

Decision

IN THE MATTER OF
RENAIRE CORPORATION (PENNSYLVANIA) ET AL.

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

Docket 6555. Complaint, May 17, 1956—Decision, Feb. 12, 1959

Order requiring an eleven-company corporate family engaged in the sale of home freezers and foods under its "Renaire Plan," to cease representing falsely in advertising in newspapers, by radio and television, etc., that participants in its said "Plan" could buy a freezer and food for the same amount as would be required to buy the same quantity of food in regular retail channels and save enough to pay for a television set, vacation, or freezer, remodel a home, or buy an auto; to cease describing sales personnel as "expert food analysts," "accredited food budget analysts," or "trained qualified food consultants"; and to cease representing falsely that other food sellers did not sell Government inspected meats, that each carton of food they sold carried a United States Department of Agriculture seal, and that they could control the cost of food because it was inspected by U.S. inspection officials.

Mr. Floyd O. Collins supporting the complaint.

Mr. Edwin P. Rome of the firm of *Blank, Rudenko & Klaus*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

STATEMENT

The Federal Trade Commission issued its complaint May 17, 1956, charging respondents with unfair methods of competition and unfair and deceptive acts and practices in commerce in connection with the sale of freezers and food. Such unfair methods and unfair and deceptive acts were alleged to consist of false advertising of their products and of their food plan. The complaint further alleged in part that the individual respondents directed and controlled the policies and practices of the corporate respondents; that all of the corporate respondents were operated as a joint enterprise; that they were all engaged in interstate commerce in the sale of freezers and food and were in substantial competition in commerce with others engaged in the sale and distribution of freezers and food.

Joint answer was filed by all respondents, which admitted the corporate set up; that the various corporate respondents were operated as a joint enterprise; that they were engaged in the sale

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and distribution of freezers and food; that they were engaged in interstate commerce (later changed to denial in amendment to answer) and that they were in substantial competition with others engaged in the sale of freezers and food in commerce. Dissemination of some of the advertising alleged to be false and deceptive was admitted, some denied. It was denied that any of the advertising was false or deceptive or that respondents had otherwise violated the law as alleged in the complaint.

Hearings were held in Philadelphia, Pennsylvania and Washington, D.C. for the taking of evidence in support of and in opposition to the allegations of the complaint. Some delay was caused by court appeal of denial of motion to dismiss as to all respondents at the end of the evidence in chief in support of the complaint. Motion to dismiss as to respondent Renaire Corporation (Pennsylvania) was granted by the hearing examiner, the ruling being entered on the record in accordance with Rule 3.8(e) of the Commission's Rules of Practice.

Proposed findings, conclusions and orders were submitted by both sides and have been considered. All such findings, conclusions and orders not herein adopted, found or concluded are hereby specifically rejected.

Upon the entire record of the proceeding and from the observation of the witnesses while testifying, the hearing examiner makes the following findings as to the facts, conclusions and order:

FINDINGS AS TO THE FACTS AND CONCLUSIONS

1. (a) Respondent Renaire Corporation (Pennsylvania) is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. Respondents Bertram P. Schrank, Harold B. Saler, Leonard S. Cohen, William Speckman, Morton Saler, Joseph Sherwood are president, executive vice president and assistant treasurer, vice president, vice president, secretary and treasurer, respectively, of said corporate respondent.

(b) Respondent Renaire Corporation (Washington, D.C.) is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Respondents Bertram Schrank, Joseph Sherwood and Jules Hecht are president, secretary-treasurer and vice president, respectively, of said corporate respondent. Respondent Harold B. Saler is also an officer of said corporate respondent.

(c) Respondent Renaire of South Delaware, Inc., is a corpora-

tion organized and existing under and by virtue of the laws of the State of Delaware. Respondents William Speckman, Leonard S. Cohen, Harold B. Saler, and Morton Saler are president, vice president, secretary-treasurer, and assistant treasurer, respectively, of said corporate respondent.

(d) Respondent Renaire Corp. of Wilmington is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Respondents Morton Saler, Bertram P. Schrank, Leonard S. Cohen, Harold B. Saler and William Speckman are president, vice president, treasurer, secretary, and assistant treasurer, respectively, of said corporate respondent.

(e) Respondent Renaire of Maryland, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maryland. Respondents William Speckman, Leonard S. Cohen, Harold B. Saler and Morton Saler are president, vice president, secretary-treasurer, and assistant treasurer, respectively of said corporate respondent.

(f) Respondent Renaire of New Jersey, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. Respondents Samuel Saler, Leonard S. Cohen, Harold B. Saler, William Speckman and Morton Saler are president, vice president, secretary-treasurer, assistant secretary and assistant treasurer, respectively, of said corporate respondent.

(g) Respondent Renaire Corp. of Delmont is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. Respondents Joseph Sherwood, Leonard S. Cohen, Harold B. Saler, William Speckman and Morton Saler are president, vice president, secretary-treasurer, assistant secretary and assistant treasurer, respectively, of said corporate respondent.

(h) Respondent Renaire of Allentown, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. Respondents Bertram P. Schrank, Leonard S. Cohen, Harold B. Saler, William Speckman and Morton Saler are president, vice president, secretary-treasurer, assistant secretary and assistant treasurer, respectively, of said corporate respondent.

(i) Respondent Renaire of Philadelphia, Inc., is a corporation organized and existing under and by virtue of the laws of the

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State of Pennsylvania. Respondents Morton Saler, Leonard S. Cohen, Harold B. Saler and William Speckman are president, vice president, secretary-treasurer, and assistant treasurer, respectively, of said respondent corporation.

(j) Respondent Renaire Corp. of Lancaster is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. Respondents Leonard S. Cohen, William Speckman, Harold B. Saler and Morton Saler are president, vice president, secretary-treasurer, and assistant treasurer, respectively, of said respondent corporation.

(k) Respondent Renaire of South Jersey, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. Respondents Leonard S. Cohen, Bertram P. Schrank, Harold B. Saler, William Speckman and Morton Saler are president, vice president, secretary-treasurer, assistant secretary and assistant treasurer, respectively, of said corporate respondent.

The home office and principal place of business of all respondents is located at 770 Baltimore Pike, Springfield, Pennsylvania.

Jurisdiction

2. Each of the corporate respondents is now and has been for more than two years last past engaged in a separate trade area in the sale and distribution of home freezers and food under a food purchase plan, but they are all operated as a joint enterprise. The respondents Leonard S. Cohen, Joseph Sherwood, Samuel Saler, Harold B. Saler, Morton Saler, William Speckman and Bertram P. Schrank own all the stock of all the corporate respondents, with the exception of Renaire Corporation (Washington, D.C.) and direct and control their management, policies and operations. The individual respondents above named together with the respondent Jules Hecht own all the stock of Renaire Corporation (Washington, D.C.) and direct and control the management, policies and operation of that corporate respondent.

3. The specific territories in which each of the corporate respondents solicit the sale of and sell freezers and food are as follows:

Renaire Corporation (Pennsylvania) in the general Philadelphia, Pa., area; Renaire Corporation (Washington, D.C.) in the general trading area of Washington, D.C. including the outlying suburban districts in Maryland, and Virginia; Renaire of South

Delaware, Inc., in an area south of Dover, Del. to the Maryland State border; Renaire Corporation of Wilmington, in the general trading area of Wilmington, Del. which comprises that area between the northern boundary of Wilmington and up to the Dover area; Renaire of Maryland, Inc., operates in Eastern Shore Maryland and in the Salisbury area; Renaire of New Jersey Inc., in the immediate vicinity of Trenton, N.J., the Trenton trading area; Renaire Corporation of Delmont in Delaware County and Montgomery County of Pennsylvania; Renaire of Allentown, Inc., operates in the general trading area of Allentown, Pa., which runs from Allentown to the general area of Lansdale, Pa.; Renaire of Philadelphia, Inc., operates in the northeastern section of Philadelphia over to the Delaware River at Norristown, Pa.; Renaire Corporation of Lancaster in the general area of Lancaster, N.Y. and Harrisburg, Pa.; Renaire of South Jersey, Inc., operates between Camden, N.J. and the South Jersey seaboard area of Atlantic City to Cape May.

4. In all, respondent corporations operate in five states and the District of Columbia. To show the specific area of operations of each corporate respondent see map which is Respondents' exhibit 6.

5. The food offered for sale and sold by respondents consists of what may be called perishables, excluding milk and eggs. They do not sell items known as staples, for instance, sugar, flour, bread or cereal. The record shows that from 30% to 55% of the average family food budget is spent for staples, milk and eggs. Respondents do sell frozen fruits, juices, vegetables, meat, fish and poultry. In such business respondents are now and have been in substantial competition with other corporations, firms and individuals engaged in the sale and distribution of freezers and food in commerce.

6. It is admitted that Renaire Corporation (Pennsylvania) sells in commerce and that the sales of Renaire Corporation (Washington, D.C.) are in commerce by statute, so far as the Federal Trade Commission is concerned.

7. The first contested issue to decide is whether the other nine corporate respondents are engaged in commerce. On this point the facts as to respondents' methods of doing business, as shown in the record, are as follows:

(a) None of the corporate respondents own or carry on hand any stock of freezers. They are all owned by the Gilbert Distributing Company, another corporation, not a respondent. The

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stock ownership and control of the Gilbert Distributing Company is vested in the individual respondents. Occasionally one of the corporate respondents will sell one of the freezers in its display room, which has been loaned to it for display purposes by the Gilbert Distributing Company. The Gilbert Distributing Company maintains a stock of freezers at the food processing plant of the Renaire Corporation (Pennsylvania) at Springfield, Pa.

(b) The Renaire Corporation (Pennsylvania) is the only respondent that owns or operates a food processing plant. It also sells freezers. In its plant at Springfield, Pa., foods including meats and meat products are processed, prepared for sale, frozen and kept until sold by one of the corporate respondents.

(c) The initial contract of sale of a freezer and supply of food by each of the corporate respondents is taken in the name of Renaire Corporation. A sort of clearing house for processing all such orders by all corporate respondents is maintained at the Springfield, Pa. plant of Renaire Corporation (Pennsylvania). A copy of the contract of sale is sent to the Gilbert Distributing Company and a copy is sent to the Renaire Corporation, (Pennsylvania), unless that concern is the corporate respondent making the sale to consumer. The particular corporate respondent that makes the sale makes the necessary financing arrangement for a credit sale with its own bank, indorsing the contract of sale to the bank. After these financial arrangements are made, the freezer is invoiced to the corporate respondent making the sale and that respondent pays the Gilbert Distributing Company for the freezer. The Gilbert Distributing Company ships the freezer direct to the consumer-purchaser. Except in the case of the Renaire Corporation (Washington, D.C.) the food in the purchase order is shipped direct by the Renaire Corporation (Pennsylvania) from its plant at Springfield, Pa. to the consumer-purchaser and is paid the full price in the sale contract for the food including meat and meat products by the corporate respondent making the sale. The corporate respondents, other than the Renaire Corporation (Pennsylvania) make no profit on the sale of foods, but rely for their profit on the difference between what they pay the Gilbert Distributing Company for the freezer and the price for which they sell the freezer to the retail purchaser.

(d) The Renaire Corporation (Washington, D.C.) maintains its own storage warehouse for food in Washington, D.C. The food stored there, including meat and meat products, is prepared

and processed at the plant at Springfield, Pa., and shipped to the Washington, D.C. storage plant. Sales of food by the Renaire Corporation (Washington, D.C.), both original sales and repeat orders for food are shipped from the Washington, D.C. storage warehouse to the retail customers. Other than as above mentioned all sales by Renaire Corporation (Washington, D.C.) are handled in the same manner as sales by the other corporate respondents. Repeat orders for food, other than in the territory of the corporate respondent, Renaire corporation (Washington, D.C.) are direct sales by and are shipped direct by the Renaire Corporation (Pennsylvania) to the retail purchaser. When they occur in the territory of the other corporate respondents, the corporate respondent in whose territory the sale is made merely acts as a conduit for funneling the repeat order for food to Renaire Corporation (Pennsylvania).

(e) Each corporate respondent files separate income tax return and pays its own tax. There is central bookkeeping for all corporate respondents maintained at the Springfield plant, and the cost is charged proportionately to each corporate respondent, as are costs of other central services. They advertise jointly, a proportionate part of the cost of each advertisement being charged to each corporate respondent participating therein.

8. When sales of freezers and food are made by the corporate respondents Renaire of South Delaware, Inc., Renaire Corporation of Wilmington, Renaire of Maryland, Inc., Renaire of New Jersey, Inc., and Renaire of South Jersey, Inc., they do literally in the words of the complaint cause the freezers and food sold to be transported from the State of Pennsylvania to the state in which the sale is made.

9. As to the corporate respondents who limit their sales to the State of Pennsylvania, Renaire Corporation of Delmont, Renaire of Allentown, Inc., Renaire of Philadelphia, Inc., and Renaire Corporation of Lancaster, they are all part of the family of corporations, admittedly operated as a unit with a common purpose and seeking a common goal by joint means, the goal being to sell freezers and food and the means being advertising over the radio, in the newspapers and by pamphlets, letters, booklets and leaflets, the cost of which is borne by all the corporate respondents. To illustrate, Commission's exhibit 206 is an advertisement appearing in the Philadelphia Evening Bulletin, dated May 15, 1955. It is a joint advertisement of Renaire of Philadelphia, Inc., Renaire of New Jersey, Inc., Renaire Corporation of Wilming-

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ton, Renaire Corporation of Lancaster, and Renaire of Allentown, Inc. Thus, Renaire Corporation of Lancaster was by this advertising helping Renaire Corporation of Wilmington to sell freezers and food in commerce. This advertisement looks like the advertisement of one concern with branch offices in the various places in Pennsylvania, New Jersey and Delaware. In fact all of the advertising in evidence appears to be that of one concern. By thus joining in the common undertaking the respondent corporations who limit their sales to Pennsylvania become jointly liable under the Federal Trade Commission Act with the respondents who do sell in commerce.¹

10. Thus it is found that all respondents were engaged in commerce in the sale of freezers and food, and with the exception of Renaire Corporation (Pennsylvania) subject to Commission jurisdiction.

11. We hold here that the processing activities performed by persons not members of the slaughtering and meat packing industry which are similar to those customarily engaged in in furtherance of the retail merchandising of meat do not constitute the manufacture or preparation of meat or meat food products within the intent and meaning of the Packers and Stockyards Act. [Refer to opinion for further discussion.]²

The Representations

12. Among the representations found in the advertising in evidence are the following:

Our main purpose is to provide you with more food, better food . . . delivered to your home . . . plus a specially designed Renarie Freezer . . . for no more than you now spend for just food. Amazing as it may seem—impossible as it may appear—Renaire is now doing this for thousands and thousands of families.

* * * * *

No waste fat with meats. From many "food plans" or department stores, you get up to 25% waste fat with meats (Com. ex. 5).

Proof of Renaire claims in impartial survey tabulated by Remington Rand. Over 85% of Renaire members reported that joining Renaire was a wise decision. Thousands of Renaire members get food plus freezer for less than they formerly spent just for food. Savings of these families average 18.02 monthly (\$216.24 per year) less than their former food budgets. 92.7% save time; 95% save work through Renaire membership (Com. ex. 6).

Renaire processes food in its own huge government inspected plant . . .

¹ *F.T.C. v. Cement Institute, et al*, 333 U.S. 683.

² See Commission Opinion *In the Matter of Food Fair Stores, Inc.*, Docket No. 6457, issued September 27, 1957.

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assuring quality control and prices far below average retail prices! (Com. ex. 7).

Only Renaire Can Bring You All of These Advantages! Don't Settle for Less: You own a specially designed freezer and your payments for freezer AND food are no more than you now spend for food alone. After freezer is all paid for your savings are vastly increased. (Com. ex. 8).

Government Inspected Meats . . . U.S. Department of Agriculture inspector on our premises at all times assures you protected quality . . . A Renaire exclusive.

* * * * *

Lowest Food Prices . . . Because we actually process and manufacture under U.S. Government inspection, we control costs. You buy direct from our plant. . . . with no in-between handling costs or profits! Our tremendous volume, largest in the industry, means added savings!

* * * * *

Each package bears Department of Agriculture seal of inspection and approval.

* * * * *

Trained Food Consultants. Not just freezer salesmen but trained qualified food consultants . . . assuring you proper planning for long term satisfaction. A Renaire exclusive! (Com. ex. 10).

Trained food consultants, not just "freezer salesmen" plan your food budget for greatest saving. (Com. ex. 11)

Your initial food order was carefully worked out for you by one of our accredited food budget analysts, (Com. ex. 2)

For only Renaire has its own Government-Inspected Food Processing Plant where all our foods are prepared under the protective scrutiny of a U.S. Department of Agriculture Inspector. (Com. ex. 13)

Learn how we deliver food to your home at prices far below retail. (Com. ex. 15)

"Renaire saved us enough on food to make our new car possible" says Mr. and Mrs. P. Scarpa, 114 Rhode Island Avenue, Collingsdale, Pa.

* * * * *

Mrs. Marcus Cullen, No. 9 highway "We've recently moved into our new home and the money saved with Renaire freezer helped to pay the cost." (Com. ex. 20)

Renaire even has a \$1,000 food bond with Century Indemnity Company to further protect you. (Com. ex. 2)

13. Through these representations and others similar in evidence it is alleged in the complaint that respondents have falsely represented directly and by implication:

(1) That the participants in their "Renaire Plan" can obtain a well balanced food order at prices below prices they would pay for food if purchased in usual retail channels.

(2) That a participant is able to obtain a freezer and a supply of food for the same amount of money as would be required to

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obtain the same quantity of food if purchased in regular retail channels.

(3) That a participant is able to buy food at wholesale prices.

(4) That a participant is able to save the difference between the wholesale prices and the prices at which the retailer sells food.

(5) That the overall cost of frozen food to the customer is less than the overall cost of corresponding food in other forms.

(6) That a participant is able to save enough to:

(a) Pay for a TV set;

(b) Remodel a home;

(c) Pay for a vacation;

(d) Buy an automobile;

(e) Pay for a freezer.

(7) That the initial food order of a participant is worked out by an expert food analyst.

(8) That participant will have the services of a trained and qualified food consultant in planning food purchases.

(9) That Government inspected meats is an exclusive with Renaire.

(10) That each carton of food purchased from respondent carries a United States Department of Agriculture inspection label.

(11) That by having their food inspected by United States inspection officials respondents are enabled to control production cost.

(12) That a participant is fully protected in the purchase of food from respondents by the Century Indemnity Company.

14. It is found that the alleged representations have been made by the advertising in evidence.

15. It is apparent that charges of false advertising represented by subparagraph 1, 2 and 6 of paragraph 6 of the complaint must stand or fall on a comparison of respondents' food prices with those of their competitors in the retail sale of food. In this connection attention should be called to the representation in subparagraph 2, alleged to be false and deceptive, which reads as follows:

That a participant is able to obtain a freezer and a supply of food for the same amount of money as would be required to obtain the same quantity of food if purchased in regular retail channels.

16. As thus stated, the charge in the complaint is indefinite because no time is given. The case was tried on the theory,

justified by the advertising, that the representations in this subparagraph and subparagraph 6 related to a credit sale of 24 months which was respondents' plan at the time the advertisements in evidence were disseminated. The record shows that the credit was later extended for a longer period of time but all comparisons and all arguments by counsel supporting the complaint are based on a 24-month credit sale. In such sales eight percent per year of the deferred balance on the freezer was added as a finance or interest charge and the total was divided into 24 equal monthly payments. The first order of food was sold on an estimated four months supply on a credit with a finance charge of \$8.00 added, with the total divided into four equal monthly payments. On subsequent credit food purchases \$7.00 was added as a finance charge for each estimated four months supply.

17. Counsel supporting the complaint has taken the initial contract of 33 participants in respondents' plan in evidence showing monthly payments on the freezer and the monthly payments on the estimated first four months supply of food and has made a chart, attached to the proposed findings, in which the cost of the food and total cost of food and freezer and finance charges over a period of 24 months for each of the 33 participants are estimated. The chart further purports to show the required savings on food purchases necessary to pay for freezer and finance charges over a 24-month period. The percentage of the required savings to the total 2 years cost is also shown.

Comparison of Respondents' Food Prices With Prices of Competing Retail Stores

18. Counsel supporting the complaint seeking to sustain the burden of proof as to the falsity of the representations set forth in subparagraphs 1, 2 and 6 of paragraph 6, picked out the Acme grocery chain and the A & P grocery chain as competitors of respondents in the selling of food in the area in which respondents do business in Pennsylvania, Delaware, New Jersey and Maryland (excluding that part of Maryland within the Washington metropolitan area) and the Safeway grocery chain as competitors of respondents in the Washington metropolitan area. He then introduced the price list of respondents' food products for the period April 20, 1955 to May 21, 1955 and price lists of the competing Acme stores, (of which there were 268 supermarkets in the area) for the same period of time. (The price list of the A & P chain was not complete. Hence it drops out of

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the picture.) He also introduced into evidence the price list of respondents for the period April 2, 1956 through April 30, 1956 and the price list at which the competing Safeway stores (of which there were 178 or 179) in the Washington metropolitan area sold the same foods during the same period of time. Comparisons of such prices have been made in charts attached to the proposed findings.

19. In the comparison between Renaire and Acme prices it is shown that considering the whole list of compared prices Renaire's price was $\frac{1}{3}$ of 1% cheaper than Acme's. In this comparison there was no attempt to compare brand named products. This would have been impossible all the way through the list. For instance Renaire sold only Snow Crop brand frozen fruits, juices and vegetables. Acme sold various brands, Ideal, P.L., Birdseye and others. Renaire had only one price for the period April 20, 1955 to May 21, 1955. Acme had four different price lists on frozen juices, fruits and vegetables during the period and more than twenty-five different price lists during the period that included meat, fish and poultry. When Acme's prices changed on anything a new bulletin would be gotten out to the different store managers. In making the comparison of Acme's prices with Renaire's, Acme's cheapest price during any part of the period for the cheapest brand of frozen fruits, juices and vegetables was taken.

20. The comparison between Renaire and Safeway prices in the Washington metropolitan area for the period of April 2, 1956 to April 30, 1956 was on a different basis. Respondents have four different suggested food plans. Each plan sets forth the amount of frozen fruits, juices, vegetables, meats, fish and poultry that is expected to give a family of a certain size a well balanced diet of these items over a four months period. Respondents' food plan No. 1 for a small family offers the items there listed for approximately \$130. Plans No. 2, 3 and 4 are suggested for larger families and cost more according to the size of the family. Each of the suggested food plans are subject to variance according to the family's eating habits.

21. In the comparison between Renaire and Safeway prices, the cost of the various items from Renaire and from Safeway making up each of the suggested food plans are compared. This is not a comparison of the price per pound or per item although those are shown in some instances, but a comparison of total

cost of the same items if bought from each source. According to the comparison made Safeway was cheaper on each suggested food plan. Here again Renaire had one price list for the whole period, while Safeway's prices varied during the period and Safeway had various brands of frozen fruits, juices and vegetables, the cheapest of which for the lowest price during the period is compared with Renaire's Snow Crop brand.

22. All of these charts have been checked by the hearing examiner against the figures in evidence on which they were based and no error has been found. Furthermore these same charts were attached to answer of counsel supporting the complaint to respondents' motion to dismiss. Respondents' evidence has gone into the record since that time. Respondents have therefore had an opportunity to point out any errors in the calculations and none have been shown.

23. With respondents' advertising and the evidence in the record from which the above mentioned charts were compiled, counsel supporting the complaint rested his case on the charges in the complaint that the representations set forth in subparagraphs 1, 2 and 6 of paragraph 6 were false.

24. Among other defenses, respondents contend that it is manifestly unfair to permit counsel supporting the complaint to choose the competitors with which their prices are to be compared; to choose the date for the comparison; the period of time for which the comparison is to be made; to pick out the lowest price of the competitor on each separate item on any day during the 30-day comparison period and to compare this with respondents' constant price for the 30 days.

25. Respondents have also challenged the accuracy and sufficiency of the comparison between their prices and those of these two competitors on several additional grounds.

26. One ground of challenge is that the goods sold by them other than the meats, were Snow Crop brand which is claimed to be a superior brand, because of national recognition, whereas the brands of these competitors were not nationally recognized. This ground of challenge is disregarded, for the reason that in the advertising better foods were offered as a bonus in addition to cheaper price, which is attacked by the allegations of the complaint.

27. Another ground of challenge is that the comparison of respondents' meat prices with the prices of these two competitors is unfair. In selling primal units of meat, both Acme and Safe-

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way charge for the weight of the meat as a primal unit and then cut it up into steaks, roasts, etc. for the use of the purchaser. Thus the purchaser pays for any waste of bone and fat. Respondents also sell their meat in primal units but when preparing it into cuts for table use remove all excess bone and fat from some of the cuts or all bone and excess fat, depending on the type of cut. The customer is charged only for the net weight of the meat furnished plus any bones delivered for use in preparing soups or other dishes. The record further shows that the amount of bone and excess fat will vary widely with the contour of the animal, its age and other factors. Also testimony was introduced to show that respondents have to strictly comply with Department of Agriculture standards in naming their various cuts of meat while Acme and Safeway do not; that comparing prices by name only is unfair because cuts of meat bearing the same name may not actually be comparable.

28. Counsel supporting the complaint seeks to meet this last mentioned challenge by showing that, based upon the figures for the two 30-day periods mentioned and projecting them over 24 months, if the participants in respondents' plan paid nothing for their meats, still the savings would not be sufficient to enable the participants to save enough to pay for the freezer and the financing cost. This could bear on the charges in regard to the representations in subparagraph 2 and 6, but not on the charges in subparagraph 1.

29. Respondents in their defense also have shown that during other recent periods of time, within a 24-month period, beginning with the two 30-day periods of comparison, their then current prices compared with Acme's and Safeways, in the respective areas, showed respondents' prices to be lower than either of these competitors on a majority of items advertised by Acme and Safeway. They have also shown that other comparisons more favorable to them, pricewise may be made from the figures for the two 30-day periods.

30. Respondents also placed in the record the testimony of a number of participants in their plan who said that after making the payments on freezer, food and financing charges to respondents and buying their staples, they still had saved varying amounts of money over what they had previously paid for food

alone. This testimony was based on estimates of previous expenditure and cannot stand up against actual records of food prices, and comparisons of these food prices, if fair and accurate.

31. There is nothing unfair in counsel supporting the complaint picking out one competitor of respondents in each competitive area for a comparison of prices. If respondents' food prices by comparison with those of any general competitor in the area for a 24 month's period show the representations here being considered to be false, no comparison with any other competitors' prices is necessary on the representations in subparagraphs 2 and 6. By picking out only Acme and Safeway for comparison, counsel supporting the complaint narrowed the proof respondents were required to meet.

32. The hearing examiner is of the opinion that the comparisons in the charts presented by counsel supporting the complaint are made on an erroneous basis, although the calculations are correct. For instance in the comparison with Acme's prices for the period April 21, 1955 to May 20, 1955 the chart shows respondents offered six 6-oz. packages of Snow Crop orange juice for \$0.83 (Comm. ex. 26). As against that it is shown that Acme offered six 6-oz. P.L. orange juice for \$0.75 during the same period of time. The four price lists of Acme's frozen juices, fruits and vegetables in evidence show varying prices of orange juice during the 30-day period. The price list of Acme for six 6-oz. P.L. orange juice from April 25, 1955 through April 30, 1955 was \$0.85 (Com. ex. 29) as compared with respondents' constant price of \$0.83 during the 30-day period for six 6-oz. Snow Crop orange juice. On Acme's price list for May 9, 1955 through May 14, 1955 (Com. ex. 31) the price had dropped to six 6-oz P.L. orange juice for \$0.75. The \$0.75 figure is taken for comparison with respondents' constant price of \$0.83 in counsel's chart. The same method is followed in all of the comparisons in the charts. No customer on any particular day could have bought all of the things from Acme for the prices shown in the charts.

33. If any further proof is needed that the comparisons in the charts of counsel supporting the complaint are made on an erroneous basis a comparison between respondents' prices on frozen vegetables with those of Acme for the period May 9, 1955 to May 20, 1955 has been worked out. It is as follows:

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Respondents' prices, Snow Crop, April 21, 1955 to May 20, 1955 vegetables				Acme's prices, Ideal, May 9, 1955 to May 20, 1955 vegetables			
Ounces		Packages	Cost	Ounces		Packages	Cost
10	Asparagus, cut.	6	\$2.03	10	Asparagus, cut.	6	\$2.22
10	Asparagus, spears.	6	2.43	10	Asparagus, spears.	6	2.43
10	Beans, cut green.	6	1.10	10	Beans, cut green.	6	1.29
10	Beans, French cut.	6	1.10	10	Beans, French cut.	6	1.29
10	Broccoli, chopped.	6	1.13	10	Broccoli, chopped.	6	1.17
10	Broccoli, spears.	6	1.37	10	Broccoli, spears.	6	1.41
10	Brussel sprouts.	6	1.53	10	Brussel sprouts.	6	1.74
10	Cauliflower.	6	1.43	10	Cauliflower.	6	1.47
2 (per pkg.)	Corn, cob.	6	1.35	2 (per pkg.)	Corn, cob.	6	1.47
10	Corn, cut.	6	.85	10	Corn, cut.	6	.99
10	Limas, baby.	6	1.43	10	Limas, baby.	6	1.47
10	Limas, Fordhook.	6	1.43	10	Limas, Fordhook.	6	1.41
10	Mixed Vegetables.	6	1.13	10	Mixed Vegetables.	6	1.17
10	Peas.	6	.89	10	Peas.	6	.99
9	Potatoes, French fried.	6	.90	9	Potatoes, French fried.	6	1.05
*11	Spinach, chopped.	6	.95	*12	Spinach, chopped.	6	.99
*11	Spinach, leaf.	6	.95	*12	Spinach, leaf.	6	.99
10	Succotash.	6	1.36	10	Succotash.	6	1.41
10	Peas and carrots.	6	.95	10	Peas and carrots.	6	.99
16	Squash.	6	.95	16	Squash.	6	1.14
Total.			25.26	Total.			27.09

34. Thus, while the chart of counsel supporting the complaint shows the whole order of vegetables from respondents costing \$25.26 as against \$25.76 from Acme a difference of fifty cents, this chart shows the order of vegetables from respondents costing \$25.26 as against \$27.09 from Acme, a difference of \$1.83. Prices on peas and carrots and squash were not obtainable from Acme's price list of May 9, 1955 to May 20, 1955 and it was necessary to go to the price list of May 25, 1955 to May 30, 1955 to obtain these prices. The point is however that the relationship between respondents' prices and Acme's during the 30-day period of comparison did not remain steady.

35. The comparison of respondents' food prices with Acme's was for the period April 20, 1955 to May 31, 1955 and in the area in Pennsylvania, New Jersey, Delaware and Maryland in which respondents did business, except that portion of Maryland in the Washington metropolitan area. The comparison of respondents' food prices with Safeway's was for the period April 2, 1956 to April 30, 1956, in another area in which respondents did business, the Washington metropolitan area. The comparison with Safeway's prices in the Washington metropolitan area from April 2, 1956 to April 30, 1956 cannot be taken as proof that Acme's prices in the other geographical area were the same as Safeway's in the Washington metropolitan area for that period of time. The

case was tried on the theory on these two charges, correct in the hearing examiner's view, that respondents' representations related to a credit sale of 24 months, which was respondents' plan at the time the representations, here considered, were made. [Refer to opinion.]

36. The hearing examiner has given consideration to reopening the proceeding for further evidence on these issues as has been done by the Commission in some cases. The conclusion is that the public interest would not warrant a reopening for the following reasons: (1) there is no jurisdictional question involved; (2) these charges are only three out of a total of twelve charges; (3) there is no indication that additional evidence for a proper comparison of prices is available and (4) there has been no request for reopening.

Wholesale Prices

37. It has been found that respondents have made the representations set forth in subparagraphs 3 and 4 of paragraph 6 of the complaint. These representations were:

That a participant is able to buy food at wholesale prices;

That a participant is able to save the difference between the wholesale prices and the prices at which the retailers sell food.

38. These representations are alleged to be false.

39. The applicable dictionary definitions of wholesale are as follows:

Sale of goods by the piece or in large quantity; distinguished from retail; selling to retailers or jobbers rather than consumers; as wholesale price.

The applicable dictionary definitions of retail are as follows:

the sale of commodities in small quantities or parcels;—opposed to wholesale; to sell directly to the consumer.

40. The business of respondents for the most part consist of selling directly to the consumers and under the above definition they are retailers although the record shows they do make some sales of their foods to retail stores, at the same prices they sell to the participants of their plan. The record further shows that wholesale prices vary in accordance with the quantities bought; that the quantity of meat sold to participants in a four months supply is equal to the quantity of meat bought at one time by some small retailers; that at least one wholesaler and one packer have complained to respondents that the prices at which their products were sold to participants were so low that small retail-

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ers could not compete; that respondents do sell some frozen foods to their participants at the same price or less than some wholesalers sell in small quantities.

41. Thus, while respondents are retailers according to the dictionary definition, in selling to the participants of their plan their prices to them are the same or less than wholesale prices are to some retailers. These two charges in the complaint must be dismissed.

That the Overall Cost of Frozen Food to the Customer
is Less than the Overall Cost of Corresponding
Food in Other Forms

42. There was no evidence on this charge of false representation, counsel supporting the complaint does not propose any finding on it. This charge must therefore be dismissed.

That the Initial Food Order of a Participant is
Worked out by an Expert Food Analyst

That Participant Will Have the Services of a Trained
and Qualified Food Consultant in Planning Food Purchases

43. The record shows that the "trained qualified food consultants" and the "accredited food budget analysts" were in reality salesmen for respondents who, when they started out, had been given one week of schooling by respondents. After that they were assigned to a more experienced salesman for the observation of one or two sales until they could make the presentation to the older salesman's satisfaction. It is evident that the essential part of the work was to sell freezers. One of the meanings of "consultant" is one who gives professional advice or services as a consulting physician. Also the phrase "accredited food budget analyst" has a professional ring to it as if the salesman had a degree from some accredited institution. Respondents required no educational qualifications for their salesmen nor was any knowledge of food an initial requirement. Respondents did employ some trained dietitians, but these persons did not call on prospects. It is clear that the advertising had reference to respondents' freezer salesmen. These representations were definitely false and misleading and it is so found.

That Government Inspected Meats is an Exclusive
with Renaire

44. Some of the advertising indicates that this claim is made in comparing Renaire with other sellers of freezers and food plans. Respondents contend that the claim was only made during

a period when none of their competitors in sale of freezers and food plans had a government inspector on their premises. Some advertising however (Com. ex. 10 among others) does not limit the claim to such comparison. The record shows that some competitors of respondents in the sale of food sold government inspected meat that had been bought from packers who had government inspectors on the premises. This representation was false and deceptive and it is so found.

That Each Carton of Food Purchased from Respondents
Carries a United States Department of
Agriculture Inspection Label

45. The record shows the United States Department of Agriculture inspection label only went on respondents' meat and meat products. The advertising indicates that all food carried such inspection labels. This representation was false and deceptive and it is so found.

That by Having Their Food Inspected by United States
Inspection Officials Respondents are Able to
Control Production Costs

46. Upon examination by counsel supporting the complaint, Mr. Harold B. Saler, an official, of the corporate respondents and an individual respondent himself stated that the United States Department of Agriculture Inspector on the premises has nothing to do with the prices at which respondents sold their merchandise; that he had nothing to do with the pricing structure at all. On later examination by his own counsel he stated that due to the inspector's examination of incoming products "we are able by uniformity of conformation, proper identification of the wholesale units (presumably of meat) which we purchase, we can therefore put these products on our assembly line production system, so that we in turn can process in uniformity and rapidity and with speed." He further said that respondents were benefited by the inspector's ability to reject any products shipped to them on the basis that they did not meet Federal requirements. This prevented respondents from having to argue with the suppliers. He also gave other instances of benefit to respondents from having a Federal inspector on the premises.

47. Taking all of these claimed benefits at their face value, they fall far short of enabling respondents to control the cost of their products to their participants, or to themselves. It is therefore found that this representation is false and deceptive.

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That a Participant is Fully Protected in the Purchase of
Food from Respondents by the Century Indemnity Company

48. There is some talk in the record in regard to the protection furnished participants by insurance policies of various kinds and also by respondents' warranties. At one time Mr. Harold B. Saler, above mentioned was requested to furnish counsel supporting the complaint with copies of all insurance policies given to participants, but they are not in the record. The name of the Century Indemnity Company was not connected with any insurance policy except in the advertising nor is there any proof that such policy was not outstanding. Counsel supporting the complaint does not propose any finding on this charge. Under this state of the record the charge must be dismissed.

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49. The record shows that since this proceeding began respondents have changed their method of operation to some extent. According to this testimony the selling and advertising are now done by what are called franchise distributors. Respondents retain some control over what is said in the advertising of the franchise distributors. Also at the time the testimony was given such arrangement did not apply to the Renaire Corporation of Washington, D.C. The hearing examiner is unable to see how such new arrangement has any bearing on the issues in the present proceeding.

50. The use by the respondents of the representations herein found to be false and deceptive had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said representations were true and to induce the purchase of substantial quantities of respondents' freezers and foods by reason of such erroneous and mistaken belief and as a result thereof trade has been unfairly diverted from respondents' competitors.

51. The aforesaid acts and practices of respondents as herein found are all to the prejudice and injury of the public and respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Renaire Corporation (Pennsyl-

vania), a corporation, Renaire of South Delaware, Inc., a corporation, Renaire Corp. of Wilmington, a corporation, Renaire of Maryland, Inc., a corporation, Renaire of New Jersey, Inc., a corporation, Renaire Corp. of Delmont, a corporation, Renaire of Allentown, Inc., a corporation, Renaire of Philadelphia, Inc., a corporation, Renaire Corp. of Lancaster, a corporation, Renaire of South Jersey, Inc., a corporation, and their officers, and respondents, Leonard S. Cohen, Joseph Sherwood, Samuel Saler, Morton Saler, Harold B. Saler, William Speckman and Bertram B. Schrank, individually and as officers of said corporations as set forth in the findings herein, and Renaire Corporation (Washington, D.C.), a corporation, and its officers, and respondents, Bertram Schrank, Joseph Sherwood, and Harold B. Saler, as officers of said corporation, and respondent, Jules Hecht, individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or through any corporate or other device in connection with the offering for sale, sale or distribution of foods and freezers in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the terms "expert food analyst," "accredited food budget analyst," "trained qualified food consultant" or any other term or terms denoting expertness in referring to their salesmen or saleswomen;
2. Representing directly or by implication:
 - (a) That their customers or participants in their plan will have the services of an expert in planning their food purchases;
 - (b) That other sellers of food do not sell government inspected meat;
 - (c) That each carton or package of food sold by them or any of them carries a United States Department of Agriculture inspection label;
 - (d) That having their food inspected by United States inspection officials enables them to control the cost of food.
 - (e) That a participant is able to obtain a freezer and a supply of food for the same amount of money as would be required to obtain the same quantity of food if purchased in regular retail channels.
 - (f) That a participant is able to save enough to (1) pay for a television set, (2) remodel a home, (3) pay for a vacation, (4) buy an automobile, or (5) pay for a freezer.

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3. Misrepresenting in any manner the savings afforded to respondents' purchasers.

OPINION ON CROSS APPEALS FROM HEARING
EXAMINER'S INITIAL DECISION

By SECREST, Commissioner :

The complaint charges that the respondents, in violation of the Federal Trade Commission Act, have misrepresented the benefits and advantages afforded by the freezers and frozen foods distributed and sold by them in commerce under a food purchase plan. In the initial decision filed after hearings were concluded, the hearing examiner held that the complaint should be dismissed as to one of the corporate respondents for lack of jurisdiction, that certain of the charges were sustained by the evidence as to the remaining respondents and that others were not so supported. Counsel supporting the complaint has appealed from various of the rulings including the jurisdictional ruling. The respondents who are appealing are those named in the initial decision's order to cease and desist and they request dismissal of the charges against them for lack of jurisdiction and on their merits.

The respondents named in the complaint are eleven corporations and eight individuals who are their stockholders and officers and direct their activities and practices. The hearing examiner held that one member of the Renaire corporate family, namely, respondent Renaire Corporation (Pennsylvania), was a packer within the intent and meaning of the Packers and Stockyards Act of 1921¹ and that its participation in the deceptive practices found to have been engaged in were matters committed to the exclusive jurisdiction of the Secretary of Agriculture and accordingly not within the Commission's jurisdiction. Respondents do not purchase any livestock for purposes of slaughter and do no slaughtering. The above corporation does, however, purchase carcasses of meat from packing houses and further processes such products in its plant at Springfield, Pa., under regulations governing meat inspection which are promulgated by the United States Department of Agriculture. These processing activities include cutting, boning, grinding and freezing of the meat food products for retail sale and delivery to buyers of respondents' freezers and participants in their food purchase plan; and it appears from the advertising exhibits that competition of those operations, including the products' wrapping

¹ 42 Stat. 160; 7 U.S.C. 181 et seq.

and freezing, requires 27 minutes. Such promotional material additionally states that the foods offered are limited to national and local leading brands and includes representations that the meats are "Armour's Star Grade" and the smoked meats are Oscar Mayer's.

Of the definitions appearing in Section 201 of the Packers and Stockyards Act, those here relevant define "packer" as 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. When previously considering this statutory language, we held in the matter of *Giant Food Shopping Center, Inc.*, D. 6459 (decision on appeal December 19 1957), that the grinding and seasoning of meatloaf and country sausage incident to over-the-counter sale of meat purchased from packer suppliers by a retailer operating a chain of grocery supermarkets in the District of Columbia and elsewhere did not confer packer status on that processor. As we stated there, Congress' purpose was to regulate the business concerns which compose the slaughtering and meat packing industry. The legislative target was the packer as Congress knew him, namely, the concern engaged in purchasing animals, slaughtering them, selling food products and processing the by-products to a greater or lesser degree. In the matter of *Crosse & Blackwell Company*, D. 6463 (decided November 13, 1957), we held that the granting of discriminatory promotional allowances in violation of Section 2(d) of the Clayton Act, as amended, by a canner of table foods, some of which contained meats purchased by that food processor from packers, were activities subject to the jurisdiction of the Commission. That holding was affirmed on January 5, 1959, by the United States Court of Appeals for the Fourth Circuit.

We hold here that the processing activities performed by persons not members of the slaughtering and meat packing industry which are similar to those customarily engaged in in furtherance of the retail merchandising of meat do not constitute the manufacture or preparation of meat or meat food products within the intent and meaning of the Packers and Stockyards Act. The circumstance that the respondents' meat products are not merely refrigerated at the plant but also initially frozen there instead of in the consumer's own home freezer does not render their activities essentially different in character from that engaged in by retailers of meat. That the business role of respondent Renaire

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Corporation (Pennsylvania) is essentially restricted to the retail marketing of meats in commerce also is corroborated by the fact that respondents have elected in the advertising to feature packer products having an established public acceptance. The hearing examiner's conclusions that respondent Renaire Corporation (Pennsylvania) should be deemed to be a packer within the meaning of the original Packers and Stockyards Act are erroneous.

On September 2, 1958, which date was subsequent to the time when the parties filed their appeals herein, Public Law 85-909 became effective. This enactment amends both the Packers and Stockyards Act and the Federal Trade Commission Act. Its effect, among others, is to confer on the Commission jurisdiction over unfair practices in commerce, in connection with all transactions by packers involving (1) commodities other than livestock, meats, meat food products, livestock products in unmanufactured form, poultry or poultry products and (2) with exceptions not here material, retail sales by packers of all products. For reasons hereinafter stated, we construe the amendment to be retrospective in operation, and, accordingly, applicable to proceedings pending before the Commission at the time of its enactment. Hence, even though the hearing examiner's interpretation of the Packers and Stockyards Act as effective prior to its amendment by Public Law 85-909 were adopted, it follows that the Commission now has jurisdiction over all practices charged in the complaint which are violative of the public policy expressed in the Federal Trade Commission Act if engaged in in commerce by the corporate respondent retailers.

A statute or amendment will be regarded as solely prospective in its operation if in derogation of common law rights or if the effect of giving it retroactive operation will be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction. *Lewellyn v. Frick*, 268 U.S. 238, 252 (1925); *Valleytown Tp. v. Women's Catholic Order of Foresters*, 115 F.2d 459, 562 (C.A. 4, 1940); 50 A.J. p. 500. On the other hand, when not excluded by the terms or implications of the language of the act, statutes and amendments which do not have the foregoing effects and are directed to changing remedies or modes of procedure for enforcing existing obligations have retrospective effect. *Beatty v. U.S.*, 191 F.2d 317 (C.A. 8, 1951); *U.S. v. National City Lines*, 80 F. Supp. 734 (D.C. S.D. Cal., 1948), cert. den. 337 U.S. 78; *Bowles v. Strickland*, 151 F.2d 419 (C.A. 5, 1945); *Bowles v. Miller*, 151 F.2d

992 (C.A. 10, 1945); *Federal Broadcasting System v. F.C.C.*, 239 F.2d 941 (C.A.D.C. 1956); 50 A.J. p. 506.

The bill which was enacted by Congress as Public Law 85-909 was introduced as H.R. 9020. Although it was the subject of a committee report in the first session of the 85th Congress, none was made on it in the second session where it was enacted in a revised form. In the latter session, however, the Committee on Interstate and Foreign Commerce did report on a companion bill which adopted the same general legislative approach and had many provisions similar to H.R. 9020 as ultimately enacted. Such report described that bill to deal "with a reassignment of jurisdiction over unfair trade practices, but leaves unchanged the present substantive provisions of law regarding such practices." (Rep. No. 1507 (p. 3), 85th Cong., 2d Sess.)

The original Packers and Stockyards Act conferring exclusive jurisdiction on the Secretary of Agriculture respecting certain proceedings involving packers did not repeal any of the statutes administered by the Commission as to packers. As to them, it had merely tolled or suspended the Commission's power and jurisdiction to enforce the organic Act and other acts imposing statutory responsibilities similar in vein to those provided in the original Packers and Stockyards Act. Congress' disclaimer respecting changes in substantive law when redistributing enforcement responsibilities between the two enforcement agencies concerned is to be accorded great weight. It follows, therefore, that the purpose of the amendment restoring Commission jurisdiction was limited to changing the forum for adjudicating complaints with respect to certain categories of statutory violations by packers. An amendment which merely provides additional machinery for enforcing preexisting statutory responsibilities does not affect substantive rights and will be accorded retrospective effect. *Mattox v. U.S.*, 187 F.2d 406 (C.A. 9, 1951), cert. den. 342 U.S. 820. The same holds true for acts effecting changes in jurisdiction and venue. *Larkin v. Saffarans*, 15 Fed. 147 (Cir. Ct. W.D. Tenn., 1883); *Hadlick v. American Mail Line*, 82 F. Supp. 562 (D.C. N.D. Cal., 1949). Hence, we construe the amendment as essentially procedural in character and hold it retrospective in its effect as to violations of substantive law by packers. As previously noted, this conclusion likewise requires reversal of the initial decision's holding of lack of jurisdiction by the Commission as to respondent Renaire Corporation (Pennsylvania).

We also have considered respondents' contentions that the hearing examiner erred in failing to hold that all corporate members of the Renaire family of corporations were within the original Act's definitions of packers. This contention is rejected.

Respondents appeal further contends that there is no record showing that 9 of the 11 corporate respondents are engaged in interstate commerce. It is not controlling, however, that each of such corporations may restrict its freezer sales and solicitations for food orders to a trading area located within the confines of the state issuing its corporate charter. The freezers and foods are shipped from the plant at Springfield, Pa., to purchasers located in other states and Renaire of South Delaware, Inc., Renaire Corp. of Wilmington, Renaire of Maryland, Inc., Renaire of New Jersey, Inc., and Renaire of South Jersey, Inc., have made contracts of sale contemplating the shipment of freezers and foods across state lines and thus directly cause their movement in interstate commerce. Furthermore, the foregoing respondents and the correspondent corporations chartered under the laws of Pennsylvania, in instances, advertise jointly and have at all times been operated as a joint and closely integrated enterprise. The hearing examiner's conclusion that the respondents' acts and practices were in commerce has sound legal basis.

Respondents additionally except to the initial decision's findings of misrepresentation in connection with the sales representatives being designated by respondents variously as expert food analysts, trained qualified food consultants and accredited food budget analysts. The fact that suggested basic food orders prepared by persons with long experience in the food field are furnished to sales personnel for use in sales presentations does not, however, support conclusions that the latter, in view of the brief training accorded them, have the qualifications and expertise claimed for them in the advertising. We think that the hearing examiner's findings on this aspect had sound basis in the record. We also have considered the exceptions additionally interposed by respondents to other findings of fact by the hearing examiner. Inasmuch as the reasons cited by the hearing examiner in support of these findings appear fully controlling to decision here and have appropriate record basis, these exceptions are denied.

The hearing examiner held that there was a failure of proof respecting the matters charged in subparagraphs 1 through 6 of paragraph 6 of the complaint and the appeal of counsel supporting

the complaint also asserts error as to those rulings except as to subparagraph 5. Subparagraph 1 charges that the respondents have falsely represented that participants in their program can obtain food at prices below those they would pay for food if purchased in usual retail channels. The second subparagraph alleges that the respondents have represented that a participant is able to obtain a freezer and his supply of food for the same amount as would be required to obtain the same quantity in regular retail channels; and subparagraph 6 alleges that the respondents have represented contrary to the true facts that a participant is able to save enough to pay for a TV set, remodel his home, pay for a vacation, buy an automobile, or pay for a freezer. Though finding that there was sound record basis for conclusions that the respondents had used the challenged representations in promoting the resale of their freezers and foods, the hearing examiner stated that the charges as to their falsity were not supported by the preponderance of the evidence.

Renaire plan No. 1 affords a quantity of freezables comprising meats, fish, poultry, vegetables, juices and fruits which is offered as a four-month supply for a small family priced at \$130. Alternative plans at other prices are suggested for larger families but all programs are subject to variation depending on the families' eating habits. Relevant to these charges, counsel supporting the complaint introduced in evidence price lists effective in Acme Stores in a territory which included the Philadelphia area for the period between April 25, 1955, and May 21, 1955, together with Renaire's listings for that period. Also received were price lists effective for Safeway Stores in the Washington metropolitan area during April, 1956, together with the Renaire price list then effective. The tabulations or charts prepared and appended to counsel's appeal brief are directed to comparing Renaire and Acme prices on individual items appearing on the Renaire price list for the above period in 1955; and the tabulated comparisons for Safeway and Renaire prices for the selected 1956 period primarily pertain to freezables included in the various Renaire food plans, and thus purport to compare total costs of the various items making up each plan if bought from those competitive sources at that time in areas where the prices were effective.

Unlike Renaire's prices, those of the two chains were subject to fluctuations on certain articles during the selected periods. The price lists and tabulations are relied on by counsel supporting the complaint as showing that the prices of the supermarket

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concerns were equivalent to or lower than respondents' prices provided the meats were bought in like quantities at the prices for primal units available in various of the chain stores. The hearing examiner expressed views that certain of counsel's tabulations purporting to show that a certain quantity of vegetables would cost \$25.26 if purchased from respondents as against \$25.76 if bought at Acme, while mathematically correct, represented an improper or erroneous comparison by reason of their being based on the latter's lowest price levels for each food item.

In the tabulation prepared by him and set forth in the initial decision, the hearing examiner instead adopted as a basis for comparison certain higher levels resulting from the price variations during the period under consideration. This indicated that the above frozen vegetables would have cost \$1.83 less if purchased from Renaire. Because of the price changes, the hearing examiner further concluded that an evaluation of future price relationships and differences and of whether consumer savings would be afforded by dealing with Renaire over other retailers over the twenty-four months' period of time customarily involved in respondents' credit or deferred payment sales was not possible.²

We agree that the foregoing evidentiary material and other record matters do not support informed determinations that savings may not be afforded in instances on purchases from respondents over prices prevailing in regular retail channels. Hence, insofar as his ruling relates to qualitative claims for savings which might be realized from purchases through respondents we believe the hearing examiner correctly held that the charges of subparagraph 1 of paragraph 6 of the complaint lack sound record support. However, notwithstanding this conclusion, we are also of the view that respondents' claims for average savings amounting to \$18.02 monthly (or \$432.48 for the period covered by respondents' contracts), claimed savings enabling a participant

² In this connection the hearing examiner related that:

"It may be argued that any possible comparison of respondents' food prices with those of Acme's and Safeway's during either period of time for which the figures are given will show that the prices are so close that if extended over a 24-months period, there would not be sufficient savings by purchasing food from respondents to pay for the freezer and the finance charges. The point is that the relationship between respondents' prices and their competitors fluctuated and the fluctuation during the two 30-day periods of time, demonstrate, if any demonstration is necessary, that no inference is possible to the effect that the relationship between respondents' prices and those of the two competitors remain approximately the same for 24 months.

"The evidence of record does not affirmatively show the truth or the untruth of the representations embodied in subparagraphs 1, 2 and 6 of paragraph 6. Therefore, the holding is that the charges as to the representations in these three subparagraphs being false, deceptive and misleading are not supported by a preponderance of the evidence, and must be dismissed." (Italic supplied.) Paragraphs 39 and 40 of the Initial Decision.

in their plans to obtain a freezer and food supply for the amounts required to obtain a like food supply in regular channels and claims for savings sufficient to enable participants to buy an automobile, television or other items mentioned in subparagraph 6, are completely refuted by this record.

To hold otherwise would be to fail to view the pricing information in its proper perspective. The prices of supermarket organizations are subject to changes in marketing conditions, including price changes adopted by competitors. The prices effective for the two chain retailers were available to consumers in a substantial segment of the territory in which the respondents conducted their operations. Furthermore, the periods selected for investigation and price comparisons were of reasonable duration; and the price levels effective in the chain stores and those adopted by respondents appear reasonably representative of the pricing policies of those concerns. It is true that the price changes effective on many articles sold by the supermarket retailers presented various alternative bases for price comparisons. Appended to the brief are additional charts apparently prepared by counsel for purposes of his appeal. These set forth price comparisons taking cognizance of a very substantial number though not all of the price changes made effective by the supermarket retailers in the periods covered by the pricing studies. The pricing pattern indicated by the record tends to similar overall price levels between respondents and their competitors with substantial price disparities in some product categories.

Also pertinent to the respondents' quantitative savings' claims is the large outlay required to pay for a freezer. For purchasers selecting the freezer listed at \$459 exclusive of finance charges and a two-year supply of food costing \$780, the price of food, freezer and finance charges for the period of twenty-four months under respondents' then customary deferred payment plan, together with finance charges on the food, totaled \$1,352.16. On a freezer priced at \$799 and a like two-year food supply, the aggregate cost of food, freezer and finance charges was \$1,745.24. The savings on food which would be required in those cases to pay for the freezers and all financing charges, respectively, amount to \$572.16 and \$965.24, or 42.31% and 55.31% of the amounts paid by those buyers. An analysis of 33 of respondents' contracts with purchasers indicates that the percentage of total costs required by way of food savings to pay the obligations

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there incurred amount to 41.32%. The cost of the freezers and finance charges have exceeded the cost of the two-year supply of meats called for under some of the food plans. Hence, even if the meats were furnished by respondents without charge in those cases, it would not necessarily result that savings equivalent to the cost of the freezers would be realized by purchasers.

In considering the competitive price data, the hearing examiner noted, among other things, testimony to the effect that when primal units of meat, including beef, were cut by respondents into steaks and other cuts for table use, their purchasers received the meats free of bone and excess fat. This nowise detracts from the conclusiveness of other evidence refuting the quantitative savings' claims. Evidence pertaining to beef orders filled by respondents shows they regularly included packages of bones. These were billed at the price per pound charged for the particular primal unit of beef sold. The tabulations introduced by respondents in support of their claimed savings included those comparing Renaire prices on a half chuck and a forequarter of beef with those charged by a competitor for like finished cuts sold over the counter. While purporting lower prices by Renaire of 15.8% and 17.3%, respectively, such levels of savings would fall far short of those promised in the advertising. Moreover, trimmed primal units of beef were available at many stores of that particular chain at prices below or equivalent to respondents' prices.

In these circumstances, we conclude, and so find, that it is not true as represented by the respondents that participants in Renaire's plans are able to buy freezers and supplies of food for the same amounts of money as would be required to obtain the same quantity of food if purchased in regular retail channels. The hearing examiner found that 30% to 55% of the average family food budget is spent for staples, milk and eggs. While freezables are a broad food category, any savings realized on their purchase would not extend to other articles of the family diet. It thus is clear that such advantages as are afforded to purchasers of respondents' freezers and freezables would not normally include savings approaching the amounts required for buying an automobile or the other things designated in the advertising, or afford the specified savings otherwise promised in the advertisements.

We hold that the charges of subparagraphs 2 and 6 of paragraph 6 of the complaint have sound record support. The record also supports informed determinations that respondents have mis-

represented the monetary savings to be realized by the average of the participants in their food program. The initial decision's findings and conclusions which are in conflict herewith are modified accordingly. The contentions of counsel supporting the complaint, insofar as they relate to the rulings of the hearing examiner's dismissal of subparagraphs 3 and 4 of paragraph 6 of the complaint, are rejected for failure of proof.

The respondents' appeal is being denied and the appeal of counsel supporting the complaint granted in part and denied in part. The record clearly shows that respondent Renaire Corporation (Pennsylvania) participated in the unlawful acts and practices which the initial decision found were engaged in and such respondent accordingly is being included as a party to the order to cease and desist. The initial decision, as modified by our accompanying order, is being adopted as the decision of the Commission.

FINAL ORDER

Counsel in support of the complaint and the respondents having filed cross-appeals from the hearing examiner's initial decision dated December 6, 1957, and the Commission having considered the same and having granted in part and denied in part the appeal of counsel in support of the complaint and denied the appeal of the respondents, and having directed modification of the initial decision and the adoption of said initial decision, as so modified:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, modified as follows:

1. By striking therefrom, and particularly from paragraph 11 thereof, all findings and conclusions to the effect that the respondent, Renaire Corporation (Pennsylvania), is a packer within the intent and meaning of the Packers and Stockyards Act of 1921, and that said corporation is not subject to the jurisdiction of the Commission, and by substituting for said findings and conclusions the pertinent portions of the Commission's opinion, of even date herewith, on this subject;

2. By striking the fourth and fifth sentences of paragraph 27 and substituting therefor the following:

"Respondents also sell their meat in primal units but when preparing it into cuts for table use remove all excess bone and fat from some of the cuts or all bone and excess fat, depending on the type of cut. The customer is charged only for the net weight

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of the meat furnished plus any bones delivered for use in preparing soups or other dishes."

3. By striking the fourth sentence contained in paragraph 35 and all of paragraphs 36 to 40 inclusive, and by substituting for said findings and conclusions the portions of the Commission's opinion relevant thereto.

4. By striking therefrom the order to cease and desist and substituting therefor the following:

It is ordered, That respondents, Renaire Corporation (Pennsylvania), a corporation, Renaire of South Delaware, Inc., a corporation, Renaire Corp. of Wilmington, a corporation, Renaire of Maryland, Inc., a corporation, Renaire of New Jersey, Inc., a corporation, Renaire Corp. of Delmont, a corporation, Renaire of Allentown, Inc., a corporation, Renaire of Philadelphia, Inc., a corporation, Renaire Corp. of Lancaster, a corporation, Renaire of South Jersey, Inc., a corporation, and their officers, and respondents, Leonard S. Cohen, Joseph Sherwood, Samuel Saler, Morton Saler, Harold B. Saler, William Speckman and Bertram B. Schrank, individually and as officers of said corporations as set forth in the findings herein, and Renaire Corporation (Washington, D.C.), a corporation, and its officers, and respondents, Bertram Schrank, Joseph Sherwood, and Harold B. Saler, as officers of said corporation, and respondent, Jules Hecht, individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or through any corporate or other device in connection with the offering for sale, sale or distribution of foods and freezers in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the terms "expert food analyst," "accredited food budget analyst," "trained qualified food consultant" or any other term or terms denoting expertness in referring to their salesmen or saleswomen;

2. Representing directly or by implication:

(a) That their customers or participants in their plan will have the services of an expert in planning their food purchases;

(b) That other sellers of food do not sell government-inspected meat;

(c) That each carton or package or food sold by them or any of them carries a United States Department of Agriculture inspection label;

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(d) That having their food inspected by United States inspection officials enables them to control the cost of food.

(e) That a participant is able to obtain a freezer and a supply of food for the same amount of money as would be required to obtain the same quantity of food if purchased in regular retail channels.

(f) That a participant is able to save enough to (1) pay for a television set, (2) remodel a home, (3) pay for a vacation, (4) buy an automobile, or (5) pay for a freezer.

3. Misrepresenting in any manner the savings afforded to respondents' purchasers.

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

It is further ordered, That the respondents named in the preamble of the order to cease and desist 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 said order to cease and desist.

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IN THE MATTER OF
PARKS CANNING COMPANY, INC., ET AL.

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

Docket 7200. Complaint, July 18, 1958—Decision, Feb. 12, 1959

Consent order requiring three associated corporate packers of seafood products and their exclusive sales agent in Seattle, Wash., to cease violating the brokerage section of the Clayton Act (Sec. 2(c)) by making sales to certain chains at reduced prices arrived at by giving up all or a large part of the brokerage earned by said sales agent on the sales; and—in cases where said sales agent acted as a primary broker for outside packers—by passing on brokerage to certain buyers or their agents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents Parks Canning Company, Inc., H. M. Parks Company, Inc., and Western Fisheries Company, hereinafter sometimes referred to as corporate respondents, are corporations organized, existing and doing business under and by virtue of the laws of the State of Washington, with their principal office and place of business located at 309 Colman Building, Seattle, Wash.

Respondent North Pacific Seafoods, hereinafter sometimes referred to as partnership respondent, is a copartnership composed of corporate respondents H. M. Parks Company, Inc. and Western Fisheries Company under the laws of the State of Washington, with its office and principal place of business located at 312 Colman Building, Seattle, Wash. Said partnership was formed in 1946 to act as a primary broker or exclusive sales agent for the corporate respondents named herein in connection with the sale and distribution of their seafood products. In addition to acting as a primary broker or exclusive sales agent for the corporate respondents named herein this respondent also acts to some