

ASHEVILLE TOBACCO BOARD OF TRADE, INC., ET AL.

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

Docket 6490. Modified order, Oct. 18, 1960

Order, following remand by the Court of Appeals for the Fourth Circuit, clarifying the desist order of Feb. 14, 1958, 54 F.T.C. 1043—requiring the Ashe-

ville Tobacco Board of Trade to discontinue unlawful restraints on new tobacco auction warehouses in the Asheville, N.C., area—by modifying paragraphs "1" and "2".

MODIFIED ORDER TO CEASE AND DESIST

The Commission having issued its tentative modified order to cease and desist in this matter on March 19, 1959, and respondents having filed objections to such tentative action and having requested that the matter be reopened for the receipt of evidence concerning developments on the Asheville tobacco market subsequent to the closing of the record herein, and the Commission, by order dated July 20, 1959, having reopened the proceeding and remanded it to the hearing examiner for the purpose of receiving such evidence; and

The hearing examiner having held hearings pursuant to said order of July 20, 1959, and having filed his report upon the evidence; and

The Commission having considered said evidence and the aforesaid objections filed by respondents and, for the reasons appearing in the accompanying opinion, having adopted the tentative modified order to cease and desist, issued on March 19, 1959, as the final order of the Commission:

It is ordered, That respondents, Asheville Tobacco Board of Trade, Inc., a corporation, and Max M. Roberts, President and director, J. Carlie Adams, Vice President and director, Fred D. Cockfield, Secretary-Treasurer and director, Jeter P. Ramsey, ex officio Assistant to the Secretary, Supervisor of Sales and General Director of the Asheville market, L. G. Hill, director, James W. Stewart, director, and James E. Walker, Jr., director, all individually and as officers and directors of Asheville Tobacco Board of Trade, Inc., and James E. Walker, Jr., and John B. Walker, part owners, co-managers and operators of Bernard-Walker Warehouses; J. Carlie Adams and Luther Hill, co-partners trading under the name and style of Adams & Hill Warehouses; Farmers Federation Cooperative, Inc., a corporation, leasing and operating Carolina Warehouse; Fred D. Cockfield, and James W. Stewart, co-partners trading under the name and style of Planters Warehouses; Sherrod N. Landon, J. W. Moore, E. G. Anderson, J. E. Godwin, Beverly G. Connor, W. G. Maples, members of Asheville Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase, selling or offering for sale leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Com-

mission Act, do forthwith cease and desist from devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy or practice which:

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

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to $3\frac{1}{2}\%$, or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse; or

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

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

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

An order to cease and desist was issued by the Commission in this matter on February 14, 1958. Thereafter, the order was reviewed by the United States Court of Appeals for the Fourth Circuit, and in an opinion, issued on January 20, 1959, the Court remanded the case to the Commission for the purpose of correcting an ambiguity in the Commission's order and to permit the Commission to "give further consideration to the questions which have arisen in this case and are discussed in this opinion * * *."

In conformity with the views expressed in the Court's opinion, the Commission on March 19, 1959, issued a tentative modified order to cease and desist together with an opinion explaining its position with respect to various questions discussed by the Court. Also, by order issued March 19, 1959, the Commission granted respondents leave to file objections to its tentative action on the remand of the case from the Court of Appeals.

The modified order would require respondents, in connection with the movement of tobacco in interstate commerce, to cease and desist from—

* * * devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy or practice which:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the size and capacity of a new entrant;
2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to $3\frac{1}{2}\%$, or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse; or
3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville tobacco market, or any other warehouse doing business on that market, from competing therein on a fair and equal basis.

On June 2, 1959, respondents filed objections to this order contending, *inter alia*, that it would have an adverse competitive effect on the Asheville tobacco market and further contending that developments in the market subsequent to the date on which the record in this matter was closed demonstrates the inappropriateness of the tentative action of the Commission. Respondents requested, therefore, that the case be reopened for receipt of evidence which they contended would show that there is an excessive amount of floor space in the Asheville market, that a building war is now in progress in that market, that one warehouse firm is going out of business and that another threatens to monopolize the market, and that the Commission's order has promoted overbuilding, a tendency to monopolize and the prospect of elimination of the smallest warehouse firm on the market.

By order dated July 20, 1959, the Commission reopened the proceeding and remanded the case to the hearing examiner for the purpose of receiving "such evidence as the respondents may offer tending to prove by facts subsequent to the closing of the record the current competitive situation on the Asheville tobacco market." Pursuant to this order, hearings were held in Asheville, North Carolina, and Washington, D.C., for the reception of evidence offered by respondents and for reception of rebuttal evidence, and after counsel had been given opportunity to submit proposed findings and conclusions, the hearing examiner made his report on the evidence.

We have reviewed the entire record on remand, including the proposed findings and the hearing examiner's report, and are of the opinion that the evidence does not support respondents' contentions with respect to the current competitive situation on the Asheville market, nor does it indicate that the tentative action of the Commission may have an adverse effect on competition in this market. We will discuss briefly the evidence relating to the major points covered in respondents' offer of proof.

To support their contention that the Asheville tobacco market is overbuilt, respondents rely primarily on the testimony of several warehousemen, some of whom are named individually as respondents in this case. These witnesses testified generally to the effect that they had more space than they needed for the sale of tobacco and that they kept or acquired this extra space solely for the purpose of retaining their selling time. The evidence offered in rebuttal, however, reveals that every warehouse operating in the Asheville market during the 1959-1960 auction was utilized for the sale of tobacco and that at the beginning of the sale all warehouses, with possibly one exception, were full of tobacco. It also appears that at least one warehouse was in such poor condition as to be unfit for the sale of tobacco but was, nevertheless, used for this purpose during the 1959-1960 selling season. The testimony of respondent warehousemen is also contradicted by other evidence. Mr. Robert S. Witherington, sales supervisor for the Asheville tobacco market, testified to the effect that there was no overexpansion of the Asheville market and that the congested condition which existed in the warehouses during the first part of the 1959-1960 selling season could occur again next season.

Other evidence upon which respondents rely to support their position that there is too much floor space on the Asheville market relates to the evils of overbuilding. According to the testimony of two experts, Mr. Stephen E. Wrather, Director of the Tobacco Division of the Agricultural Marketing Service, United States Department of Agriculture, and Mr. Albert G. Clay, President of the Burley Auction Warehouse Association, overbuilding of warehouses on a tobacco market leads to speculation by warehousemen, increase in the warehousemen's commission rates, and various sharp practices detrimental to the producer. There is no direct evidence in the record, however, that these conditions exist in the Asheville market. As a matter of fact, there is ample evidence in the record to support the conclusion that insofar as the producers and buyers are concerned, conditions in the Asheville market have improved considerably within the past few years.

Respondents have also failed to show that a building war is in progress in the Asheville market or that there is any likelihood of one in the future. Although several warehousemen gave notice of their intention to build at the April meeting of the Board of Trade in 1958 and 1959, no new warehouses were built and no notices of this kind were filed in 1960. Mr. Witherington testified that he had been sales supervisor for the Asheville market since 1957 and that during that time there had been no building war and

no actual threat of one. The record also discloses that only two new tobacco warehouses have been built in Asheville within the last five years, one by Mr. C. T. Day and the other by the warehouse firm of Adams & Hill Warehouses. It also shows that in 1954 there were twelve tobacco warehouses in the Asheville market with total floor space of 611,326 square feet and that this year there are nine warehouses with total floor space of 517,701 square feet.

Since the record fails to indicate that there has been a building war on the Asheville market, we find no substance to respondents' contention that the Carolina warehouse was withdrawn from the market because its owner, Farmers Federation Cooperative, did not have the financial resources to compete in a building war. The hearing examiner concluded from his review of the evidence that this warehouse had been withdrawn from the market by the Farmers Federation Cooperative because it had added little and sometimes no profit to that organization's business for many years. We agree with this conclusion.

Respondents also stated prior to the reopening of this proceeding that warehouseman Day is threatening to monopolize the Asheville market. They do not urge this point in their proposed findings, however, and the only evidence cited in support thereof relates to the amount of floor space owned by Day. It is our opinion that there is nothing in the record to support respondents' offer of proof concerning the possibility of a single firm monopolizing the Asheville market.

Respondents have also contended throughout the proceeding that because of the Commission's proposed order various warehouse firms have allowed entire warehouses to remain unused year after year solely for the purpose of retaining selling time. We do not understand this argument since there is nothing in our modified order which could be construed as a requirement that selling time be based in any manner upon the amount of floor space in an established warehouse as distinguished from a new entrant on the market. We think that the condition complained of by respondents, insofar as it exists, has been brought about, not by the Commission's tentative action, but by the rule of the Board of Trade which arbitrarily limits the loss of selling time allotted to a warehouse to $3\frac{1}{2}\%$ of the selling time allotted to the warehouse for the preceding season. In other words, by reason of this limitation on loss of selling time, a warehouse that has received a time allotment can remain unused for a long period of time without losing an appreciable amount of such selling time. For example, a warehouse can remain unused for ten years and still retain about 70% of its original allotted time. The

Commission's order would prohibit this unreasonable limitation and thereby tend to discourage the practice of holding unused space solely for the purpose of retaining selling time.

In the aforementioned objections filed by respondents to the tentative action of the Commission, the argument is made that the Commission failed to give due weight to the views expressed by the Court of Appeals by adopting an inhibition which would require the Asheville Board of Trade in allotting selling time to a new warehouse, to "take into account and give reasonable credit for the size and capacity of a new entrant." One of the principal reasons for adopting this inhibition is set forth in the opinion accompanying our Tentative Modified Order. On page 4 of that opinion we state:

This [the conclusion that a provision in respondents' regulations which excludes size and capacity as a factor in allotting selling time to a new warehouse for the first year of its operation is unduly restrictive of competition], we think, is true even though, as the Court states, the competitive position of a new warehouse may be improved in subsequent years under the performance system by the utilization of free time, no matter what the initial allotment to the warehouse may be. There is no certainty, however, that an appreciable amount of free time will be available to a new warehouse. The record shows that new competition on the Asheville market in 1954 enlivened the market and resulted in improved and more efficient services by the established warehouses to the farmers. More vigorous competition for the farmers' business by all warehousemen may result in the utilization of all, or nearly all, their allotted selling time, thus practically freezing the allotted time of a new warehouse to its allotted time the first year of its operation.

Our prediction appears to be borne out by the showing in the record [Respondents' Exhibit 20] of the difference between the ratio of allotted time to actual sales of individual warehouse firms for the 1954-1955 selling season and the ratio of allotted time to actual sales of these firms for the 1958-1959 season. The earlier ratio shows a great disparity between the percentage of allotted time and the percentage of total sales for certain firms, thus indicating that free time was readily available. The ratio of allotted time to actual sales was considerably lower for the 1958-1959 season, thus indicating that the individual warehouse firms utilized all or nearly all of their allotted time.

Respondents have made one other objection to the Tentative Modified Order which should be mentioned. The second paragraph of this order reads as follows:

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to 3½%, or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse.

Respondents claim that the underlined portion of this inhibition is so indefinite that it would require them to operate at their peril and under a cloud of uncertainty and that the Commission must confine its order to the 3½% limit only.

This argument must also be rejected. Respondents have violated the law and the order imposes upon them the burden of establishing that any gain or loss limitation rule which they adopt is reasonable. The order requires in this connection that respondents file with the Commission a report setting forth in detail the manner and form in which they have complied with such order. Thus, a showing of the reasonableness of any gain or loss limitation rule which they propose to adopt should be made by respondents when the compliance report is filed and the Commission will determine at that time whether such rule complies with the order. This procedure will eliminate any uncertainty as to the propriety of respondents' future operations insofar as this inhibition is concerned.

The tentative modified order to cease and desist, issued by the Commission on March 19, 1959, is hereby adopted as the final order of the Commission. The Commission, having considered the various questions discussed by the Court and having modified the first two paragraphs of the order to cease and desist in conformity with the views expressed in the Court's opinion, has fully complied with the direction of the Court of Appeals on the remand of this case.

IN THE MATTER OF
ORSI, INC., ET AL.