-foot warehouse. Confronted with this situation, respondents met on October 2, 1954, and adopted the performance system, together with the gain-or-loss proviso and the new-warehouse proviso hereinabove quoted and discussed.

PURPOSE AND EFFECT OF THE TWO PROVISOS

The respondents, by their written agreements and their adopted resolutions, have ostensibly professed a desire to remedy the defects of the Asheville system of allocating selling time, and to preserve competition on the Asheville market; but by those same agreements and resolutions, they have shown that their major concern was the preservation of the status quo, and the restriction of selling time allocated to any new competitor. In the resolution of January 14, 1954, we find that they profess to take action " * * * to the end that they may take steps to protect their established business if it is threatened by competition * * * ." They contracted among themselves not to build new tobacco warehouses during the period from 1954 to 1958. Respondent Walker asserted that the new system would protect " * * * the values of property of the firms who have all these years spent their time and money in building up a business, and will tend to discourage further building expansion." We do not question respondents' right to plan for the preservation of their own businesses; but we do question their right to plan and combine together for the purpose of preserving the status quo of business on the market as a whole, and preventing or hindering further expansion thereof. Although the respondents' purpose in adopting the performance system proper may have been worthy, we believe that their purpose in adopting the two provisos in question was predominantly self-serving, and that the provisos were designed unreasonably to hinder and restrict, and, as far as possible, prevent the establishment of competitive warehousing facilities on the Asheville market.

What were the actual effects of these two provisos? Under the floor-space system existing prior to January 1954, a new entrant into the market would have received a prorated share of the selling time, based upon the ratio of the square footage of his warehouse to the total square footage of all warehouses on the Asheville market. Such an allocation of selling time would appear to grant a new entrant to the market his due proportion of the selling time available, and consequently a fair opportunity to compete therein. This system would

have allocated to the new warehouse built by Mr. Day, on the basis of its 125,000 square feet of floor space, 20.83 percent of the total selling time available on the Asheville market. By the system which was temporarily put into effect by Respondents on January 14, 1954, Mr. Day's warehouse would have been entitled to over 10 percent of the available selling time.

THE NEW-WAREHOUSE PROVISIO

By the new-warehouse proviso of October 2, 1954, Mr. Day was actually granted 8.33 percent of the available selling time, based upon the average square footage of the total of all warehouses on the market or approximately 51,000 square feet. Accordingly, no selling-time credit was granted for the 74,000 square feet of space by which Mr. Day's warehouse exceeded the average size of all warehouses on the Asheville market. Mr. Day testified that he would not have built his new warehouse, had he known that he would be so restricted.

Counsel for respondents points with emphasis to the fact that Mr. Day actually received, during the 1954-55 season, over 20 percent of the available selling time, and still more additional selling time in the 1955-56 season. This contention is factually true; but it fails as a defense of the new-warehouse proviso, because, in advancing this contention, counsel for respondents is attempting to attribute to the new-warehouse proviso a benefit which did not result from its operation, but flowed rather from a fortuitous circumstance which might or might not be repeated. The extra time Mr. Day received was in the form of "second sales" or "free time"—time that was not needed by the other warehouses for the reason that they did not have on their floors enough tobacco, ready for sale, to utilize all the selling time allotted to them. The new warehouse received, in effect, the leavings of selling time after the established warehouses had used all the selling time they could. For any business to be forced by regulation to depend, competitively, upon such a fortuitous circumstance is clearly unfair.

Furthermore, after receiving this extra selling time, the new warehouse still sustained competitive injury, in that it was "blocked"—that is, tobacco was left unsold on its floor at the expiration of its allotted period of selling time—oftener and longer than any other warehouse on the Asheville market. In fair competition, if the total selling time allotted to the Asheville market as a whole were insufficient to sell all the tobacco ready for sale on the floors of all the warehouses, the deficiency should be borne, not principally by one warehouse alone, but in due proportion by all the warehouses on the market. The restriction

that placed the greater proportion of this deficiency upon the new warehouse is thus manifestly unfair.

The new-warehouse proviso also resulted in injury to the farmers who desired to sell their tobacco in the new warehouse on the Asheville market. Farmers testified, in fact, that their tobacco was forced to remain on the floor of the new warehouse from 3 days to 3 or 4 weeks before there was sufficient selling time available to sell it. Other farmers testified that because the new warehouse was denied sufficient selling time, they removed their tobacco to other markets, in Tennessee and elsewhere. Thus, not only was the new warehouse deprived of their business, but that business was lost to the Asheville market as a whole. The farmers also suffered injury by reason of the fact that they were compelled to transport their tobacco farther, and, in some instances, to accept a lower price therefor, because of the delay in selling it. Thus the new-warehouse proviso also had a secondary effect detrimental, not only to the market as a whole, but to the farmers, who were not members of Respondent Board, but only members of the general public.

THE OPINION OF THE NORTH CAROLINA COURTS

Counsel for the respondents, in support of his contention that the provisos here in question are lawful, cites the decisions of the superior court and the Supreme Court of North Carolina in the case of *C. T. Day v. Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E. 2d 18 (1955). In that case, Mr. Day, the owner of the new warehouse here involved, sought an injunction in the North Carolina courts to restrain Respondent Board from adopting the performance system and the two provisos here in issue. The trial court's denial of the requested injunction was sustained on appeal, the appellate court asserting, by way of conclusion, that "the rule by which the allotment was made * * * by the board appears fair and equitable. Indeed, it does not appear that there is any restraint of trade in the rule." In evaluating this opinion, it must be observed that the court, in this instance, was engaged in resolving a private controversy, as distinguished from the broader concept of an impersonal action, such as the instant proceeding, brought solely in the public interest; that it did not have before it the record in the instant proceeding; that the trial court did not consider the facts before it in the light of the Federal law against restraint of trade by unfair methods of competition; and that the appellate court, in approving the denial of injunction by the lower court, was likewise limited because, in reaching its decision, it did not go beyond the record presented to it by the lower court. Its statement

that Respondent Board's rule did not appear to be in restraint of trade was therefore merely incidental, and cannot be regarded as a valid precedent in ruling upon the question here in issue.

THE GAIN-OR-LOSS PROVISIO

After placing an arbitrary limitation upon the competition which might develop from a new entrant upon the Asheville market during the first year of his operation, respondents adopted the gain-or-loss proviso, by which they assured themselves, not only that the established warehouses could not lose more than 3½ percent of their selling time in any one season by reason of business vicissitudes encountered during the preceding year, but that neither the new entrant nor any of the established warehouses could gain more than that amount in any one season. Again, in the *Wilson* case, *supra*, the hearing examiner approved the performance system because he found that it possessed "three requisites of competition: opportunities for competitors to grow; opportunities for competitors to appeal for patronage by improving or changing services; no restraint upon the farmer's freedom of election to patronize the competitor of his choice." The gain-or-loss proviso obviously violates all these requisites of fair competition. In conjunction with the new-warehouse proviso, this limitation would have compelled the new entrant to wait between 3 and 4 years, under optimum conditions, before receiving the just proportion of the available selling time which, in a freely competitive system, would have been accorded to him promptly upon his entry into the market. This seems too heavy a competitive handicap for any business to be required to carry.

We must conclude, therefore, that the new-warehouse proviso and the gain-or-loss proviso, both separately and operating in conjunction with each other, are unreasonable and unfair, and constitute an undue hindrance to and restriction upon fair competition in the Asheville tobacco market.

The Commission held, in the *Wilson* case, *supra*, that it was basically unfair and arbitrary to restrict a new entrant's allotment of selling time to the amount of selling time granted the last entrant upon the market because, as Hearing Examiner Hier stated, "* * * it determines a new entrant's competitive opportunity by the energy and efficiency of another."

By the same reasoning, it is basically unfair and arbitrary to limit the competitive opportunity of a new entrant in any market to the average competitive ability of all his established competitors. The very idea of such arbitrary limitation of opportunity is alien to the whole concept of the free-enterprise system.

CONCLUSION

Based upon consideration of the entire record, and in consonance with the applicable principles of law and precedent, we conclude:

1. That the Federal Trade Commission has jurisdiction over the respondents and over their acts and practices alleged in the complaint herein to be unlawful;

2. That this proceeding is in the interest of the public and that public interest herein is substantial; and

3. That the acts and practices of respondents, as hereinabove found, have had and now have a tendency and capacity to, and do, unreasonably and unduly restrain trade in the Asheville tobacco market in the purchase, sale and distribution of tobacco in commerce, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of §5 of the Federal Trade Commission Act.

Accordingly,

It is ordered, That Respondents Asheville Tobacco Board of Trade, Inc., a corporation, and Max M. Roberts, president and director, J. Carlie Adams, vice president and director, Fred D. Cockfield, secretary-treasurer and director, Jeter P. Ramsey, ex officio assistant to the secretary, supervisor of sales and general director of the Asheville market, L. G. Hill, director, James W. Stewart, director, and James E. Walker, Jr., director, all individually and as officers and directors of Asheville Tobacco Board of Trade, Inc., and James E. Walker, Jr., and John B. Walker, part owners, comanagers and operators of Bernard-Walker Warehouses; J. Carlie Adams and Luther Hill, copartners trading under the name and style of Adams & Hill Warehouses; Farmers Federation Cooperative, Inc., a corporation, leasing and operating Carolina Warehouse; Fred D. Cockfield, and James W. Stewart, copartners trading under the name and style of Planters Warehouses; Sherrod N. Landon, J. W. Moore, E. G. Anderson, J. E. Godwin, Beverly G. Connor, W. G. Maples, members of Asheville Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase, selling or offering for sale leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy, or practice which:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take

into account and give reasonable credit for the full size and capacity of a new entrant;

2. Limits the possible gain or loss in selling time allotted to any warehouse, under the performance system or any other system, for any one selling season to 3½ percent, or any other specific percentage, of the selling time so allotted to such warehouse for the preceding selling season; or

3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville tobacco market, or any other warehouse doing business on that market, from competing therein on a fair and equal basis.

It is further ordered, That the complaint herein, insofar as it relates to Respondents Henry B. Duncan, designated in the record as H. B. Duncan, and A. R. Johnson, Jr., deceased, be, and the same hereby is, dismissed.

ON APPEAL FROM INITIAL DECISION

By Secrest, Commissioner:

Complaint herein issued January 11, 1956, charging respondents with having conspired and combined together in pursuance of a planned common course of action to restrict, hinder, suppress and prevent the establishment and operation of new tobacco auction warehouse market facilities and market opportunities and competition in the purchase and sale of leaf tobacco in the Asheville, N.C., market, in violation of the Federal Trade Commission Act. Hearings were held in due course before a hearing examiner, who filed his initial decision on March 29, 1957.

Respondents are the Asheville Tobacco Board of Trade, Inc., its directors, officers, and certain of its members. Membership in the board is open to those engaged in producing, buying, selling, rehandling, or otherwise dealing in leaf tobacco. Twelve member auction warehouses in the market each are entitled to one vote on the board. Buyer and seller members hold either participating or nonparticipating memberships. Participating members are entitled to one vote. Only warehousemen or their general managers are eligible for membership on the board of directors, the governing body of respondent board of trade. Thus, respondent board chiefly is governed by the warehousemen by reason of their voting strength.

All of the respondents appealed from the hearing examiner's initial decision. Oral argument was had before the Commission on this

appeal and briefs in support of and in opposition to the appeal were filed. Also, a "Brief of State of North Carolina Amicus Curiae" was submitted.

The initial decision prohibits respondents from restricting the allotment of selling time to any *new entrant* on the Asheville tobacco auction market to an amount which is based (a) upon an average of the size in square feet of all established warehouses, (b) upon an average of the amount of selling time allotted during the preceding selling season to established warehouses, or (c) upon a formula which divides the total selling time available to the market as a whole by the total number of warehouses operating therein. The initial decision further inhibits respondents from limiting possible gain or loss of selling time for any one selling season to $3\frac{1}{2}$ percent, or any other specific percentage, of the selling time allotted to a given warehouse for the preceding season.

Respondents in their appeal assert that the issues presented are both substantive and jurisdictional. The two substantive issues are stated by respondents as being first, whether it is reasonable and lawful to grant selling time to a new warehouse equal to the average selling time of all warehouses on the market, and second, whether it is reasonable and lawful to limit gain or loss of selling time of $3\frac{1}{2}$ percent to or from the selling time allocated to a warehouse for the previous selling season. We will consider these substantive issues at the outset and thereafter state and dispose of the jurisdictional questions.

Prior to the 1954-55 selling season, the Asheville market operated under a "floor space" system, whereby a warehouse was given an amount of selling time on a daily basis proportionalized between its total square footage of floor space and the total square footage of all warehouses on the market. Beginning with the 1954-55 selling season, the Asheville board abandoned the "floor space" system and adopted what is designated as the "performance" system with respect to the allocation of selling time to existing warehouses and promulgated a regulation setting up a "unit" system with respect to the allocation of selling time upon the entry of a new warehouse. Under the performance system selling time is allotted to each warehouse on the Asheville market in such proportion as the sales of tobacco of producers thereof in such warehouse were to the total sales of producers on the Asheville market for the year preceding the allocation.

The "unit" system, or "new warehouse proviso" generally would

allot a *new* warehouse selling time on the basis of the average of the selling time available to all warehouses.¹

The board also adopted a regulation which provided that regular selling time in each warehouse shall not vary more than 3½ percent from the selling time allocated to a warehouse for the preceding season. This is known as the "gain or loss proviso."

There is no dispute here as to the legality and reasonableness of the "performance" method of allocating selling time on the Asheville tobacco market. In fact, the Commission has sustained the intrinsic legality of such a method in a recent proceeding involving another North Carolina tobacco auction market. *In the Matter of Wilson Tobacco Board of Trade*, F.T.C. Docket No. 6262 (decided August 23, 1956). And the courts likewise have upheld the adoption of the "performance" method of allocating selling time.²

A problem is presented, however, under the performance system adopted by respondents October 2, 1954, where they added to it the "new warehouse proviso" and the "gain or loss proviso" hereinbefore mentioned.

A careful reading of the respondents' "new warehouse proviso" (*supra*, n. 1) discloses that it establishes an allocation of selling time to a new entrant into the market based upon the average and in proportion with the amount of selling time available to all warehouses operating on the Asheville tobacco market, and, further, that it expressly provides that no time be allocated to any new warehouse "for the size thereof in excess of the average of all warehouses." This provision that a new warehouse claiming selling time is not to be given credit for any of its floor space in excess of the average floor space on the market in actual operation was disclosed on the record to have had the effect of restraining trade unreasonably.

In this connection the hearing examiner found that in January 1954, the respondent Board was notified of plans for a new tobacco

¹ This proviso in full is as follows:

"Provided that in the event of a new warehouse and/or a warehouse which did not operate on the Asheville tobacco market during the preceding season claiming selling time, then the selling time allotted to such new warehouse or warehouses not operating the preceding season claiming selling time shall be allotted on an average and in proportion with the amount of selling time available to all warehouses operating on the Asheville tobacco market; provided further each such new warehouse and/or warehouses which did not operate the preceding season is smaller in size than the average of all warehouses comprising (sic.) the Asheville tobacco market, then the said selling time shall be allocated according to the proportion of its size in relation to all other warehouses; provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the average of all warehouses operating on the Asheville tobacco market, such warehouse or warehouses shall not receive any consideration and be allocated selling time for the size thereof in excess of the average of all warehouses and shall in no event be allocated more than its equal prorata share of selling time as is determined by the number of warehouses operating on the Asheville tobacco market."

[Emphasis supplied.]

² *Day v. Asheville Board of Trade*, 242 N.C. 136, 87 S.E. 2d (1955); *Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471 (C.A. 5, 1957).

auction warehouse containing 125,000 square feet of floor space which would entitle it to 20.83 percent of the available selling time on the market under the allotment system then prevailing. When completed, this new warehouse was actually granted 8.33 percent of available selling time under the "new warehouse proviso" adopted on October 2, 1954. This was on the basis of 51,000 square feet (the average size of all warehouses theretofore operating in the market) *with no selling-time credit being granted for the 74,000 square feet of floor space in excess of the average.* It is true, as contended by respondents, that in the 1954-55 season this new warehouse actually received about 20 percent of available selling time. But, as the initial decision points out, this extra time resulted from "second sales" or "free time"—that not needed by other warehouses because they did not have enough tobacco on their floors to utilize their allotted time. As the hearing examiner correctly concluded, the net result was that the new warehouse ended up with the leavings of selling time after established warehouses had used all they could. Thus, said the hearing examiner, "[f]or any business to be forced by regulation to depend competitively upon such a fortuitous circumstance is clearly unfair." He found further competitive injury, and in this is clearly sustained by the record, in that the new warehouse was "blocked" (tobacco left unsold on its floor at expiration of its allotted period of selling time) oftener and longer than any other warehouse.

The record also establishes that the effect of the "new warehouse proviso" on farmers and on the Asheville market as a whole was deleterious. There is testimony that farmers' tobacco had to remain on the floor of the new warehouse for periods from three days up until four weeks before selling time became available; that because of this situation farmers removed their tobacco to other markets, in Tennessee and elsewhere, incurring additional transportation costs and in some cases being forced to accept lower prices because of the delay in selling. Thus, the new warehouse not only was deprived of business, which also was lost to the Asheville market as a whole, but the farmers were injured by operation of the proviso.

As to the "gain or loss proviso," the record demonstrates that, through its operation, established warehouses could not lose more than 3½ percent of their selling time in any given season by reason of marketing difficulties encountered during the preceding season and, also by reason of the proviso, that neither a new entrant nor any established warehouse could gain more than 3½ percent in any one season. Clearly, under this proviso, existing warehouses gained an unreasonable and unfair competitive advantage, since if a new entry, notwith-

standing the fact that its allocated time was limited under the "new warehouse proviso," still managed to compete by improving or changing service, the established warehouses remained secure in the knowledge that any newcomer would be limited arbitrarily to an increase in selling time each year to 3½ percent. As illustrative of this result, it appears that the new warehouse previously mentioned as having been granted 8.33 percent of available selling time in 1954 would have to wait about 28 years to be allocated the approximately 21 percent of selling time which it would have obtained under regulations in effect when it was constructed.³ We have found that the "performance system" in and of itself is not illegal; but tied up as it is here with this "gain or loss proviso" and the "new warehouse proviso," we are confronted with an entirely different situation. We are of the opinion, in the light of the whole record herein, that the hearing examiner correctly concluded that the new warehouse proviso and the gain or loss proviso, both separately and operating in conjunction with each other, are unreasonable and unfair and constitute an undue hindrance to and restriction upon fair competition in the Asheville tobacco market. Both substantive issues raised by respondents on appeal should be, and hereby are, decided adversely to respondents' contentions in support thereof, except as noted in the concluding two paragraphs of this opinion.

We turn now to the jurisdictional issues raised by respondents. They urge first that respondent Asheville Board of Trade, Inc., is not a "corporation" within the meaning of section 4 of the Federal Trade Commission Act and that it is not a "person, partnership or corporation" within the meaning of section 5 of the act. As a corollary respondents argue that the board is not engaged in interstate commerce and that the acts and practices alleged are not "in" commerce so as to confer jurisdiction upon the Commission over such acts and practices. Similar contentions were advanced in the matter of *Wilson Tobacco Board of Trade, supra*, recently decided by us, and we ruled that they were without merit. On the basis of the reasons stated in our decision in the *Wilson* case, we reject respondents' contentions here that the Commission is without jurisdiction.

Respondents contend in effect also that, even if jurisdiction exists in the Commission, the proceeding should be dismissed for lack of

³ In *Rogers v. Douglas Tobacco Board of Trade* (*supra*, n. 2), the United States Court of Appeals, Fifth Circuit, in remanding that case for further proceedings, stated in regard to a similar "gain or loss proviso" that:

"The 3½ percent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system * * *."

public interest because it is purely a private controversy completely devoid of public interest; because the public interest has in no way been affected by the regulations in question; and because the regulation of the business of tobacco warehousing by the Federal Government is unwarranted in view of the adequacy of the regulatory program established by the State of North Carolina and the United States Department of Agriculture.

The gravamen of the complaint is that respondents in concert attempted to hinder, interfere with and prevent such further warehouse competition in the Asheville tobacco auction market as would upset the status quo of the established warehouse members of respondent Board in that market. The record clearly demonstrates the effectiveness of respondents' efforts in this respect. Moreover, as we have seen above, all tobacco producers in the area—the farmers—were affected adversely by respondents' practices. Their tobacco remained on the floor of the new warehouse for periods of up to four weeks before selling time became available by reason of the adoption and placing into effect by respondents of the by-laws, rules, and regulations herein discussed. Farmers, because of the situation obtaining, removed their tobacco to other distant markets, incurring concomitant additional transportation costs and in many cases were forced to accept lower prices. Not only was the new warehouse deprived of business, that business was lost to the Asheville market as a whole as well. The hearing examiner made his subsidiary findings as to the facts and concluded "[T]hat this proceeding is in the interest of the public and that public interest herein is substantial * * *." From our review of the whole record, we think there is substantial proof of a substantial public interest in this matter. Respondents' contentions to the contrary are rejected.

As to respondents' argument that regulation of tobacco warehousing by the Federal Government is unwarranted because of the adequacy of regulatory programs established by the State of North Carolina and the United States Department of Agriculture, we fail to see any merit therein. The United States Department of Agriculture does not govern or regulate tobacco markets. It only provides informational, inspection and grading services as well as a price support program.

It is true that the State of North Carolina has by statute authorized the establishment of boards of trade pursuant to which the latter are:

* * * authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse

floors in the several towns and cities in North Carolina in which an auction market is situated.⁴

And in *Cooperative Warehouse v. Lumberton Tobacco Board of Trade*,⁵ that authority correctly and logically was held to include "authority to make reasonable rules and regulations in respect to allotment of sales time."

However, the record evidence in this case proves unequivocally, as the examiner found, that the respondents' purpose in adopting the rules and regulations here involved essentially was self-serving and that "the provisos were designed unreasonably to hinder and restrict, and, as far as possible prevent the establishment of competitive warehousing on the Asheville market." In such circumstances, the Commission has the statutory duty and authority to take corrective action. In the opinion of the Commission the principle enunciated by the United States Court of Appeals, Eighth Circuit, in the landmark case of *Chamber of Commerce of Minneapolis, et al. v. Federal Trade Commission*⁶ is controlling here. One of the arguments in that case was that rules and regulations prescribed by the Chamber affected interstate commerce only indirectly and they, therefore, were subject only to state action. In rejecting that contention the court ruled that:

This may be true as a broad general statement (*Hill v. Wallace*, 259 U.S. 44, 68, and citations in that opinion). But Congress, in the Federal Trade Commission Act, has assumed to legislate concerning "unfair methods of competition" affecting interstate commerce and if any action by or any rule or regulation of the chamber has that effect it is certainly subject to that act, no matter what the state has or has not authorized or permitted in that respect. Any action by the State legislature or any decision of the State courts falls blunted if it strikes at this power which Congress vested and had constitutional authority to vest in the Commission (*Northern Pac. Ry. v. Washington*, 222 U.S. 370, 378).

We conclude, therefore, that respondents' argument that Commission action is unwarranted because respondents are regulated by the State of North Carolina is without merit and it is rejected.

Respondents, before the hearing examiner, cited the decision of the Supreme Court of North Carolina in *Day v. Asheville Tobacco Board of Trade*, *supra*, n. 2, as being determinative of the issues in the instant proceeding. In that case the plaintiff Day, owner of the new warehouse hereinbefore mentioned as having entered the Asheville tobacco auction market in 1954, sought unsuccessfully

⁴ North Carolina Gen. Stat., §106-465, P.L. 1933, ch. 268. It should be noted that the statute also provides that:

"Nothing in this act shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade."

⁵ 242 N.C. 123, 87 S.E. 2d 25.

⁶ 13 F. 2d 673, 684 (C.A. 8, 1926).

to enjoin operation of the "new warehouse proviso." The hearing examiner held, however, that the decision in that case resolved a private controversy and was arrived at upon a limited record wholly different from that made in this proceeding, involving, as it does, broad considerations of public interest and principles of Federal law against restraint of trade by unfair methods of competition. He concluded, therefore, that the *Day* case "cannot be regarded as a valid precedent in ruling upon the question here in issue." The Commission is of the opinion that the hearing examiner's conclusion in that respect was fully justified.

In oral argument before the Commission counsel for respondents cited in support of their appeal *Rogers v. Douglas Tobacco Board of Trade*, *supra*, n. 2, a case also involving the allocation of selling time in a tobacco auction market. That decision of the United States Court of Appeals, Fifth Circuit, dated May 9, 1957, subsequent to entry of the initial decision here under review, involved an action for treble damages for alleged violations of the Sherman Antitrust Act and was before the court on appeal from a district court ruling sustaining motions of defendants to dismiss and for judgement on the pleadings. The basic question was whether defendants were entitled to a judgment as a matter of law. All responsible parties were not before the court and the appellate court specifically recognized that the issues were not so framed as to be the basis for review of the performance system of allocating selling time there involved. The case was remanded for further proceedings with no final judgment on the merits. It is not controlling of our decision here.

As previously noted, the State of North Carolina, through its Attorney General, filed a brief *amicus curiae* in support of respondents' appeal. In arriving at its decision herein, denying in part respondents' appeal, the Commission has carefully considered that brief, together with the whole record before it.

In conclusion, the Commission is of the opinion that insofar as respondents object to paragraph 1 of the order to cease and desist contained in the initial decision, there is considerable merit in their position. As written, this paragraph would prohibit respondents under any and all circumstances from allocating selling time to new warehouses on the basis of an average of the size, previous selling time, or number of warehouses already operating on the Asheville market. As we have noted, however, the vice of respondents' system of allocating selling time to new warehouses lies not so much in relating their selling time to an average of the established warehouses, but rather to the arbitrary refusal to take into account and give credit to the size

Order

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and capacity of the new entrant over and above the average of the sizes and capacities of the warehouses already in operation. In view of this, we think paragraph 1 of the order should be revised so as not to prohibit the allocation of selling time to a new entrant on the Asheville market on the basis of some average of the established warehouses, but to require that, under whatever system is employed, reasonable selling time credit be given for the full size and capacity of the new entrant.

In view of the foregoing considerations, respondents' appeal is denied in part and granted in part to the extent indicated in this opinion, and the hearing examiner's initial decision, modified as indicated in the last succeeding paragraph, is adopted as the decision of the Commission.

FINAL ORDER

Respondents having filed an appeal from the hearing examiner's initial decision and the matter having come on to be heard upon the whole record, including briefs and oral argument, and the Commission having rendered its decision denying respondents' appeal in part and granting the appeal in part and adopting as its own decision the initial decision, as modified by the Commission's opinion:

It is ordered, That paragraph 1 of the cease and desist order contained in the initial decision be modified to read as follows:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the full size and capacity of a new entrant.

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

Decision

IN THE MATTER OF
MOHAWK REFINING CORP. ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6588. Complaint, July 17, 1956—Decision, Feb. 14, 1958

Order requiring a concern in Newark, N.J., engaged in reclaiming used motor oil obtained from drainings of motor crankcases which they sold, some of it blended with new oil, to dealers for resale to the purchasing public, to cease advertising for sale or selling such oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on containers.

Mr. John W. Brookfield, Jr. for the Commission.

Mr. Seymour Friedman and *Mr. Joseph H. Freehill*, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondents are charged with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act, by the sale of lubricating oil which has been reprocessed by them in whole or in part from used motor oil procured from gasoline stations and other sources, without showing on the containers in which said oil is sold, or otherwise disclosing, the fact that such oil is reclaimed and reprocessed. By answer respondents deny that they have in any way violated the Federal Trade Commission Act, and aver that the Federal Trade Commission is without jurisdiction in the matter, that the proceeding is not in the public interest, and that the complaint fails to state a cause of action.

Hearings have been held, evidence in support of and in opposition to the allegations of the complaint has been received, duly recorded and filed with the Commission, proposed findings of fact and conclusions have been submitted by counsel and oral argument thereon heard by the hearing examiner. Based upon consideration of the entire record, the following findings of fact are made and conclusions reached:

1. Respondent Mohawk Refining Corp. is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 472 Frelinghuysen Avenue, in the city of Newark, N.J. Respondents John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby are