all the capital stock of a competitor, and remanding the case for further proceedings.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

For the second time we are called upon to consider the correctness of a ruling by the hearing examiner upon respondent's motion to dismiss at the conclusion of evidence in support of the Commission's complaint charging violation of Section 7 of the Clayton Act, as amended. On the earlier occasion, the hearing examiner denied the motion insofar as it related to the industrial steel wool market but granted it insofar as it related to the household steel wool market. He based his ruling in each instance upon the market shares of respondent and of the acquired company in the particular line of commerce involved. We reversed and remanded to the hearing examiner for his further consideration of the record. Now before us is the hearing examiner's initial decision, in which he has found that a *prima facie* case was not established by the evidence. Counsel supporting the complaint has appealed from that holding and the initial decision's order which would dismiss the complaint.

Respondent produces steel wool and steel wool products. In July, 1955, it acquired all of the capital stock of the Williams Company which processed similar products. The complaint alleges that the effects, among others, of that acquisition may be substantially to lessen competition and tend to create a monopoly in the production and sale of industrial and of household steel wool and steel wool products. The correctness of the hearing examiner's findings that industrial and household steel wool and steel wool products constitute separate and distinct lines of commerce within the meaning of the Act is not in issue in the present posture of the case. The appeal's exceptions instead are directed to the hearing examiner's conclusions that the record does not reveal reasonable probabilities of substantial lessening of competition or tendency to create monopoly.

At the outset, it is important to take particular note of the procedural posture in which the hearing examiner made his decision. In this regard, we believe that he has failed to evaluate the evidence in support of the case-in-chief in accordance with the Commission's previous directives. The sole task confronting the hearing examiner in initially considering the motion to dismiss at the close of the case-in-chief was to ascertain whether a *prima facie* case had been established. In the performance of that task the principle expressed in *Vulcanized Rubber and Plastic Company*, D. 6222, reiterated in the *Timken Roller Bearing Company* case, D. 6504, and recently reaffirmed in *Consolidated Foods Corporation*, D. 7000, decided March 4, 1960, should have been applied. The principle

involved, as well as its application, is a simple matter. It requires that on a motion made at this stage of the case, the evidence and inferences reasonably to be drawn therefrom should be viewed in the light most favorable to the complaint. We conclude that the hearing examiner failed to apply this principle and in consequence committed manifest error.

It seems to us that the hearing examiner's first ruling upon the motion which, upon appeal, we reversed and remanded, was unduly preoccupied with pursuing the so-called quantitative substantiality doctrine—in this case to a point unjustified by existing judicial precedents interpreting the requirements of Section 7 of the Clayton Act—and thereby gave overwhelming consideration to market shares to the complete exclusion of all other relevant economic factors. However, the hearing examiner in the initial decision now before us on appeal, with an ambivalence that we deem unjustified by our remand direction, seems repelled by that which he once embraced. He now ignores the great and perhaps conclusive weight to be given to these very same considerations when viewed in connection with an already existing heavy industry concentration and other relevant record facts. When we refused to adhere to the rigid yardstick utilized by the hearing examiner in his earlier ruling, and directed that he look at all the relevant facts of competition, we did not want to be taken to conclude that in certain situations the rigid yardstick of market shares might not only be extremely meaningful, but indeed perhaps conclusive under some circumstances on the issue of probability of competitive injury or tendency to monopoly. Obviously the more concentrated an industry, the more meaningful it becomes; indeed, the more meaningful any additional single evidentiary element bearing on this issue becomes.

With those guideposts in mind, we turn to the evidence supporting the complaint.

Industrial steel wool wares are sold into the paint and furniture manufacturing trades and to janitor supply houses and other jobbers. At the time of the acquisition in 1955, Brillo and Williams and five other producers were selling steel wool nationally in the industrial market. As found by the hearing examiner, Brillo in 1954 was the largest producer with 29.1% of the industrial market; and Williams was No. 4 with 18.2% of that market. He further found, among other things, that the evidence showed that the industrial market had continued to be as keenly competitive after the acquisition as before and that there was no record basis for concluding that it would not so continue. The appeal contends that probable substantial lessening of competition is evident from the large market share afforded respondent and that such adverse effects

will be greatly enhanced by other marketing and economic facts of record.[1]

The salient record information bearing on the general competitive situation in the industrial market and financial conditions of the producers included the following matters. Brillo's profit on net sales in 1955 was 5.1%. The limited data relating to S.O.S. indicate that its profit situation has been satisfactory. S.O.S., like Brillo, markets the great majority of its volume in the household market where profit margins substantially exceed those for the industrial line of commerce. The marginal type of operation from a profit standpoint which has resulted for one of the producers is evident from an exhibit received. Another company which had its first full year of operation in 1956 incurred substantial losses. The record points to profits of 4% on gross sales or less for the other producers.

Contributing to such low margins has been the excess plant capacity by all except Brillo and the circumstance that the industrial market has been a relatively static one. This has meant that to secure added volume a producer usually must induce buyers to switch from their established sources. The result has been keen and intense competition contributing to low prices and narrow profit levels.[2] In the light of these matters, it also is apparent that the handicaps to profitable operations and normal business growth

[1] Counsel supporting the complaint alternatively contended before the hearing examiner and argues here that because the evidence portraying the competitive and economic factors operating in the industrial market did not detract from inferences of lessened competition properly to be drawn from the size of the market shares involved, a *prima facie* case of probable anti-competitive effects was therefore established. When rejecting this, the hearing examiner stated such proposed standard would improperly shift the burden of proof to respondent and also contravene the rule of law expressed in the Commission's order of remand. We do not agree with the initial decision's concept of improper shifting of burden of proof inasmuch as it erroneously assumes that market share data have no evidentiary value in determining probable effects of the acquisition. The Commission's prior remand was based on the view that although market share data constituted an important evidentiary facet of the case, decision as to the presence or absence of a *prima facie* case was not to be based on market share evaluations to the exclusion of all other factors as the hearing examiner had originally done.

Nor did the Commission hold thereby that proof of violation would turn solely on whether the attendant competitive factors appeared affirmatively to enhance or give added impetus to adverse effects inhering in the expanded market share acquired. On the other hand, the hearing examiner's rejection of the rule of law advocated in the appeal perhaps had no effect on his instant disposition of the case inasmuch as he found that inferences of substantial lessening of competition were negated by competitive factors cited in the initial decision. However, to the extent the decisional formula pressed by staff counsel contemplates that no showing of added impetus to injury from surrounding competitive circumstances should ever be required if consequential market shares are involved, it is incorrect.

[2] Substantial increases in production and shipping costs for steel wool occurred in the years subsequent to 1950. However, the prices at which certain medium and coarser grades of steel wool were sold by the producers in the first nine months of 1956 were two cents per pound below those made effective by them in December, 1950; and Brillo's prices for such 1956 period were the same on its coarser grades as its prices of December 8, 1950. A representative of one of the producers testified his firm did not pass on increased production costs because it was not feasible to raise prices unless Brillo did so.

which exist in the industrial market impose formidable barriers to the success of new entrants into the field. Hence, conclusions of easy entry into the industry are of dubious validity.

The record additionally indicates great and progressively widening disparity in resources and sales volume between Brillo and the other producers excluding S.O.S. For example, in 1955, Brillo's total assets were $5,234,000 and its surplus $3,259,000. Excluding Williams and S.O.S., the aggregate sales of the remaining producers in the composite industrial and household markets were substantially less than Brillo's surplus. Further illustrating that disparity is the more than 1.4 million dollars spent by Brillo on advertising in that year, primarily for promoting the sale of its household line. American, the third ranking producer in the total steel wool field, with a market share of 4.5% in that year, had a volume of $1,311,654. Its market share for that year in industrial steel wool was 20.3%. In the period 1950–56, the smaller producers lost market shares in the industrial line of commerce and Brillo progressively gained. The record supports reasonable inferences that none of the smaller producers engaged exclusively in marketing steel wool has made appreciable financial growth in the half-decade preceding the acquisition.

Another issue concerns the impact, if any, upon competition resulting from Brillo's access to the plant facilities involved in the acquisition. Brillo's plant is located in Brooklyn and the Williams' factory is in London, Ohio. Steel wool manufacturers traditionally have sold at freight prepaid prices based on three zones which zone areas vary slightly among the producers. The eastern or first zone price has been one cent below the central zone and two cents under that for the far west. All producers are located in the first zone, however, and their zone differentials look to partially compensating them for added freight costs into distant markets. The hearing examiner found (1) that the potential freight savings afforded by Brillo's control of midwest production facilities would not appreciably improve its competitive position; (2) that conclusions that respondent would lower prices among markets in proportion to freight savings would be based on far-fetched assumptions that it would abandon the traditional zone system for selling industrial steel wool; and (3) that to find that anti-competitive effects instead of enhanced competition might result from price reductions would be to insulate weak competitors from the rigors of competition and be inconsistent with the public policy underlying the antitrust laws.

Low prices when used in competitive settings enabling sellers to achieve monopolistic power are but a prelude to higher prices.

The goal of amended Section 7 therefore is to preserve competition to the end that competition may preserve low prices. Hence, in cases of proved likelihood of anti-competitive effects, the fact that the statutory remedy will reduce undue competitive handicaps for the violator's rivals is no bar to corrective action. A chart attached to the appeal brief indicates that very substantial freight savings can be realized by shipping from London, Ohio, instead of Brooklyn or vice-versa. For example, the savings through Ohio shipments to ten typical cities in the south, southeast, midwest, southwest and west average $1.45 per hundred pounds on an l.c.l. basis and approximately $1.00 on a carload basis. The choice of shipping points made available to respondent by the acquisition accordingly affords substantial freight savings to respondent.

Nor is it reasonable to conclude that respondent may never elect to abandon the industry's present zone pattern of pricing. It is the only industry member having two production points; and it is the price leader in the industrial field.[3] Were Brillo to lower its prices in areas where it has freight advantages over competitors, retaliatory decreases based on corresponding savings by individual producers with single production points necessarily would involve fewer markets. Also, instead of abandoning zone pricing, respondent could formulate area prices differing as between Brillo and Williams. Differing prices between the two companies in fact prevailed in the first nine months of 1956, Williams being lower on some grades than respondent and its competitors. The dual plant aspects of the acquisition, accordingly, represented a material change in competitive patterns theretofore existing in the industrial line of commerce for steel wool and its potential for strengthening respondent's marketing power or handicapping or foreclosing other producers in some markets is evident.

The foregoing economic factors affecting the industrial line must, of course, be regarded in the context of the highly concentrated

[3] The briefs in support of and in opposition to the appeal contained extended arguments on whether the respondent has been the price leader in the industrial field. The hearing examiner found it was not. Inasmuch as this is not a Sherman Act proceeding, the absence of such market power is not controlling to decision; but if present, it is a relevant market factor of which due regard should be taken. To analyze all the evidence bearing on this issue would unduly lengthen this memorandum. It suffices instead to note that general price increases for industrial wares occurred in December, 1950, August, 1954, January, 1956, and October, 1956. Brillo was the first to promulgate prices at those times. It is true that most of the producers were selling their coarser grades at two cents above Brillo for an extended period and later, up to January, 1956, sold at one cent over Brillo. Such differentials do not signify, however, that Brillo was merely following the leadership of other producers when raising its prices. This holds true because the new prices established by it on some grades usually exceeded those of its rivals on such grades. Brillo alone had the ability to initiate price movements upward which would be followed by other or like raises on the part of the remaining producers. The record thus supports reasonable inferences that respondent was the leading factor in the industrial market as early as 1950 and subsequently established price leadership.

market structure resulting from the acquisition. Respondent, which had 29.1% of the industrial market in the year prior to the acquisition, gained control of a competing enterprise which had 18.2% of that market. Thus the expanded market share controlled by respondent represented 47.3%. The record further shows, among other things, that there had been progressive losses of market shares in the industrial line of commerce by the smaller producers for several years preceding the acquisition and concomitant gains by Brillo and that the great disparities in financial resources which theretofore existed between respondent and all but one of the other producers were widened by the acquisition. In view of all those factors, we believe that the hearing examiner erred in failing to find that a *prima facie* case of statutorily proscribed adverse effects in the industrial line of commerce was established by the record.

As to the household line of commerce, Brillo's share of such sales in the year prior to the acquisition was 45.3%, that for S.O.S. amounted to 50.9%, and Williams had 0.3%. The shares of American and Durawool, the only other producers selling in the household market, were 1.4% and 0.3%, respectively. The hearing examiner found the acquisition lacking in competitive impact on the smaller producers inasmuch as they had been unwilling or unable to incur the substantial expenditures for advertising required for gaining consumer acceptance and access to retail outlets in the household field. We think it evident from the record, however, that the failure of Durawool and American to emulate Brillo and S.O.S. by engaging in national advertising has stemmed from financial inability, not unwillingness. The high entry fee in that respect also explains why certain of the other steel wool manufacturers who are factors in the industrial steel wool field do not try to sell in the household market.

Other record considerations also detract from the initial decision's conclusions that the acquisition would have no adverse effects on the smaller producers. One of the reasons for Brillo's acquisition was the inadequacy of its own plant facilities for meeting anticipated sales demands. After the acquisition, Williams' production was increased over 400% for making Brillo products. Thus, Brillo's access to added production capacity has strengthened it competitively and as a corollary tended to widen the disparities in competitive capacities for entering or surviving in the household field which theretofore existed between Brillo and the smaller producers.

The initial decision's conclusions of lack of anti-competitive effects in the household line also must be weighed with due regard to any tendencies to industry concentration which may appear. This is

warranted because there may be lessening of competition or tendency to monopoly if a merger substantially increases concentration. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 (S.D.N.Y., 1958).

In 1950 and up into 1954, there were six producers selling in the household market. In the latter year, S.O.S. acquired Cleanser whose market share was 1.8%. In 1953 respondent and S.O.S. had 95.7% of the market, their shares being 45.4% and 50.3%, respectively. The share held by Williams was 0.3% in 1954 and 1955. In 1956, the combined share of the Big Two, including that of the affiliated Williams, was 98.5%. In 1953, American (1.6%) and Durawool (0.2%), accounted for 1.8% of the household market; in 1956, their combined share was 1.5%. Brillo's share in 1953 was 45.4% as noted above, and 45.3% in 1954, and in 1956 Brillo's combined share with Williams was 46.5%. It thus appears that between 1953 and 1956, the combined shares of the small producers slightly decreased percentagewise, the shares held by the two large producers increased both individually and in the aggregate, and the number of independent companies competing in the household field declined by one-third or 33⅓%.

Bearing in mind that aggravation of an existing oligopoly framework comes within the statutory concept of "tend to create a monopoly," *United States* v. *Bethlehem Steel Corp.*, *supra*, p. 607, the foregoing market facts reasonably support the inference that respondent's acquisition has operated to intensify the marked concentration which theretofore existed in the household field. It therefore is not controlling that the share held by Williams was a fraction of one percent. The Act also encompasses minute acquisitions which tend to monopoly. *United States* v. *Brown Shoe Co.* (D.C. Mo., 1959; CCH Trade Reg. Rep. 69531). We think the hearing examiner erred in failing to find that a *prima facie* case of statutorily proscribed adverse effects in the household line of commerce was established by the record.

Viewing the evidence in this record and inferences to be drawn therefrom in the light most favorable to the complaint, we conclude that a *prima facie* case has been established of statutorily proscribed adverse effects in both the industrial steel wool and in the household steel wool lines of commerce and that the hearing examiner erred by dismissing the complaint. In the present posture of the case we, of course, draw no conclusions on the merits. Respondent will have ample opportunity to rebut, explain or contradict the proof adduced in support of the complaint in the next stage of the proceeding.

Finally for determination is the appeal of counsel supporting the complaint excepting to the hearing examiner's refusal to regard

the composite industrial-household market as a statutory line of commerce and find violation therein. In this connection we find counsel in support of the complaint on somewhat thin ground. First, with respect to the pleadings, it would require the broadest possible interpretation of the complaint to disagree with the hearing examiner's conclusion that the position of counsel supporting the complaint is "contrary to the allegations of the complaint." Moreover, both the theory of presentation and the substance of the evidence in support of the case-in-chief indicates that perhaps this proposition may have been an afterthought. We concur with the hearing examiner's conclusion on this matter. This aspect of the appeal is denied.

The appeal of counsel supporting the complaint, except as above indicated, is granted. The initial decision accordingly is being vacated and set aside and the case remanded to the hearing examiner for further proceedings consistent with this opinion.

Chairman Kintner and Commissioner Tait concur in the result.

ORDER

This case having come on for hearing upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint for failure to establish a *prima facie* case; and

The Commission, for reasons stated in the accompanying opinion, having determined that the hearing examiner erred, and having granted the appeal:

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this case be remanded to the hearing examiner for further proceedings.

Chairman Kintner and Commissioner Tait concurring in the result.

REYNOLDS METALS COMPANY

Docket 7009. Order and Opinion, Mar. 30, 1960

Order denying petition to reopen proceeding to adduce new evidence and modify desist order of Jan. 21, 1960 (p. 743 herein).

ON PETITION TO REOPEN PROCEEDING

By TAIT, *Commissioner:*