

IN THE MATTER OF
BROWN SHOE COMPANY, INC.

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

Docket 7606. Complaint, Oct. 13, 1959—Decision, Feb. 20, 1963

Order requiring the nation's second largest shoe manufacturer, an integrated company operating at all levels of the shoe industry, to cease unlawfully restraining competition by such practices as enforcing a provision in its franchise agreements with independent retail shoe store customers which required them to restrict their purchases of shoes to its lines and prohibited their stocking of competing lines, giving them in return special benefits in-

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cluding free signs, business forms and accounting assistance, participation in lower cost group fire, public liability, robbery, and life insurance, and special below-list prices on canvas and waterproof footwear; and to cease requiring its retail shoe store operator customers to adhere to its suggested resale prices, and maintaining continuous pressure upon them to insure that they did not depart from the minimum resale prices it fixed.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of Section 5 of said Act (U.S.C., Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent, Brown Shoe Company, sometimes hereinafter referred to as "Brown", is a corporation organized under the laws of the State of New York with its office and principal place of business located at 8300 Maryland Avenue, St. Louis, Missouri.

PAR. 2. Brown is an integrated company operating at all levels of the shoe industry. Prior to 1950, it was primarily engaged in the manufacture and distribution of shoes at the wholesale level. Since 1951, through the acquisition of retail shoe stores Brown has become a substantial and large retailer of shoes. Brown owns and operates 48 factories and warehouses in 41 different cities located in 7 States. Brown's total sales of \$236,946,078 for its fiscal year ending October 31, 1957, make it the world's second largest manufacturer and seller of shoes.

Brown's shoes are marketed by three separate methods or plans: (1) through independent retail shoe stores which have entered a franchise agreement with Brown or one of its divisions or subsidiaries; (2) through wholesale sales to independent shoe stores, chains and mail order houses; and (3) through approximately one thousand company-owned retail stores.

Brown's shoes are sold under a wide variety of trade names. The Kinney and Regal brands are sold only through Brown owned retail stores bearing those names. Brown shoes for men are trade named Educator, Pedwin, Roblee, Stuart Holmes, and Style-Craft. Brown shoes for women are marketed under the trade names Air Step, Connie, Educator, Glamour Debs, Jacqueline, Life Stride, Marquise, Naturalizer, Natural Poise, Paris Fashion, Revette, and Risque. The

Brown manufactured children's shoes bear the names Buster Brown, Educator, Official Boy Scout, Official Girl Scout, Propr-bilt, and Robin Hood. All of the Brown shoes retail in the medium price field. In addition, shoes are sold to retail chain and mail order houses for resale under the private brand names of the customers.

PAR. 3. The shoes manufactured or distributed by Brown have been, and are being, sold by Brown through its divisions and subsidiaries to purchasers located throughout the several States of the United States, the territories thereof, and in the District of Columbia. The respondent causes said shoes to be transported and shipped from the various places of manufacture to purchasers thereof who are located in States other than the State where said shoes were manufactured, and there has been and is now a constant and continuous current and flow of said shoes in interstate commerce. Respondent, therefore, is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of shoes in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business in commerce, Brown, through its Brown Franchise Stores division, has been and is now engaged in unfair methods of competition and unfair acts or practices in that it has entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown. Customers who have entered into such agreements or franchises with Brown are termed "Brown Franchise Stores", and are afforded special treatment and given certain benefits, hereinafter described, which are not granted to the Brown customers who do not enter into such agreements or franchises.

PAR. 6. At the present time, there are approximately 650 Brown Franchise Stores located in forty-seven of the States of the United States. Total sales by Brown to the Brown Franchise Stores in Brown's fiscal year ending October 31, 1957, were \$21,724,564.

Brown Franchise Stores are, for the most part, "family type" stores selling a complete line of shoes to fit every member of the family. They are mostly located in the towns and smaller cities and only one Franchise Store is appointed in each town or small city.

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PAR. 7. Among the valuable benefits or services received by Brown Franchise Stores from, or through, Brown are free signs, business forms and accounting assistance; participation in lower cost group fire, public liability, robbery, and life insurance policies; and special, below list prices on U.S. Rubber Company canvas and waterproof footwear.

As consideration for the above-enumerated services, the Brown Franchise Store is required to concentrate its purchasing to the grades and price lines of shoes sold by Brown and to refrain from stocking and selling the shoes of competitors of Brown. The Standard Brown Franchise agreement provides that the franchisees will:

1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company.

PAR. 8. Dealers who violate the above-described agreement, by buying and stocking shoes manufactured and sold by competitors of Brown, are dropped from the Franchise program and are deprived of the hereinbefore-described valuable benefits attendant thereto. Acting on instructions from Brown, the insurance companies which write the Brown-sponsored, term group fire, public liability, robbery and life insurance policies covering Brown Franchise Stores, refuse to renew the policies of recalcitrant dealers. Also acting on instructions from Brown, the United States Rubber Company charges recalcitrant dealers higher prices for canvas and waterproof footwear. Furthermore, Brown itself withdraws and refuses to grant to dealers dropped from the Franchise program, the free signs, business forms, accounting assistance and other services and benefits granted to dealers under the Franchise program.

PAR. 9. The purpose, intent or effect of the aforesaid methods, acts and practices of the respondent has been, is, or may be, substantially to lessen, hinder, restrain and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and handling shoes of competitors of Brown; to exclude, or to tend to exclude, competitors of Brown from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of Brown from a substantial share of the retail-dealer market in many trade areas; to appropriate to Brown the exclusive right to supply substantially the entire purchased shoe requirements of a substantial number of retail shoe dealers; and to enhance further the dominant position of Brown in the shoe industry and thereby to tend to create a monopoly in Brown in the purchase and sale of shoes in interstate commerce.

COUNT II

PAR. 10. Paragraphs 1 through 4 of Count I are hereby incorporated by reference and made a part of this charge as fully and with the same effect as though here again set forth verbatim.

PAR. 11. Through its sales divisions and subsidiaries, Brown sells its branded shoes to more than fifteen thousand independent retail shoe stores located in each of the States of the United States and in the District of Columbia.

In many trade areas throughout the country, the independent retail shoe store customers of Brown compete with each other or with Brown owned retail stores in the resale to the public of Brown manufactured shoes.

PAR. 12. In the course and conduct of its business of selling branded shoes to independent retail shoe stores, Brown has been, and is now, engaged in unfair methods of competition and unfair acts or practices in commerce, in that it forces and requires or attempts to force and require its retail shoe store operator customers to agree to maintain arbitrary, noncompetitive resale consumer prices fixed and promulgated by Brown.

PAR. 13. Brown regularly publishes and distributes to its retail shoe store operator customers price lists or catalog sheets which contain the consumer prices to be observed by said customers.

Frequently Brown publishes said consumer prices in full page advertisements in magazines having national circulation.

Through its representatives and officials, Brown maintains continuous pressure upon its retail shoe store operator customers to insure that they do not depart from or sell below the minimum resale prices fixed by Brown. Customers who do advertise or sell at prices below the agreed minimum are immediately contacted by a Brown representative, who is instructed to secure the operator's adherence to the fixed minimum prices by persuasion, but if that fails, to threaten and inform the customer that Brown will discontinue doing business with it.

PAR. 14. By means of the aforesaid unlawful agreements, which respondent enforces or attempts to enforce by coercion and threats, plus the distribution of the aforesaid price lists and the publication of prices in national magazines, Brown has illegally fixed, controlled and maintained, or attempted to fix, control and maintain, the prices at which shoes manufactured and distributed by it are resold to consumers.

PAR. 15. The acts and practices of Brown as alleged in Counts I and II of this complaint are all to the prejudice of competitors of Brown and to the public; have a tendency to hinder and prevent,

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and have actually hindered and prevented, competition in the purchase and sale of shoes in commerce; have a tendency to obstruct and restrain, and have actually obstructed and restrained, such commerce in shoes; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. James P. Timony supporting the complaint.

Bryan, Cave, McPheeters & McRoberts, of St. Louis, Mo., by *Mr. R. H. McRoberts*, *Mr. Gaylord C. Burke* and *Mr. Edwin S. Taylor*, for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

JANUARY 25, 1962

The Federal Trade Commission issued its complaint against the respondent on October 13, 1959, charging that it has entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require these customers to restrict their purchasers of shoes for resale to the respondent's lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of respondent; and in a separate count, charging that it forces and requires, or attempts to force and require, its retail shoe store operator customers to agree to maintain arbitrary, noncompetitive resale consumer prices fixed and promulgated by respondent. The complaint charged that these practices, alleged in both counts of the complaint, constituted unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act. Respondent's answer denied generally the allegations of the complaint, although minor factual allegations were admitted.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint and oral argument thereon. At the close of the presentation of the Commission's case, respondent moved for dismissal of the charges on the grounds that a prima facie case had not been established. The hearing examiner elected to defer ruling upon this motion until the close of all the evidence in the case. The hearing examiner now hereby denies the motion to dismiss the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both

parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom, and issues the following order:

FINDINGS AS TO THE FACTS

COUNT I

1. Brown Shoe Company, Inc. (referred to in the complaint as Brown Shoe Company; hereinafter sometimes referred to as "respondent" and as "Brown"), is a New York corporation with its office and principal place of business at 8300 Maryland Avenue, St. Louis County, Missouri.

2. Respondent has among its wholly owned subsidiaries G. R. Kinney Corp., Regal Shoe Company, Wohl Shoe Company, Bourbeuse Shoe Company, and Moench Tanning Company., Inc.

Respondent is primarily engaged in the manufacture and distribution of a broad line of medium-priced, nationally advertised shoes for men, women, and children. These shoes are marketed principally by sales at wholesale to independent retail shoe store customers. In 1959, respondent was actively selling to approximately 6,000 independent retail shoe stores.

Respondent and its subsidiaries have over fifty manufacturing plants, tanneries and warehouses in ten States of the United States and in Canada.

3. Wohl Shoe Company (hereinafter referred to as "Wohl") is a wholly owned subsidiary of respondent, and is a Missouri corporation with its principal office at 1601 Washington Avenue, St. Louis, Missouri. Wohl sells shoes at wholesale to independent retail customers and also at retail to consumers.

Wohl sells women's shoes at wholesale to approximately 3,200 customers located throughout the United States and the District of Columbia. In 1958 there were 208 of these customers operating on the "Wohl Plan". A Wohl plan account is an independent retail outlet which is partially financed by Wohl and generally buys most of its women's shoes from Wohl. In addition, Wohl retails primarily women's shoes, but also some children's and men's shoes. In 1958 Wohl was selling at retail through 457 leased departments in 243 stores.

Regal Shoe Company, a wholly owned subsidiary of respondent, is a manufacturer and retailer of men's medium-priced shoes. In 1958 Regal had a chain of 92 retail outlets in which its shoes were sold.

The G. R. Kinney Corporation is a wholly owned subsidiary of respondent. It operates a chain of family shoe stores and manu-

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factures and sells men's, women's, and children's popular-priced shoes. In 1959 it owned and operated 488 retail stores.

4. Respondent has separate selling divisions through which it markets its brands of shoes. The principal brands and the divisions selling them are:

<i>Division</i>	<i>Brand</i>
Air Step.....	Air Step
Buster Brown.....	Buster Brown
	Glamour Debs
	Official Boy Scout
	Official Girl Scout
	Propr-Bilt
Life Stride.....	Life Stride
Naturalizer.....	Naturalizer
Risque.....	Risque
Robin Hood.....	Robin Hood
	Robinettes
Roblee.....	Roblee
United Men's.....	Buster Brown
	Official Boy Scout
	Pedwin

Each of these sales divisions has its own sales manager and its own sales force. A retailer who sells respondent's shoes will be called on by a salesman from each division whose brand he carries. Each of the sales managers of the sales divisions is responsible to the vice president in charge of sales.

5. In 1957, Brown conducted the largest consumer advertising campaign in the shoe industry, spearheaded by 52 color pages in Life Magazine and 58 additional pages in other leading national magazines.

6. Respondent's sales for the fiscal year ending October 31, 1959, including the sales of its subsidiaries at wholesale and at retail, were \$276,549,164. Respondent is second in dollar sales and third in pairage production among shoe manufacturers in the United States.

7. Respondent has been, and is now, in competition with other corporations, individuals, and partnerships engaged in the manufacture, sale, and distribution of shoes in interstate commerce.

8. Respondent manufactures shoes in six States of the United States. Respondent causes its shoes to be transported and shipped from these places of manufacture to retail shoe customers who are located in each of the States of the United States and the District of Columbia. There has been, and is now, a constant and continuous current and flow of said shoes in interstate commerce.

9. Another division of respondent is the Brown Franchise Stores Division. The personnel of this division includes the headquarters staff comprised of three men, one of whom is the manager of the division, and 16-salaried fieldmen who visit the franchise stores. The

franchise stores division is responsible to the vice-president in charge of sales.

10. During a recent 5-year period, 200 stores entered the program. In November 1959, there were 682 stores on the program, and in October 1961, the total had risen to 766.

11. Of the retailers operating on the franchise program, about 259 have entered into written Franchise Agreements with respondent. In recent years written agreements have not been made with newcomers to the program. There is no difference in respondent's policy toward those franchise holders who have signed the agreement and those who have not, and the rights and obligations of both groups are the same. The total sales of respondent to retail stores on the franchise program for the fiscal year ending October 31, 1959, was \$24,675,617.

12. For the benefits and services which dealers on the franchise program who entered into written agreements will receive, they agreed that:

In return I will:

1. Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company.

This provision has been in effect since 1949 or 1950. The preceding Brown Franchise Contract provided that the Franchise Agreement terminated if the franchise dealer purchased shoes from any manufacturer other than Brown.

13. Among the benefits and services which a dealer will receive by being on the franchise plan are: architectural plans, service of a field representative, merchandising records, retail sales training program, accounting system, national and regional meetings, and group purchasing of insurance, rubber footwear, and display material.

14. The retailer on the franchise program obtains the service and assistance of field representatives who give advice and suggestions on merchandising, sales promotion, personnel, accounting and record-keeping, and on other matters. In addition, these fieldmen will conduct a sales clinic or a salesmanship lecture for store personnel, and counsel a prospective franchise holder on the location of his store and terms of the lease.

15. Fieldmen call on the franchise holders from 2 to 10 times a year and work exclusively with dealers on the franchise program; except when calling on other dealers to persuade them to go on the program, and during the "conversion" period when a dealer is about to go on the program.

16. Fieldmen assist in filling out monthly reports by the franchise holders. This report is sent to the respondent and shows the performance of each line for that month and the ending inventory. Fieldmen also help fill out the buying guide for the franchise holders. This buying guide is used in restocking a store, and helps the dealers determine the amount of shoes he will buy for the season. The buying guide contains statistics taken from the monthly reports, so that the franchise holder knows the performance of all his lines at the end of each season. The buying guide is prepared prior to the two buying seasons, which are spring and fall.

17. The accounting and recordkeeping system furnished through the franchise program is a complete record system for a shoe store. Franchise holders are given a continuing supply of these forms. One of the forms supplied is the monthly report, which the Franchise Agreement requires to be made regularly, but which many dealers make less frequently.

18. Respondent has an architectural department that will completely design a new store or draw plans to remodel an existing store in its entirety. As many as half of the franchise holders have used this service. Although the service is available to other retailers who concentrate on respondent's shoes, 70-75 percent of the architects' time is devoted to working on plans for franchise stores.

19. Under an arrangement with U.S. Rubber Company, respondent receives a commission on purchases of U.S. Rubber Company footwear by dealers on the franchise program. For the fiscal year ending October 31, 1959, respondent received commissions totaling \$171,417. Respondent pays U.S. Rubber Company for the canvas and waterproof footwear purchased by the franchise dealers. U.S. Rubber Company ships the footwear directly to the dealers and respondent bills the franchise dealers. During 1959 there were 473 franchise dealers purchasing rubber or canvas footwear under this arrangement. From 1950 to October 21, 1955, respondent represented to franchise dealers that they would receive the following additional discounts on purchases through respondent, over and above the discounts available if purchased directly from U.S. Rubber Company:

Storm Footwear

Advance orders of more than 144 pairs and less than 480 pairs—3 percent.
Fill-in orders if bought in 12 pair runs and if merchants ordered more than 144 pairs on advance orders—8 percent.

Keds

Fill-in orders if bought in 12 pair runs and if merchants ordered at least 480 pairs on advance orders—8 percent.

These additional discounts were not made available by respondent to customers other than franchise dealers.

20. From 1956 up to 1959 respondent represented to franchise dealers that on this storm footwear and Kedettes they would get the 8 percent discount and 2 percent cash discount by purchasing 144 pairs, instead of having to purchase 480 pairs to get those discounts if they were not on the franchise program. Respondent represented that on fill-in orders on these shoes the franchise dealers would get an 8 percent discount for buying 12 or more pairs which was not available to dealers not on the franchise program. On Keds, the discount on fill-in orders is still in effect, and this discount is available only to respondent's franchise dealers.

21. Respondent represents to franchise dealers that they will be participating in group purchasing of fire, public liability, robbery, safe burglary, business interruption, and life insurance. From November 1, 1949, to October 31, 1955, respondent represented that merchants on the franchise program would receive a discount in price on fire insurance not available to individual outlets and represented to them:

Because of the favorable experience the insurance company has had with our Franchise Store operators during the past 25 years, we are in a position to save the retailer approximately 25% on his fire insurance premium compared to his local rate.

Respondent has continued to represent that there would be considerable savings on insurance purchased through the franchise program. Respondent supplies the average inventory of the franchise holders to the insurance company, and for this service is compensated by the insurance company.

22. In addition to the benefits and services which dealers receive under the Franchise Agreement, many Brown Franchise Dealers have received loans from respondent. These loans are as high as \$30,000. On October 31, 1957, the total amount of loans to all dealers, including those under the franchise program, was \$844,886.83.

23. Large outside illuminated Roblee and Buster Brown signs and neon Naturalizer signs are given to dealers who aggressively push those lines and sell them effectively, and are not handling conflicting lines. The dealer pays \$1 for the outside sign, and he pays the maintenance cost, and the sign is given to the dealer until he stops handling the shoes, in which case, respondent takes the sign down. Brown Franchise Dealers have 30 of the 51 Roblee signs which respondent has given out, and they have 53 of the 115 Buster Brown signs given out.

24. Window decoration service for which there is a charge and the architectural service are offered to other dealers who concentrate on

respondent's lines, as well as to Brown Franchise Dealers. Respondent also gives dealers window decoration without charge, such as neon signs and cards.

25. The forms upon which the Brown franchise fieldmen submitted their reports state: "ENCOURAGE CONCENTRATION ON B.S.C. LINES AND ELIMINATION OF CONFLICTING LINES." A newer form has eliminated this statement, but the omission did not change the practice.

26. The following written instructions to fieldmen by the manager and the assistant manager of the Brown Franchise Program show the policy of encouraging the concentration on Brown lines and the elimination of conflicting lines:

This week our Buster Brown sales representative, Frank Mirra, called me and among various things discussed, he advised that he had just learned that Orville Shugart plans to buy American Girl line for Fall.

George, let's get into this immediately and head this off before the shoes are received in the store. As you know, if the American Girl line is purchased, this will not be in keeping with our Franchise Program.

I think it is time for a forthright discussion with Mr. Bump on what we attempt to accomplish with dealers who operate their business on our Franchise Program. If he does not see the wisdom of going along with the thought of operating these stores more progressively, avoid directly conflicting purchases, then I think we have no other alternative than to ask him to withdraw from the program.

The one very important point that concerns me, T. R., is that you say he can get a better mark up on men's Great Northern shoes and that his customers want leather soles. If this be the case and he is determined to continue to carry Great Northern instead of Pedwin, then we have no other alternative than to ask him to withdraw from the Franchise Program.

27. Such evidence as there is relating to action taken by the fieldmen in following these instructions indicates that they sometimes failed to achieve the desired results, and it appears that respondent's home office was sometimes lax in enforcing its policies, although, as hereinafter found, some dealers were dropped from the program for failing to comply with this policy. The manager of Brown Franchise Stores Division testified that there was a point at which a dealer would be dropped from the program for carrying conflicting lines.

28. The manner in which the fieldmen encourage concentration on Brown lines and the elimination of conflicting lines is shown in the following excerpts from their reports:

Outside lines were analyzed, and the unprofitable performance of these lines pointed out to the management. One line of ladies' shoes that was bought in 8 patterns last spring, was cut to 4 patterns for the Fall buy, and will be reduced even further for next Spring's buy.

The only problem in this store, in-so-far as we are concerned, is the presence of an outside line of shoes. Tom and I talked with Clarence about this and

he agreed to give the Life Stride serious consideration before buying next season. Apparently he was not aware of the strength of Life Strides and the strong position it holds in the stores.

I will do everything possible to get this other line out of the store.

A good portion of Jack's inventory represents spot shoes from outside lines and in talking with Jack he admits that these represent a small percentage of his sales and are not needed. In most cases they amount to overlapping patterns. Three lines of shoes will be eliminated this coming season.

Outside lines were discussed and she also agrees that most are not necessary and will be discontinued.

Concentration on fewer lines and less patterns was discussed and will be applied more this fall. Debs are to be discontinued and Shelby Arch type shoes are to be replaced with Propr-Bilt.

Concentration on fewer lines was discussed and it was decided to discontinue Golo dress flats and Grinnell sports.

29. During the fiscal years 1949 through 1955, respondent dropped 22 stores because of a failure to comply generally with the conditions of the Brown Franchise Agreement, one of the conditions being the prohibition against handling conflicting lines. Respondent, in that period, dropped 19 stores for handling conflicting lines which was "completely contrary to the franchise agreement." From November 1, 1954, through April 1, 1958, a dozen or more dealers were dropped from the Brown Franchise Program primarily because they handled conflicting lines.

30. The Brown Franchise Dealers probably buy on an average about 75 percent of their total volume of shoes from respondent.

31. Shoe manufacturers try to have only one account carry each of their lines in a town or trading area. U.S. Shoe Corporation gives May Company Department Stores a 10-mile radius "protection." Freeman Shoe Corporation sells to only one account in a small town. So does respondent. Most Brown Franchise Dealers are found in towns of from 5,000 to 30,000 population, and in almost all instances there is only one franchise store in each community. Some manufacturers will put their line of shoes in two outlets in a town if one is a shoe store and the other is a department store.

32. Price is a factor in determining which outlets are available to a manufacturer. Not all retail shoe outlets are desirable customers for this reason. The outlet may stock shoes ranging too far below or too far above the manufacturer's suggested resale price to be a suitable outlet.

33. There are nearly 100,000 retail outlets in the United States which sell shoes. Many of these sell only a particular style of shoe, such as cowboy boots in a western store, or baby shoes in a baby store. Many also have few shoes in relation to their total inventory, their

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shoes being carried as a side line. Among the outlets which sell shoes are the following types:

Grocery store	Drug store	Health store
Dry goods	Surplus store	Pawn shop
Variety store	5 & 10	Curio shop
Shoe repair shop	Western store	Indian Post
Hardware store	Supermarket	Cafe
Sporting goods store	Army Surplus store	Glass manufacturer
Saddle shop	Leather goods store	Commissary
Work clothes store	Zink smelter	Baby store
Oil company	Gun store	
Specialty store	Dollar store	

34. Brown Franchise Stores are choice retail shoe outlets. Because these stores are family shoe stores they are considered a prime market by respondent's competitors. They are considered most desirable from a volume as well as a credit standpoint. The average volume of sales in 1960 for stores on the Brown Franchise Program was \$97,000. The average return on investment for these stores has been 16 percent as against 11.8 percent for all independent shoe stores. Respondent characterizes its franchise dealers as the "most prosperous group of shoe retailers in America" and states that the Brown Franchise Program is not available to any shoe store but is best fitted for the "outstanding dealers" in each community.

35. Representatives from six of respondent's competitors testified that they were foreclosed from selling Brown Franchise Dealers generally. They testified that their sales volume was reduced or lost entirely to customers who became Brown Franchise Dealers. Most of them gave specific examples, some of which were erroneous, but it is clear that they lost volume to these accounts and some of them lost accounts completely. By the very nature of the transition of dealers to the Brown Franchise Program it would be expected that many competitors would lose accounts completely to Brown and that others who did not lose the accounts would lose sales volume to these accounts. The question to be resolved is whether they, and as a consequence competition, were likely to be adversely affected by the restriction the Brown Franchise Program placed on the dealers to refrain from dealing in conflicting lines. The terms of the agreement are clear and the dealers undoubtedly knew what they had agreed to do, and when the written agreements were replaced with oral agreements, with the newer accounts in recent years, the terms were the same. The dealers could not know positively how rigidly they would be required to adhere to their agreements, but it must be inferred that many of them would abide by their agreements to the letter. Over the years most of these dealers have learned that respond-

ent will condone some duplication of lines, particularly if the outside line is a short line or a specialty line or if the real volume is in respondent's lines, because five out of six of them carry at least one line that competes to some extent with a Brown line. There is a point beyond which outside lines will not be tolerated by Brown, and it is believed that generally the dealers know what it is.

36. It is therefore found that the restrictive provision of the agreements between respondent and its Brown Franchise Stores Division dealers was a major factor in foreclosing markets to the competitors who testified herein, as well as to other competitors of respondent, and as a consequence competition has been adversely affected as will be hereinafter more specifically found.

37. Respondent contends that the contract requirement has been abandoned and that most of the present franchise holders have not signed a written agreement containing the restrictive provision. It also contends that it was not enforced and that the restrictive contract could not have had adverse effects. The evidence does not support these contentions, except that in recent years the written contract has not been used in bringing stores under the franchise plan, and many of the franchise holders testified that the restrictive provision was not called to their attention or enforced.

38. The evidence shows that the restrictive provision against handling conflicting lines has been enforced and will continue to be enforced and that it necessarily inhibits franchise holders from buying other brands which they would buy if they were not restricted.

39. It may be, as respondent contends, that for some retailers it would be an unwise business practice for them to carry conflicting lines, but the law protects the buyer's freedom of choice, even if the choice is uneconomic for him.

40. Respondent also contends that most franchise holders carry other lines, some of which are conflicting, and that this shows a lack of effectiveness of any restrictions if any there be. Most of the important conflicting lines carried by the franchise holders are short lines of specialty shoes, such as Clinics (primarily for nurses) and Hush Puppies (loafers), which are condoned, but it is clear that respondent will remove customers from the plan when it considers the restrictive provision has been seriously breached. It will continue to sell these customers, but will not continue the benefits which accrue to Brown Franchise Plan customers.

41. The question remaining is whether the adverse effects of the practice may be substantial.

Although respondent is the second largest shoe manufacturer in the country, its sales through the Brown Franchise Plan are less than

1 percent of all shoes sold in the United States. It confines its production to medium-priced shoes which limits the area of effective competition to some indeterminate extent, but since most of these Brown Franchise Plan customers are in cities of 5,000 to 30,000 population, it would appear that the greatest effect of the restrictive provision would be felt in these localities. The substantiality of the effect is distorted by attempting to compare the market share sold through the franchise plan to the total United States market. It appears that each trading area where a Brown Franchise Plan account is located would be the appropriate geographical market in which to appraise the effects of the restrictive provision because the retail shoe market is not a national market except to the slight extent that shoes are bought by mail. Because of custom, convenience, necessity, or perhaps other reasons, consumers usually purchase shoes in their local communities and it is the aim of most shoe retailers to give their customers such service and value as will retain their patronage. Considering the importance of fitting shoes, it is believed that purchases of shoes by mail constitute only a small part of the total sale of shoes and that the retail shoe market is essentially a series of local markets. In these trading areas the market share of the stores under the Brown Franchise Plan is, of course, much higher, and the number of retail competitors varies from about 5 to about 26.

42. Since there are about 600 such trading areas, in most of which the effect of the restrictive provision is substantial, it is concluded that the total effect on competition is substantial. The benefits of unrestricted competition should be permitted to flow to competitors of respondent, to customers of respondent and their competitors, and to consumers. In many trading areas the benefits of competition are hindered by respondent's restrictive provision.

43. At least two other shoe manufacturers, which sell men's, women's, and children's shoes in direct competition with Brown, have franchise stores programs somewhat similar to respondent's program.

International Shoe Company, the nation's largest shoe manufacturer, sells men's, women's, and children's shoes under a variety of brand names which compete directly with Brown brand shoes. International has a franchise stores program under the direction of its Merchants Service Division, and the independent shoe retailers which operate on that program are known as Merchants Service Stores. In order to obtain the benefits and services available under the program, a Merchant Service Dealer agrees to feature the shoes of a division of International, in each type of shoes (men's, women's, and children's) he carries, and at all times to handle such shoes in a representative manner.

General Shoe Company sells men's, women's, and children's shoes under a variety of brand names which compete directly with Brown brand shoes. General has a franchise stores program under the direction of its Genesco Retailers Service Agency, and the independent shoe retailers which operate on that program are known as Friendly Franchise Stores. In order to obtain the benefits and services available under the program, a Friendly Franchise Dealer agrees to purchase sufficient quantities of footwear from General, in each type of shoes (men's, women's, and children's) he carries, as are necessary to assure the presence of an adequate and representative stock of merchandise in the Friendly Franchise Store at all times.

This record does not show whether the requirements of these contracts of International and General are construed to require the dealers to refrain from buying competitive shoes, but to the extent they are so construed, or to the extent they tend to create captive customers, the market open to the many sellers of shoes would be further restricted.

44. It is found and concluded that the effect of the methods, acts, and practices of the respondent, as hereinbefore found, has been, is, or may be, substantially to lessen, hinder, restrain, and suppress competition in the purchase and sale of shoes in interstate commerce; to cause a substantial number of retail shoe dealers to refrain from, or discontinue, buying and dealing in shoes of competitors of respondent; to exclude, or attempt to exclude, competitors of respondent from selling shoes to a substantial number of retail shoe dealers; to foreclose competitors of respondent from a substantial share of the retail dealer market in many trade areas; and to enhance the dominant position of the respondent in the shoe industry.

COUNT II

45. The foregoing findings numbered 1 through 10, 22, 34, and 38 relate to the charges in Count II of the complaint and it is so found. They are incorporated herein at this point by reference.

46. Respondent contends it does not require or attempt to require its dealers to adhere to its suggested resale prices. The evidence shows that respondent has a definite policy of seeking adherence to its announced or advertised resale prices and shows instances where, on two different occasions each, attempts were made to secure the adherence of two price cutters to suggested resale prices. It is not clear whether these attempts resulted in agreements with the customers each time, but they appear to have ultimately come into line with respondent's policy. In any event, respondent resorted to several means in an effort to bring this about, which included sending salesmen to advise the dealers of Brown's policies, telephoning one of them from the central

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office urging adherence, instructing salesmen to advise the dealer that continued lack of conformance would result in his being disenfranchised, arranging a meeting between its price-cutting dealer and a nonprice-cutting dealer, urging that they agree upon adhering to suggested resale prices, attempting to suppress advertising of discount prices, and checking these dealers at a later time to determine whether they were conforming.

47. Each of the respondent's selling divisions publishes wholesale price lists for the brand or brands of shoes sold by it. The Buster Brown and Robin Hood lists contain "suggested" retail prices. The United Men's and Roblee lists contain a schedule showing the retail price to be charged for each different wholesale price category. The women's and girls' shoe price lists do not contain a "suggested" retail price, but a suggested markup of "44 or 45 percent" is communicated to the customers orally by the salesmen. Because dealers know what the recommended markup is, they know automatically the suggested resale price. In addition, most of the respondent's selling divisions send out suggested retail price lists each season.

Respondent publishes suggested resale prices for some of its shoes in full page advertisements in magazines having national circulation. These ads often give a specific price for the shoe illustrated, as well as a price range for the line.

48. Respondent's director of marketing testified concerning customers of respondent who do not abide by the suggested resale price:

Now, once in a while a fellow will get an idea that he is going to have an advantage, and we will try to get him turned around to where he wants to sell his shoes at the regular markup which other merchants are doing.

In response to a question as to the instruction given to salesmen who are sent to see price-cutting merchants, he said:

... we have to go over and see this fellow and try to dissuade him from that practice ... you have got to make your peace over in that area or you will lose several customers. So you have got to straighten it out.

So the way to straighten it out is to try to show him the error of his ways and get him on the right basis because this practice of selling shoes at a discount price level is an almost inflexible thing with our brand of shoes. And when he is doing that he is in trouble.

When respondent first establishes a sales relationship with a retailer, the program of adherence to retail prices is discussed. Respondent's director of marketing was asked:

When you take a new outlet that hasn't been in the shoe business you wouldn't know whether he is going to be a price cutter or not?

He responded:

Oh, yes. You talk to him quite a while before you sell him, telling him what is expected of him.

The result of these conversations is that price-cutting dealers rarely get on the respondent's books.

49. During the summer of 1956, Fraver's Shoe Store of Chambersburg, Pennsylvania, a Brown franchise store, cut the price on certain patterns \$1 below the recommended price. Paul Dutrey, another Brown franchise holder with stores in Waynesboro and Carlisle, Pennsylvania, complained of this price cutting and he received help from respondent. George Croker, the Brown Franchise Stores Division field representative, was sent to see Fraver and he got Fraver and Dutrey to "have a cup of coffee together and talk it over" so that they could "have an agreement on the prices on their shoes." Croker reported back to J. R. Johnston, manager of the Brown Franchise Stores Division, that "Mr. Fraver has assured me he will maintain the prices on our shoes so there will be no confliction in the future." Croker's purpose in writing to Johnston was "to indicate to the St. Louis office that these two parties has—was going to get together and iron out any differences that they had in their thinking." Croker did get Fraver to agree to the "proper markup." Johnston wrote to Croker and stated that: "We certainly appreciate Fraver's willingness to cooperate."

50. Fraver apparently resumed price cutting because Johnston called him concerning his price cutting in June of 1957. On October 5, 1957, Dutrey directed a letter to Johnston complaining that Fraver was " * * * still underselling your shoes in every line." This letter was answered by T. R. Curtis, the assistant manager of the Brown Franchise Stores Division, who assured Dutrey that the field representative, George Croker, had been ordered to " * * * contact Fraver for the purpose of having a thorough understanding that he must discontinue this practice." In his letter to Croker, Curtis instructed:

" * * * we want you to again, personally, contact Fraver for the purpose of discussing the necessity of his selling our lines at our recommended retail prices and if he does not agree to this, then it will be necessary for us to discontinue selling him. He will, perhaps, agree to our recommended prices and if so, be sure to have a very thorough understanding that if he does under-price the lines in the future, it will be necessary for us to discontinue our business relationship.

In addition, the fieldman was told to contact Dutrey after visiting Fraver " * * * so he will know this is being taken care of."

On October 14, 1957, Dutrey again complained about Fraver's cutting prices, and this time threatened to discontinue purchasing Brown shoes " * * * unless we get satisfactory guarantees from you that this practice will stop * * *." Upon receiving this complaint, Johnston again telephoned Fraver, with the result that he was able to telegraph Dutrey that Fraver " * * * agrees to abide by suggested retail prices

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all patterns of Brown Shoe Company lines he carries." And Johnston followed the telegram with a letter which read :

This letter will follow up my telegram regarding the discussion I had with Mr. Fraver over at Chambersburg regarding the pricing of certain Brown Shoe Company patterns. I talked with him at considerable length on why it was necessary that we ask him to abide by our suggested retail prices and he agreed to do just that.

He will remark any patterns that are necessary, at once, and I am confident that we will not have a recurrence of this situation. I have much respect for Mr. Fraver's integrity and with the long association we have enjoyed I know we can count on him to keep his word.

The manager of the Brown Franchise Stores Division also wrote to all the selling divisions of Brown telling them of Fraver's price cutting and recommending "* * * that when you call on Mr. Fraver from time to time that you check the retail prices for your particular line of shoes and make sure he is abiding by your suggested prices other than during clearance sale periods."

51. On June 15, 1956, Pomeroy's, a department store in Harrisburg, Pennsylvania, advertised Roblee shoes which normally sell for \$10.95 to \$16.95 at a sale price of \$6.99. Mr. Dutrey of Carlisle, Pennsylvania, complained to Brown that this action by Pomeroy's breached an agreement between Brown Franchise Dealers and the respondent as to when a clearance sale, with attendant reduced prices, was to be held.

Stanley Bozaich, manager of the Roblee Division, immediately contacted his salesman, John Mirra, and asked: "I want to know how come Pomeroy's ran this ad on June 15 showing these two shoes, as we have discussed previously that this would not happen and our program on Roblee sales was definitely pointed out to them." And, he later wrote to the salesman and said :

Regarding your conversation with Al Schwarz relative to the ad of June 15 in which they advertised Roblee shoes on sale, I believe you know the policy of the Company and this is definitely not allowed.

Roblee shoes go on sale twice a year in July and January. Any other sale promotion on Roblee shoes is not to be advertised as such.

I want you to straighten this out with Al Schwarz so that in the future regardless of whether we give him close-outs or he is running out his regular stock, this is not to happen.

The manager of the Brown Franchise Stores Division wrote to Dutrey and said that he had been taking care of the price cutting by Pomeroy's by "* * * telephone conversations with the salesman, with the merchandising manager of Pomeroy's, correspondence, etc." He said that in contacting the Roblee salesman and the sales manager about the price cutting, they "* * * have authorized me to give you their assurance that there will not be a recurrence of this."

52. In September of 1956 Pomeroy's again advertised Brown shoes below the suggested list prices and this time both Buster Brown and Roblee brand were involved.

Dutrey complained to the president of Brown and he advised Dutrey that the matter was "* * * being given thorough attention * * *." The "attention" consisted, in part, of the issuance by the Roblee Division sales manager Bozaich to his salesman, Mirra, the following instruction:

Before I took any actual action with Pomeroy's I wanted to write and inform you of this situation. At this time I am going on record and telling you if this happens once again we will be forced to withdraw Roblee shoes from the Pomeroy store in Harrisburg.

I understand a change in merchandise men is going on at the present time at Pomeroy's, however, putting a sale on Brown Shoe Company products and advertising them at this particular time of the year is definitely against Company policy and we will not adhere to these principles.

You will probably have to make a trip to Harrisburg to get this thing straightened out. The above facts will definitely have to be given to Pomeroy's since we do not want a repetition of this in the future.

53. Mirra made the trip to Harrisburg and went to see Moskowitz, who had succeeded Schwarz as merchandising manager at Pomeroy's. Mirra testified concerning his conversation with Moskowitz:

* * * I said to Mr. Moskowitz, I realize that cleaning stock was very important and adjusting the inventory was very important but if he would just not advertise—put these shoes in the newspaper, just sell them, put them on the table and sell them so I could get Mr. Dutrey off my back.

54. The sales manager of the Buster Brown Division reported:

Our salesman Tufshinsky has contacted these people and has their assurance that there will be no further cut-price promotions on our shoes at any time other than our Semi-Annual Sale periods.

55. That the above action by the sales managers of the Roblee and Buster Brown Divisions was taken at the behest of the president, Clark Gamble, is shown by a letter from the Brown Franchise Stores Division manager, Johnston, to his field representative, Croker, in which letter he stated: "Mr. Gamble has insisted that the Sales Managers of these divisions get this situation straightened out. I am sure it will be." That rigid price maintenance is the official policy of Brown, endorsed and supervised by its highest official, is indicated by a memo to Gamble from Tom Curtis, assistant manager of the Brown Franchise Stores Division, which reads as follows:

Dick Dutrey, son of Paul Dutrey who wrote you the attached letter, telephoned us about this situation on Monday of this week. I, personally, talked to Paul Dutrey this morning prior to having learned that he had written you and had sent in copies of the ads. In my conversation, I assured him that this will be properly taken care of with Pomeroy's, in keeping with our pricing policies.

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I have discussed the Roblee under-pricing with Stan Bozaich and understand we had this same difficulty with Pomeroy's earlier this year. Stan is writing John Mirra, the Roblee Sales Representative selling Pomeroy's, instructing him to contact the account for the purpose of getting this straightened out so there will be no reoccurrence of under-pricing.

56. Some of respondent's dealers occasionally vary their resale prices from respondent's suggested prices by 50 cents or a dollar on some styles without complaint from respondent or any competitor, but there is no evidence that their competitors or respondent were aware of these deviations.

57. Respondent has required, and attempted to require, certain of its customers to agree to maintain resale prices established by respondent, and through the use of such policy and practice has suppressed and eliminated price competition between customers.

CONCLUSION

The acts and practices of respondent as herein found are all to the prejudice of competitors and customers of the respondent and of the public, have a tendency to hinder, prevent and restrain, and have actually hindered, prevented and restrained, competition in the purchase and sale of shoes in interstate commerce, and constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Brown Shoe Company, Inc., its officers, representatives, agents, employees, subsidiaries, successors, and assigns, directly or through any corporate or other device, in or in connection with the offering for sale, sale and distribution of shoes, in interstate commerce, do forthwith cease and desist from:

1. Entering into, continuing in operation or effect, or enforcing any agreement or understanding with any customer or prospective customer or imposing any condition upon any customer or prospective customer, which has the purpose or effect of precluding such customer or prospective customer from independently determining whether shoes will be purchased by such customer or prospective customer from any competitor of respondent or from independently determining the volume of such shoes to be purchased.

2. Obtaining or attempting to obtain from any customer or prospective customer any agreement, understanding or assurance concerning the price at which any shoes are to be resold.

3. Entering into, continuing, or enforcing any agreement or understanding with any customer or prospective customer concerning the price at which any shoes are to be resold.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

I

Complaint, Initial Decision, and Respondent's Exceptions

This matter is before us on the exceptions of respondent, Brown Shoe Company, Inc. (Brown), to the initial decision and order of the hearing examiner holding that respondent violated Section 5 of the Federal Trade Commission Act by virtue of its franchise agreements with independent shoe retailers as well as by its activities in connection with resale price maintenance.

Specifically, Count I of the complaint charges that respondent, through its Brown Franchise Stores Division, has been and is now engaged in unfair acts and practices by entering into contracts or franchises with a substantial number of independent shoe retailers, requiring such customers to restrict their purchases of shoes for resale to respondent's lines and precluding such retailers from purchasing the products of Brown's competitors. The complaint alleges further in this connection that franchisees under the plan receive valuable benefits and services and that in consideration therefor they were required to concentrate their purchases on the grades and price lines of shoes sold by Brown and to refrain from selling the shoes of competitors. The complaint charges that dealers who violate the agreement to concentrate on respondent's shoes and to refrain from handling lines conflicting with those of respondent are dropped from the Brown franchise plan and deprived of its attendant benefits. The complaint states that the purpose, intent or effect of respondent's franchise plan may be substantially to lessen and restrain competition in the purchase and sale of shoes in interstate commerce, to foreclose a substantial share of the retail dealer market in many trade areas to Brown's competitors, as well as to further enhance the dominant position of Brown in the industry and tend to create a monopoly in Brown in the purchase and sale of shoes in interstate commerce.

Count II of the complaint charges that respondent's requirement or its attempt to require that its retailer customers adhere to arbitrary and noncompetitive prices promulgated by Brown is an unfair method of competition.

The hearing examiner, in the initial decision, found that counsel

supporting the complaint had sustained the burden of proof under both counts of the complaint and ordered respondent to cease and desist from entering into or continuing agreements or understandings with the purpose or effect of precluding its customers from independently deciding whether shoes should be purchased from Brown's competitors, as well as the volume of such purchases. The order entered by the initial decision further prohibits respondent from obtaining or attempting to obtain agreements, understandings or assurances from its customers on the resale price of its shoes.

Although respondent takes numerous exceptions to the examiner's findings, the thrust of its argument on appeal may be briefly summarized. With respect to the allegations under Count I of the complaint, respondent contends there is no substantial evidence to support the finding that the restrictive provision in the franchise agreement requiring concentration on Brown's products and prohibiting purchase of lines conflicting with respondent's had been enforced or that the restrictive provision necessarily inhibited stores under the franchise plan from buying other brands which they would have purchased if not so restricted. Respondent further denies that the record justifies the inference that the restrictive provision in the written franchise agreement had been agreed to by the majority of franchise dealers who had not signed such an instrument. Respondent takes the position that the hearing examiner, in making the finding that the restrictive provision in issue here was enforced, erred in relying on the memoranda of Brown's employees and officials, when the inferences which could be drawn from these documents were rebutted by the testimony of respondent's witnesses. Respondent argues that accordingly such inferences were contrary to the weight of the evidence. Respondent contends further that its Brown franchise plan is lawful and that the services furnished under the program give Brown no leverage whereunder the franchisees can be forced to buy Brown brand shoes. Respondent further maintains that membership in the franchise program does not affect a retailer's ability to purchase the respondent's shoes under the same terms and conditions as all customers.

Respondent argues that there has been no showing that its competitors are foreclosed from selling to franchise stores or that the adverse effect of the franchise plan on competition has been substantial. In this connection, the respondent also claims that the examiner erred in delineating the relevant geographic market as the trading areas where a Brown franchise plan account is located. Brown states that the proper geographic market is the nation as a whole, since this is the area of effective competition between Brown and other shoe manufacturers. Respondent, in effect, claims that had the examiner cor-

rectly defined the relevant market, he would have been forced to find that Brown's sales to its franchise stores were not substantial.

In the case of the charges under Count II of the complaint, respondent argues that there is no substantial evidence to support the finding that it required or attempted to require its customers to maintain the resale prices which it established. Respondent argues that the record shows only that Brown encouraged its customers to obtain an adequate markup to cover their expenses. As in the case of its exceptions to the examiner's findings under Count I, respondent urges that the hearing examiner erroneously relied on inferences drawn from documentary evidence which the testimony of its customers, employees and officials had rebutted. In this connection, respondent argues that such inferences were therefore necessarily contrary to the weight of the evidence.

Brown also objects to the order entered below on the ground that it is vague and indefinite, excessively broad, and not in conformity with the complaint or the evidence in the record.

II

The Operation Of The Brown Franchise Program

The threshold question presented by respondent's exceptions to the examiner's findings under Count I is whether he correctly found that the restrictive provision against the handling of conflicting lines had been, and will continue to be, enforced and that it necessarily inhibits franchise holders from buying other brands which they would buy if not so restricted.¹

Respondent argues, in effect, that the restrictive provision is not enforced insofar as the signers of written franchise agreements are concerned and is not even a part of the agreement or understanding between respondent and those franchise holders who did not sign such an instrument. Upon a review of the evidence we are persuaded the finding in question is clearly supported by substantial evidence.

The franchise agreement states:

In return I will:

Concentrate my business within the grades and price lines of shoes representing Brown Shoe Company Franchises of the Brown Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company.

The proviso on its face restricts franchisees as to the purchases they may make from competitors of Brown. Further, the manager of the Brown Franchise Stores Division, in the course of his testimony in this proceeding, expressly admitted that the restrictive provision was

¹ Initial Decision, paragraph 38.

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equally applicable to signer and nonsigner franchise holders alike.² It is therefore difficult to understand respondent's bald assertion that there is no evidence demonstrating that the restrictive proviso was part of the agreement and understanding between respondent and those franchisees not signing the agreement.

The documentary evidence in the record on which the hearing examiner relied, namely, the instructions to fieldmen from the manager and assistant manager of the franchise program as well as the fieldmen's reports to their superiors, clearly support the finding that respondent's fieldmen were expected to, and did their utmost to, encourage concentration on Brown lines and elimination of conflicting lines.³ The following declarations by Brown fieldmen or their superiors support the hearing examiner's finding on this point:

* * * He has been urging us to allow him to carry "Town and Country" which are profitable for him in Willimantic and has been refused. I am leaving Risque in as a cushion for this problem. Time will have to settle that problem. (Brown Franchise Division Inter-Company Correspondence—McEmery to Lon Carrol dated February 4, 1957, re Prague Shoe Company, New London, Conn.)

Outside lines were discussed and she also agrees that most are not necessary and will be discontinued. This will eliminate many over-lapping patterns and types that she does not need in this low-volume store. (Report of fieldman Bob Taylor to Tom Curtis re White's Shoe Store, Lancaster, New Hampshire, July 19, 1958.)

He has already discontinued Heydays and will drop Jolene, Williams, and Show Offs for fall. He is concentrating more on our lines each season. (Report of fieldman T. R. Forgan to Franchise Division, dated April 26, 1958, re Ward's Bootery, Chanute, Kansas.)

I think it is time for a forthright discussion with Mr. Bump on what we attempt to accomplish with dealers who operate their business on our Franchise Program. If he does not see the wisdom of going along with the thought of operating these stores more progressively, avoid directly conflicting purchases, then I think we have no other alternative than to ask him to withdraw from the program. (Letter to fieldman T. R. Forgan from Dick Johnston, Manager of the Brown Franchise Stores Division, dated February 18, 1958, re Lloyd's Shoes, Wichita and Great Bend, Kansas.)

The one very important point that concerns me, T. R., is that you say he can get a better markup on men's Great Northern shoes and that his customers

² "Q. With respect to paragraph 1 of Exhibit 25-C [the restrictive provision] and its interpretation, do you make any distinction between the Brown franchisees who have signed one of these contracts and those who have not signed a contract?

"A. No, sir.

"Q. Would that be true of the provisions of the Brown franchise program as a whole? In other words, the services that a man can get and the requirements and obligations that he is supposed to live up to.

"A. Yes, that is correct. There would be no variation of service or items whether he signed the agreement or not."

If this statement is not to be taken as an express admission that the terms of the restrictive proviso are applied to both signers and nonsigners of the agreement alike, then the utility of the English language as a suitable means of communication is indeed subject to question.

³ Initial Decision, paragraphs 26 and 28.

want leather soles. If this be the case and he is determined to continue to carry Great Northern instead of Pedwin, then we have no other alternative than to ask him to withdraw from the Franchise Program. (Letter to Brown fieldman T. R. Forgan, from Dick Johnston, March 11, 1958, re Bump Shoe Stores, Wichita and Great Bend, Kansas.)

These statements and others in a similar vein are contained in memoranda pertaining to retailers who had signed the agreement as well as to nonsigners. They clearly demonstrate that Brown fieldmen, pursuant to the instructions of their superiors, followed a policy of discouraging the purchases of competitors' lines conflicting with Brown and urging the elimination of conflicting lines. These actions were obviously pursuant to the restrictive policy expressed in the written franchise agreement applicable to signers and nonsigners alike.

Another persuasive fact compelling the same conclusion is the legend "Encourage concentration on B.S.C. lines and elimination of conflicting lines" borne for some time on the fieldmen's reports. This slogan also supports the inference that the basic purpose of the program as far as Brown is concerned is to serve as a medium to persuade a selected group of stores, namely, its franchise dealers, to restrict their purchases of shoe lines conflicting with those of respondent.

Brown's argument that the restrictive provision is not enforced or a part of respondent's arrangement with all of the franchise stores, namely, the nonsigners, is not reconcilable with the admission in respondent's brief, obviously applicable to the franchise program as a whole, that:

'The record shows that Brown franchise dealers are offered and given the benefits and services of the kind and character in evidence, in return for concentrating on Brown's lines, and carrying them in a representative manner. If and when a dealer decides to cease concentrating on Brown lines and to purchase the major portion of his requirements elsewhere, he may be asked to leave the franchise program (CX 28, 29). This is Brown's relationship to its Brown franchise dealers, both with and without written agreements.'

Even in the light of this rather euphemistic statement, the assertion that the restrictive provision was not a part of the understanding between respondent and all its franchise holders strains credulity. A more realistic appraisal of the actual situation as disclosed by the record is, of course, that the program requires respondent's franchisees to purchase the majority of their shoes from Brown and consequently they are sharply restricted in the purchases they may make from Brown's competitors.

The true nature of the relationship between Brown and its franchisees, however, is explicitly set forth in the answer by respondent

* Respondent's brief, page 19.

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to interrogatories in *United States v. Brown Shoe Company, et al.*⁵ There respondent expressly stated that the handling of conflicting lines is one of the factors considered as a failure generally to comply with the conditions of the franchise program. In this connection, Brown's reply further stated: "This [conflicting lines] covers the situation where the franchise account sold shoes of another company which directly conflicted with a line or lines of shoes manufactured by Brown Shoe Company. This was completely contrary to the franchise agreement."⁶

Aarol C. Fleener, vice president of respondent, testified in *United States v. Brown Shoe Company, et al.*,⁷ that:

Q. Do you ever drop a dealer because he carries conflicting lines?

A. We will drop them from the franchise plan, yes, if they persist in carrying conflicting lines.⁸

Moreover, the record demonstrates specific instances where retailers have been separated from the franchise program in the course of enforcing the restrictive terms of the agreement pursuant to the policy enunciated by Mr. Fleener. For example, Samuels Shoe Store, Compton, California, Richards Shoes, Norwalk, California, Seymours Shoes, Evansville, Indiana, and Revell and McCall Store, Emporia, Kansas, among others, were all separated from the program at various times in the period November 1954 to April 1958 for carrying shoes conflicting with those of respondent's.

The memoranda of respondent's personnel demonstrating Brown's efforts to eliminate or restrict the franchise holders' purchases of conflicting lines, coupled with the language of the restrictive proviso in the written agreement, as well as the actual enforcement of that provision, shown by the separation of noncomplying retailers, evidence respondent's intent to restrict the access of other shoe manufacturers to retailers under the franchise plan. It is inconceivable that respondent, which obviously invested considerable time and effort and expense in the program, would permit a retailer to enter or enjoy the benefits of the plan unless he assented to what was clearly Brown's purpose in establishing the program. Our conclusion on this point is confirmed by the following testimony of Mr. Fleener also given during the course of the trial in *United States v. Brown Shoe Company, et al.*:

Q. During the past 5 or 6 years, have any franchises been discontinued because the franchisee didn't concentrate on Brown branded merchandise?

⁵ 179 F. Supp. 721 (E.D. Mo. 1959), *aff'd* 370 U.S. 294 (1962).

⁶ This material is incorporated into the record as CX 28. It may be noted that respondent's definition of its policy on its franchise holders' purchases from competitors (note 4, *supra*) which is based in part on this exhibit clearly glosses over the admission that purchases of conflicting lines are completely contrary to the franchise agreement.

⁷ *Supra* note 5.

⁸ Included in this record as CX 118.

A. Yes, I would say there have been some.

Q. Before you dropped the franchisee, did you warn him that you're going to drop him?

A. Naturally, in dealing with our customers, we try to get them to follow the program and if we find they persist in not doing it, why, then there's no point in continuing this plan.

Q. You point out the various benefits of the plan and try to get them to concentrate on your lines?

A. Yes, we do.

Q. Do you feel that there's no point in continuing the plan if the firm won't concentrate on your lines?

A. As a franchise man, yes. We'll still sell them shoes, branded shoes.⁹

In the light of these considerations, we must concur with the hearing examiner's reliance on the documentary evidence in preference to the testimony of respondent's dealer witnesses. Respondent's accusation, that in not taking the testimony of its dealer witnesses at face value the hearing examiner arbitrarily and unjustly ignored the only substantial evidence in the record, is without merit. Documentary evidence subsequently contradicted or explained by participants to the events related therein or qualified by the authors or other witnesses, is of course, not by virtue of that fact inherently insubstantial or necessarily outweighed by such testimony.¹⁰

The fact is that the hearing examiner, in making the disputed findings, performed precisely the function for which he was appointed, that is, to evaluate and weigh the probative worth of conflicting evidence; this is a task which he is uniquely equipped to perform since he observed the demeanor and bearing of the witnesses during the course of their testimony. Respondent, in effect, would strip both the examiner and the Commission of the fact-finding function imposed upon them by statute. It is, of course, well settled that, even in those instances where substantial evidence supports inconsistent inferences, an administrative agency is not precluded from drawing one of them.¹¹

We now turn to respondent's related procedural argument that the examiner erred in refusing permission to adduce additional testimony from franchise dealers on their understanding of and experiences with the Brown franchise program. Respondent contends that this testimony should not have been curtailed until the examiner could make a finding that the remaining Brown franchise dealers, if called to testify, would testify along the same or similar lines as the thirty-six dealer witnesses whom respondent had already called to the stand.

Section 4.14(b) of the Commission's Rules of Practice, which re-

⁹ Id.

¹⁰ Cf. *United States v. United States Gypsum Co., et al.*, 333 U.S. 364, 396 (1948).

¹¹ *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942); *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461, 491 (9th Cir. 1959), cert. denied 361 U.S. 884 [6 S. & D. 598] (1959).

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spondent cites in this connection, although providing that every party shall have the right to present evidence,¹² does not confer a license to present cumulative or unduly repetitive evidence.

In making the disputed ruling, the hearing examiner stated:

... I am not going to permit you to call any further dealer witnesses to testify in the same manner as the past dealers have testified.

* * * * *

... It seems to me that I have heard all of that kind of testimony that I need to hear. In fact, a lot of the testimony that we have heard has been cumulative. I certainly don't want to listen to any more of the same kind of testimony. . . ."

It is obvious from the ruling complained of that the hearing examiner took into consideration the probability that respondent could well call a great many more retailers who would testify along lines substantially similar to the testimony of previous dealer witnesses, but that this particular line of testimony would not gain in probative worth as far as he was concerned by virtue of repetition. An examination of the testimony of respondent's thirty-six dealer witnesses convinces us that the examiner had ample opportunity to properly evaluate this evidence and that he rightly concluded that pyramiding additional testimony of this nature would not aid him in resolving the issues presented.

The examiner who has heard the witnesses must have the discretion to prohibit cumulative testimony on those points where he is satisfied that the issues have been thoroughly presented and that additional evidence of a cumulative nature would not assist him in arriving at the truth. Moreover, "... It has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment or whim. . . ." ¹³ The principle that the extent to which cumulative evidence will be received rests within the sound discretion of the trial court is well established.¹⁴ Were it otherwise, neither the Commission nor the hearing examiner would be able to dispatch the business before them.

Respondent further argues that the examiner wrongly construed the documentary evidence as proof of enforcement of the restrictive provision when in fact many of the statements therein reflected only the concern of Brown's manager or fieldman for inventory situations wherein a retailer had too many overlapping patterns or styles or was

¹² "Every party . . . shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing."

¹³ VI. Wigmore, "A Treatise on the Anglo-American System of Evidence in Trials at Common Law," Section 1907, 3d Edition, 1940.

¹⁴ See *Suhay, et al. v. United States*, 95 F. 2d 890, 894 (10th Cir. 1938), cert. denied 304 U.S. 580 (1938); *Hauge v. United States*, 276 Fed. 111, 113 (9th Cir. 1921).

carrying too many lines of shoes. Respondent argues that the principle of line concentration, viz, concentrating on one brand line of shoes in a given price range and thus avoiding conflicting lines, which increase inventory and duplicate patterns without bringing in additional sales, is a principle of good shoe retailing.

An examination of the fieldmen's reports and the memoranda of their superiors convinces us that while respondent's employees may well have been concerned about the inventory situation of certain franchise stores, their altruism in this respect was not unalloyed and that the overriding concern was the elimination of competitor's conflicting lines and concomitantly promoting an increase in the volume of purchases from Brown.

We need not concern ourselves here with the arguments of respondent and counsel supporting the complaint about the intrinsic economic merits of line concentration against the advantages of selecting only the best items from several lines in the same price and style ranges. We suspect that the validity of the principle may vary with the individual situation of the particular retailer.

The economic justification, if any, of line concentration is irrelevant to the issues presented to us here. While line concentration itself may or may not be economically justifiable, there is no economic justification for making the adherence to this doctrine the subject of agreement between buyer and seller and enforcing the agreement to the latter's advantage.

We are here concerned with the question of whether the franchise plan operates to foreclose Brown's competitors from a segment of the market. If the operation of the franchise plan is, in fact, an illegal restraint of trade, its reasonableness may not be justified on economic or other grounds.¹⁵ The short run advantage, if any, to respondent's franchise dealers of systematic application of the principle at the urging of respondent because of their membership in the franchise program cannot outweigh the long range interest of the community in the removal of restraints on competition.¹⁶

Respondent, by incorporating its insistence on line concentration (on Brown products) as a basic tenet of its franchise program, has achieved a measure of control over the purchasing operations of the dealers under that program. Respondent's basic mechanism for achieving such control and influencing the purchasing decisions of its franchise stores are the detailed reports on inventory, purchases, etc., to be submitted to respondent's franchise division or fieldmen for their information, analysis, and suggestions, as well as the conferences be-

¹⁵ See *Sandura Company*, Docket 7042 [61 F.T.C. 756] (1962).

¹⁶ See *Standard Oil Co. of California, et al. v. United States*, 337 U.S. 293, 309 (1949).

tween the retailers and fieldmen on the inventory situation and future purchases.

The record demonstrates that the retailer's prime motivation for joining and staying in the franchise program was the benefits and services available to him as a franchise dealer. These benefits have been fully described in the initial decision and that task need not be duplicated here.¹⁷ Not every dealer utilized all of the benefits or services available, but it is apparent that the services collectively achieved the effect desired by Brown, namely, attracting retailers to the program and inducing them to comply with its requirements.

Respondent apparently contends that the franchise program is inherently lawful and in support of that contention cites *Federal Trade Commission v. Sinclair Refining Company*,¹⁸ and *The Timken Roller Bearing Company v. Federal Trade Commission*.¹⁹ In our view, however, neither precedent supports the position of respondent. Both the *Timken* and *Sinclair* cases turned on factors not applicable to the instant proceeding. While it is true that in *Sinclair* the gasoline dealer could purchase respondent's products with or without the equipment subject to the restrictive lease and that in the instant case a retailer may purchase Brown's products irrespective of his membership in the franchise plan, the restrictions attendant on the franchise program are considerably more far-reaching than the arrangements upheld in *Sinclair*. In *Sinclair*, the agreement only purported to limit the gasoline which could be dispensed through the pumps leased by respondent, the dealer being free to secure additional equipment through which he might dispense whatever gasoline he desired. On these facts, the Court held that *Sinclair's* leases did not undertake to limit the leasee's right to use or deal in the goods of a competitor of *Sinclair*.

In this case, Brown's franchise dealers are expressly prohibited from purchasing lines of shoes conflicting with those of respondent and are required to concentrate on respondent's products; the prohibition extending to the franchisee's entire business as long as he is under the program. Under the terms of the restrictive provision under consideration here, the dealer, unlike the gasoline dealer in *Sinclair*, is foreclosed from exercising his own judgment as to the

¹⁷ "Among the benefits and services which a dealer will receive by being on the franchise plan are: architectural plans, service of a field representative, merchandising records, retail sales training program, accounting system, national and regional meetings, and group purchasing of insurance, rubber footwear, and display material." (Initial Decision, paragraph 13.) See also paragraphs 14-21 of the examiner's findings.

¹⁸ 261 U.S. 463 [1 S. & D. 306] (1923).

¹⁹ 299 F. 2d 839 [7 S. & D. 362] (6th Cir. 1962), cert. denied 371 U.S. 861 (1962).

purchases he may make from his supplier's competitors.²⁰ In *Sinclair*, the Court further found that limiting the leased equipment to the sale of Sinclair fuel protected the integrity of the Sinclair brand from possible debasement through the sale of inferior fuels. The franchise program cannot be justified on such grounds. The analogy advanced by respondent is neither relevant nor appropriate and does not support the conclusion that somehow the Brown franchise program is inherently lawful.

Respondent cites the *Timken* case²¹ in support of the assertion that "its program of giving benefits and services to shoe retailer customers who concentrate on Brown brand lines is entirely lawful." Specifically, respondent relies upon the holding by the court that a manufacturer is not prohibited from selecting dealers who will devote their energies to his products nor compelled to retain dealers with divided loyalties and that the seller has the right to select his own customers. The rule in *Timken*, on which respondent relies, predicated on the finding that no agreement between respondent and its dealers had been shown is not applicable to the circumstances of this record. In the instant case, as heretofore noted, the evidence demonstrates agreements and understandings between Brown and its franchise holders expressly prohibiting the latter from purchasing lines conflicting with those of respondent.

The examiner's holding that the franchise plan was a major factor in foreclosing markets to competitors of respondent is supported by the record. In disputing this finding, respondent directs our attention to fragments of the testimony of representatives of its competitors and to the statements of its retailer witnesses in order to rebut the inferences which must be drawn from the operation of the plan as a whole. We have already noted that the terms of the restrictive proviso prohibiting the purchase of conflicting lines and demanding concentration on Brown products was part of the understanding between respondent and the retailers of the franchise plan, which by October 1961 numbered 766 stores, whether they had signed a written agreement or not. We have also noted the activity of respondent's officials and employees in enforcing this understanding. The record is indisputable that franchisees have been expelled from the program for handling lines conflicting with those of respondent. In short, the record demonstrates that the restrictive proviso under consideration here has been enforced. The fact that the restrictive

²⁰ The Supreme Court in subsequently analyzing the import of *Sinclair* held:
". . . there is marked difference between a contract which confines an entire retail outlet to the sale of a single brand and a contract which merely confines the use of a dispensing mechanism to a single brand" *Standard Oil Co. of California, et al. v. United States*, *supra* note 16, at p. 304, n. 6.

²¹ *Supra* note 19.

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understanding between Brown and its franchisees has been effectively enforced is documented by the testimony of Aarol C. Fleener, Brown's vice president, in *United States v. Brown Shoe Company, et al.*,²² that on an overall basis Brown franchise dealers' sales of shoes purchased from respondent would constitute 75% of their total sales. This percentage, according to the witness, in the case of individual stores may vary from 60% to a high of 95%. Moreover, the extent to which competitors' conflicting lines are excluded from the franchise dealers' shelves is undoubtedly higher than these figures indicate, for this witness also stated that purchases from respondent's competitors in individual instances would be dictated by a need for either higher or lower price shoes than those made by respondent.

The foregoing summary of the facts establishing that conflicting lines of competitors are excluded by virtue of the enforcement of the terms of the restrictive proviso in the franchise agreement, and that such enforcement of the proviso was substantially effective, is sufficient to support the examiner's finding that respondent's competitors are foreclosed from selling to the market represented by the franchise dealers. Respondent's further contention that its competitors are not foreclosed because franchise holders are free to leave the plan without restriction is without merit; this proceeding, of course, is concerned with the foreclosure arising with respect to those retailers under the plan. While the record does indicate some attrition in the membership of the plan, we are satisfied that, on the whole, the relationship between Brown and its franchisees is a reasonably stable one.

The examiner, in making this finding, also properly relied on the testimony of six representatives of respondent's competitors who corroborated the necessary inference from the very nature of the Brown franchise program and its operation that the inevitable occurred, namely, that for practical purposes they were foreclosed from selling to the Brown franchise holders. Respondent attacks the testimony of these six representatives as hearsay and speculation on the part of obviously biased witnesses. The question of bias on the part of these witnesses is, of course, best resolved by the examiner who heard them and observed their demeanor. The record does not suggest that he abused his discretion in this respect. Further, the fact that the witnesses' knowledge as to loss of sales or difficulty of making sales to retailers under respondent's franchise plan was largely derived from reports of their salesmen does not rob the evidence of probative value.²³ Obviously, this is the type of knowledge upon which businessmen must rely if they are to conduct their business. In fact,

²² *Supra* note 5. (This testimony is incorporated in the record as CX 118.)

²³ Certain of the witnesses who experienced personal rebuffs from franchise dealers were, of course, also testifying from firsthand knowledge.

the record shows that Brown's competitors utilized this knowledge in formulating sales policy, namely, the determination on the part of some not to actively solicit Brown franchise stores because they were convinced this constituted a waste of sales effort. Since it is apparent that the witnesses themselves relied on this knowledge in their conduct of the business, it is sufficiently trustworthy for consideration by the examiner and the Commission in resolving the issues presented.

The record, moreover, demonstrates specific losses of sales by other shoe manufacturers traceable to the operation of the franchise plan, as shown by the following examples documented by sales data from Brown's competitors:

Franchise shoe store	Date it joined plan	Name of competitor	Competitors' sales to franchise store	Total pairs of shoes
Fisher Shoe Store, Plymouth, Mich. ²⁴	Dec. 17, 1952	Juvenile Shoe Co....	1951 1952 1953 1954 1955 1956 1957 1958 1959	1, 224 1, 530 246 240 252 381 228 188 23 314

²⁴ The vice president of the Juvenile Shoe Co. testified that the owner of this store advised him that purchases would be curtailed because of Fisher's participation in the franchise program.

²⁵ Commencing with 1953, the majority of sales were of the "short" Clinic line. E.g., out of 246 pairs sold in 1953, 234 were Clinic.

Franchise store	Date it joined plan	Name of competitor	Competitors' sales to franchise store	Dollar volume
Blynn's Shoe Stores, Inc., Pittsburgh, Pa.	Feb. 27, 1959	Weyenberg Shoe Co....	²⁶ 1957 1958 1959 1960	636 2, 782 376
Gryder Co., Biloxi, Miss.-----	May 11, 1955	Weyenberg Shoe Co....	1951 1952 1953 1954 1955 1956	1, 581 5, 803 8, 388 3, 219 428 186
Meyers Shoe Store, Watertown, Wis.-----	Aug. 2, 1956	Leverenz Shoe Co.-----	1953 1954 1955 1956 1957	397. 30 1, 316. 10 2, 399. 12 886. 25 -----

²⁶ New account November 1957.

The fact that some representatives of Brown's competitors erred in their testimony relating to certain accounts to whom they allegedly lost sales because of the operation of the franchise plan, or that certain of Brown's dealers may have withheld purchases from Brown's competitors for reasons other than the existence of the franchise agreement, does not significantly detract from the force of this evidence.

The record, as we have noted, does show concrete examples of such losses, but more significant is the testimony of these witnesses on the over-all impact of respondent's program and similar programs of other manufacturers on their sales opportunities generally.

Respondent, conceding that its franchisees concentrated on its lines, directs our attention to the testimony of certain dealers to the effect that their choice to enter the franchise program was governed by the quality and performance of respondent's product, and contends further, in effect, that the decision to concentrate was, therefore, a voluntary choice, quite unlike the situation where the manufacturer prohibits the purchase of competitor's goods. We are not persuaded. Respondent glosses over the fact that whatever a dealer's reasons may have been for entering the program, once he became a participant he was subject to the agreement or understanding requiring him to refrain from purchasing a competitor's conflicting lines and to concentrate on respondent's products. The record is plain that whatever the merit of its products, respondent added to its competitive arsenal the franchise plan embodying restrictions, which necessarily foreclosed competitors from effectively selling to the select group of retailers under that program.

Respondent also directs our attention to its "Outside Line Survey" as conclusive proof of the fact that Brown's competitors are not foreclosed from selling to retailers on the franchise plan. The survey, according to respondent, demonstrates that approximately five out of six franchise stores carried at least one conflicting line, while many carried two or more. The hearing examiner's analysis of this evidence agrees with respondent's contention to the extent of finding that five out of six of respondent's franchisees did carry at least one line competing to some extent with a Brown line. However, the examiner's other findings pertinent to the survey data puts this evidence in its proper context and precludes the inference which respondent urges on us on the basis of the "Outside Line Survey." The following findings of the examiner are crucial on this point:

Respondent also contends that most franchise holders carry other lines, some of which are conflicting, and that this shows a lack of effectiveness of any restrictions if any there be. Most of the important conflicting lines carried by the franchise holders are short lines of specialty shoes, such as Clinics (primarily for nurses) and Hush Puppies (loafers), which are condoned, . . . (Initial Decision, Paragraph 40.)

and

. . . Over the years most of these dealers have learned that respondent will condone some duplication of lines, particularly if the outside line is a short line or a specialty line or if the real volume is in respondent's lines, because five out of six of them carry at least one line that competes to some extent with a Brown

line. There is a point beyond which outside lines will not be tolerated by Brown, and it is believed that generally the dealers know what it is." (Initial Decision, Paragraph 35.)

Significantly, respondent, although taking exception to other findings in paragraphs 35 and 40 of the initial decision, has not taken exception to the excerpts quoted above. We may take these findings as undisputed, therefore. Our own review of the evidence, moreover, persuades us that the findings of the examiner are amply supported by the record. For example, J. R. Johnston, the manager of Brown's franchise program, under whose direction and supervision the survey was made, testified that a franchisee might simply be carrying a few patterns of a conflicting line and yet be listed by the survey as carrying a conflicting line. This witness further stated that even in those instances where only certain patterns in a competitor's line conflicted with respondent's shoes, if the reporting retailer carried any pattern in the line, he would be recorded as carrying a conflicting line. This witness conceded that the overlap in the Brown line and the competitor's line might extend only over a small part of either line, that is, the higher price shoes of one and the lower price shoes of the other, and yet still be considered as conflicting lines for the purposes of the survey. Of particular significance in evaluating the probative worth of this data is the further fact that the survey does not disclose the volume either in pairs or dollars of purchases of conflicting lines by the reporting franchisees; yet the record shows that the sales of competitors, whose representatives testified in this proceeding, to certain franchisees were minimal.

In the light of the examiner's findings, therefore, the "Outside Line Survey" does not demonstrate, conclusively or otherwise, that Brown's competitors were not foreclosed, as a practical matter, from selling to retailers under the Brown franchise plan; nor does it rebut the other evidence of record clearly indicating that respondent has effectively restricted access to the market represented by its franchisees to vendors of conflicting lines.

In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act. Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anticompetitive.

Brown, on the other hand, contends that the legality or illegality of its franchise plan may be determined only after an examination

of the competitive impact of the plan throughout the nation. Brown further argues that the franchise plan involves only an insubstantial share of the national market either in terms of shoes sold or number of retail outlets involved. In this connection, respondent points out that the shoes which it sells to its franchise holders constitute less than one percent of shoe sales nationally and further argues that the same conclusion must be reached after comparison of the 766 stores under the Brown franchise plan in October of 1961 against either the 100,000 retail outlets in the country which sold shoes in 1958 or the 70,000 stores within that total classified as retail shoe outlets. Respondent concedes that the total number of outlets selling shoes included cobbler shops, drugstores, and other outlets having a limited selection of shoes or which carried few shoes in relation to their total inventory. The proper comparison, under respondent's argument, must therefore relate the number of Brown franchise accounts to the 70,000 retailers classified as retail shoe outlets. The stores under the franchise plan constitute approximately one percent of that figure.

In making the argument that the amount of commerce involved in the franchise plan is not substantial in the context of the nation as a whole, Brown relies heavily on *Tampa Electric Co. v. Nashville Coal Co., et al.*,²⁷ and *Rural Gas Service, Inc.*²⁸ In effect, respondent urges us to apply, in a proceeding under Section 5 of the Federal Trade Commission Act, the test of illegality applicable to Section 3 of the Clayton Act to practices not coming within the narrow restraint encompassed by that statute. The Commission recently rejected a similar argument in *Luria Brothers and Company, Inc., et al.*²⁹ Moreover, neither case supports the quantitative insubstantiality rule Brown urges us to follow. Certainly, it would not be appropriate to promulgate a higher standard of illegality for proceedings under Section 5 of the Federal Trade Commission Act than for actions under the Clayton Act, at the urging of respondent, when the former Act was designed ". . . to stop in their incipiency acts and practices which, when full blown, would violate [the Clayton Act]" ³⁰

If respondent's argument were material to the issue presented by Count I of this complaint, it should be weighed in the light of the holding of the Supreme Court in *Brown Shoe Co., Inc. v. United States*.³¹ There the Court, in considering the vertical aspects of an acquisition, found the probability of a substantial lessening of com-

²⁷ 365 U.S. 320 (1961).

²⁸ Docket 7065 [59 F.T.C. 912] (1961).

²⁹ Docket 6156 [p. 243 herein] (1963).

³⁰ *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394 [5 S. & D. 498] (1953).

³¹ 370 U.S. 294 (1962).

petition despite the fact that Brown's sales to the acquired concern, G. R. Kinney Company, Inc., constituted less than one percent of shoe sales nationally after the acquisition. Holding that the market foreclosure demonstrated was neither of *de minimis* nor monopoly proportions, the Court ruled that in such cases the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive and that it was, therefore, necessary to examine the various economic and historical factors in the relevant market to make the determination of whether the supplier-customer relationship is the type of arrangement which Congress sought to proscribe.³² Factually there is a close parallel between this proceeding and the merger action involving Brown's acquisition of the G. R. Kinney Company.³³

We have found that Brown's operation of the franchise plan constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act. We conclude, therefore, that Count I of the complaint has been sustained. Moreover, an examination of the market facts of the shoe industry, as developed in this record in the light of the *Brown Shoe* decision,³⁴ persuades us that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met.

We recognize that a consideration of the economic context in which a challenged act or practice takes place of the nature pursued by the Supreme Court in *Brown Shoe*,³⁵ is primarily germane to a determination of legality or illegality under the Clayton Act. However, an important question remaining to be resolved under Count I is the nature and scope of the remedy to be applied. Economic factors affecting the shoe industry have a direct bearing and provide a significant guide in this respect. We turn now to a consideration of the market facts of the shoe industry for that purpose.

The structure of the shoe industry is significant. Although there are a large number of shoe manufacturers, a few companies occupy a commanding position. Of the approximately 1,000 shoe manufacturers in 1959, the top 70 manufacturers accounted for approximately 54 percent of the shoe production in that year. The 5 largest manufacturers, it should be noted, produced 24 percent of total pairs of shoes

³² Id. at p. 329.

³³ Kinney, at the time of acquisition, had about 1.2 percent of all national retail shoe sales by dollar volume and 1.6 percent in terms of pairs of shoes sold. Kinney, which obtained 20 percent of its shoe requirements from its own plants, subsequent to the acquisition, purchased 7.9 percent of its requirements from Brown, an amount obviously considerably less than 1 percent of sales of all shoes sold nationally. At the time of trial, there were over 400 stores involved in Kinney's retail operation. Id. at pp. 303, 304.

³⁴ *Supra* note 31.

³⁵ Id.

produced in 1959 and their production further constituted 45 percent of the product manufactured by the top 70 manufacturers. Even within the group of the 70 largest manufacturers there is a considerable gap between the 4 or 5 largest and the remaining manufacturers. Brown, in 1959, held third rank in shoe production and second in dollar volume.³⁶ Of particular significance, in our view, is the fact that Brown's sales of \$24,675,617 to the retailers under the franchise plan for the year ending October 31, 1959, alone exceeded by almost two million dollars the sales of the tenth ranking company in that year. This fact convincingly demonstrates the competitive disparity between respondent and the vast majority of shoe manufacturers.

The shoe retailers under the Brown franchise program are a select group, according to the testimony of respondent's own officials, and the representatives of Brown's competitors.³⁷ Only the better credit risks are permitted to remain in the program. Retailers may be, and are, separated from the program because their financing is inadequate to support credit necessary for the volume of purchases expected of a franchise store, although they may have sufficient credit to purchase as a general account. The desirability of the Brown franchise plan accounts is further enhanced by the fact that while the average return of investment for independent shoe retailers generally was 11.8 percent, Brown's franchise holders enjoyed an average 16 percent return.

In the period 1959-1961, the number of stores enrolled under respondent's program showed an increase of approximately 12 percent. The increase is significant, since it demonstrates an intent to expand the program at a time, when according to the testimony of the repre-

³⁶ See the following table for 1959:

Manufacturer	Rank	Pairs of shoes produced	Manufacturer	Dollar volume
International Shoe Co.....	1	51,529,543	International Shoe Co.....	283,260,000
Endicott Johnson Corp.....	2	32,407,012	Brown Shoe Co.....	276,549,164
Brown Shoe Co.....	3	29,681,274	Genesco.....	276,422,000
Genesco.....	4	29,520,000	Endicott Johnson Corp.....	146,099,113
Shoe Corp. of America.....	5	11,050,000	Shoe Corp. of America.....	117,100,000
Evy Footwear Co., Inc.....	6	8,010,000	U.S. Shoe Corp.....	50,858,933
Sudbury Footwear.....	10	6,200,000	Consolidated Nat'l Shoe Corp..	22,864,000
Kessler Shoe Co.....	20	3,203,676	Five Star Shoe Co.....	15,050,000
Valsey-Bristol Shoe Mfg.....	30	2,517,262	Mid-States Shoe Co.....	10,100,000
Evangeline Shoe Co.....	40	2,224,300	Williams Shoe Mfg. Co.....	7,850,000
Connors-Hoffman Footwear.....	50	2,035,000	Laconia Shoe Co.....	5,510,000
Juvenile Shoe Corp.....	60	1,650,000	M. Beckerman & Sons, Inc.....	4,150,000
Liberty Shoe Co.....	70	1,450,000	Sham-O-Kin Shoe Corp.....	2,312,000

(CX 89 A-B. These figures are exclusive of slippers and rubber, canvas, or plastic footwear.)

³⁷ Respondent's descriptive brochure states that the franchise program is not available to everyone, but that the program is best fitted for the outstanding dealer or prospective dealer in each community. (CX-22U).

sentatives of other shoe manufacturers, the prospective number of good, independent retailer accounts available to independent manufacturers is diminishing.

The record evidences a trend in the shoe industry generally and on the part of respondent in particular to vertical integration by way of merger or other arrangements which naturally has a tendency to dry up otherwise available sales outlets to independent shoe manufacturers competing with Brown.

Respondent, as the hearing examiner noted, has several wholly owned subsidiary corporations engaged in the retailing or wholesaling of shoes. In this connection, the Wohl Shoe Company, one of respondent's subsidiaries, sells shoes at wholesale to approximately 3,200 customers located throughout the United States, and more significantly, in 1958, 208 of these customers operated on the "Wohl Plan." Wohl plan accounts, as the hearing examiner found, are independent retail outlets partially financed by Wohl and generally buying most of their women's shoes from Wohl. In addition, Wohl, in 1958, re-tailed shoes to some 457 leased department stores in 243 stores. The Regal Shoe Company, a wholly owned subsidiary of respondent, had a chain of 92 retail outlets in which its shoes were sold. Finally, the G. R. Kinney Company, whose acquisition by respondent was found illegal by the Supreme Court, in 1959 operated and owned a chain of 488 retail family shoe stores.

The testimony of representatives of Brown's competitors supports the finding that the smaller manufacturers depend to a great extent on the purchases of independent shoe retailers. These witnesses stated, however, that at this time they are faced with a diminishing number of retail outlets available to them as a practical matter. According to their testimony, this trend is due in large part either to the purchase of such outlets by the larger manufacturers or to the fact that many independent retailers have come under the control of manufacturers by virtue of franchise plans or other arrangements.

The testimony of these witnesses on the subject of a trend to vertical integration in the shoe industry is graphically corroborated by respondent's own exhibits relating to the franchise plans of the International Shoe Company and of the General Shoe Company, the first and fourth ranking companies in terms of shoe production in 1959. As of 1961, International Shoe had some 1,400 independent retailers under its Merchants Service Plan, while some 317 shoe retailers were members of General Shoe's Friendly Franchise Store Plan. Most significantly, the evidence shows that in the period June 1959 to June 1961, the number of participants in the Merchants Service Plan had increased by approximately 16 percent.

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An examination of the terms of the programs of General Shoe and of International Shoe supports the testimony of the manufacturer witnesses in this proceeding that the franchise plans of the larger manufacturers generally had the effect of restricting their access to stores under such programs. Under these plans, retailers are required to feature the shoes of the sponsor and to handle the sponsor's shoes in a representative manner (Merchants Service Plan) or to purchase sufficient quantities of footwear to assure the presence of an adequate and representative stock of the sponsor's shoes in the franchise store at all times (Friendly Franchise Store Plan). Under both plans retailers are required to furnish detailed reports of their business to the sponsoring manufacturers.

Certain of Brown's competitors whose representatives testified in this proceeding make no serious effort to sell to stores under the franchise plan because of the feeling that it would be a waste of time. This, in our view, is a most significant indication of a deteriorating competitive situation, demonstrating as it does that respondent's competitors have lost the incentive to energetically strive for sales in an important segment of the market.

In assessing the need for Commission action, we must take account of the fact that historically one of the purposes of the antitrust laws, over and above purely economic considerations, has been to preserve ". . . an organization of industry in small units which can effectively compete with each other. . . ." ³⁸ To foster the competitive position of the smaller manufacturers, Brown should be prohibited from entering into arrangements with its customers interfering with the latter's independent judgment in making purchasing decisions.

III

Resale Price Maintenance

Count II of the complaint alleges that Brown engaged in unfair acts and practices violative of the Federal Trade Commission Act by requiring, or attempting to require, its customers to adhere to the arbitrary noncompetitive resale prices which it established.

Brown communicates its suggested resale prices on the shoes it manufactures in various ways. In the case of certain selling divisions, the suggested resale price is also included on the wholesale price list. The wholesale price list of the women's and girls' lines do not give the suggested resale price but dealers are advised orally of the 44 to 45 percent markup on these shoes by Brown's salesmen; the dealers, therefore, automatically know the suggested resale price on the shoes

³⁸ *United States v. Aluminum Co. of America, et al.*, 148 F. 2d 416, 429 (2d Cir. 1945); see also *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

in these lines. Most of respondent's selling divisions send schedules of suggested resale prices each season to their accounts. In addition, respondent publishes the suggested resale prices for some of its shoes in advertisements inserted in magazines of national circulation. Brown, apparently to prevent conflict among its dealers, also suggests the starting and the closing dates of sales at the end of each six-month selling season.

Respondent, according to its vice president and board member, Aarol C. Fleener, will attempt to dissuade a dealer from selling below suggested resale prices if other customers complain about the practice in order to prevent the loss of business to the complaining retailer.

The finding that it is Brown's policy to require adherence by its dealers to the suggested resale prices on its products is specifically supported by evidence that Brown sought to bring the pricing practices of Fraver's Shoe Store, Chambersburg, Pa., and Pomeroy's Department Store in Harrisburg, Pa., into line with its suggested retail prices at the urging of another account, their competitor, Dutrey's Shoes, with stores located in Waynesboro and Carlisle, Pa.

Brown, although it concedes that the documentary evidence in the record relating to these events raises inferences of illegal price activity on its part, contends that such inferences were completely rebutted by the testimony of its witnesses. The primary question to be resolved on respondent's exceptions is whether the hearing examiner properly weighed the conflicting evidence when he found that the allegations under Count II of the complaint had been sustained. A detailed examination of these occurrences is therefore warranted.

The record demonstrates that Brown went to considerable lengths to secure adherence to its suggested resale prices on the part of the Fraver Shoe Store in Chambersburg, Pa., at the insistence of Fraver's competitor, Dutrey's Shoes, in neighboring Carlisle. In September of 1956, after Dutrey's notification that Fraver had cut prices on respondent's merchandise, Brown's fieldman, George Croker, called upon Fraver pursuant to Dutrey's complaint about Fraver's pricing. Croker testified that he advised Fraver that Dutrey felt that the former was not getting the proper markup on his shoes and suggested that Fraver meet with Dutrey so that they could discuss their pricing differences among themselves. The witness, who at one point in the proceeding denied that he had asked Fraver to enter into any agreement as to the resale price of respondent's merchandise, subsequently admitted that Fraver had agreed to place his regular markup on Brown's shoes. Croker's subsequent contention that he and Fraver had not discussed specific prices is therefore irrelevant.

In advising his superior, J. R. Johnston, manager of the Franchise

Division, as to the results of the conference with Mr. Fraver, Croker stated in his memorandum of September 9, 1956: "Mr. Fraver has invited Dick Dutrey to call on him so that they can have an agreement on the prices on their shoes and Mr. Fraver has assured me he will maintain the prices on our shoes so there will be no confliction [sic] in the future." Johnston replied, advising Croker that he was glad the situation was straightened out once and for all and that Fraver's willingness to cooperate was appreciated.

A year later, in October of 1957, Dutrey again complained to Brown about Fraver's pricing. In response to that complaint, T. R. Curtis of the Brown Franchise Division, advised Dutrey that George Croker, Brown's field representative, had been requested to "personally, contact Fraver for the purpose of having a thorough understanding that he must discontinue this practice [price cutting]." In fact, Curtis did order Croker to make the call, instructing him to discuss with Fraver "the necessity of his selling our lines at our recommended retail prices" and Croker was further instructed to advise Fraver that if the latter underpriced Brown's merchandise in the future it would be necessary for Brown to discontinue its business relationship with Fraver. Copies of these instructions were sent to representatives of three of respondent's sales divisions in Fraver's area.

Croker, testifying in behalf of respondent, stated that he took no action on the letter from Curtis because he regarded these instructions as improper. This testimony is difficult to believe, since it is clearly inconsistent with his actions of the preceding year. At any rate, it is indisputable that Croker's superior in the Franchise Division, J. R. Johnston, did not let the matter rest but took personal action. On October 16, 1957, he advised Mr. Dutrey by telegram that Fraver had agreed to abide by the suggested resale prices on all patterns of the Brown Shoe Company which he carried. Johnston's follow-up letter to the telegram assured Dutrey that he had talked at considerable length with Fraver "on why it was necessary that we ask him to abide by our suggested retail prices and he agreed to do just that." Johnston further advised Dutrey that Fraver would remark any patterns necessary at once and that he was confident that there would be no recurrence of such price cutting since he knew that Fraver could be counted on to keep his word.

Respondent argues, in its brief, that Johnston's testimony in this proceeding must dispel any inferences of illegality which may be drawn from respondent's memoranda concerning Fraver's pricing policy. Respondent summarizes Johnston's testimony as follows:

Johnston testified that he did not ask Fraver for any commitment as to the prices he would charge for Brown brand shoes and that he did not ask Fraver to raise his prices. (R. 418) He said that the terms "agree" or "agreement"

used in his correspondence to Dutrey related only to the fact that Fraver "agreed that the philosophy of raising (his) prices to afford him a reasonable markup on the basis of replacement cost made sense." (R. 418, 458-59) Johnston said that no threat to discontinue any line of shoes or anything like that, was made to Fraver. (R. 420)²⁹

The argument is without merit since this testimony cannot be construed as simply explaining the statements in these memoranda; plainly, the statements of Johnston relied upon by respondent are in irreconcilable conflict with the documentary evidence. This conclusion is inescapable after a reading of Johnston's letter of October 16, 1957, to the personnel of respondent's sales divisions arranging for the policing of Fraver's resale prices in the following terms:

Dutrey's were very firm again in their request to have Mr. Fraver abide by our suggested retail prices and if this is not corrected once and for all it could mean losing Dutrey's account.

May I recommend that when you call on Mr. Fraver from time to time that you check the retail prices for your particular line of shoes and make sure he is abiding by your suggested prices other than during clearance sale periods.

We are equally convinced that Fraver's testimony that he had never been asked to enter into any agreements by Johnston or that he had never entered into any agreement with respondent on pricing practices is similarly entitled to little credit. His testimony in this regard, like the statements relied upon by respondent on the part of Johnston and Croker, simply cannot be reconciled with the contemporaneous records of the events described, unbiased by the publicity or possible consequences of litigation.

Dutrey, on June 15, 1956, also complained about the advertisements of Pomeroy's, a department store in Harrisburg, Pa., promoting respondent's shoes below the suggested resale prices. In response, the manager of the Roblee Division, on June 28, contacted John Mirra, his salesman in the area, instructing him to find out why Pomeroy's ran the advertisement and pointing out further that this customer had been previously definitely advised of the program on Roblee sales. Subsequently, on August 10, the Roblee sales manager again contacted Mirra with respect to Pomeroy's advertisement of June 15, advising that Roblee shoes went on sale only twice a year, namely, in July and January, and that any other sale promotion on Roblee shoes was not to be advertised as such. Significantly, Roblee's sales manager stated: "I believe you know the policy of the Company and this is definitely not allowed." These instructions concluded with the admonition to straighten the matter out with Al Schwartz of Pomeroy's so that there would be no recurrence.

Subsequently, J. R. Johnston, manager of the Franchise Division,

²⁹ Respondent's brief, p. 47.

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advised Dutrey that both the Roblee salesman and sales manager had authorized him to give Dutrey their assurance that there would not be a recurrence of Pomeroy's advertisement of price cuts on Roblee shoes in advance of the sale period for Roblee shoes.

By September of 1956, Pomeroy's had again advertised Brown's shoes below the suggested resale price. In this instance, both the Roblee and Buster Brown brands were involved. Another complaint by Dutrey ensued. This time the irate customer complained directly to the president of Brown, Clark R. Gamble. By letter of September 12, 1956, Mr. Gamble advised Dutrey that his complaint would be given thorough attention and that he would hear from Brown as soon as a complete investigation had been made. A copy of this letter was sent to Tom Curtis of the Brown Franchise Division. Curtis advised respondent's president that the manager of the Roblee Division was writing Mirra, the Roblee sales representative in the area, instructing the latter to contact Pomeroy's for the purpose of getting the price cutting situation straightened out and to insure there would be no repetition.

The sales manager of Roblee did, in fact, instruct his salesman to visit Pomeroy's to correct this situation to insure there would be no recurrence of such advertising in the future. Mirra was advised that if there were a repetition of this advertising Brown would be forced to withdraw the Roblee line from the Pomeroy store in Harrisburg. The salesman of the Buster Brown Division was given similar instructions by his sales manager.

Respondent, to rebut the documentary evidence, adduced testimony from the salesmen of the Roblee and Buster Brown Divisions as well as from Messrs. Schwartz and Moscovitz, division manager of shoes for Pomeroy's and assistant division manager, respectively. Schwartz and Moscovitz both testified that they had set shoe prices independently and that no one from Brown had ever complained to them about their pricing decisions. Mirra testified that he did not discuss the June 15 advertisement complained of by Dutrey with Pomeroy's and had done absolutely nothing with respect to the instructions from the sales manager ensuing from Dutrey's first complaint. With respect to Dutrey's second complaint, Mirra admitted that he asked Pomeroy's not to advertise the sales but "just sell them [the shoes], put them on the table and sell them so I could get Mr. Dutrey off my back. Tufton, the Buster Brown salesman, testified that he might have received a memorandum from the Buster Brown sales manager on Dutrey's complaint on Pomeroy's pricing but had never made any calls pursuant to such a memorandum.

This testimony is simply not credible in the light of the documentary

evidence. It is inconceivable that respondent's personnel did nothing or as little as one might believe, taking their testimony at face value, since J. R. Johnston, manager of the Franchise Stores Division, stated in a letter to his fieldman, George Croker, referring to Pomeroy's advertising of the Roblee and Buster Brown shoes, that "Mr. Gamble has insisted that the sales managers of these divisions get this situation straightened out and I am sure it will be." Mirra's denial that he had discussed Dutrey's first complaint with Pomeroy's cannot be reconciled with J. R. Johnston's letter of August 16, 1956, advising that both Mirra and the sales manager of the Roblee Division had authorized Johnston to give Dutrey their assurance that there would be no repetition of the Pomeroy advertising complained of. The conclusion is inescapable that either Johnston was giving Dutrey's false assurances in 1956 or that Mirra was not telling the truth in the course of his testimony in 1961. The denial by the Buster Brown salesman, Tufton, that he took any action is contradicted flatly by the memorandum of October 9, 1956, to Tom Curtis of the Franchise Division by the sales manager of Buster Brown, advising Curtis that Tufton had contacted Pomeroy's and had the account's assurance that there would be "no further cut-price promotions on our shoes at any time other than our Semi-Annual Sale periods."

The extent to which Fraver's and Pomeroy's acquiesced in respondent's attempt to suppress price competition is not altogether clear. The fact that respondent took active steps to achieve that goal is beyond the dispute.

The conclusion that Brown's activities designed to suppress price competition between Dutrey and Fraver as well as Pomeroy's were not isolated instances but rather a part of respondent's general policy is supported by the testimony of Aarol C. Fleener, vice president and board member of Brown, who admitted in this proceeding that:

Well, I will go back again; that we have to go over and see this fellow [a price cutting retailer] and try to dissuade him from that practice, because we get these protests from other people, and we have to go to it and attend to it.

There are many, as I say, that will take place [instances of price cutting], and if it doesn't affect anything there is nothing done. But if it does affect another merchant you have got to make your peace over in that area or you will lose several customers. So you have got to straighten it out.

* * * * *

... if a man is a persistent price cutter on his shoes and other merchants are complaining about it, we have got to see to it that he straightens out his practice.

These admissions of the witness compel the inference that respondent followed a policy of seeking adherence to its suggested resale prices at least in those instances where price cutting was the cause of friction among its dealers, as well as the further inference that re-

spondent must have had an agreement or understanding with its dealers that prices be maintained, going beyond a mere unilateral announcement of policy to its customers coupled with the retailer's independent decision to adhere to the prices announced. In the absence of such an understanding, respondent's dealers would have no reason for complaint to Brown and the latter would have no reason for taking steps to "straighten out" errant retailers. It strains credulity to believe that respondent would act as arbitrator in such instances in the absence of any agreement.

The hearing examiner's finding that respondent is rarely faced with problems posed by price cutting on the part of its dealers is supported by the following exchange between the examiner and Mr. Fleener:

HEARING EXAMINER CREEL: When you take a new outlet that hasn't been in the shoe business you wouldn't know whether he is going to be a price cutter or not?

THE WITNESS: Oh, yes. You talk to him quite a while before you sell him telling him what is expected of him. . . .

Respondent contends that in making the findings complained of, the examiner took Mr. Fleener's statement out of the context of his testimony as a whole, which reflected only a fundamental concern that Brown's retailers obtain a sufficient return on their product to stay in business. While respondent may well have been concerned with the profit picture of its dealers, it is equally true that respondent's prime motivation in straightening out price cutting situations, as is apparent from this witness' testimony, was to satisfy the complaints of competitors of the price cutting retailers.

The hearing examiner's finding that respondent had a policy of seeking adherence to suggested resale prices and that it required or attempted to require agreements to that effect from its dealers is not vitiated by Mr. Fleener's disclaimers irreconcilable with the documentary evidence that Brown could not dictate the price at which its customers were to sell. When Brown, at the behest of one dealer, confers with another dealer for the purpose of persuading the latter to raise prices or to refrain from advertising cut prices except at certain sale periods, it matters not whether respondent attempts to achieve the desired end by simple persuasion, appeals to the dealer's self interest, or threats of refusal to sell.⁴⁰ In either event, respondent has gone beyond the mere unilateral declaration of policy coupled with a refusal to sell, sanctioned by *United States v. Colgate & Com-*

⁴⁰ ". . . whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. . . ." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

pany.⁴¹ Clearly, the *Colgate* doctrine extends only to those cases where the dealer independently decides to adhere to the prices of the manufacturer; it does not sanction respondent's attempt to suppress price competition among its retailers at the request of certain of its customers. Once respondent takes steps of this nature, neither its own pricing decisions nor that of its customers may be considered unilateral.⁴²

We have already held in connection with the charges under Count I of the complaint that the fact that contemporaneous documents and the subsequent testimony of the author of the documents and other participants to the events described are in conflict does not prevent the trier of fact from resolving the conflict on the basis of the documentary evidence. The hearing examiner is, of course, in the best position to evaluate the credibility of the witnesses who have appeared before him in the light of all the evidence. An examination of the record here convinces us that his finding that respondent has illegally taken steps to suppress and eliminate price competition between its customers is amply supported by the record.

Respondent's objections that the order entered below is too vague and indefinite to be enforceable and that it does not conform to the allegations of the complaint or to the evidence are without merit. The order merely prohibits respondent from further pursuing the unfair trade practices evidenced by this record and defines Brown's obligations thereunder with clarity.

The exceptions of respondent are denied and the initial decision as modified in the accompanying order is adopted as the decision of the Commission.

Commissioner Elman, considering that the exclusive vertical arrangements shown by the record have the requisite competitive effects, *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-324 (1962), concurs in the Commission's decision and order.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter.

⁴¹ 250 U.S. 300 (1919).

⁴² See *United States v. Parke, Davis & Co.*, *supra* note 40, at p. 46, where the Court held: ". . . It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies, his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's acquiescence is not then a matter of free individual choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price maintenance combination or conspiracy in violation of the Sherman Act. . . ."

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FINAL ORDER

This matter having come on to be heard upon respondent's exceptions to the initial decision of the hearing examiner and upon briefs and oral argument in support of said exceptions and in opposition thereto, and counsel for both parties having filed on September 4, 1962, a "Joint Motion for Correction of Record"; and

The Commission having rendered its decision denying the exceptions of respondent and having determined that the aforesaid "Joint Motion for Correction of Record" should be granted:

It is ordered, That the hearing examiner's initial decision be modified by striking therefrom paragraphs 41 and 42 of the findings and substituting therefor the findings embodied in the accompanying opinion beginning on page 715 with the words "In short, from our review of the record," and ending on page 720 with the words "interfering with the latter's independent judgment in making purchasing decisions."

It is further ordered, That the hearing examiner's initial decision, as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the "Joint Motion for Correction of Record" filed September 4, 1962, be, and it hereby is, granted.

It is further ordered, That respondent, Brown Shoe Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioners Anderson and Higginbotham not participating.

IN THE MATTER OF

INLAND RUBBER CORPORATION