

(e) That respondents guarantee the success of those selling their product or that they do not have competition;

(f) That respondents' product is made by a scientific new process.

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

IN THE MATTER OF

GRAND CAILLOU PACKING COMPANY, INC., ET AL.,
TRADING AS THE PEELERS COMPANY

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

Docket 7887. Complaint, May 13, 1960—Decision, June 4, 1964

Order requiring five members of a Louisiana family engaged in the development and distribution of shrimp processing machinery, of which they had a monopoly and which they leased to shrimp canners in the United States and sold to foreign canners, to cease discriminating in price between domestic lessees by such practices as charging shrimp canners in the North-Western United States double the rates they charged the canners' competitors on the Gulf of Mexico; and to cease discriminating between foreign and domestic shrimp processors by selling their machinery abroad while refusing to sell to domestic canners, with result of maintaining static higher production costs at home and permitting lower costs which receded with increased production to foreigners, thus creating the likelihood that foreigners would enlarge their penetration of the United States market and making it increasingly difficult for domestic producers to compete for foreign markets.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the

Complaint

65 F.T.C.

provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent Grand Caillou Packing Company, Inc., sometimes hereinafter referred to as Grand Caillou, is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at Houma, Louisiana.

Respondent Emile M. Lapeyre is president and a member of the board of directors of the corporate respondent and at all times mentioned herein participated in the formation, direction and control of the policies, practices and acts of Grand Caillou hereinafter referred to.

PAR. 2. Respondents Emile M. Lapeyre, Fernand S. Lapeyre, James M. Lapeyre, Andre C. Lapeyre, Felix H. Lapeyre, and Emile M. Lapeyre, Jr., are individuals and copartners, trading and doing business as The Peelers Company, with their offices and principal place of business located at 619 South Peters Street, New Orleans 4, Louisiana. These individual respondents, at all times mentioned herein, participated in the formation, direction and control of the policies, practices and acts of The Peelers Company hereinafter referred to.

PAR. 3. The Peelers Company, now and since November 1951, has been a partnership in commendam composed of six active or general partners (the individuals of the Lapeyre family named herein as respondents) and approximately twenty-six limited partners (also members of the Lapeyre family by blood or marriage) and respondent Grand Caillou Packing Company, Inc. Grand Caillou is a silent or inactive partner in The Peelers Company and is owned and controlled by members of the Lapeyre family. The officers and directors of the corporate respondent include the following individual respondents:

Emile M. Lapeyre, *President and Director*

Emile M. Lapeyre, Jr., *Vice President*

Fernand S. Lapeyre, *Director*

James M. Lapeyre, *Director*

Andre C. Lapeyre, *Director*

The Peelers Company is the successor to Peelers, Inc., a Louisiana corporation, which was dissolved in November 1951. All of the stockholders in Peelers, Inc., members of the Lapeyre family, became partners in the present partnership. The Lapeyre family through its ownership, domination and control of Grand Caillou and The Peelers Company formulates, directs and controls, and authorizes all of the policies,

practices and acts of both the respondent corporation and respondent partnership hereinafter referred to.

All of the partners in The Peelers Company constitute a class so numerous as to make it impracticable to specifically name them all as respondents herein. The individual partners of The Peelers Company, hereinbefore specifically named as respondents, are fairly representative of the class composed of all the partners in The Peelers Company, and are herewith and hereby made respondents as representative of that class. All partners in The Peelers Company, as represented by the individual respondents hereinbefore specifically named, are hereby made respondents as though specifically named herein and, together with the specifically named partners of The Peelers Company, are sometimes hereinafter referred to as The Peelers Company.

PAR. 4. Grand Caillou is engaged primarily in the business of processing, canning, selling, and distributing shrimp to customers located in various States of the United States, including the States of Washington, Oregon, and Alaska, and is one of the largest concerns of its kind in the country. In the course and conduct of its business, Grand Caillou obtains raw shrimp, primarily from the Gulf Coast fishing area, processes and places this product in cans, and causes it to be shipped or otherwise transported to wholesale and retail customers located in States other than the State in which it carries on its canning and packing operations. There has been at all times mentioned herein, and is now, a continuous current and movement of said shrimp in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act.

PAR. 5. The Peelers Company is engaged in the leasing, licensing or sale in the United States and foreign countries of shrimp peeling machines, shrimp cleaning machines, shrimp grading machines, shrimp deveining machines, shrimp separating machines, and other machinery pertaining to processing shrimp, hereinafter sometimes collectively referred to as shrimp processing machinery, to canners and packers of shrimp located in the United States and foreign lands. The Peelers Company controls patents, through direct ownership or assignment, or has patent applications pending, on all of its shrimp processing machinery.

In the course and conduct of its business, The Peelers Company causes its shrimp processing machinery to be shipped or otherwise transported to its lessee customers and other customers located in States other than the State or States in which such shipments originate and, in some instances, The Peelers Company sells its shrimp processing machinery to customers located outside of the continental

Complaint

65 F.T.C.

limits of the United States. There has been at all times mentioned herein, and is now, a continuous current and movement of said shrimp processing machinery in interstate and foreign commerce, as "commerce" is defined by the Federal Trade Commission Act.

PAR. 6. Respondent Grand Caillou Packing Company, Inc., is now, and at all times mentioned herein has been, in competition with other individuals, partnerships, corporations and firms in the processing, canning, sale and distribution of shrimp and other seafoods in interstate commerce, except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged.

PAR. 7. The Peelers Company is now, and at all times mentioned herein has been, in competition with other individuals, partnerships, corporations and firms engaged in the manufacture, sale or lease, and distribution of shrimp processing machinery in interstate commerce, except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged.

PAR. 8. Prior to 1947, shrimp peeling, or picking, was done by hand labor. In 1947 the United States Patent Office issued a patent to respondents Fernand S. Lapeyre and James M. Lapeyre covering a shrimp peeling machine which efficiently peeled shrimp at sufficient speed and in such quantities to make feasible its commercial exploitation. In addition to the basic peeling machine, the individual respondents have subsequently obtained the issuance or control of additional patents on other shrimp processing machines which supplement and complement the peeling machine. These machines include a machine for cleaning shrimp after peeling or picking; one for slitting the shrimp's back; one for removing the heads from raw shrimp; and a machine for separating shrimp into various sizes. In 1956 industry sales of processed shrimp exceeded \$16,000,000.

Beginning about October 1947, the individual respondents named herein through Peelers, Inc., began to commercially exploit the aforesaid shrimp peeling machine by the medium of leases and sales to shrimp canners and packers located throughout the United States and in foreign countries. These respondents through The Peelers Company now commercially exploit the aforesaid shrimp peeling machine and also the other shrimp processing machines on which they own or control patents. As of March 1958, they had leased approximately 118 shrimp peeling machines, 70 shrimp cleaning machines, 68 shrimp separating machines, 41 shrimp deveining machines, and 19 shrimp grading machines to 51 processing plants located throughout the United States. Due to the efficiency of operation of respondents'

shrimp processing machinery, domestic shrimp processors, including respondent Grand Caillou, must utilize these machines in their plants in order to compete in the processed shrimp market.

In addition to the aforementioned patents, the individual respondents, or The Peelers Company, have filed with the United States Patent Office, since May 17, 1956, applications for patents on an additional 11 different machines designed for the processing of shrimp.

In addition to obtaining domestic patents and applying for other patents on shrimp processing machinery, the individual respondents, since about September 1950, have obtained 86 foreign patents in 42 foreign countries on many of their various shrimp processing machines and have made patent applications for 24 patents in 24 foreign countries on other shrimp processing machinery.

PAR. 9. From 1947 to the present the individual respondents, in the course and conduct of the business of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have engaged in unfair methods of competition and unfair acts and practices in interstate and foreign commerce, and, as a part thereof, have done and performed the following acts, among others:

(a) Since about February 1951, the individual respondents, The Peelers Company, and Peelers, Inc., have entered into agreements with various individuals whereby respondents have obtained exclusive licenses granting all of the rights to control, manufacture, and commercially exploit various shrimp processing machines on which these licensors had obtained United States patents or had applied for United States patents. These licensors include, among others, Robert J. Semanie, James L. Self, Le Roy Ernest Demarest, Stephen D. Pool, and Walter Peuss. Individual respondents and The Peelers Company have, in most instances, never attempted to manufacture, develop, or commercially exploit the shrimp processing machines covered by the aforementioned agreements.

(b) Since about February 1951, the individual respondents, The Peelers Company, and Peelers, Inc., have entered into agreements with Robert J. Semanie, James L. Self, Le Roy Ernest Demarest, and Stephen D. Pool, among others, whereby said individuals agreed to disclose to respondents any and all future inventions on machines pertaining to the processing of shrimp and agreed to assign or license such inventions, if any, to aforesaid respondents.

(c) Since the development of a competitive shrimp peeling machine or device, patented by Paul C. Skrmetta of New Orleans, Louisiana, in 1957, and hereinafter called the Skrmetta machine, the individual respondents, with full knowledge of that development and patent, have harassed, intimidated, and threatened suit for patent infringe-

Complaint

65 F.T.C.

ment against shrimp processors who purchased or leased the Skrmetta machine, or who were potential purchasers or lessees of the Skrmetta machine; have filed suit for patent infringement against purchasers, lessees, and manufacturers of the Skrmetta machine; have threatened suit for patent infringement against purchasers and prospective purchasers of the Skrmetta machine located in foreign countries; and have offered unfair terms and conditions of sale to purchasers and prospective purchasers of the Skrmetta machine located in foreign countries.

(d) The individual respondents and The Peelers Company have placed a provision in their agreements with lessees or licensees of their shrimp processing machinery in the United States which requires the lessee or licensee to purchase non-negotiable debentures issued by The Peelers Company. These debentures have a value of \$500 each, bear an interest rate of five percent per annum and the majority of the outstanding debentures do not fall due or become payable until April 1, 1966. The aforesaid agreements between the respondents and such processors contain provisions requiring said processors to purchase from The Peelers Company a specific number of debentures for each type of leased shrimp processing machine, as follows:

<i>Machine type:</i>	<i>No. of debenture</i>	<i>Total debenture, amount per machine</i>
Shrimp Peeler.....	12	\$6, 000
Shrimp Cleaner.....	2	1, 000
Shrimp Separator.....	1	500
Shrimp Deveiner.....	6	3, 000

(e) The individual respondents and The Peelers Company have leased or licensed the use of shrimp processing machinery to various processors of shrimp located in various States, including the States of Oregon, Washington, and Alaska at discriminatory and substantially higher rental or royalty rates than the rental or royalty rates granted to other lessees or licensees of similar machinery located in other States of the United States, including the State of Louisiana.

PAR. 10. From 1947 to the present, Grand Caillou, in the course and conduct of its business, as aforesaid, and the individual respondents, in the course and conduct of the business of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have agreed and combined among themselves to adopt and carry out the unfair methods of competition and unfair acts and practices hereinbefore described and set forth in Paragraph Nine.

PAR. 11. Included among the effects and results of the methods of competition, acts and practices, as hereinbefore alleged, are the following:

(a) The Peelers Company has obtained a dominant position amounting to a virtual monopoly in the manufacture, leasing, licensing or sale, and distribution of shrimp processing machinery in the United States.

(b) Potential competitors and competitors of the individual respondents and The Peelers Company have been, or may be, hindered, restricted, or prevented from engaging in the business of manufacturing, leasing, licensing, selling, or otherwise distributing shrimp processing machinery in the United States and in foreign countries.

(c) Domestic shrimp processors have been, or may be, deprived of the benefits of fair competition in the leasing, licensing, sale and distribution of shrimp processing machinery.

(d) Inventors and potential inventors of shrimp processing machinery have been, or may be, deterred from developing, producing, manufacturing, patenting, selling, leasing, licensing, or otherwise distributing and marketing shrimp processing machinery.

(e) Competitors of Grand Caillou in the processing, distributing or sale of shrimp or shrimp products have been, or may be, injured, and competition with Grand Caillou has been, or may be, prevented or destroyed.

(f) Competition in the processing, distribution or sale of shrimp or shrimp products has been, or may be, substantially lessened, and a tendency toward monopoly has occurred.

PAR. 12. The aforesaid acts and practices of the respondents have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened, or eliminated actual and potential competition, as hereinbefore alleged, and are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce or unfair acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Richard E. Ely and Mr. William L. Weber, Jr., for the Commission.

Kelley, Drye, Newhall, Maginnes & Warren for respondents.

Mr. W. D. Keith, Mr. Joseph H. Smith, Mr. A. Robert Theibault, Mr. Guy W. Shoup and Mr. John J. Loflin, Jr., of counsel.

OPINION OF THE COMMISSION

JUNE 4, 1964

By MacIntyre, *Commissioner*:

This matter is before the Commission on cross-appeals of the parties from the hearing examiner's initial decision filed April 25, 1963. Pur-

suant to permission granted October 3, 1963, Buquet Canning Company, Mavar Shrimp & Oyster Co., Inc., Southern Shell Fish Co., and Violet Packing Co., Inc., shrimp canners located in the Gulf of Mexico coast area, have filed a brief as *amicus curiae*.

The respondents are Grand Caillou Packing Company, Inc. (hereinafter Grand Caillou), a Louisiana corporation primarily engaged in the production and sale of canned shrimp, its president, Emile M. Lapeyre, and five additional members of the Lapeyre family as individuals and as copartners representative of all partners engaged in distributing shrimp processing machinery under the trade style The Peelers Company. The complaint, issued May 13, 1960, charges respondents with having conspired to engage in unfair methods of competition or unfair acts or practices in commerce having the tendency and actual effect of injuring, hindering, suppressing, lessening or eliminating actual and potential competition in two fields, the processing and sale of shrimp products and the manufacturing and distribution of shrimp processing machinery. Separate denial answers were filed by Grand Caillou and the individual respondents.

The hearings commenced August 26, 1960, and proceeded intermittently in various cities throughout the country until October 8, 1962, when the record was closed for the reception of evidence. The transcript of the testimony includes more than 5,790 pages. Approximately 1,300 exhibits were introduced by complaint counsel and about 2,200 exhibits by respondents. Most of the exhibits consist of documents containing a multiple number of pages. The exhibits placed in the public record occupy twenty-six bound volumes or exhibit binders. The *in camera* exhibits are contained in eleven binders.

The hearing examiner dismissed the complaint as to the corporation, Grand Caillou, and Emile M. Lapeyre in his capacity as president and director of Grand Caillou. A single charge of the complaint was sustained as to the individual respondents and an order which would require them to cease and desist from the found violation is contained in the initial decision. All other allegations of the complaint were dismissed as to all parties.

The initial decision, consisting of ninety-two pages, was, except for a few pages, copied *in haec verba* from proposed findings, briefs and pleadings filed by the respondents. It contains little independent factual or legal analysis. Nor does it explain why one hotly contested factual viewpoint was adopted instead of another. The numerous cases cited by the parties are not discussed.

We are not saying that it is error for the hearing examiner to adopt any or all of the proposed findings submitted by either party. Proposed findings are submitted for the very purpose of being adopted. Our view

is that Rule 3.21 of the Rules of Practice requires the hearing examiner to give his own independently conceived reason or basis for each conclusion made upon all material issues of fact, law or discretion presented on the record. An initial decision which does less is of little use to the Commission, for there is no indication that the primary job of the hearing examiner, that of making an initial judgment as to the facts and law, has been accomplished. In a recent case, the Supreme Court commented on a somewhat similar situation:

* * * He [the district judge] told counsel for respondents "Prepare the findings and conclusions and judgment." They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his, they are not to be rejected out-of-hand, and they will stand if supported by evidence. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court. See 2B Barron and Holtzoff, *Federal Practice and Procedure* (Wright ed. 1961), § 1124. Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States v. Forness*, 125 F. 2d 928, 942, and do not reveal the discerning line for decision on the basic issue in the case. * * * *United States v. El Paso Natural Gas Company*, 376 U.S. 651, April 6, 1964.

The Court cited with approval the statement of Judge J. Skelly Wright of the Court of Appeals for the District of Columbia, found in *Seminars For Newly Appointed United States District Judges* (1963), p. 166, as follows:

Who shall prepare the findings? Rule 52 says the court shall prepare the findings. "The court shall find the facts specially and state separately its conclusions of law." We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the Judge decided the case.

Since the initial decision is of no help to the Commission in resolving the many issues of this proceeding, it will be set aside and the Commission will, in this opinion, make its own findings and conclusions as to the facts.

The Respondents

This is, in essence, a proceeding against the Lapeyre family, for its members own, operate and completely control the corporations and partnerships involved. While separate business organizations are maintained, there is doubtless a community of interest which supersedes the business organization forms utilized. Where separate corporate forms are utilized, the family members become the common directors and officers. Where a partnership form is utilized, the general or operating partners also hold positions in one or more of the family corporations as officers or directors.

Grand Caillou Packing Company, Inc., is the wellspring of the Lapeyre family's various business endeavors. It was organized in March 1924, and has been primarily engaged ever since in the canning and sale of shrimp. Until about 1950 it also canned and sold oysters, but this has now been discontinued, although on occasion it still purchases and resells oysters canned by other canneries. Grand Caillou also sells canned shrimp, which it purchases from other canners. Sales are made directly to chain stores and indirectly to other customers through brokers. The canned shrimp is labeled with either the customer's brand or Grand Caillou's brand, Lou-z-ana. About 15 to 17 percent of Grand Caillou's sales of canned shrimp are made for export to foreign countries.

Grand Caillou purchases canned shrimp for resale from Shell-Tex fisheries of Brownsville, Texas, a limited partnership. Twenty-nine and sixty-six one hundredths percent of this partnership is owned by Southernmost Corporation, a private corporation organized under the laws of Texas. Respondent Emile M. Lapeyre is the president of Southernmost Corporation and all of its stock is owned by Grand Caillou. Louis F. Lapeyre is the plant manager of Shell-Tex.

In 1960 Grand Caillou sold 70,804 standard cases¹ of shrimp out of a total U.S. pack of 952,223 standard cases. Thus, Grand Caillou accounted for 7.4 percent of the total U.S. pack. During the nine-year period from 1952 through 1960 it sold 5.7 percent of the total U.S. pack. Respondents' exact ranking among shrimp canners was not exactly determined but certainly it is among the largest. Peeling machinery rentals paid to The Peelers Company give some indication of ranking, since all domestic canners save one utilize respondents' peeling equipment. In 1960 Grand Caillou ranked eighth in rentals paid to The Peelers Company.

The relationship or connection of five of the individually named respondents to Grand Caillou is as follows: Emile M. Lapeyre is the

¹ A standard case is an arbitrary statistical unit composed of forty-eight cans of 5-ounce weight.

president and a director. His son Emile, Jr., is vice president and a director. Another son, James, is a director. A brother, Fernand, is a director and another brother, Felix, is general counsel. With the exception of a negligible amount owned by two Houma, Louisiana, families, all of the common and preferred stock in Grand Caillou is owned by the Lapeyre family.

The Individual Respondents

When this suit was brought each of the individual respondents was a general partner of The Peelers Company, a partnership in commendam. Complaint counsel informed the Commission at oral argument, without contradiction from respondents' counsel, that individual respondent Andre Lapeyre died in November 1963. The complaint, therefore, will be dismissed as to him. Complaint counsel also advised that since about November 1963 the business of the former partnership, The Peelers Company, has been conducted in corporate form under the names "Lathrum Corporation" and "Lathrum International, Inc." According to counsel, the former partners in The Peelers Company have subscribed to stock in the corporations in the proportional amounts of the interest they previously held in the partnership. The Peelers Company has been liquidated and the individually named respondents are now the officers and directors of the new corporations.

The Dun & Bradstreet reference book for March 1964 lists The Laitram Corporation at 619 South Peters Street, New Orleans, Louisiana, the address of The Peelers Company. Presumably, therefore, the spelling contained in the transcript of the oral argument, *i.e.*, Lathrum, is incorrect.

While the information concerning the change in the business form utilized by the individual respondents to market their shrimp peeling machinery should have been more formally presented to the Commission, the change appears to be a fact. And, in view of the silence of respondents' counsel on the point, we assume that the ownership and control of the new corporations are substantially the same as that of The Peelers Company. Even if this were not true, however, the liability of the successor corporations and their officers to comply with the terms of any order which may issue as a result of this proceeding is clear, for the succession transpired in the midstream of the litigation. See *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9 (1945); *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944); *Southport Petroleum Co. v. National Labor Relations Board*, 315 U.S. 100 (1942).

All of the individual respondents are named in their individual capacity, in their capacity as partners in the Peelers enterprise and as

representatives of a class consisting of all of the unnamed partners in The Peelers Company. Under Louisiana law a partnership in commendam is composed of two types of partners: general partners responsible for the direction, control and formulation of policies of the partnership, and partners in commendam, who are prohibited from participating in direction and control and who are not personally liable for the obligations of the partnership.

The respondents contend that under Louisiana law a partnership is a separate entity apart from the partners which must be named and served in a proceeding brought against it. Since the complaint does not name Peelers as a party, they argue, it is not before the Commission. If in fact the partnership entity is an indispensable party, the partners could not be held in their capacity as partners and possibly not at all. By naming the general partners as representative of a class consisting of all partners, The Peelers Company has effectively been brought within the ambit of this proceeding. Respondents' over-technical argument has no force in an administrative proceeding of this type. Respondents before this Commission are entitled to their "day in court", that is, they must be properly informed of the Commission's intentions with respect to them so that they may appear or be represented during the proceedings. The complaint in this proceeding is completely adequate in this respect and respondents' plea is denied.

Both the partnership The Peelers Company (hereinafter sometimes referred to as Peelers) and its predecessor, Peelers, Inc., have been engaged in the development and distribution of shrimp processing machinery, including shrimp peeling machines, shrimp cleaning machines, shrimp grading machines, shrimp deveining machines and shrimp separating machines. With the exception of some raw shrimp grading machines which are sold outright for use on board shrimp fishing vessels, respondents' machinery is leased to shrimp processors located in the continental United States.

Since June of 1958 the respondents have sold shrimp processing machinery to purchasers located in several foreign countries.

All of the respondents admit that their operations are conducted in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The Scope of the Complaint

Throughout this proceeding there has been a continuous dispute as to the scope of the complaint. The respondents contend that a great deal of the evidence introduced by complaint counsel and admitted by the hearing examiner is irrelevant and immaterial to the specific allegations of unlawful activity made in the complaint. In his initial decision the hearing examiner agreed with respondents and refused

to make findings upon some sixteen so-called "factual" issues, holding they were "* * * unpleaded and unheard issues, and that the findings in this proceeding should be restricted to the issues posed by the complaint". (Initial decision, p. 91.) Complaint counsel, on appeal, argue that the rejected issues are well within the four corners of the complaint and, alternatively, that whether specifically pleaded or not, the rejected issues were heard and respondents were afforded adequate opportunity to present evidence in rebuttal. To a certain extent, this dispute is over the theory of the case, and it must, therefore, be resolved at the outset.

Before engaging the issue, it is appropriate to describe the procedures under which this complaint was issued and the evidence received. As is well known, the Commission itself originates and issues complaints and it has not delegated this authority to its staff. Thus, the Commission itself made the original determination that it was possessed of sufficient evidence to form reason to believe that the law had been violated. Neither complaint counsel nor the hearing examiner have the authority to amend a Commission complaint in such a manner that new charges or new matter not in keeping with the original theory of the complaint are appended thereto. *E.g., Standard Camera Corporation*, 63 F.T.C. 1238, November 7, 1963. Recognizing that some new evidence will usually be discovered during the course of a hearing and that a petition to the Commission to amend the complaint will almost invariably disrupt and delay a proceeding, we have generally drafted our complaints in terms sufficiently broad to encompass matter reasonably related to the violation thought to exist.

Under the Commission procedure in force when this complaint issued on May 13, 1960, hearings to receive evidence were held at spaced intervals, with the time between hearings fixed by agreement of counsel and the hearing examiner. Following this practice, complaint counsel introduced evidence in support of the complaint at hearings which commenced December 7, 1960, and which were held in New Orleans, Louisiana, Seattle, Washington, and Washington, D.C., on various hearing days during December 1960 and January, February, March, July and August 1961. Respondents commenced their defense in New Orleans on November 7, 1961. Further defense hearings were held in New Orleans in January 1962 and in Washington, D.C., in March 1962. On June 4, 1962, complaint counsel filed a motion for permission to adduce newly available evidence. This motion was granted by the hearing examiner and further hearings were held in July 1962 in San Francisco, California. Complaint counsel rested their case on July 19, 1962. Respondents presented additional evidence at a hearing in Washington, D.C., on October 8, 1962, and thereafter rested their case.

At oral argument before the Commission, respondents' counsel stated that during the hearing before the hearing examiner he objected to the admission of evidence which he considered did not pertain to the allegations of the complaint and upon being overruled, then unsuccessfully moved to strike such evidence. He further stated that he was afforded the opportunity to offer evidence in rebuttal to complaint counsel's evidence, which he felt had been admitted erroneously, but that he did not choose to do so. Both sides filed proposed findings with the hearing examiner, dealing with the evidence respondents contend is irrelevant, although in doing so respondents labeled their findings "conditional" to bar the filing thereof being considered as a waiver of their objections as to relevancy and materiality.

Turning to the complaint itself, Paragraphs One through Three describe the respondents and the capacity in which they are named. Paragraph Four contains a brief description of the business activity of Grand Caillou and alleges that its activities are conducted in commerce. Paragraph Five describes the activities allegedly engaged in by the individual respondents through The Peelers Company, particularly charging that in addition to leases or sales in the various states of the United States, it "sells its shrimp processing machinery to customers located outside of the continental limits of the United States." Paragraph Six points out that Grand Caillou competes with other shrimp canners and Paragraph Seven charges that The Peelers Company competes with other manufacturers and distributors of shrimp processing machinery.

With two important exceptions, respondents' answers substantially admit the allegations of fact made in Paragraphs One through Seven of the complaint. One of the exceptions deals with the sufficiency of the complaint as to holding The Peelers Company, a partnership in commendam, as a respondent. The other exception is their denial of the allegation in complaint Paragraph Seven that The Peelers Company is in competition with other manufacturers and distributors of shrimp processing machinery. In this respect respondents pleaded "* * * they have no knowledge of any competition with The Peelers Company which presently exists or has existed from any person or persons in or connected with shrimp processing machinery used in the production of canned shrimp except by one infringer, the DeepSouth Packing Company of New Orleans, Louisiana, and those in privity with that infringer."

Paragraph Eight of the complaint describes in some detail the history of respondents' development of their shrimp processing machinery and their successful efforts to exploit it. The paragraph alleges specifically: "Due to the efficiency of operation of respondents' shrimp

processing machinery, domestic shrimp processors, including respondent Grand Caillou, must utilize these machines in their plants in order to compete in the processed shrimp market." In answer to this allegation, respondents pleaded: "Respondents further admit, on information and belief, that all of those companies in the United States making the product known in the trade as canned shrimp probably use the patented shrimp peelers which are leased by The Peelers Company or shrimp peeling machines made by infringers of patents owned by The Peelers Company."

The lead-in or "preamble" subparagraph of Paragraph Nine reads as follows:

From 1947 to the present the individual respondents, in the course and conduct of the business of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have engaged in unfair methods of competition and unfair acts and practices in interstate and foreign commerce, and, as a part thereof, have done and performed the following acts, among others:

Thereafter follow five subparagraphs lettered (a) through (e), which describe five courses of conduct allegedly pursued by the individual respondents. The conduct which these subparagraphs allege to be unlawful can be summarized as follows:

(a) Entering agreements with inventors whereby respondents secured exclusive licenses to control and exploit shrimp processing machinery patented by such inventors. It is additionally charged that in most instances respondents have not attempted to develop the rights secured.

(b) Entering agreements with certain inventors whereby they were required to disclose all future inventions on shrimp processing machinery to respondents and to assign or license such inventions to respondents.

(c) Harassing, intimidating, threatening to sue, and suing any person who purchased, leased, or manufactured a competing shrimp peeling machine patented by one Paul C. Skrmetta.

(d) Requiring that lessees of respondents' shrimp peeling and processing machines purchase nonnegotiable debentures issued by respondents.

(e) Discriminating between lessees of shrimp processing machinery by charging shrimp canners located in the states of Oregon, Washington and Alaska substantially higher rental rates than those afforded to lessees in other states, including the state of Louisiana.

It should be noted that Paragraph Nine is directed to the individual respondents and does not charge Grand Caillou, the corporate respondent. However, included among the individual respondents is Emile M. Lapeyre, the president of Grand Caillou. Grand Caillou's opera-

tions are brought into the complaint in Paragraph Ten, wherein it is alleged that it, together with the individual respondents, agreed and combined to engage in the unfair methods of competition described in Paragraph Nine.

In Paragraph Eleven the effects and results of the questioned conduct are alleged. These may be summarized as follows:

(a) The Peelers Company has obtained a "virtual monopoly" in shrimp processing machinery.

(b) Competitors and potential competitors of The Peelers Company have been hindered or prevented from engaging in the business of making and distributing shrimp processing machinery in the United States and in foreign countries.

(c) Domestic shrimp processors are deprived of the benefit of fair competition in the leasing, sale or distribution of shrimp processing machinery.

(d) Inventors and potential inventors of shrimp processing machinery are deterred from developing, producing and selling such machinery.

(e) Those competing with Grand Caillou in the processing and sale of shrimp products have been or may be injured and competition prevented or destroyed.

(f) Competition in the processing and sale of shrimp products has been or may be lessened and a tendency toward monopoly has occurred.

With certain exceptions as to details, the respondents' answers deny the allegations made in Paragraphs Nine, Ten and Eleven. The exceptions include an admission that the respondents entered certain agreements with inventors, that they have and will continue to assert their patent rights by filing patent infringement suits against persons they deem responsible for infringement of any of their rights, and that it has been their policy to require the purchase of debentures as a condition precedent to the execution of a lease for shrimp processing machinery.

Turning now to the sixteen so-called "untried and unheard issues" which respondents' counsel persuaded the hearing examiner were not within the scope of the complaint, we find them a curious amalgamation of statements of fact and factual and legal conclusions. The sixteen so-called "issues" as framed by respondents' counsel and copied in the initial decision are as follows:

- (1) have attempted to monopolize the automatic high-capacity, bulk-fed shrimp processing machinery field in the United States;
- (2) have acquired patent or patent rights on virtually every competitive or potentially competitive device which came to their attention;

- (3) have taken care to keep abreast of all developments in the field, viz. have engaged in "industrial surveillance" and have been quick to apply for patents on any principle they believe may be useful;
- (4) have contacted or been contacted by inventors in the shrimp processing machinery field with whom they communicate;
- (5) have paid and proposed awards to lessees for new ideas and discoveries;
- (6) have suppressed machines capable of peeling shrimp on which they hold patents (apart from the Samanie peeler or cleaner);
- (7) have offered for sale or sold shrimp processing machinery in certain foreign countries while leasing the same machinery in the United States;
- (8) have charged exorbitant rates for their leased shrimp peeling machinery;
- (9) have increased some machine rental rates by one-third effective June, 1960;
- (10) have fixed minimum annual rentals for peeling machines and deveining machines;
- (11) have fixed the terms of the machine leases at three years;
- (12) have used machine rental charges which are not based upon the amount of shrimp meat remaining after the processing operation has been completed;
- (13) have used machine leases containing provisions restricting the use of cleaners and separators to shrimp which had been peeled by a Peelers' peeling machine;
- (14) have used machine leases prohibiting the repair or alteration or the placing of attachments on any machine;
- (15) have used deveiner leases requiring the lessees to replace blades in the cutting chute with blades purchased from lessor at cost plus 10%;
- (16) have used machine leases providing for the right of entry of representatives of Peelers into a lessee's plant for the purpose of inspecting and testing the performance of any leased machine.

The initial decision contains no clue as to the hearing examiner's reasoning in arriving at his conclusion that these points were "unpleaded and unheard", for in dealing with them he quoted from the pleadings of the respondents. Further, there appears to be a rather peculiar inconsistency in his handling of this conflict, for he, perhaps unwittingly, did make findings on quite a few of the so-called "unheard" issues. For example, at page 78 of his initial decision he found that respondents increased machine rentals by one-third in June 1960, as described in "issue" number 9. At page 73 he sets out the minimum annual rentals for machines and deveining machines, as described in "issue" number 10. At page 72 he finds the leases are set for a term of three years, as described in "issue" number 11. "Issue" number 12 is decided and described at page 75 of the initial decision. Contrary to the factual allegations of "issues" 14 and 15, the hearing examiner finds, at page 72 of the initial decision, that lessees are not precluded from making their own repairs, buying their own replacement parts or servicing their machines. Thus it appears that at least some of these "issues" were both pleaded and heard and apparently findings thereon were necessary to the decision.

To afford further extended seriatim treatment to the remainder of the sixteen purported "unpleaded and unheard" issues would place too much importance upon this peripheral problem. As we see it, only two of the remaining issues merit consideration. The first of these is number (1), wherein it is stated or alleged that respondents have attempted to monopolize the automatic, high-capacity, bulk-fed shrimp processing machinery field in the United States. To hold, as did the hearing examiner, that this charge is not within the purview of the complaint is such obvious error that only a brief discussion is required to point out its shortcomings. This complaint deals with two broad classifications of alleged unlawful conduct: (1) acts taken to gain, perpetuate or extend a monopoly position in the shrimp processing machinery field and (2) acts constituting abuse or misuse of patent monopoly power. Subparagraphs (a) through (d) of Paragraph Nine are alleged as specific examples of the acts which the respondents are alleged to have pursued, "among others", in order to gain and extend their monopoly position. In Paragraph Eleven it is charged that the effect of the respondents' activities has been to grant them a "virtual monopoly" in the shrimp processing machinery market. In subparagraph (f) of Paragraph Eleven it is alleged that competition has been lessened and an actual tendency toward monopoly has occurred. It is an inescapable conclusion then that this complaint cannot be read other than as charging respondents with having pursued certain specific acts for the purpose and with the result of obtaining a monopoly. Moreover, as we pointed out above, respondents' answers aver they are unaware of the existence of any competition in "shrimp processing machinery used in the production of canned shrimp. . . ."

The remaining "issue" of importance on the hearing examiner's exclusion list is number 7, which reads as follows:

(7) have offered for sale or sold shrimp processing machinery in certain foreign countries while leasing the same machinery in the United States;

It is complaint counsel's position that this issue was both pleaded and heard. In support of their contention that the pleading encompasses this charge, they point to complaint Paragraphs Five and Eleven (c). The language referred to in Paragraph Five of the complaint charges:

In the course and conduct of its business, The Peelers Company causes its shrimp processing machinery to be shipped or otherwise transported to its lessee customers and other customers located in states other than the state or states in which such shipments originate and, in some instances, The Peelers Company sells its shrimp processing machinery to customers located outside the continental limits of the United States. * * *

Subparagraph (c) of Paragraph Eleven of the complaint reads:

Domestic shrimp processors have been, or may be, deprived of the benefits of fair competition in the leasing, licensing, sale and distribution of shrimp processing machinery.

The record reveals that complaint counsel informed respondents at an early stage that they felt that unfair discrimination between foreign and domestic canners was charged in the complaint. In their August 3, 1961, answer to respondents' motion to dismiss, complaint counsel argues "* * * that each and every charge set forth in the complaint in this matter has been proven without a shadow of a doubt." Among such charges allegedly proven was: "The practice of selling shrimp processing machinery in foreign lands while leasing this machinery at exorbitant rates in this country * * *." Respondents' position, then as now, was that such a charge is not encompassed within the complaint. However, their brief in support of a motion to dismiss filed on behalf of the individual respondents, filed August 28, 1961, contains a rebuttal discussion of the charge and concludes that "* * * Commission counsel have failed to show prima facie that the practice of The Peelers Company in selling machines in foreign countries while leasing them in the United States constitutes an unfair method of competition * * *."

From the foregoing it is apparent that the issue was raised before respondents began their defense. However, the respondents did not direct any rebuttal evidence specifically toward this issue, although that part of their evidence which tended to show that the difficulties of the shrimp canners in the northwestern United States were due to factors other than the activities of The Peelers Company does, of course, have a direct bearing on the issue.

The hearing examiner's rulings in this controversy are enigmatic, to say the least. Throughout the hearings he denied every motion and objection by the respondents as to the relevancy and materiality of evidence adduced for the purpose of proving the charge. As a matter of fact, he convened an entirely separate set of hearings in San Francisco, California, for the sole purpose of adducing evidence on this point. This came about in the following manner:

On June 4, 1962, after the close of respondents' defense, complaint counsel filed a motion for permission to adduce newly available evidence "* * * directed towards showing substantial or proposed increases in the imports of canned shrimp, particularly from Japan and India." The motion points out that this material is relevant to Paragraph Eleven (c) of the complaint. The motion further described the evidence to be adduced as tending to show "* * * the effect or potential

effect which imported canned shrimp may have upon the capacity of domestic shrimp canners to compete with foreign canners; the inability of domestic shrimp canners to maintain and/or improve their position in the export market for canned shrimp; and the current status of sales of shrimp processing machinery to foreign purchasers by the respondents doing business as The Peelers Company." The respondents opposed the motion on the grounds that the evidence to be adduced was not relevant or material to any allegation of the complaint. However, the hearing examiner granted the motion and hearings were removed from Washington, D.C., to San Francisco, California, where they commenced on July 16, 1962.

At the outset of the hearings in California, the hearing examiner made a perplexing statement for the record. He advised the parties that although he had scheduled the hearings he had not, as of that time, passed upon complaint counsel's motion for leave to adduce newly available evidence, as set forth in their motion. He then ruled that he would allow the motion to adduce the newly discovered evidence but in doing so was not "* * * inferring that the evidence may be material or relevant to any of the issues in this case, * * *." We have characterized this ruling as perplexing, for both the Administrative Procedure Act (§ 7(c)) and the Commission's Rules of Practice (§ 3.14 (b)) require the hearing examiner to exclude irrelevant and immaterial evidence. Moreover, it is difficult to understand why an adjudicative hearing would be removed three thousand miles from Washington, D.C., to San Francisco, California, for the entire purpose of hearing and receiving evidence not determined to be relevant or material to any of the issues in the proceeding.

The California hearings continued for four days and the transcript thereof runs to almost 500 pages. During the hearings, Commission Exhibits numbered 1276 through 1355 were received. Most of the evidence, testamentary and documentary, dealt with and bore solely upon the questioned issue. It was received over respondents' objections as to materiality and relevancy and at the conclusion of the hearings, respondents' motion to strike, based on the same grounds, was denied.

At the conclusion of the San Francisco hearings, respondents were offered the opportunity to adduce evidence in rebuttal. A hearing for this purpose was called October 8, 1962, in Washington, D.C. Respondents called no witnesses but did introduce exhibits numbered 2246 through 2295. However, respondents pointed out that their introduction of evidence did not constitute an abandonment of their contention that the issue as to sales of the peeling equipment to foreigners was not properly within the proceeding. Thereafter both parties submitted

proposed findings to the hearing examiner on the issue and fully briefed and argued the point.

The most important question to be answered is: Were the respondents afforded due process with respect to the question issued, *i.e.*, did they have their day in court? The threshold consideration leading to a solution of this question is whether the respondents were fully apprised of the nature of the charge made against them and consequently not prejudiced in submitting a defense thereto.

Before attempting to answer these questions in the light of pertinent legal authorities and precedents, it is appropriate that we set out our preliminary conclusions as to the facts of this controversy. In the first place, it is apparent that the four corners of the complaint do not contain a specific charge of discrimination by selling to some competitors while leasing to others. On the other hand, it is equally apparent that the complaint is sufficiently broad to encompass such activity within its periphery.

As we stated above, the complaint alleges two broad species of unlawful activity—acts performed to gain, maintain and extend a patent-based monopoly and acts constituting an abuse of patent monopoly power. The distinction is real, for activities of the first type would primarily affect manufacturers or potential manufacturers of shrimp processing machinery, while acts of the latter type would here directly affect only shrimp canners. The specifically described complaint charge in the “abuse of patent” category is found in Paragraph Nine (e), wherein it is alleged that respondents charged discriminatory higher shrimp processing machinery rentals to shrimp canners in Washington, Oregon and Alaska. The alleged effect of the charged discrimination, according to Paragraph Eleven (f), is to lessen competition in the processing and sale of shrimp products.

The disputed “issue” Seven is likewise a charge of patent abuse by discrimination with resulting ill effects to shrimp processors. As such it is closely related to the charge contained in complaint Paragraph Nine (e). It falls properly within the ambit of that paragraph as one of the non-specified acts envisioned by the preamble subparagraph. As we pointed out above, the acts specifically described in Paragraph Nine are alleged to have been performed “as a part” “among others” of the unfair acts engaged in by respondents.

Prior to the commencement of respondents’ defense, they were apprised, in writing, that complaint counsel interpreted the complaint as including the allegation. The hearing examiner admitted evidence relevant and material to the charge and removed the locus of a hearing three thousand miles to receive evidence with respect to it. Respondents

have conducted cross-examination and introduced documentary evidence in rebuttal to the charge. Both parties submitted proposed findings to the hearing examiner on the issue. Therefore, without question, the issue has been thoroughly heard.

From the foregoing it appears, and we conclude, that the respondents have not been prejudiced by the complaint's lack of specificity with respect to this allegation, since they were afforded ample opportunity to submit evidence in rebuttal thereto. In somewhat similar circumstances, Circuit Judge Aldrich, writing for a unanimous court, opined:

* * * More important, respondents have not been able to suggest to us how, in the light of the evidence which they introduced after a suitable interval to prepare against the Commission's showing, they have been prejudiced. Rather, we think they are simply trying to restrict the issue to one they might be able to meet, instead of one they plainly cannot * * *. *Colgate-Palmolive Co. v. Federal Trade Commission*, 310 F. 2d 89, 92 (1st Cir. 1962).

It must be remembered that "* * * Pleadings before the Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation that characterizes the proceedings of administrative bodies [citations omitted] * * *." *A. E. Staley Mfg. Co. v. Federal Trade Commission*, 135 F. 2d 453, 454 (7th Cir. 1943). Respondents argue that the complaint should have been amended during the course of the proceeding and its charges supplemented by the addition of a specific allegation concerning sales to foreign shrimp processors. Assuming, *Arguendo*, that such tidying up might have been desirable, we fail to see how its omission prejudiced respondents. They were informed time and again of complaint counsel's interpretation of the complaint. They were afforded ample time to secure and offer defensive evidence on the point. An amendment effecting complaint counsel's interpretation could only have formalized the procedure actually being followed, *i.e.*, the trial of the questioned issue.

The leading case on this point in which the Federal Trade Commission was involved is *Armand Co., Inc. v. Federal Trade Commission*, 84 F. 2d 973 (2d Cir. 1936). In that proceeding a circuit court panel consisting of Judges Swann, Learned Hand, and Augustus Hand were moved to vacate a decree of the circuit court affirming an order to cease and desist directed against respondent on the ground that the order was not responsive to the facts found. The complaint in the proceeding had charged that respondent Armand Co. conspired with various wholesalers and dealers to restrain competition by, among other things, fixing the resale price of respondent's products. The Commission made no finding that a conspiracy had existed, dismissed

the case as to the named wholesalers and retailers, but entered an order against Armand. The court denied the motion, holding that in order for the respondent to prevail it must show that " * * * the order * * * abandoned the very frame and outline of the original charge * * *." The court opined that in reaching a decision on questions of this type " * * * much depends upon what takes place before judgment; if, for instance, the defendant merely files an answer and defaults thereafter, a closer registry between pleading and judgment is exacted than after a contested trial, where it may reasonably be assumed that the disposition corresponded to the actual controversy as the parties understood it, even though no formal amendment of the pleadings appears in the roll. Not only must this be true, but, even when the case has not been contested, the question is always one of degree, else any judgment may be upset for trifling variances. At least in a contested case there must be an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet. [Citations omitted.] * * *" (84 F. 2d at 974-975.)

It is our conclusion that *Armand* disposes of the contentions of respondents with respect to the issue of discrimination by selling shrimp processing machinery to foreign shrimp canners in competition with respondents' domestic lessees. Certainly respondents were advised of the charges to be met and by no stretch of the imagination can the raising of this issue be considered an abandonment of the very substance of the dispute to which respondents were summoned or the substitution of a charge which they could not have anticipated.

The hearing examiner's refusal to find and rule upon the issue was erroneous. The issue is properly within the proceeding.

The appeals of the parties from the hearing examiner's rulings and the principal issues involved in this proceeding will be considered hereinafter in the following order: (1) the discrimination between domestic canners, (2) the discrimination between foreign and domestic canners, (3) the monopolization charge, and (4) the conspiracy charge.

THE DISCRIMINATION BETWEEN DOMESTIC CANNERS

The Raw Material, Gulf Area:

The raw material with which this case is concerned is shrimp, a delectable marine crustacean found in all of our coastal waters. Until 1956 the only commercial exploitation of this raw material occurred in the South Atlantic and Gulf of Mexico coast areas. The warm water

shrimp caught in these areas are almost all the penaeid type. The penaeid catch is made up of three principal species, white shrimp, brown shrimp, and pink shrimp or hoppers. A numerically less-important species commonly referred to as sea-bob makes up the remainder of the catch.

The white, brown and pink penaeid shrimp range in size from counts of 100 or more to the pound of raw heads-on shrimp to counts of less than fifteen to the pound. The sea-bob variety does not grow as large and generally runs in the 100 to the pound classification. Since only the tail of the shrimp is utilized for human consumption, the percentage of tail weight to the total weight is of importance. In the penaeid variety the tail makes up approximately 60 percent of the total weight of the animal. Penaeid shrimp spawn in outside waters, that is, waters well off the coast, with the resultant larvae working their way into inshore waters where they begin to mature. As they grow larger the young work their way to outside waters.

Penaeid shrimp are captured by boats dragging trawl nets. The outside waters are fished by large boats averaging forty to sixty-five feet in length, with an occasional boat as large as one hundred feet. Such boats fishing the outside waters ordinarily stay out from approximately five to twelve days. Outside boats dehead (headless) their shrimp and sell them in "box" units consisting of 100 pounds of headless shrimp. In a week's fishing an outside boat will average a catch of four to seven thousand pounds of heads-on shrimp.

The smaller inside boats do not headless their shrimp and sell them in "barrel" units consisting of 210 pounds of raw, heads-on shrimp. A good catch for an inside boat may reach two to four barrels a day, that is, 420 to 840 pounds. These boats are generally no bigger than thirty or thirty-five feet in length and remain at sea for no more than two or three days. Fishing in inside waters in the Gulf of Mexico and South Atlantic areas is regulated by the various states. There are certain closed seasons and other limitations which the fishermen are required to observe. Fishing in outside waters is unregulated.

Fishermen sell their shrimp to processors, both directly and through dealers who operate receiving docks. Many factors affect the price of shrimp, with the most important being the quantity available, the competition among processors, and the extent to which processors have carried over inventories of processed shrimp. Prior to World War II competition for shrimp was almost exclusively between canners. During World War II the freezing segment of the shrimp processing industry experienced a very rapid growth and after the war it emerged as a very sizeable and major factor.

799

Opinion

The advent of the freezing processes produced a change in the pricing procedure for raw shrimp. Prior to World War II the price a fisherman received for a barrel of shrimp did not take into account the average size of the shrimp. The increased competition for shrimp between freezers and canners, especially for shrimp in the larger sizes, led to a change in pricing practices, with the cost of the raw shrimp increasing with the size. There is little detailed information in the record dealing with the exact prices paid by canners for raw shrimp during the relevant period. The record does show the per barrel costs of Robinson Canning Co., Inc., one of the larger Gulf canners, for the smaller-sized shrimp during the period from June 1954 through August 1957. The following chart illustrates its experience:

TABULATION A.—Raw Shrimp Costs of Robinson Canning Co., Inc.

[Price Record—Raw Shrimp delivered cannery in dollars and cents per barrel of 210 pounds heads-on shrimp—not including any bonus]

Month and year	Number of shrimp per pound heads-on					
	41-45	46-50	51-60	61-68	Over 68	Over 85
June 1954.....	\$30.00	\$30.00	\$25.00	\$20.00	\$20.00	.....
October 1954.....	20.00	20.00	15.00	15.00	15.00	.....
January 1955.....	20.00	20.00	20.00	20.00	15.00	.....
April 1955.....	30.00	25.00	25.00	25.00	20.00	.....
May 1955.....	30.00	30.00	30.00	30.00	25.00	.....
June 1955.....	30.00	30.00	30.00	25.00	25.00	.....
August 1955.....	30.00	30.00	25.00	25.00	20.00	.....
April 1956.....	35.00	35.00	30.00	30.00	25.00	.....
May 1956.....	40.00	40.00	40.00	40.00	40.00	.....
June 1956.....	50.00	50.00	45.00	40.00	40.00	.....
August 1956.....	50.00	50.00	45.00	40.00	35.00	.....
October 1956.....	55.00	55.00	50.00	45.00	40.00	.....
May 1957.....	55.00	55.00	50.00	45.00	45.00	\$40.00
August 1957.....	50.00	50.00	45.00	45.00	40.00	35.00

The experience of this one company is reasonably representative of the prices paid by the other canners in the Gulf Coast area from Florida to Texas. There is no widespread difference in the price of raw shrimp across the Gulf Coast. The explanation for this lies in the fact that the canning activity lies approximately in the geographic center of the fishing area. Shrimp are hauled by motor truck from the various landings to the canneries. Thus, prices tend to be stable in the various areas, for canners can and do reach out into other states to acquire shrimp at attractive prices.

The shrimp fisheries of the Gulf and South Atlantic areas appear to be producing at or near their maximum. There is little likelihood for an increase in this area of the amount of raw material available.

The yield, that is, the amount of useable, saleable shrimp which remains after processing depends upon the nature of the process utilized. In general, the yield of shrimp meat per unit of raw shrimp is higher for the frozen shrimp products than for the canned shrimp products.

When made from penaeid shrimp an uncooked, frozen, peeled shrimp product represents a yield of about 50 percent of the weight of the raw shrimp. A canned product made of penaeid shrimp represents an average yield of about 28 to 37 percent.

The Raw Material, Northwest Area :

The cold-water shrimp found in waters off our Northwest Coast are of the pandalid variety. Pandalid shrimp have a three- or four-year life cycle and, unlike penaeids, do not spawn directly into the water but carry their eggs on their abdomen until hatched. There is some indication that the meat of the pandalid is less firm than the meat of the penaeid shrimp. Pandalid shrimp are much smaller than penaeid, running at average counts of more than ninety to the pound of raw heads-on shrimp. Moreover, pandalid shrimp are 60 percent head and 40 percent tail.

The fishing grounds for pandalid shrimp lie off the coasts of Oregon, Washington and Alaska. The shrimp are found in a mud bottom area no less than fifteen miles from shore and at a depth of from forty to ninety fathoms. The boats used by the fishermen in the Northwest area are quite large, running from sixty to eighty-five feet.

The small size of the pandalid variety is compensated for by their tremendous numbers. Fishing boats normally remain at sea for two or three days and catches may average as much as 20,000 pounds for such a trip. However, the variation in average catch is wide, running from two or three thousand pounds to forty or even seventy thousand pounds.

The combination of rather plentiful supply and limited buyers has produced comparatively low prices. During 1957 and 1958, processors on the Oregon and Washington coast paid between \$14.70 and \$15.75 per barrel. The price increased to \$16.80 in 1959 and in September 1960, rose to \$18.90 per barrel. The price paid by Alaskan processors for raw heads-on shrimp fished in Alaska coastal waters is considerably lower, four cents per pound or \$8.40 per barrel.

There is no closed season for shrimp fishing in Alaska and boats operate year around, weather permitting. There is a closed season off the Oregon-Washington coast during the period when the shrimp are carrying their eggs. There appear to be definite limitations to the shrimp potential in the fisheries off the coast of Washington and Oregon, but the amount of shrimp available in Alaskan waters appears to be almost unlimited.

Respondents contend that government reports indicate the presence of substantial quantities of larger shrimp in the Alaskan and Washington-Oregon shrimp fishery but the state and federal government

reports found in the record indicate that the average catch in the area will run no less than 100 to the pound. An occasional extremely low count of sixty-eight shrimp to the pound is encountered but, on the other hand, counts of as high as 227 shrimp to the pound are also found. It further appears that there was no consistent difference in the size of shrimp, dependent upon the geographic area or depth fished. Apparently no selective fishing for the larger sizes of shrimp has been attempted, for the fishermen are paid by the pound without regard to size and thus have no economic inducement to seek the larger sizes. However, on the basis of the government surveys there appears to be little likelihood that selective fishing for only the larger sizes would produce a sufficient quantity of shrimp to make the endeavor economically feasible. Thus, the canners and processors of the Pacific Northwest are tied to a raw material which, although comparatively plentiful and cheap, is composed of shrimp which are individually much smaller than the average shrimp landed in the Gulf area.

Because of their anatomical differences, the yield of useable shrimp meat per unit of raw heads-on shrimp is much less for the pandalid shrimp than for the penaeid varieties. The yield obtained by canners from Northwest shrimp varies between 10 and 20 percent of the weight of the raw heads-on shrimp.

The Shrimp Canners:

The shrimp processing industry in the United States is composed of three separate and distinct segments: the fresh and frozen industry, the canning industry and the drying industry. The fresh and frozen section of the industry is by far the largest. In 1959, more than 140,000,000 pounds of shrimp were processed and sold by the fresh and frozen processors and dealers. The dollar value of these products approximated \$100,000,000. By comparison, the canned shrimp segment of the industry produced only 922,150 standard cases (fifteen pounds to the case), having a dollar value of less than \$15,000,000. The drying industry is the smallest segment, utilizing a little more than three and one-half million pounds in 1959, with a dollar value of slightly over two and one-half million dollars.

The market for frozen shrimp products has rapidly increased since the early 1940's due to several factors, including the definite rise in this country of the use of frozen foods of all kinds, vigorous promotional efforts, and expansion into the large institutional market. The principal shrimp products in the frozen industry are headless frozen shrimp, frozen raw peeled shrimp, frozen raw peeled and deveined shrimp, cooked and peeled products, cooked-peeled and deveined prod-

ucts, breaded products and various specialties. New forms and types of products are being constantly developed.

The market for dehydrated or dried shrimp is apparently diminishing. Most of the driers are located in the state of Louisiana. The process followed by this segment of the industry is to first subject the raw, whole, unpeeled shrimp to blanching, then spreading it on platforms to dry in the sun. After three or five days, the shrimp is divested of head and shell and packaged.

Turning now to the canning segment of the industry, with which this matter is primarily concerned, a most important characteristic of this industry is that its total production has shown neither growth nor diminishment over the years. Apparently the market for canned shrimp is static and has not kept up with population trends. The record indicates that total production of all U.S. canners in units of standard cases (48 five-ounce cans) is now at approximately the same level as during the 1920's. The reasons for this phenomenon are obscure, but the record reveals that until very recently little or no advertising promotion of canned shrimp was engaged in.

Prior to 1956, all shrimp canneries, excepting a single plant in Georgia, were located on the Gulf Coast. Shrimp canning has declined steadily in Georgia and its single plant ceased production in 1961.

The only shrimp processing engaged in in the Northwestern United States before 1956 was the production in Alaska of "cooked-peeled" shrimp. This operation has been in existence for many years, but the processing and end product are quite distinct from the product produced by the canneries on the Gulf Coast. The Alaskan manufactory was unique in that it subjected the shrimp to cooking before they were peeled. The shrimp were then "cold packed", that is, placed into large cans and frozen.

With the discovery in the early 1950's of commercially exploitable quantities of pandalid shrimp off the coasts of Washington and Oregon, several fish canners in that area commenced production of canned shrimp. The first plant was started in 1956 by Edward Kaakinen at Westport, Washington. Alaskan seafood canners very quickly entered the picture and by 1960 there were eleven shrimp canneries operating in the Northwestern United States.

The 1956 advent of shrimp canning in the Pacific Northwest did not result in an increase in over-all U.S. production, and thus it must be assumed that the market penetration by these new canners was accomplished at the expense of the Gulf producers. The following tabulation shows the number and location of shrimp canning plants during the period 1957 through 1961.

TABULATION B.—*Shrimp canneries*

	1957	1958	1959	1960	1961
Georgia.....	1	1	1	1	0
Texas.....	0	1	1	2	3
Alabama.....	2	2	2	1	1
Mississippi.....	13	13	9	12	11
Louisiana.....	24	22	19	18	18
Oregon.....	2	2	2	2	2
Washington.....	3	5	3	3	2
Alaska.....	1	5	9	6	7
Total.....	46	51	46	45	44

As the tabulation shows, the number of shrimp canning plants in the United States has remained fairly constant during the five-year period covered. The emergence of the new plants in the Northwest has been offset by the disappearance of plants in the Gulf area. It cannot be assumed, however, that there is a direct casual connection between the two phenomena.

The tabulation which follows shows the production statistics in units of standard statistical cases for the plants located in the two major producing areas:

TABULATION C.—*Shrimp production in standard cases*

	1957	1958	1959	1960	1961
Gulf:					
Alabama, Georgia, Texas.....	¹ 35,360	81,126	53,098	65,775	² 46,415
Mississippi.....	182,458	179,202	193,836	232,844	83,454
Louisiana.....	340,945	547,986	506,072	573,354	350,288
Total Gulf.....	558,763	808,314	753,006	871,973	480,157
Pacific:					
Washington and Oregon.....	32,794	94,952	64,817	27,997	26,009
Alaska.....	16,444	50,613	104,327	51,249	112,773
Total Pacific.....	49,238	145,565	169,144	79,246	138,782
Total, United States.....	608,001	953,879	922,150	951,219	618,939

¹ No Texas production in 1957.

² No Georgia production in 1961.

The largest part of the United States production of canned shrimp is packaged in four and one-half ounce cans. Twenty-four of these cans make up a case. The next most popular size is the five-ounce can, likewise sold twenty-four cans to the case. A small amount of the production is packaged in three-ounce cans with forty-eight cans to the case.

The shrimp canning industry is the only segment of the shrimp manufactory which has generally recognized size-grades for processed shrimp. The grade is based upon the size of the cooked meat in the can and, in the case of broken shrimp, upon the fact that it is broken,

regardless of its size. The grading system was promulgated and adopted by the Gulf shrimp canners and while not official, is generally recognized by interested government agencies. The proper grade must appear on the label of the can. Prior to 1954, the recognized grades of canned shrimp were as follows:

<i>Grade</i>	<i>Number of Cooked Meats to the Ounce</i>
Jumbo (extra large) -----	Less than 3½
Large -----	3½ to 5
Medium -----	6 to 9
Small -----	More than 9

In 1954, the Gulf shrimp canners added new grades to the top and bottom of the grading schedule. This new system which still prevails provides:

<i>Grade</i>	<i>Number of Cooked Meats to the Ounce</i>
Colossal -----	Less than 2½
Jumbo -----	Less than 3½
Large -----	3½ to 5
Medium -----	6 to 9
Small -----	10-17
Tiny -----	More than 17

Shrimp which have lost one or more segments while being processed so that the finished product will not form a shape similar to the letter U must be labeled "broken".

There are two types of canned shrimp—"wet pack" and "dry pack". The dry packing method, in which the shrimp is baked in the can without supplementary liquid, is the older system and it has largely fallen into disuse. The wet pack form, in which salt brine is added to the shrimp-filled can before sealing, is now the common commercial form.

Some canned shrimp, usually in the larger grades, are deveined before packing. This produces a certain amount of weight loss and the grade requirements permit a tolerance of 8 percent to offset this loss. Since almost 100 percent of the production of the Northwest canners is in the small or tiny grades, the shrimp are not deveined. Moreover, it appears that the pandalid shrimp lacks the heavy black tract found in the penaeid species. Deveining of the larger penaeid variety is performed solely to make the product more saleable. As a matter of fact, it appears that certain nutrients are lost in the deveining process.

While we shall consider the prices commanded by canned shrimp in the various United States markets in a subsequent section, it is well to point out at this juncture that the size-grade of the shrimp canned is reflected in the price. The broken shrimp command the lowest price,

followed by Tiny, with the price increasing for each successively larger grade through Colossal.

Since the Northwest cannerys are limited by their raw material, practically all of their production is in the smallest "Tiny" grade. Northwest packers will, on occasion, secure a sufficient amount of the larger shrimp to make canning runs of the "Small" or "Medium" grades, but such production is intermittent and accounts for only about 5 to 10 percent of the total Northwest output of canned shrimp.

The situation is significantly different with producers on the Gulf Coast. The leading grade with Gulf producers is "Medium", followed quite closely by the "Small" grade. Production of the "Tiny" grade is erratic with Gulf cannerys. In certain years shrimp of this small size are not available in large quantities. But the supply of this size shrimp apparently fluctuates and in some years is sufficient to support rather heavy production of the "Tiny" grade. The following tabulation illustrates the experience of one of the larger Gulf cannerys.

Tabulation D

Shrimp size	Fiscal year 1955-1956		Fiscal year 1956-1957	
	Regular	Deveined	Regular	Deveined
	(Percent)	(Percent)	(Percent)	(Percent)
Broken.....	14.36		18.37	
Tiny.....	9.72		4.81	
Small.....	21.19	1.28	24.37	1.32
Medium.....	28.57	5.20	28.35	4.73
Large.....	10.47	4.80	8.67	2.20
Jumbo.....	2.87	3.43	3.22	3.96
Colossal.....		.11		
	100		100	

The Canning Process:

As aforesaid, delivery to the cannery on the Gulf Coast is effected by both boats and trucks. For the most part, the West Coast cannerys are all located on the water and receive their shrimp by boat.

After unloading, the first operation is to wash and de-ice the shrimp. They are then inspected, and decomposed and diseased shrimp and extraneous matter are removed. The shrimp are weighed and sent to the peeling or picking department. Since it is the peeling operation with which this case is primarily concerned, it is discussed in greater detail below. At this juncture it is only necessary to point out that with the introduction of the respondents' peeling machine all shrimp cannerys discontinued hand peeling and, with the exception of a single cannery in Alaska, all cannerys were utilizing respondents' machines at the time this matter was tried. In the picking operation the shrimp is divested of its head and hull. A second machine, known as a cleaner, removes

the remaining bits of shell and legs. Wastes are separated from the shrimp meat by a third machine, known as a separator. While it was formerly the practice to discard the waste material, it is now dehydrated and ground and sold as an ingredient for poultry feed or fertilizer.

The next step involves blanching of the shrimp. In this first cooking, the shrimp are placed in a boiling saline solution. The length of the cook varies, depending upon the size and condition of the shrimp. Blanching causes the shrimp to curl, extracts a certain amount of water and solubles, and changes the color from the natural pigmentation to pink. After blanching, the shrimp are graded into the various size grades and cooled. The broken pieces are separated and prepared for packaging as broken shrimp.

The shrimp are then packed into cans by hand, each can being filled to an exact weight. Following packing, a hot saline solution is added and the cans are closed. The closed cans are then processed for approximately twelve minutes at 250° F. and immediately cooled to less than 90° F.

Prior to the advent of the respondents' peeling machine in 1949, the shrimp canning industry depended upon hand labor to perform the peeling or picking operation. In the hand-picking operation the peelers or pickers lined up on both sides of tables which were usually approximately four feet wide and of varying lengths up to thirty or forty feet or more. The pickers used only their hands to remove the head and shell from the useable meat. The peeled shrimp were generally placed in a flume and floated away for further processing. The workers could be compensated either by weighing the shrimp which they had peeled or by weighing the waste removed, that is, the heads and empty shells. The hand-picking procedure had many disadvantages. The hand-picking work force was the largest single group in the cannery. A medium-sized plant would employ as many as 300 hand pickers. The expense of such a large work force was not confined to the wages alone. Higher tax and insurance rates and bookkeeping costs were incurred as a direct result of the employment of this large group. The rather wide range in size of the shrimp received in the Gulf canneries in itself produced a production problem when hand-picking was the practice. It took the pickers approximately the same length of time to peel each individual shrimp no matter what size it was. Since the size of the shrimp to be picked each day could not be accurately foretold, the canneries frequently found themselves with either too great or too small a picking force. If the shrimp were large, too many pickers would be on hand and when the shrimp ran very small, the picking force would frequently be inadequate.

Another difficulty occasioned by the varying size of the shrimp was an inability to accurately predict costs. In order to keep the level of earnings of pickers at a point satisfactory to them and in compliance with the Federal Minimum Wage Law, canners were forced to raise the rate of pay when the pickers were working with small shrimp. Moreover, it was economically unfeasible to even attempt to process shrimp of a very small size, for the peeling costs would have been prohibitive. The smallest size which could be economically handled by hand-picking were shrimp that ran about seventy-five to eighty shrimp per pound raw with heads on.

Another principal drawback of hand-picking was that the longer the pickers worked the slower they became. Thus, the remainder of the cannery could not be run at a constant speed but gradually slowed down with the pickers. Hand-picking of the smaller sizes of shrimp produced more waste than picking the larger sizes. With the small shrimp the pickers tended to pinch off the last segment of the tail.

The Shrimp Peeling Machine:

During the period from 1944 to 1949 the individual respondents James M. Lapeyre and Fernand S. Lapeyre constructed a machine to peel shrimp in sufficient volume for use in a commercial shrimp canning plant. It is apparently a unique combination of previously patented elements. The machine was patented and each subsequent modification or improvement was also patented.

Emile M. Lapeyre, the father of James Lapeyre and president of Grand Caillou, played a leading role in the development of the machine. He urged his brother Fernand to get together with James in the original development work on the machine. As early as 1945 Emile participated in the work on the machine. The first test machine was installed in the Grand Caillou plant in Dulac, Louisiana, in 1948. During this entire development period the work was financed by Grand Caillou.

From the beginning it was agreed that any fruits of the development would be shared equally by Fernand, James and Grand Caillou. But in 1946, the original three shares were reduced to quarters, making an additional one-quarter interest available. Equal parts of this one-quarter interest were transferred to the five sisters and brothers of Emile and Fernand (Olga, Alma, Andre, and Felix Lapeyre and Louise Lapeyre Waldo). Each of the new participants made a financial contribution. In 1949, the group incorporated and formed Peelers, Inc. In November 1951, this corporation was liquidated and its assets were acquired by the partnership in commendam, The Peelers Company.

In 1951, the respondents added another machine, known as a cleaner, to their line. This machine is used as an adjunct to the peeling machine and its function is to complete the peeling operation. In 1953 yet another machine, known as a separator, was offered. This machine separates the useable shrimp meat from the trash residue of the peeling operation.

In 1954, the respondents added a shrimp deveining machine to their line. Unlike the cleaner and separator, the deveiner is not an adjunct of the peeling machine, but performs a completely separate operation of removing the black tract from the shrimp. In 1956, the respondents added a grader of raw peeled shrimp meats to the line. The peeler, cleaner and separator, the deveiner and the peeled meat grader constitute the full line which The Peelers Company offers to shrimp canners. Since 1960 the respondents have offered for sale and sold a shipboard grader of raw shrimp. This is the only machine which respondents sell outright to customers located in the United States.

In May of 1949, respondents called a meeting of all canners located in the Houma, Louisiana, area. At this meeting respondents made the initial offer to build and lease the shrimp peeling machines. The offer was instantly accepted. In May and June, Grand Caillou, Bourg & Voisin Seafood Co., Barre Seafood Company, Aubin Buquett, Louisiana Packing Co., Inc., and Morgan City Canning Company became lessees and upon installation of the machines, began peeling shrimp with them. By the end of 1949, eleven peeling machines had been placed in eight Louisiana shrimp canneries. The growth thereafter was rapid. By the end of 1952, the number of peeling machines leased had grown to thirty-nine, located in twenty Louisiana plants. When the cleaning machine was first offered in 1951, all of the canners who had leased peeling machines elected to take the cleaning machine. Thereafter the cleaner became an integral part of the leased peeling equipment and the peeling machine was not leased separately.

Respondents encountered some difficulty in introducing the machine in Mississippi, since labor unions there took a dim view of this encroaching automation. However, in 1953, the first peeling machine was leased in Mississippi, and by the end of that year, sixty machines had been placed in the three states of Louisiana, Mississippi and Alabama. Plants leasing peeling machines also leased cleaners, usually in the ratio of one cleaning machine for every two peeling machines. When the separator was added to the line in 1953, it was installed in all plants having a peeling machine.

The respondents' peeling machine constituted such a tremendous advance and improvement over the hand peeling procedure that within

a few years after its first offer practically all canners on the Gulf Coast had installed it. Of course, the principal advantage of the machine was the lowering of the picking cost, as compared to the use of hand labor. Since the machine did not become fatigued or slow its production output when smaller-sized shrimps were used, it gave the canner a more constant and accurately predictable cost of peeling. The machine would handle shrimp which, because of their small size, could not be economically peeled by hand labor, that is, shrimp running from 100 to 125 or more to the pound. Moreover, the machine gave a higher percentage of yield from these smaller sizes of shrimp than did the hand pickers.

The dramatically lower picking costs, as a result of installing the Peeler machine, can be illustrated by the experience of one of the major Gulf packers. In June 1953, its cost per barrel for peeling a lot of small and medium shrimp was \$6.99. In May of 1954, its cost for machine-picking a lot of mostly small shrimp was only \$3.05 a barrel. This canner stated, "Without The Peelers Co. picking machines we could not have afforded economically to stay in the shrimp canning field."

Each peeling machine will process approximately 1,100 pounds of raw heads-on shrimp per hour. The machine can be fed at a faster rate, but this results in a lower percentage yield and a higher rate of broken or torn shrimp. When the capacity of the picking machines is compared to that of hand peelers, it appears that four of the machines can approximately equal the output of 250 to 300 laborers.

The immediate effect of the advent of the respondents' peeling machine was to obsolete hand picking as an economically feasible method of processing in the canning industry. It became absolutely necessary to install and utilize the machines and within less than ten years all of the canners in the Gulf area had done so.

The Alleged Discriminatory Leasing System:

When Peelers first offered its peeling machine in 1949, respondents decided to lease, rather than sell, the machines, for the market for them was so limited that it would not be possible to sustain a continuing business if the machines were sold. As new machines were added to the line, they too were offered on a lease only basis. As aforesaid, the shipboard grader, a machine not sold to canners, is the only item in the Peelers line which is sold outright in the United States.

After a certain amount of experimentation with a device to measure the volume of shrimp peeled by the machine, it was determined that the best basis for the lease rental charge was the extent of machine use as determined by counting its revolutions. Meters were attached to the machines, which registered a one unit increase for each 100 roller cycles of the machine.

To determine the rate to be charged, the respondents employed L. W. Strasburger, an independent shrimp expert, to conduct a comparison between hand peeling and machine peeling. From this study it was determined that a lease fee or rate of 55 cents for each unit increase on the meter would afford the company a reasonable return and the lessees a substantial savings when compared to the cost of hand peeling. When the cleaner was offered as an adjunct to the peeling machine in 1952, the respondents did not increase the leasing charge and thereafter the 55 cents per unit increase charge was ascribed to both the peeling machine and the cleaner. An additional charge of 5 percent of the peeling machine charge is made for the separator.

Under the respondents' billing procedure, the actual cost of producing a pound of peeled shrimp meat will vary, depending upon the rate at which shrimp is fed to the machine. Apparently the machine cannot be speeded up and it operates at a steady rate of 2,430 roller cycles per hour, equalling 24.3 meter units. Thus, it costs \$13.37 per hour to operate the machine without regard to the amount of shrimp fed to it. The respondents recommend that shrimp be fed to the machine at a rate of approximately 800 pounds per hour. This recommendation is unaffected by the size of the shrimp being processed. While the practices of the lessees vary, with some adhering to the 800 pounds per hour recommendation, it appears that most canners feed the machine at the rate of at least 1,000 pounds per hour. Some canners, striving desperately for lower costs, have fed the machine at the rate of 1,500 pounds per hour. However, force-feeding the machine at too fast a rate produces a larger percentage of broken and mutilated shrimp, so that a point is reached where it is uneconomical to attempt to further increase the rate of feed.

Since the lease charge is based upon use, with respondents receiving no return from an idle machine, lessees are required to pay a minimum annual rental of \$2,500 for each peeling machine. This is not an additional charge, but a minimum requirement which only becomes an actual charge when the rent return based upon the machine's use falls below \$2,500. In such cases the lessee is billed for the difference between the rental actually paid and the minimum, \$2,500.

In late 1953, James M. Lapeyre made a trip to the Pacific Coast to determine whether that area constituted a market for the Peelers equipment. Thereafter the respondents obtained samples of raw shrimp from Alaska, which were tested on the peeling machine with good results. At about this time it was discovered that commercial quantities of pandalid shrimp existed off the coast of Washington and Oregon.

In 1956, one Edward Kaakinen, a seafood processor, started a shrimp cannery in Westport, Washington. He experimented briefly with hand peeling and then entered negotiations with Peelers for the lease of a peeling machine. The machine was installed but the lease fixed the rental at \$1.10 per unit of meter increase, exactly double the charge then being made to canners on the Gulf Coast. According to the record, this double rate was "directed" by the respondent Felix H. Lapeyre, the lawyer partner of The Peelers Co.

The witness's qualifications to "direct" the double rental charge are obscure, since he testified that he had never worked in the shrimp industry and that his knowledge thereof was gathered by hearsay from members of the industry. Nor did the witness have anything to do with fixing the original 55-cent rate. His reason for determining that the rate should be \$1.10 was that his brother had told him that the West Coast shrimp were of a small size, having a count per pound of approximately 100, which was approximately twice the count per pound of the shrimp then being peeled by the Gulf canners. Thus, he stated, the higher rate was fixed "* * *" in order to adhere to our basic policy of charging a rate which was in proportion to the labor saved."

As of September 30, 1957, respondents had placed their machines in two additional Northwest shrimp canning plants, Harbor Seafoods, Seattle, Washington, and W. F. Smith, Wrangell, Alaska. By September 30, 1959, respondents' peeling machines were operating in twelve Northwest shrimp canneries. During this period all of the Northwest canneries were charged the double peeling rate of \$1.10 per unit increase on the meter attached to the machines.

On June 24, 1957, the respondents advised all of their lessees on both the Gulf and Northwest Coasts that effective in all peeling machinery leases, either in issue or renewal, signed thereafter, the rental charge would be increased by one-third effective June 1, 1960. This increase raised the cost of the peeling, cleaning and separating machine combination to a Gulf Coast lessee from 57.75 cents per 100 roller cycles to 77 cents per 100 roller cycles. The cost to a West Coast canner for the same equipment was raised from \$1.155 to \$1.54 per 100 roller cycles. The lessees on both coasts are billed twice a month for the rentals due for use of the machines.

Prior to the middle of 1959, lease agreements covering the peeling machine provided that at the option of the lessor an alternative method of computing the rental based upon the weight or volume

of shrimp processed could be instituted at any time. While the respondents have never exercised their option to change to a volume measuring meter, had they done so the discrimination between the Gulf and Northwest cannery would have been unaffected, for the leases entered with the Northwest cannery stipulated a charge per gallon or per pound of shrimp meats discharged from the machine which was exactly double the charge found in the Gulf Coast leases.

On May 18, 1959, about one year prior to the date when the complaint herein issued but well after the commencement of the pre-complaint investigation, respondents announced that they were establishing a schedule of lease rentals which would apply to all lessees wherever located. This rate schedule was incorporated in all leases executed after June 1959 and lessees whose three-year leases still had a substantial amount of time to run were offered the option of accepting new leases containing the new rate schedule but having the same expiration date as their existing leases. The new rate schedule provided for rental charges ranging in nine steps from 55 cents per 100 cycles to \$1.10 per 100 cycles, depending upon the average size of the shrimp processed. The schedule follows.

Rate No.	Shrimp per pound	Charge per 100 cycles
1	Under 48.875	\$0. 55
2	48.875-54.625	.61 $\frac{1}{8}$
3	54.625-60.375	.68 $\frac{3}{4}$
4	60.375-66.125	.75 $\frac{5}{8}$
5	66.125-71.875	.82 $\frac{1}{2}$
6	71.875-77.625	.89 $\frac{3}{8}$
7	77.625-83.375	.96 $\frac{1}{4}$
8	83.375-89.125	1.03 $\frac{1}{8}$
9	89.125 or over	1.10

The implementation of the above rate schedule had no effect upon the discrimination between Gulf and Northwest cannery, for respondents assigned rate number 1, the 55-cent rate, to all Gulf cannery and rate number 9, the \$1.10 rate, to all Northwest cannery.

Actually, the extent of the discrimination between the Gulf and the Northwest cannery is not fully revealed by a comparison of the rental rates. The smaller size of the pandalid shrimp and the increased waste due to its larger head combine to produce a much lower yield, with the result that peeling costs per case on the West Coast are considerably higher and would be considerably higher even if the discrimination in peeling machine rentals did not exist. Of course, respondents cannot be blamed for the anatomical differences between pandalid and penaeid

shrimp. However, they are fully aware of such differences and must be charged with knowledge that the imposition of their discriminatory rating system almost quadruples, rather than doubles, the per case peeling costs of the Northwest canners as compared to the costs of the Gulf canners.

At the present rental rates, Gulf Coast lessees pay approximately 77 cents per 100-cycle operating phases of the peeling machine, while West Coast lessees pay \$1.54. The peeling machines have a fixed rate of operation of 24.3 100-cycle operating phases per hour. Thus, the per hour rental rate to the Gulf Coast canners is \$18.71 and the per hour rate to Northwest canners is \$37.42. Assuming a yield of 33 percent on the Gulf Coast and 17.5 percent in the Northwest, peeling machine operation at a feed rate of 1,100 pounds of raw heads-on shrimp per hour would produce, in terms of canned shrimp meat, approximately 363 pounds and 192.5 pounds, respectively. This yield, in terms of cases of twenty-four 4½-ounce cans (6.75 pounds per case), would amount to about 53.8 for the Gulf Coast canners and 28.5 for those in the Northwest, with a per case cost in terms of machine rentals of \$0.35 and \$1.31, respectively. The costs per standard case would be \$0.77 and \$2.92, respectively.

In order to lower their peeling costs, canners on both the Gulf and Northwest Coasts tend to exceed the recommended feeding rate of the peeling machine. This, of course, does not affect the discrimination, since the ratio between the Gulf and Northwest costs will remain the same, no matter what the hourly rate of feed. It appears from the record that because of the higher rate assigned to them, Northwest Canners tend to force-feed the machines at a higher rate than Gulf Coast canners. While this tends to narrow the cost gap somewhat, the higher rate produces more broken shrimp, more waste, and shrimp having a fuzzy appearance. Thus a point is quickly reached beyond which it is economically unfeasible to increase the feed rate of the machines.

The two tabulations which appear on the following pages graphically illustrate the competitive disadvantage imposed upon the Northwest canners by the discriminatory leasing system. While the comparisons are not perfect (as indicated by the footnotes on the tabulations), they present a reasonably accurate picture of peeling cost disparity between canners in the two regions. The tabulations' errors tend to minimize the discrimination, for the Gulf rental figures doubtless include deveiner fees well in excess of the \$1,000 minimum per machine deducted.

Opinion

65 F.T.C.

Tabulation "E"

[Tabulation showing dollar value of Gulf Coast and West Coast Canned Shrimp Pack and Dollar Value of Gulf Coast and West Coast Rentals charged]

Year	Dollar value—Gulf Coast			Dollar value—West Coast		
	Pack	Peeler * rentals	Percent of rentals to pack	Pack	Peeler rentals	Percent of rentals to pack
1958	\$18,578,925	\$815,103	3.3	\$2,211,677	\$247,109	11.2
1959	14,220,786	777,603	5.5	2,727,684	297,747	10.9
1960	15,992,296	980,501	6.1	1,240,297	206,901	16.7
1961	9,735,177	571,885	5.9	2,242,611	314,539	14.0
Total, 4 years	58,527,184	2,945,092	5.0	8,422,269	1,066,296	12.7
Year	Total region pack	Percent of Gulf Coast pack to total region pack	Percent of West Coast pack to total region pack	Total region rentals	Percent of Gulf Coast rentals to total region rentals	Percent of West Coast rentals to total region rentals
1958	\$20,790,602	89.4	10.6	\$862,212	71.3	28.7
1959	16,948,470	83.9	16.1	1,075,350	72.3	27.7
1960	17,232,593	92.8	7.2	1,187,402	82.6	17.4
1961	11,977,788	81.3	18.7	886,424	64.5	35.5
Total, 4 years	66,949,453	87.4	12.6	4,011,388	73.4	26.6

Rental Figures CX 106-C, 106-B, 106-M and 106-N, are shown on a fiscal year basis, whereas pack figures, RX 1893-N, 1894-P, CX 1278-P14 and 1279-P13, are shown on a calendar year basis.

*RX 216 and CX 852, pages 103, 109, 110, 111, 144, 145, 166 and 172, show that there was a minimum of 35 shrimp deveining machines under rental contract from the period 1958 through 1961 in the Gulf Coast area. Since no deveining machines were under rental contract in the West Coast area during this period, the minimum rental charge of \$1,000.00 per machine has been deducted from the total rental charge for the Gulf Coast area. Actual deveiner rentals are not separately shown in the record. Brunswick Quick Freezer, Inc., John A. Chauvin, Inc., Ed. Martin Sea Food Co., New Orleans Shrimp Co. and Trade Winds Co., Inc. did not pack canned shrimp; therefore, the total rental charges for these companies has been deducted from the Gulf Coast rental charges shown on CX 106.

Tabulation "F"

[Tabulation showing Shrimp Production in Standard Cases for Gulf Coast and West Coast, and the Rental Cost per Standard Case]

Year	Gulf Coast production			West Coast production		
	Number of cases	Peeler* rentals	Rental cost per case	Number of cases	Peeler rentals	Rental cost per case
1958	808,314	\$615,103	\$0.76	145,565	\$247,109	\$1.70
1959	753,006	777,603	1.03	169,144	297,747	1.76
1960	871,973	980,501	1.12	79,246	206,901	2.61
1961	480,157	571,885	1.19	138,782	314,539	2.27
Total, 4 years	2,913,450	2,945,092	1.01	532,737	1,066,296	2.00
Year	Total number region cases	Percent of Gulf Coast cases to total region cases	Percent of West Coast cases to total region cases	Total region rentals	Percent of Gulf Coast rentals to total region rentals	Percent of West Coast rentals to total region rentals
1958	953,879	84.7	15.3	\$862,212	71.3	28.7
1959	922,150	81.7	18.3	1,075,350	72.3	27.7
1960	951,219	91.7	8.3	1,187,402	82.6	17.4
1961	618,939	77.6	22.4	886,424	64.5	35.5
Total, 4 years	3,446,187	84.5	15.5	4,011,388	73.4	26.6

Rental Figures CX 106-C, 106-B, 106-M and 106-N, are shown on a fiscal year basis, whereas pack figures, RX 1893-N, 1894-P, CX 1278-P14 and 1279-P13, are shown on a calendar year basis.

*RX 216 and CX 852, pages 103, 109, 110, 111, 144, 145, 166 and 172, show that there was a minimum of 35 shrimp deveining machines under rental contract from the period 1958 through 1961 in the Gulf Coast area. Since no deveining machines were under rental contract in the West Coast area during this period, the minimum rental charge of \$1,000.00 per machine has been deducted from the total rental charge for the Gulf Coast area. Actual deveiner rentals are not separately shown in the record. Brunswick Quick Freezer, Inc., John A. Chauvin, Inc., Ed. Martin Sea Food Co., New Orleans Shrimp Co. and Trade Winds Co., Inc. did not pack canned shrimp; therefore, the total rental charges for these companies has been deducted from the Gulf Coast rental charge shown on CX 106.

Respondents' stated reason for doubling the rental rate to the West Coast canners is not persuasive. In the first place, we cannot fail to note that the author of the discriminatory rate, Felix Lapeyre, testified that he had no knowledge as to the cost of shrimp peeling labor on the West Coast. Further, except for one brief-lived experiment by one Northwest canner, no one had tried to peel raw pandalid shrimp for canning and no information as to the cost of such labor was available.

While it is probably legally unnecessary to examine the respondents' real reasons for setting a discriminatory rate since the illegality of an unfair practice depends not upon its purpose but upon its effect, yet the unique nature of this proceeding impels such an examination. Having found that respondents' avowed reason for their practices is not worthy of belief, we cannot leave unanswered the question as to respondents' real reason. It is elementary that business practices of this type are not planned and carried out without a rational purpose and respondents' activities here do not constitute an exception to this basic rule. Their purpose and intent was to protect and foster their own interests as shrimp canners by inhibiting the shrimp canners packing the pandalid shrimp of the Northwest.

The respondents' and other Gulf Coast canners' fear of the embryo Northwest shrimp manufactory stems from two factors: the comparative low cost of pandalid shrimp and the static condition of the canned shrimp market. These factors convinced the respondents that unless defensive steps were taken the Gulf Coast shrimp industry would be unable to compete and would be eventually overpowered by the new competition from the Northwest. That Gulf canners were concerned about the new competition in the Northwest cannot be subject to serious doubt. In a letter to respondents, dated March 10, 1958, Mr. H. R. Robinson, a leading Gulf canner, warned:

The production of canned shrimp along the Pacific Coast has introduced a new factor into the canned shrimp business. That the Gulf area canners of shrimp are concerned over the future impact of this West Coast production is evident by the interest it has commanded in the Gulf. At the most recent meeting of the Louisiana Shrimp Canning Industry this matter was discussed, as per agenda of March 6, 1958, meeting attached.

I as an individual, and my firm as such, am gravely concerned to the point where we are even discussing the possibility of putting a plant somewhere on the West Coast—believing that if you can't beat 'em then join 'em.

At another place in the same communication the author declared:

Prior to 1957 no area outside the Gulf produced canned shrimp in sufficient quantity to affect the market price. Production began on commercial scale during 1957 on the Pacific Coast and we soon began to feel the effects of it.

Apparently 1957 was an ideal time for the embryo shrimp manufactory on the Pacific Coast to enter the market. In the latter part of

1957 the Louisiana shrimp crop was severely limited. The production of Louisiana canneries fell from the 1956 total of 628,465 standard cases to a total pack in 1957 of 340,945 standard cases. Of course, the effect of the shortage was to skyrocket the price of raw heads-on shrimp to Gulf canners. This had the effect of intensifying the Gulf canners' fears of the new competition from the West Coast, for, in the words of one Gulf canner, "Initially I believed (as did many of my competitors based upon conversations on this subject) that if we could get our raw material costs down a little we could run the Pacific shrimp a rugged race." But the Gulf canners were not able to get the price of their raw material down and, as we disclosed above in this opinion, the prices they must pay to fishermen for raw shrimp are substantially higher than the prices paid on the West Coast.

In concluding on the disparity of the West and Gulf Coast prices for raw heads-on shrimp, Mr. Robinson was quite pessimistic, stating:

With raw material prices having been at a high level for quite some length of time, and with the prospects of heavy catches in the Gulf area about nil, we can look forward to opening raw material prices in the Gulf area being too high; too high to allow competition with West Coast canned shrimp.

The respondents were aware of but apparently discounted the fact that the West Coast canners' advantage in the price of raw material is offset by the low yield prevailing on the West Coast. As stated, on the Gulf Coast the yields are from 28 to 37 percent, while on the coasts of Oregon and Washington the yields range from 17 to 18 percent, and on the Alaskan Coast, 10 to 20 percent. While there is some substance to respondents' claim that inefficient methods are responsible in part for the lower yield on the Pacific Coast, it is an incontrovertible fact that shrimp which are 40 percent tail will yield considerably less useable meat than shrimp which are 60 percent tail. Thus, a 210-pound barrel of the pandalid shrimp will yield a maximum of 84 pounds of headless shrimp, as compared to the 126 pounds of headless shrimp secured from a barrel of the penaeid shrimp. Moreover, the yield from the smaller sizes of shrimp is always less than the yield from the larger sizes of the same variety.

As we pointed out above, the market for canned shrimp has shown no appreciable growth over the past forty years. Under such conditions the success of a new market entrant must be purchased at the expense of existing competitors. The proof of this economic truism is contained in the record, which clearly shows that each gain in market penetration made by the Northwest canners was earned at the expense of a reduction in sales by the Gulf canners. See, for example, Tabulation C, above.

Moreover, the record reveals that the principal market for canned shrimp in the United States consists of the eleven states which make up the western one-third of the continental country, excluding Alaska.² While parts of this area lie equal distance from the Northwest and Gulf Coast producers, most of the principal metropolitan consuming areas within the segment lie much closer to the canneries of Oregon and Washington, giving those producers a decided freight advantage. A survey made by the Fish and Wildlife Service of the Department of the Interior in 1956 (Respondents' Exhibit 1863), revealed that 46.5 percent of the country's canned shrimp consumers (those who had purchased canned shrimp in the preceding twelve months) were located in these eleven western states. The survey also showed that from the standpoint of frequency of use the West was a greater market than indicated by its percentage of all consumers, since consumers in the West served canned shrimp more often than did consumers in other areas. Moreover, it appears that the two states of California and Oregon absorbed a comparatively large percentage of Grand Caillou's total output of canned shrimp during the nine years from 1950 through 1958. The following tabulation is particularly revealing of the importance of the eleven-state "West" market to Grand Caillou. The importance of the area as a market for Grand Caillou's output of small, tiny, and broken shrimp, the only grades produced by the Northwest canners, is dramatically revealed.

TABULATION G

[Grand Caillou Packing Company Incorporated, sales to domestic consumers for the period 1-1-52 through 7-31-61 in terms of cases of 48/5 oz. cans to the case. RX 1907-A-B-C]

Years	Total all sizes			Total small, tiny, and broken		
	All regions	West	Percent of West to all regions	All regions	West	Percent of West to all regions
1952.....	46,607	10,920	23.4	17,067	6,689	39.2
1953.....	37,823	8,105	21.4	14,000	5,384	38.5
1954.....	44,330	22,050	49.7	23,177	15,587	67.3
1955.....	45,534	21,401	47.0	20,116	15,941	79.2
1956.....	34,613	18,591	53.7	13,337	8,434	63.2
1957.....	24,760	10,299	41.6	8,749	6,039	69.0
1958.....	29,359	15,038	51.2	10,105	7,137	70.6
1959.....	46,439	25,696	55.3	22,140	18,508	83.6
1960.....	41,326	15,943	38.6	15,526	9,898	63.8
1961.....	22,294	11,410	51.2	11,351	9,270	81.7
10-year, totals.....	373,085	159,455	42.7	155,568	102,896	66.1

The Effects of the Discrimination:

While the Western United States is the primary geographic market in which Gulf and Pacific Coast canned shrimp compete, both pro-

² Washington, Oregon, California, Idaho, Montana, Wyoming, Nevada, Utah, Colorado, New Mexico, and Arizona.

ducing groups are attempting to make sales throughout the United States. Through the medium of brokers, even the smallest canner can reach the most remote market. Almost all of the canners utilize brokers to sell their shrimp to smaller purchasers, but the big buyers, such as the chain grocery stores, are dealt with directly without an intervening broker.

Because of the diminutive size of their raw material, the Northwest producers are restricted to competing for the market composed of sellers who desire canned shrimp in the small, tiny, and broken sizes. Of course, the effect of this phenomena is to place Northwest producers at somewhat of a disadvantage, for their entire profit must be made from these three sizes. Moreover, as we pointed out before, the larger sizes command a higher price, but since the raw material costs are likewise higher for shrimp in these grades, it cannot be said with certainty that profit margins are greater on the larger grades.

Because many canners do not merchandise their product but instead sell it in unlabeled form to other resellers, the number of merchandisers of canned shrimp is substantially less than the number of canners. Of the Peeler lessees operating canneries in the Gulf area, about twenty have sold their product primarily in unlabeled form to others. Among the producers who do sell their product to direct purchasers or through local brokers, five can be classified as large. These are Southern Shell Fish Company, which sells about 25 percent of the national production (including its own production and that of other Southern canners), Southland Canning & Packing Company, which sells the product of its large producing unit. Violet Packing Company, and also canned shrimp purchased from others; Mavar Shrimp & Oyster Company, which primarily sells its own product; De Jean Packing Company, which sells its own product and canned shrimp purchased from others; and Robinson Canning Company, which, for the most part, sells its own product.

Grand Caillou sells both shrimp and oysters; however, canned shrimp accounts for approximately 75 percent of its volume of sales. It sells canned shrimp directly to chain stores and indirectly to other customers through brokers. Sales are made under Grand Caillou's brand name, Lou-z-ana, and under the customer's private brand. An increasing percentage of Grand Caillou's shrimp sales are made to buyers for export. Grand Caillou's export business in 1960 accounted for 30 percent of its sales of canned shrimp. In addition to its own production, Grand Caillou sells canned shrimp purchased from other canners. A principal source of supply is Shell-Tex Fisheries of Brownsville, Texas, a limited partnership, partially owned by Grand Caillou. (See page 808, above.)

With the exception of Southern Shell Fish Company, which is a subsidiary of a large food corporation, the merchandisers of canned shrimp do very little advertising. This is in contrast to the sellers of frozen shrimp products, who militantly exploit their product, utilizing most advertising media.

As above disclosed, the first canner of shrimp from the pandalid fishery of the Northwest using respondents' machinery commenced operations in 1956, but the first canned shrimp from that fishery was sold in 1957. By the close of 1957, six canneries were in operation in the Northwest, two in Oregon, three in Washington, and one in Alaska. By 1958 the total had grown to twelve, and a peak of fourteen was reached in 1959. The number declined to eleven in 1960 and remained at that figure in 1961. See Tabulation B, above, for the distribution of the canneries in each of the three states during these years.

In the years 1957 through 1960, the greatest part of the pack of canned shrimp from the Northwest was sold by three brokerage firms located in Seattle, Washington, Ivar Wendt, Wafico, and John L. Granger. One producer, East Point Seafood Company, which began business in 1958, sells its own production. Of the sellers, Ivar Wendt is by far the largest. He testified in 1961 that during the years 1957 through 1960 he had handled approximately one-half of the entire pack of canned shrimp produced in the Northwest. He had also financed, or helped to finance, three of the earlier producers: Peelers' first lessee, Kaakinen, W. F. Smith, and Pacific Shrimp Company. Wendt also owned a cannery, Pacific Pearl Frozen Foods, Inc., and had a two-thirds interest in another cannery, Sutterlin & Wendt, Inc. Most of the shrimp sold by Wendt bore his own private label, whether produced in one of his own canneries or by an independent. He handled his sales through brokers who represent him in every state of the union, paying them a commission of 2½ percent.

During the years 1958 to 1960, Wafico sold the canned shrimp output of Harbor Seafoods Company of Wrangell, Alaska, which started production in 1957. It also sold the canned shrimp output of King Crab, Inc., its affiliate, which started production in 1959 and is sometimes referred to as Island Seafood Company. Wafico sells its shrimp under its own label, under the labels of other brokers, and under the private labels of buyers. It sells both through brokers and direct to large chain stores.

The third broker, Granger, has sold much of the output of Crown Packers, Inc., Halibut Producers Cooperative, and some of Seaside Clam Company and several others. Granger primarily distributes through brokers located throughout the United States and Canada.

The only West Coast shrimp canner which sells its product without the aid of an intervening field or primary broker is East Point Seafood Company. This company sells its canned shrimp directly to large buyers and to the smaller buyers through approximately twenty-five local food brokers. It sells only its own production and under its own labels.

The testimony of Wafico, Wendt, Granger, and East Point with respect to the competitive picture in the primary markets for Northwest canned shrimp is remarkably similar. Representatives of each of these sellers pointed out that the wholesale buyers for canned shrimp of this tiny or "cocktail" size are primarily interested in the price of the product. The product is only attractive if it can be offered to the consumer by retailers at a price not exceeding thirty-nine cents a can, with an occasional "special" of three cans for a dollar. The first shrimp offerings by the Northwest sellers in 1957 were made at about \$7.30 per case. Because of the shortage of Gulf shrimp, prices gradually rose to \$8.00 a case, where they remained through much of 1958 and into 1959. The broker Granger dropped his price to \$7.50 a case on June 18, 1959, but was unable to move it at that reduced figure, and on June 29, dropped it to \$7.25. Occasionally, in order to make sales, he sold as low as \$6.75 a case, but he was unable to move any substantial quantities at these lower prices, for buyers informed him that Gulf shrimp was being quoted in the markets at \$6.50 a case. Wendt testified that his price in 1957 had gotten up to \$8.00, but that when Gulf shrimp came back into the area, the price broke to \$7.25. Mr. Wendt believes that \$7.25 a case is a natural price at which canned shrimp is attractive to buyers and, as a consequence, will move in substantial quantities. He stated that he lost a carload sale to a large buyer in San Francisco because a Gulf competitor underbid him with a price of \$6.50 a case. In 1960, Wendt advised the canners in which he had an interest to stop producing canned shrimp, for money was being lost on each case sold. The experience of Wafico and East Point is substantially the same as that of Wendt and Granger. They were able to sell shrimp at a satisfactory profit during the period of the Gulf shortage in 1957 and the first part of 1958 but in 1959 competition of Gulf shrimp drove the price down to \$7.00 and less. Neither seller was able to move shrimp at a price greater than \$7.25 a case.

Representatives of almost all Northwest producers testified in the proceeding as to their costs of production and the profits or losses incurred as a result of their operations in canning shrimp. As it is to be expected in a new industry, the Northwest shrimp canners experienced many difficulties in entering and continuing to economically operate in the shrimp canning field. The respondents point out quite

correctly that a good deal of the difficulties encountered by the Northwest producers resulted from their own inexperience in a new field. Respondents point out that a 1952 survey showed that Northwest and Alaska canned shrimp products were overweight, that is, the contents of the can weighed more than the required $4\frac{1}{2}$ ounces. They point out that some of the Northwest canners treated their products with citric acid after it had been peeled, thereby materially decreasing the yield and producing an inferior product. Respondents conclude:

But the evidence in this case reveals that if, in fact, these Northwest and Alaska canners are not making the money they envisioned, the fault lies in their own inexperience, their poor selling methods, and their attempt without preparation or advertising to sell a tiny shrimp to a public which, arbitrarily but certainly, wants a larger shrimp, in a market which has been virtually static for forty years. (Respondents' Proposed Findings, p. 116.)

Assuming, as we do, that all of these charges made by the respondents are absolutely true, we fail to see in these factors any justification for the respondents' discriminatory peeling rate. One cannot justify throwing an anchor to a drowning man with the excuse that he was going under anyway. The plain fact of the matter is that the principal difficulty encountered by the Northwest canners was the discriminatory high peeling rate forced upon them by the respondents. This conclusion is forced by the testimony of the Northwest canners, which we shall now briefly review.

As we stated above, the respondents' first lessee in the Northwestern United States was Edwin Kaakinen, who built and commenced operating a cannery in Westport, Washington, in 1956. Kaakinen canned a few shrimp in 1956 and continued operations until early 1959. During the period of his operation he lost approximately \$14,000. During the period he paid more than \$108,000 in rental fees to the respondents. The discriminatory excess rental fee of more than \$53,000 was the direct and proximate cause of the losses incurred by Kaakinen. Had he been charged a rental fee for the peeling machines at the same rate as the respondents charged to their Gulf producers, his operations would have returned a tidy profit.

Another Northwest producer whose canned shrimp operations had been unprofitable is E. H. Bendiksen of South Bend, Washington. Mr. Bendiksen is the president of East Point Seafood Company. His first leases from respondents were executed under the name of E. H. Bendiksen Company, but more recently the leases have been in the name of East Point Seafood Company. During 1958, 1959, and 1960, Bendiksen paid approximately \$46,000 in excess discriminatory rentals to the respondents. During this period his peeling costs per case of twenty-four $4\frac{1}{2}$ -ounce cans were 99 cents in 1958, 97 cents in 1959, and \$1.06 in 1960, before the increase of June 1st, and \$1.20 per case thereafter.

Halibut Producers Cooperative handles and markets the products of its members, consisting of about 350 fishermen. The cooperative had operations in leased premises in Seward, Alaska, where it canned salmon. When salmon fishing started to fall off, the cooperative decided to enter the shrimp canning field. Considerable expenditures were made to convert the cannery to the shrimp canning operation and machines were leased from the respondents. Shrimp canning at the plant commenced in early 1959. During the period from January 1959 to March 31, 1960, Halibut Producers Cooperative lost approximately \$20,000 on its shrimp canning operation. The remainder of the year 1960 saw an additional loss of approximately \$72,000. During this period the cooperative paid between \$40,000 and \$50,000 in excess discriminatory leasing fees to the respondents.

The cooperative experienced peeling costs which ran from \$1.34 to as high as \$1.70 per case (twenty-four 4½-ounce cans) during this period. Experiments were engaged in, feeding the peeling machines at different rates in order to determine the most economic feeding rate. Feeding the machine at a high rate of approximately 1,400 pounds per hour decreased the machine rental but produced an increase in labor costs because it became necessary to put more workers on the production line to remove shell which the machine did not peel at the high rate of feed. Also, the forced feeding resulted in more broken shrimp.

Pacific Shrimp, Inc., of Warrenton, Oregon, has been canning shrimp since the fall of 1957. During the period from October 15, 1957 to March 20, 1961, it packed more than 54,000 cases of shrimp, on which it incurred a peeling cost of approximately 84 cents per case (twenty-four 4½-ounce cans). The rentals paid to respondents during this period aggregated approximately \$47,800. Over this period the operations of the company produced a net loss of more than \$10,000. Had it been charged a rental rate at the same level afforded to the Gulf Coast canners, the operation would have produced more than \$10,000 profit.

Alaska Marine Foods, Inc., of Anchorage, Alaska, was a short-lived shrimp cannery, operating facilities at Seward, Alaska. The company closed its operations entirely in June 1960, shortly after the one-third peeling rate increase became effective. In July of 1960, the treasurer of the company wrote to respondents, stating, *inter alia*:

Your letters of May 25th, May 27th, and June 3rd, 1960 are acknowledged. The rate increase for the rental of your shrimp processing equipment which took effect June 1, 1960 has had a seriously crippling effect on our business. Your discriminatory rate structure, coupled with high wages in Alaska and the soft market condition has made it impossible for us to operate with a reasonable return on our investment. In view of this condition, we have elected to temporarily suspend operations until either or both the market conditions improve

allowing a higher price for our finished product or you elect to rent your equipment on an equitable basis.

Our last run, prior to our temporary suspension of operations, was on June 24th. For the use of your machines on this run, we incurred a liability to you amounting to \$2.13 for each case packed. We understand that this is approximately six times the average cost per case paid by your lessees in the Gulf area. It is obvious that the shrimp industry here cannot survive with such a discriminatory rate structure.

The testimony and the documentary evidence concerning the effect of the discriminatory rate upon the Northwest canners is singularly uniform and uncontradictory and further summarization of it in this opinion would serve no purpose. The picture in the Northwest is that of a struggling industry attempting to break into a new field. As stated, many of the difficulties encountered were due to ignorance and inexperience and a certain number of casualties are expected in such an endeavor. However, the difficulties of the Northwest canners were greatly enhanced and, to a large extent, created by the discriminatory peeling rate.

Several of the canners who ceased canning shrimp entirely testified that they would have been able to continue operations and garner a reasonable profit had they been charged the same rates as those enjoyed by the Gulf canners. The statistical evidence completely supports this testimony, for in most cases the excess rental charged was substantially greater than the losses experienced.

As we view it, respondents' conduct is completely undefensible. It constitutes a hasty, almost panicky, reaction to a new competitive threat. Their activities are shortsighted and economically self-defeating. The long-range interests of the shrimp canning industry in this country and of the economy as a whole lies in increased, rather than curtailed, competition. This industry is selling in a market which has remained static for four decades. While in recent years the lack of growth may be blamed to a certain extent upon the increasing popularity with the public of frozen shrimp products, this was not true for the entire period and does not constitute a complete explanation today. A principal reason for the static condition of this universe is the complete failure of the producers to aggressively exploit their product by an aggressive program of consumer education. The money spent for advertising by the industry as a whole has been insignificant and this record indicates that an untapped market consisting of 76 percent of all American families is awaiting exploitation. If, as this record indicates, the supplies of shrimp in the Alaskan fishery are indeed unlimited, the potential for the Northwest shrimp canning industry directly and for the respondents indirectly through increased utilization of their machines is likewise unlimited.

In view of all of the foregoing facts and conclusions, it is the decision of this Commission that the respondents have engaged in unfair methods of competition and unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The gravamen of the offense so found is the fixing and charging of higher discriminatory peeling machinery rental rates to producers of canned shrimp located in the Northwestern United States with the result and effect of injuring and destroying competition between said Northwest canners and canners located in the Gulf and South Atlantic areas of the United States.

The Remedy:

The respondents attack the order to cease and desist promulgated by the hearing examiner, on the ground that it is unduly restrictive and goes beyond the practice found to be unlawful. In pertinent part the hearing examiner's order would require the respondents to refrain from:

Leasing and renting such machines of the same type to any lessee at any rate or upon any terms different from the rate or terms charged any other lessee which results in any lessee paying a higher rate per hour of use of such machines than the rate charged any other lessee.

Respondents charge that this order constitutes a usurpation of their right to fix the terms and conditions pursuant to which they will lease their machines. They point out that the order would rule out other rating systems which presumably could be applied on a nondiscriminatory basis, such as a minimum annual rental or a charge based upon the volume of shrimp processed or the weight of the shrimp processed.

On the other hand, the complaint counsel contend that the order does not go far enough and that an order should be entered which requires the respondents to make a charge for their machinery based upon the amount of shrimp meat left after the processing operation has been completed. They claim that the examiner's order would be ineffective, since under its terms the respondents would be free to double the rate to Gulf Coast packers rather than halving it to the Northwest canners.

The hearing examiner's order was framed with an eye to the facts adduced in these proceedings. The evidence adduced herein, much of it by respondents, showed that at the present time the only practical way to measure the utilization of the peeling machine is by means of the meter system which measured the operating cycles. Respondents experimented with a procedure to measure the peeled shrimp yielded by the machine and decided the method was unsatisfactory. As for

complaint counsel's plea that the hearing examiner's order would permit the respondents to effect a nondiscriminatory rate by raising the rate to the Gulf Coast producers, we can only state that this is a decision which must rightfully be left to the respondents. Even though the respondents have a monopoly in the high-capacity shrimp-peeling machinery field, they are yet subject to competition or potential competition from hand peeling and the finished product of United States producers is in competition in the domestic and world markets with the product produced by foreign canners. Thus, the ceiling on the respondents' lease rate is best left to them to fix. The most that a Commission order can or should attempt to accomplish is to require that the rates be nondiscriminatory.

We find ourselves in substantial agreement with the respondents' view that the order proposed by the hearing examiner is unduly restrictive in that it does not permit nondiscriminatory alternative methods of leasing respondents' machines, but, on the other hand, we cannot agree with respondents' contention that the order should only "* * * direct respondents to cease and desist from charging its lessees differing amounts for each unit increase as reflected on the meters affixed to [their] peeling machines." Such an order would be unduly narrow and would permit alternative discriminatory rental procedures. As we see it, the ideal order will prohibit the respondents from discriminating between their lessees but would permit them freedom to frame and institute such leasing and charging systems or procedures as they desire. Thus we shall enter an order which simply prohibits the respondents from discriminating among domestic canned shrimp producers in the rentals charged for their machines. While such an order may be criticized for its lack of specificity, we feel that it constitutes a desirable middle ground between the easily-evaded, exact prohibition of past conduct advocated by the respondents and the overly restrictive order of the hearing examiner.

In keeping with our usual procedure, the respondents will be required to file within sixty days after service of the order a report of the manner in which they intend to comply. The plan which they submit will be reviewed by the Commission and respondents will be advised as to its acceptance or rejection and, if the latter, the reasons therefor. If at any subsequent time the respondents desire again to change their distribution procedures, our Rules of Practice (§ 3.26(b)) permit them to request advice from the Commission as to whether their proposed course of action will constitute compliance with the order. These procedures insure that the respondents need never institute a course of action at their peril.

THE ALLEGED DISCRIMINATION BETWEEN FOREIGN AND DOMESTIC CANNERS

Respondents' Procedures with Foreigners:

Respondents first explored the possibility of distributing their machines in foreign markets in 1950. In that year they addressed inquiries to authorities in several foreign countries to determine whether a potential market for their machine existed. Also, at about this time, the respondents were receiving inquiries from interested persons in various foreign countries who had learned of the existence of these machines.

After conducting several experiments to determine whether the equipment would satisfactorily peel the type of shrimp found in the foreign fisheries, respondents filed applications for patent in every country where they felt a potential market existed. Applications for patent protection on peeling machinery and on deveining equipment have been filed in Argentina, Australia, Belgium, Brazil, British Guiana, British Honduras, Canada, Ceylon, Chile, Columbia, Costa Rica, Cuba, Denmark, Ecuador, Egypt, France, Germany, Great Britain, Greece, Guatemala, Holland, Honduras, Iceland, India, Jamaica, Japan, Mexico, New Zealand, Nicaragua, Norway, Pakistan, Panama, Republic of the Philippines, Puerto Rico, Salvador, South Korea, Spain, Sweden, Tangiers, Turkey, Uruguay, and Venezuela.

Respondents at first decided to lease their equipment in foreign countries, as was done in the United States, and because they did not wish to undertake liability as a partnership, formed a corporation in 1956 known as Shrimp Machinery, Inc. According to respondents, dollar exchange and import license problems defeated their efforts to lease abroad and the attempt was abandoned in the early part of 1958, at which time respondents offered to sell their machines in all foreign countries, with the exception of Canada and Mexico. To handle their foreign sales attempt, respondents engaged the export firm of Smith, Kirkpatrick & Co., Inc. This firm still represents them in all countries except Iceland. Respondents have continued to attempt to lease their machines in Canada and Mexico, stating that problems of exchange, import licenses and the like, do not bar distributing the machines on a lease basis in these countries. So far, respondents have not been successful in leasing any machinery to Canadian canners. Equipment was leased to a Mexican canner, but the machines were returned in 1958 or 1959 because of labor problems encountered.

As of May 1962, respondents had sold twenty peeling machines to foreign shrimp canners. Eleven machines were sold to Japanese canners, two machines each were placed in the countries of Greenland, Sweden and Iceland, and one machine was placed in Panama, Denmark and Norway. Excepting only the Japanese sales, one separator

was sold to accompany each peeling machine. The Japanese producers purchased only eight separators to accompany their eleven peeling machines. The situation with cleaners is somewhat similar, with one cleaner sold to accompany each peeling machine, excepting that only one cleaner accompanied the two Swedish machines and only eight cleaners were sold to accompany the eleven Japanese-purchased peeling machines. The identity of each foreign purchaser and the number of machines individually purchased is contained in the record.

As of January 1, 1962, the prices of the three peeling units F.A.S. New Orleans were: peeler, \$36,650; cleaner, \$3,250; separator, \$3,250. These prices represent a substantial increase over the prices charged for the first sales made in 1958. The prices then were F.A.S. New Orleans: peeler, \$32,650; cleaner, \$2,350; separator, \$2,350. Respondents charged slightly lower prices in Iceland.

Respondents have steadfastly refused to sell shrimp peeling machinery to domestic producers at any price.

The Advantages to Foreign Canneries:

The ideal procedure to determine whether domestic canners have in fact been disadvantaged by respondents' refusal to sell peeling equipment to them on the same basis as it is sold to foreigners would be to compare the cost experience of the domestic lessees with that of the foreign buyers. Unfortunately, the record contains no figures as to the peeling costs incurred by the foreign companies which have purchased respondents' equipment. Thus we are forced to rely upon less pragmatic, but in our view no less reliable, procedures. The record does show the number and type of machines in place in each of the United States canneries and the amounts paid to the respondents in rentals during each year. A comparison of the respondents' 1958 price to foreign buyers for the equipment in place in any domestic cannery with the rentals paid to respondents for the equipment will produce the approximate amount of advantage or disadvantage. Of course, such a comparison is essentially an oversimplification, for it does not take into account the cost of freight from New Orleans to the buyer's plant, replacement parts, repairs, insurance, and similar costs not incurred by lessees. On the other hand, the comparison does not take into account the federal and state tax laws which permit depreciation deductions from corporate income resulting in the complete return of the cost of capital investment. For federal income tax purposes the respondents depreciate their machines over a five-year period at the fixed rate of 20 percent of the original cost per year. Shrimp canners may be permitted the same rate. The following tabulation compares the rentals paid during a recent four-year period by two Gulf and two Northwest

Opinion

65 F.T.C.

canners with the total selling price of respondents' machinery which they were leasing as of August 31, 1960.

TABULATION H

[A tabulation showing the purchase cost of shrimp peeling equipment in relation to rental cost of shrimp peeling equipment]

	Type and amount of equipment in use (RX 216)	Dollar cost to purchase equipment (CX 843 I)	Rentals paid for equipment use from 9/30/58 to 9/30/61 (CX 106 A-O)	Excess rental payments over purchase cost
Gulf Coast companies:				
Southern Shell Fish Co., Inc.				
	12 Peelers.....	\$391,800		
	6 Cleaners.....	14,100		
	6 Separators.....	14,100		
	2 Graders.....	1,840		
	4 Develiners.....	49,000		
		470,840	\$525,641	\$54,801
Violet Packing Company.....				
	6 Peelers.....	195,900		
	3 Cleaners.....	7,050		
	3 Separators.....	7,050		
	2 Graders.....	1,840		
	2 Develiners.....	24,500		
		236,340	278,668	42,328
West Coast companies:				
E. H. Bendiksen.....				
	2 Peelers.....	65,300		
	1 Cleaner.....	2,350		
	2 Separators.....	4,700		
		72,350	94,525	22,175
W. F. Smith (Wrangell).....				
	1 Peeler.....	32,650		
	1 Cleaner.....	2,350		
	1 Separator.....	2,350		
		37,350	129,101	91,751

From the foregoing one can conclude without question that the ability to purchase respondents' equipment constitutes an advantage of considerable proportions. As was expected, the double peeling rental rate on the West Coast resulted in a greater disparity between the rentals and the cost of the equipment utilized by canners in that locality. In fact, the rentals paid by W. S. Smith for respondents' single fiscal year ended September 30, 1958, exceeded by \$9,000 the price of the equipment had he been permitted to buy it.

The Effects of the Discrimination Between Foreign and Domestic Canners:

Since the practice of selling shrimp processing machinery to foreigners is of comparatively recent origin, the full effects of the practice have yet to be felt by the domestic shrimp canning industry. However, there is sufficient evidence in the record to support a finding that the probable effects of the practice will be to injure and seriously curtail

the competitive abilities of domestic canners in two relevant markets: one consisting of the entire United States and the other the total of all foreign countries.

The Export Market:

Domestic canners have always sold a substantial percentage of their total pack in foreign countries. In 1960, more than 232,000 standard cases were exported out of a total United States pack of 951,219 standard cases. In 1961, exports dropped to 166,800 cases out of a total United States pack of 618,939. According to the Gulf Shrimp Canners Association the decline in exports of almost 30 percent was due to "the increased competition and pressure for foreign markets as exercised by foreign produced canned shrimp. * * *"

The full nature and extent of the effects of respondents' practices in foreign markets was not extensively explored in this proceeding. A comprehensive inquiry and exposition of all factors surrounding competition for foreign markets would be expensive and time-consuming, far beyond the needs of this case. The record is adequate, in our opinion, to support the conclusion that respondents' activities have curtailed the abilities of our domestic canners to compete in foreign markets with foreign canners who have purchased and own respondents' peeling equipment. The full extent of the injury or disability was not explored and need not be, for we need only find that the discriminatory distribution practices will tend inevitably to injure, destroy or prevent competition between domestic and foreign users of the respondents' equipment. The respondents are continuing to offer their machines abroad and are continuing to refuse to sell the machines to domestic canners. The inevitable result of this practice is to maintain high production costs at home and to permit to foreigners lower production costs. The resulting imbalance of competitive ability can have no other effect than to make it increasingly difficult for our domestic producers to compete for foreign markets. On the other hand, we could reasonably expect that with lower peeling costs our domestic canners could expand their foreign sales. To impede or prevent such expansion is no less of an unfair practice or unreasonable restraint than to occasion a diminution in market position.

It has been established beyond question that the purpose of the Federal Trade Commission Act is to proceed against acts at an early stage which, if full blown, will constitute violations of the Sherman or Clayton Act, e.g., *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394, 395 (1953). It is in this light that we are here attempting to reach in their incipency acts which, if permitted to continue, will seriously damage and injure do-

mestic producers and exporters of shrimp products attempting to sell canned shrimp abroad.

Effects in the Domestic Market:

The effects of the respondents' activities upon competition between foreign and domestic canners for the domestic United States market were more fully explored.

While there are no official statistics available showing the volume of canned shrimp imported into the United States, the American Can Company, at the request of the Gulf Shrimp Canners Association, compiled the following figures from verified data:

TABULATION I.—Imports of canned shrimp—in standard cartons 48/5-oz.

From—	1957	1958	1959	1960	1961
India.....	2,667	3,861	21,944	31,683	69,065
Norway.....	4,461	6,702	3,335	6,703	2,665
Denmark.....	600	4,813	2,565	1,967	3,447
Japan.....	1,283	1,148	2,183	849	27,479
Mexico.....				9,515	
Netherlands.....				7	20
Germany.....				20	
Iceland.....				127	
Greenland.....					5,660
England.....					453
Belgium.....					33
Sweden.....					115
Holland.....	141	733	3,006		
Hong Kong.....		1,699	420		
Chile.....			40		
Egypt.....			33		
Portugal.....			3,867		
Totals.....	9,152	18,956	37,393	50,871	108,937

Comparison of the above tabulation with Tabulation C, above, which reveals the total U.S. production, shows that canned shrimp imports have climbed from 1 percent of domestic production in 1957 to 11 percent in 1961. However, these figures do not tell the whole story, for the Gulf Shrimp Canners Association estimated that foreign imports show a 50 percent increase in 1962 over 1961. This prediction was based upon announcements that foreign producers, and particularly the Japanese, were expanding shrimp canning facilities and planned to increase their efforts to sell in the United States market. The Fishery Products Report for February 6, 1962, of the Interior Department's Bureau of Commercial Fisheries, reports on an article which appeared in a Japanese periodical, *Saisan Keizai Shimbun*, that one large Japanese fishing company was planning to operate a shrimp factory ship, the Einin Maru, in the Bering Sea in 1962. Accompanying the factory ship would be five pairs of two-boat trawlers. The production target for this ship in 1962 was 300,000 cases of shrimp

(twenty-four 8-ounce cans to the case). This target represented a four-fold increase over the same ship's production of 74,000 cases in 1961. The article disclosed that new shrimp peeling machinery for installation on the factory ship had been purchased and the production line would be increased by two to a total of four lines.

On June 28, 1962, the Department of the Interior was able to report in its fishery products report that the Japanese factory ship, Einin Maru, had produced over 100,000 cases (twenty-four 8-ounce cans) as of June 15th and that at the present rate of production was expected to exceed its target of 300,000 cases.

The factory ship Einin Maru is owned by Taiyo Gyogyo Kabushiki Kaisha of Tokyo, Japan. The export manager of this company advised the president of Washington Import-Export Corporation of San Francisco, a company purchasing imported shrimp and other articles for resale in the United States, that his company expected to export approximately one-half or 150,000 cases of the Einin Maru's total 1962 pack to the United States.

Additional evidence indicates the extent and manner of the penetration of the U.S. market by Taiyo fisheries. In October 1961, it sold to Southern Shell Fish Company 1,000 cases of small and 1,000 cases of broken 24 4½-oz. shrimp at a delivered price to the West Coast per case of \$7.02 and \$5.77, respectively. This shrimp was shipped to the West Coast in November of 1961, with 1,000 cases going to San Francisco and 500 each to Portland and Seattle. In September of 1961 Taiyo sold to Washington Import-Export Corporation of San Francisco, California, 1,500 cases of small and 1,500 cases of broken 24 4½ oz. shrimp at a price per case f.o.b. Japan of \$6.75 and \$5.50, respectively. The freight rate from Japan to the West Coast is 27 cents per case, making this price equal to the price paid by Southern Shell Fish. Washington Import-Export sold the broken shrimp in early 1962 at a delivery price of \$6.55 per case, excepting 100 cases which were sold f.o.b. San Francisco for \$7.15. It did not do so well, however, on the small shrimp, selling it at a delivered price per case of \$7.00. On May 30, 1962, Taiyo sold to Washington Import-Export Corporation 3,500 cases of small and 1,500 cases of broken 24 4½ oz. shrimp at a price per case f.o.b. Japan of \$7.00 and \$6.00, respectively. On June 25, 1962, Washington Import-Export Corporation purchased 2,500 cases of tiny and 2,500 cases of broken shrimp packed on Taiyo's floating cannery at a price per case f.o.b. Japan of \$6.75 and \$6.00, respectively.

The ability of Taiyo fisheries to operate a floating cannery and compete in the United States market in the manner indicated by this record stems from their purchase and utilization of the respondents'

shrimp peeling equipment. The first shipment of this machinery consisting of two peelers, two cleaners, two separators, and two deveiners was shipped to Taiyo about March 14, 1961. An additional two peelers, one cleaner and one separator were shipped about March 1, 1962. Shrimp cannot be hand peeled aboard a factory ship because there is insufficient space to accommodate the labor force which would be necessary. Moreover, labor costs aboard ship are so high that it would be impractical from an economic standpoint to utilize a seagoing hand-peeling force. Freezing the shrimp aboard a factory ship and then thawing and peeling the shrimp ashore at the end of the voyage produces a product of inferior quality.

Another Japanese company selling in the United States markets is Nichiro Tyogyo A. K. This company purchased two peeling machines, one cleaner, one separator and one deveiner in July of 1961, and two peelers, one cleaner and one separator in March of 1962. The record reveals that Granger and Company purchased 500 cases of shrimp packed by this company in October of 1961 at a delivered price to the West Coast of \$6.75 for the tiny size.

The person having the most experience in selling canned shrimp packed by the Northwest producers is Ivar Wendt. During the years 1957 to 1960 Mr. Wendt handled more than one-half of the entire pack of canned shrimp produced in the Northwest and Alaska. He financed or helped to finance three of the earlier producers, Kaakinen, Smith and Pacific Shrimp Company. He "owns" Pacific Pearl Frozen Foods, Inc., and has a two-thirds interest in Sutterlin & Wendt, Inc. This witness testified that in 1962 he was selling or attempting to sell Northwest tiny shrimp at \$8.00 a case f.o.b. Seattle. Freight and handling charges to the East Coast of the United States equalled approximately 72 cents a case. At this time Japanese canned shrimp was being offered in the New York City area at a price of \$7.40 to \$7.45 per case f.o.b. warehouse, New York. In Boston, as of May 7, 1962, Japanese shrimp was being sold at \$7.45 a case. The price of Japanese tiny shrimp in Philadelphia, as of June 13, 1962, was \$8.00 a case, less 35 cents a case promotional allowance. The witness concluded that the Japanese prices were below the prices at which he could produce and sell shrimp without losing money.

The San Francisco broker for Southern Shell Fish Company testified that his 1962 sales of broken and cocktail size shrimp packed by Southern Shell Fish were 50 and 25 percent less than the volume done during the first half of 1961. He attributed this loss of sales entirely to competition from imported shrimp. He pointed out that a leading brand of Japanese shrimp was being offered for 84 cents per case less than the brand packed by his principal.

Several other sellers of shrimp testified that competition from Japanese imports was becoming an increasingly serious factor in the domestic shrimp market. Apparently most canners in both the Northwestern United States and along the Gulf Coast are apprehensive with respect to this already serious competition and the almost inevitable probability that the present relative trickle of imported canned shrimp will increase to a flood. Although the Gulf area canners are the beneficiaries of respondents' discriminatory leasing rates among United States producers, four of them³ requested and were granted permission to file a brief as *amicus curiae* in this proceeding. In their brief the canners take the position that notwithstanding the fact that they are the recipients of the discriminatory lower rental rate the respondents' discriminatory leasing practices constitute a misuse or abuse of their patents. With respect to the discrimination in favor of foreign canners, they plead:

* * * Are the domestic shrimp canners being deprived of the benefits of fair competition where foreign competitors get possession, title and use of the machines on terms more favorable than those granted domestic lessees for the same machine? We say that they are. Moreover, the fact that the domestic lessees have no alternative but to continue the leasing arrangement, notwithstanding the unfairness of the situation, is itself a clear manifestation of the presence and exercise of monopoly power, for no American businessman would voluntarily accept and continue such an arrangement if he had any other choice. * * *

The discomfiture of the American canners is understandable, for the respondents have placed them in an untenable position. They are required to operate with static higher peeling costs—costs which remain at a constant level without regard for production level. Foreign canners using machines purchased from respondents experience initial lower costs which recede with increased production. American canners have been placed at a competitive disadvantage by respondents' foreign sales and the likelihood is that their foreign competitors, particularly the Japanese, will enlarge their penetration of the United States canned shrimp market. Domestic canners are powerless in the face of respondents' patent monopoly to effect any change in their competitive position vis-a-vis their foreign competitors using respondents' machines and the public interest requires remedial action on their behalf. Respondents' discriminatory practice of selling to some, but not all, competing canners has been shown by this record to be unfair and violative of Section 5 of the Federal Trade Commission Act.

³ Buquet Canning Company, Mavar Shrimp & Oyster Co., Inc., Southern Shell Fish Co., Inc., and Violet Packing Co., Inc.

The Remedy:

A patentee has no right to market his invention in a manner violative of the law. As a matter of fact, the patent statute does not even grant him the affirmative right to place his product on the market but merely grants to him, for a term of seventeen years, "* * * the right to exclude others from making, using, or selling the invention throughout the United States, * * *" (35 U.S.C. 154 (1958).) The Supreme Court has uniformly held that resale price maintenance is just as illegal when practiced by a patentee as by others. *Boston Store of Chicago v. American Graphophone Co.*, 246 U.S. 8 (1918); *Strauss v. Victor Talking Machine Company*, 243 U.S. 490 (1917). However, a patentee may establish the price at which its agents must sell goods consigned to them. *United States v. General Electric Company*, 272 U.S. 476 (1926).⁴ A patentee may not sell or lease his invention upon the condition or understanding that it will be used only with supplies obtained from the patentee or other designated source. *Motion Picture Patents Company v. Universal Film Manufacturing Company*, 243 U.S. 502 (1917). The imposition of such a tying restriction upon a lessee or purchaser may effectively void all of the patentee's rights under the patent. In *Morton Salt Co. v. G. S. Suppiger*, 314 U.S. 488 (1942), the Supreme Court held that such misuse of a patent right effectively barred the patentee from maintaining an infringement suit regardless of whether the infringer had suffered from the misuse of the patent.

The Supreme Court has been presented with the argument that since a patentee may choose to refrain entirely from marketing his invention he must logically and necessarily be permitted to impose any condition which he chooses when and if he does decide to market it. The Court disposed of this argument in *Motion Picture Patents Company v. Universal Film Manufacturing Company*, stating:

* * * The defect in this thinking springs from the substituting of inference and argument for the language of the statute and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however,

⁴ In *Simpson v. Union Oil Company*, decided April 20, 1964, the Supreme Court placed what appears to be new emphasis on the importance of patents in price-fixing proceedings, stating:

"The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*. That was the *ratio decidendi* of the General Electric Case. * * *" (84 S. Ct. 1051, 1058.)

Mr. Justice Stewart, dissenting, took the view that had the Court decided in *General Electric* that a valid agency had not been set up "* * * the price fixing requirement would have made the agreement nothing more than a resale-price maintenance scheme, unlawful under the antitrust laws, * * * regardless of whether or not the article sold was patented." (*Id.* at p. 1061.)

are subject to the rules of general as distinguished from those of the patent law * * *. (243 U.S. at 514.)

The right which is here involved, that is, the right to sell machinery to one group of competitors while leasing to a competing group is not a right acquired by respondents from the patent laws but was created by private contract completely outside their aegis. Thus, it is to be judged by the antitrust principles applicable to any other series of contracts. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

Although respondents have seriously abused the monopoly power acquired through the peeling machinery patent, we do not deem it necessary to deny to them the future fruits of the patents by an order denying their right to file infringement suits or requiring compulsory royalty-free licensing, as proposed by complaint counsel. Regardless of the facts which have given rise to the need for an order, Federal Trade Commission proceedings are not punitive and it is axiomatic that its " * * * orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; * * *" *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 217 (1933). The "evil" which here exists can be corrected with a far less drastic remedy than that advocated by complaint counsel.

Affirmatively, our order must be directed toward the goal of restoring and insuring future workable competition between respondents' foreign purchasers and domestic lessees. To achieve this end, the respondents must be required and directed to treat both groups equally. Our study of the record convinces us that the minimum order to effect relief in this situation will require these respondents to offer their machines for sale to domestic canners at the same prices and under the same conditions and terms as are presently offered to foreign canners. Such an order will permit to respondents and their customers a desirable flexibility, for it permits the continuation of the leasing system, pursuant to which some canners may choose to continue to operate.

THE MONOPOLIZATION CHARGES

The Alleged Unlawful Agreements with Inventors as to Existing and Future Inventions:

Complaint Paragraph Nine (a) charges that since February 1951 the respondents, by means of agreements with various individuals, have obtained exclusive rights to exploit patented shrimp processing machines and have in most instances never attempted to produce or market said machines. The paragraph charges that such agreements were entered with Robert J. S[a]manie, James L. Self, LeRoy Ernest Demarest, Stephen D. Pool, and Walter Peuss.

In Paragraph Nine (b) of the complaint, respondents are alleged to have entered agreements with the same individual inventors, excepting Walter Peuss, whereby the inventors agree to disclose, assign or license all future inventions of shrimp processing machinery to the respondents.

We have conducted a detailed examination of all of the evidence adduced in support of and rebuttal of these charges and have concluded therefrom that while the allegation has been, at least in part, sustained, the evidence is not sufficient to support an order to cease and desist. This is true even when the proof adduced is considered as a part of the entire complex of respondents' activities illustrated by the whole record. The question is a close one, for no more effective method of curtailing competition can be imagined than the acquisition of an exclusive right to control competing machinery.

Some of the alleged unlawful agreements were entered by the respondents with its own employees and gave respondents certain rights with respect to shrimp processing machinery developed while the employee was working for the respondents. Other agreements or licenses secured covered machinery such as cleaners, separators, or deheaders, which could be considered as complementary to the shrimp peeling machinery then being developed by the respondents rather than as directly competitive therewith. With a few exceptions the respondents' agreements with the various inventors did not result in the development of marketable machines. In essence, the respondents' activities constitute little more than the normal efforts of a manufacturer to secure the rights to develop any new and promising inventions in its field. When carried to extreme and coupled with other anti-competitive acts and practices, such activity can clearly constitute a violation of the antitrust laws, *e.g.*, *United States v. Besser Mfg. Co.*, 96 F. Supp. 304 (E.D. Mich. 1951), *aff'd*, 343 U.S. 444 (1952). But respondents' monopoly position in the shrimp processing machinery field is the result of their own invention, development and exploitation of the first shrimp peeling machine capable of economic employment in a shrimp cannery. While they have been able to improve this machine and consequently their hold upon the market by reason of the agreements and licenses secured from various inventors, this activity has not been shown to constitute a violation of law.

The Alleged Harassment of Developers and Users of Competing Shrimp Peeling Machines:

In complaint Paragraph Nine (c) respondents are alleged to have harassed, by patent infringement suits or threats of suits, purchasers, lessees, and manufacturers of a competitive shrimp peeling machine patented in 1957 by one Paul C. Skrmetta. It is alleged that these

activities were undertaken "with full knowledge" of the fact that the Skrmetta machine had been patented.

In 1957, Raphael Q. Skrmetta, the president of Deepsouth Packing Company, Inc., a corporation principally engaged in packing and selling canned shrimp, secured a patent on a shrimp peeling machine. The first machine developed and manufactured was retained and used at the plant of the Deepsouth Packing Company. In August of 1957 a machine was placed in the plant of Battistella Canning Company, pursuant to a lease arrangement. On November 25, 1957, the respondents filed a suit for patent infringement against Battistella, Raphael Q. Skrmetta, his father Paul C. Skrmetta, and Deepsouth Packing Company. At Battistella's request the machine was forthwith returned to Deepsouth Packing Company, where it is presently installed.

In October of 1957, Skrmetta shipped his third machine to Bay Center, Washington, for installation on an approval lease in the canning plant of Harbor Seafoods, Inc. On November 23, 1957, respondents notified Harbor Seafoods by telegram that they were filing suit against Skrmetta, Battistella, et al., for patent infringement. On November 25, 1957, respondents notified all of their West Coast lessees that the suit had actually been filed. In January 1958, respondents filed a suit for patent infringement against National Blowpipe & Manufacturing Company, Inc., the company which had been manufacturing the machines for Skrmetta.

As a result of the various notices from the respondents, Harbor Seafood refused to lease the Skrmetta machine and it was sold outright to Edwin A. Kaakinen and John Close. Skrmetta produced an additional seven machines, of which five were shipped to domestic shrimp canners and two were shipped to foreign canners.

In February 1958 respondents filed suits against Edward Kaakinen, who operated a shrimp cannery as Kaakinen Fish Company at Westport, Washington. As pointed out in an earlier section, Mr. Kaakinen had been a lessee of the respondents' peeling equipment since October 15, 1956, and was in fact their first lessee on the West Coast. On December 12, 1957, Kaakinen had purchased the Skrmetta machine which Harbor Seafoods had refused to accept.

The trial of the respondents' case against Kaakinen was held in Takoma, Washington, in August 1959 before United States District Judge George Boldt. On April 11, 1960, the district judge issued his decision, holding the Skrmetta machine infringed the patent rights of the respondents and enjoining the defendants from further use of the Skrmetta machines. The defendants appealed to the court of appeals for the ninth circuit and on January 22, 1962, that court sustained the district court and dismissed the appeal. 301 F. 2d 170. Rehearing was

denied April 10, 1962 (301 F. 2d 173) and the Supreme Court denied certiorari on October 8, 1962 (371 U.S. 823).

As a result of this successful suit, the respondents secured injunctions against all domestic canners who had purchased or were using a Skrmetta machine. Respondents secured an end to the use of the two machines which had been sold to foreign producers by the effective expedient of purchasing them from their owners.

While certainly not *res judicata* of the issues raised by complaint Paragraph Nine (c), the court decisions in respondents' infringement case against Kaakinen are extremely persuasive. As we have stated, the public policy of the United States, as expressed in its patent laws, grants to patentees the right to prevent others from manufacturing, selling or using the article patented. The laws go further and provide affirmatively:

No patent owner otherwise entitled to relief for infringement * * * of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having * * * (3) sought to enforce his patent rights against infringement. * * * (35 U.S.C. § 271(d).)

The complaint in this proceeding issued about one month after the April 11, 1960, district court decision holding that the Skrmetta machines infringed respondents' patent right. The affirmance of that decision and the denial of certiorari in 1962 preclude a finding by this Commission that the respondents' infringement suits were not brought in good faith for the purpose of protecting their patent rights. Moreover, to order respondents to cease filing suits against infringers would constitute a complete confiscation of their patent rights. Such a remedy is too drastic under the circumstances shown here. Moreover, the "clean hands" doctrine which denies relief to a patentee shown to have misused his patents in violation of the antitrust laws (*e.g.*, *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942)), looms as a formidable obstacle to the successful future prosecution of infringement suits by respondents.

The Debenture Issue:

Complaint Paragraph Nine (d) alleges that respondents' leases require lessees to purchase "non-negotiable debentures" issued by respondents in \$500 denominations and bearing interest of 5 percent per annum. The required number of debentures varies with the type of machine leased, as follows:

Machine type	No. of debentures	Total debenture amount per machine
Shrimp Peeler.....	12	\$6, 000
Shrimp Cleaner.....	2	1, 000
Shrimp Separator.....	1	500
Shrimp Deveiner.....	6	3, 000

Respondents admit that up to July 1961 all of their machine leases, except those for peeled meat graders, required, as a condition of the lease, the purchase of debentures at the time the lessee signed the initial lease. In July of 1961, the debenture requirement was discontinued as a result of a disagreement with the Securities & Exchange Commission as to whether the debentures constituted an exempt private offering under the Securities Act of 1933.

The evidence reveals that all debentures issued paid the same rate of interest, 5 percent, and all required respondents to establish a sinking fund for the purposes of retirement. The debentures were negotiable in a sense, since respondents would reissue a transferred debenture to the new holder upon application.

It is complaint counsel's theory that the debenture requirement is unlawful as a part of the individual respondents' over-all effort to impede and discourage would-be competitors in shrimp processing machinery. They argue that the system had "* * * partnership characteristics in that debenture holders might not get their money back if The Peelers Company did not prosper, and this in itself is obviously a potential deterrent to a competitor seeking to interest and existing lessee in renting other equipment."

Respondents contend that the sole and only purpose of the debentures was to finance the production of machinery and when their need for such financing ceased, the issuing of debentures was abandoned. Respondents appear to have the better of this argument, for complaint counsel's own evidence shows that the purpose of the debenture system was to finance the construction of machinery. Of course, this innocent purpose would not save the system from a finding of illegality if the record demonstrated that its actual effect was to suppress competition. But the record does not so show. The respondents' lessees purchased Skrmetta machines without regard for the safety of their debenture investment. The record contains no testimony from either shrimp processors or manufacturers of shrimp processing machinery to the effect that the debentures were a material competitive consideration. In keeping with the foregoing conclusions, we hold that complaint counsel has failed to show that the debenture system formerly utilized by the respondents is unreasonable or unlawful in any way.

THE CONSPIRACY CHARGE

In complaint Paragraph Ten, the corporate respondent, Grand Caillou, and the individual respondents are charged with having "* * * agreed and combined among themselves to adopt and carry out the unfair methods of competition and unfair acts and practices hereinbefore described and set forth in Paragraph Nine." As we view

this proceeding, there is no necessity for a decision that a conspiracy existed between Grand Caillou and the individual respondents to perform the acts found herein to be unlawful. A complete remedy can be effected by an order issued to the respondents responsible for the shrimp processing machinery phase of the Lapeyre family's operations. An order responsive to Paragraph Ten could only require that the respondents, including Grand Caillou and its president, cease agreeing or conspiring to carry out the unlawful acts perpetrated by the individual respondents in the distribution of shrimp machinery. Such an order would add little in the way of protection to the public and may well engender some confusion, for the order we shall direct to the individual respondents flatly prohibits the performance of certain acts without regard to the manner of their conception or whether performed singly or in concert. In holding that a formal finding of conspiracy to perform unlawful acts is unnecessary, we are not shutting our eyes to the obvious fact that both shrimp canning and the manufacture and distribution of shrimp processing machinery are the enterprises of a single family with the same persons, that is, the individual respondents, in control and direction of both enterprises. While conceivably such interaction of interests may constitute a conspiracy, a formal finding to that effect is not required in the circumstances here presented. The proceeding will be dismissed as to the corporate respondent Grand Caillou and as to Emile M. Lapeyre in his capacity as president of the corporate respondent.

CONCLUSIONS

It is the Commission's conclusion and ultimate finding that the individual respondents have seriously injured the competitive opportunities of all domestic shrimp canners by selling their patented shrimp processing machinery to foreign shrimp canners, thereby granting the foreign competitors a significant competitive advantage over domestic canners in both domestic and foreign markets for canned shrimp products. It is also our conclusion and ultimate finding that the respondents have grievously injured and curtailed the competitive opportunities of shrimp canners located in the states of Oregon, Washington and Alaska by charging them a discriminatory leasing rate for patented shrimp processing machinery which is approximately double the rate charged to other domestic shrimp canners.

The acts of the respondents constitute serious abuses of the monopoly rights granted to them under the United States patent laws, are in derogation of the public interest and are hence unfair methods of compe-

tition and unfair acts or practices violative of Section 5 of the Federal Trade Commission Act.

Commissioner Elman has filed a separate opinion.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

SEPARATE OPINION

By Elman, *Commissioner*:

Respondents in this case are The Peelers Company, Grand Caillou Packing Company, and the members of the Lapeyre family, who control the two companies. Through Peelers, the family, by virtue of holding certain patents, enjoys a complete monopoly of the manufacture and distribution of shrimp processing machinery used in shrimp canning. Through Grand Caillou, the family is engaged in the shrimp canning business on the Gulf Coast. Due to the high cost of peeling and cleaning shrimp by hand, respondents' shrimp processing machinery is virtually an economic necessity for shrimp canners. Peelers refuses to sell this machinery to any domestic shrimp canner, but, instead, leases it to the domestic canners. The lease charge, however, is twice as high for canners located in the Northwest as for canners located on the Gulf Coast. Respondents' explanation for the differential is that the shrimp processed by the Northwest canners requires (because of its smaller size) about twice as much hand labor per pound to process as the larger shrimp processed in the Gulf Coast canneries; and respondents' machinery is a substitute for hand labor.

In these circumstances, what are the duties of respondents under Section 5 of the Federal Trade Commission Act in the leasing of their shrimp processing machinery? Is their "discriminatory" leasing practice an unfair method of competition? An affirmative answer to this question could readily be given if, as the Commission in its opinion finds, respondents' purpose was to protect Grand Caillou from the competition of the Northwest canners. However, while it seems clear both that the Gulf canners are in competition with the Northwest canners and that the latter have found respondents' additional lease charge severely burdensome, there is no indication that Grand Caillou was anything but an incidental beneficiary of the differential. For one thing, the manufacture and leasing of shrimp processing machinery represent the more profitable and more important aspect of respondents' business interests than Grand Caillou, and it seems most unlikely that the interests of Grand Caillou would weigh heavily in respondents' decisions concerning their shrimp processing machinery business.

Moreover, if respondents desired to give Grand Caillou a boost, why did they not grant Grand Caillou a discount or rebate of some sort on its lease of their shrimp processing machinery in preference to the other Gulf Coast shrimp canners? So far as appears, respondents have not utilized their position as the sole supplier of shrimp processing machinery to confer any competitive advantage on Grand Caillou vis-a-vis its Gulf Coast competitors. Nor does the record show either that Grand Caillou was specially threatened by competition from the Northwest canners, or that Grand Caillou's competitive position was specially benefited by Peelers' differential leasing arrangement, or that the protection or improvement of Grand Caillou's business was otherwise any part of the purpose or effect of the differential. Indeed, if the Commission is correct in its conclusion on the charge of unlawful discrimination by respondents between domestic and foreign shrimp canners, namely, that respondents' practice of freely selling its machinery to foreign shrimp canners while refusing to sell to domestic canners inflicted injury on the domestic canners—Northwest and Gulf Coast alike, including Grand Caillou—then it seems quite clear that respondents managed their shrimp processing machinery business with little regard for the impact of their management decisions on the fortunes of Grand Caillou.

Although the Commission's opinion in this case nowhere mentions the Robinson-Patman Act, the rationale of the decision (apart from the question, discussed above, of the role of Grand Caillou) is a Robinson-Patman rationale. The Commission views respondents' differential lease charge as a form of price discrimination inflicting injury on competitors (the Northwest shrimp canners) of favored customers (the Gulf Coast shrimp canners), and therefore unlawful. While unfair practices in conflict with the policy of the Robinson-Patman Act may be suppressed under Section 5 of the Federal Trade Commission Act in a case where, as here, the Robinson-Patman Act is inapplicable for jurisdictional reasons¹ (respondents having leased rather than sold their machinery), I question whether the present case presents the kind of problem with which the Robinson-Patman Act was designed to deal. In the first place, whether there is discrimination here depends on how one views the transaction. If respondents may be deemed to be charging for the use of their machinery according to the number of shrimp processed, there is no discrimination between the Northwest and Gulf Coast canners; the per shrimp charge for using respondents' machinery is the same for all lessees. The question

¹ See, e.g., *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 1962); *American News Co. v. F.T.C.*, 300 F. 2d 104 (2d Cir. 1962).

becomes whether it is reasonable for respondents to charge for use of their machinery on such a basis.

In the second place, the circumstances of this case seem far removed from the central concerns of Congress in enacting the Robinson-Patman Act. If the role of Grand Caillou is discounted, as I think it must be, it becomes clear that there is no problem here of large buyers demanding and receiving price concessions to the detriment of their competitors. The problem is the converse. A supplier having a complete monopoly of essential equipment is charging what the traffic will bear, with, as it happens, discriminatory results. Cf. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19, 24 (1957).

The only substitute for respondents' machinery, and hence the only possible source of challenge to their monopoly, is hand labor. If respondents were to increase their lease charges beyond a certain point, hand labor would become competitive with their machinery; but since hand-labor costs in the Northwest canneries, due to the size of the shrimp processed there, are approximately twice as high as the same costs in the Gulf Coast region, respondents, without increasing their charges to the point at which competition from hand labor would be invited, may with impunity charge the Northwest canners at least twice as much as the Gulf Coast canners. The differential lease charge thus enables respondents to maximize their profits. For if respondents charged the Northwest canners no more than they charge the Gulf Coast canners, they would obviously be earning less overall, while if they charged the Gulf Coast canners the same high rate as they charge the Northwest canners, the former might be driven to substitute hand labor for respondents' machinery.

In short, the source of the discriminatory effects and of the consequent injury to the Northwest canners in this "secondary line" case is not inequality of bargaining power among customers. It is, rather, the conjunction of two factors: the cost differential in the processing of shrimp by hand as between the Northwest canners and the Gulf Coast canners; and respondents' monopoly of shrimp processing machinery, which enables the differential in shrimp processing costs to be maintained notwithstanding the substitution of machinery for hand labor. If respondents did not have a monopoly of shrimp processing machinery, presumably competition would drive the price of such machinery to the Northwest canners down toward the level of the Gulf Coast canners, since the cost of processing shrimp by machine is the same regardless of the size of the shrimp. Conceptually, then, the problem of this case is not one of Robinson-Patman-type discrimination, but of the duty, if any, of a lawful monopolist to conduct its busi-

ness in such a way as to avoid inflicting competitive injury on a class of customers.

Respondents have a monopoly not only in the sense that every lawful patent confers a monopoly of the patented article, but also in an economic sense. (See my separate opinion in *American Cyanamid Co.*, F.T.C. Docket 7211 [63 F.T.C. 1747, 1892] (decided Aug. 8, 1963).) Respondents enjoy a complete monopoly of an economically significant and commercially important product market, *i.e.*, machinery for processing shrimp for canning purposes. Firms possessing monopoly power may not be *ipso facto* unlawful monopolists under the antitrust laws, but the permissible limits of lawful business conduct for such firms are more narrowly circumscribed than in the case of firms not possessing such economic power. See *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521. They are accordingly subject, under the antitrust laws, to some of the obligations of fair and equal treatment borne by publicly regulated utilities. See, e.g., *Associated Press v. United States*, 326 U.S. 1; *United States v. Terminal R.R. Assn.*, 224 U.S. 383. A course of conduct that would be lawful if engaged in by a non-monopolist may, therefore, be an unfair method of competition when engaged in by a monopolist.

Had machinery for the processing of shrimp for canning purposes not been invented, the Northwest shrimp canners, owing to their high labor costs, would today inevitably be at a serious competitive disadvantage vis-a-vis the Gulf Coast canners. But such machinery has been invented, and because it processes shrimp at the same cost of operation regardless of the size of the shrimp, it has eliminated any inherent disparity in processing costs as between the Gulf Coast and Northwest canners. Thus, if respondents charged the Gulf Coast and Northwest canners equally, the Northwest canners would be in a position to compete with the Gulf Coast canners on more or less equal terms. Respondents, however, by being able to charge, and by charging, a monopolist's discriminatory price, have prevented the equalization of processing costs made possible by the invention of shrimp processing machinery, and have thereby prevented the Northwest canners from competing effectively. The Northwest canners have been forced to the wall, and may well be eliminated as a competitive factor in the shrimp canning industry.

The short of it is that respondents' insistence on charging a monopoly price may well result in the destruction of a substantial segment of the shrimp canning industry. This result, which is not dictated by efficiency—for, to repeat, the cost of processing shrimp by machine

is the same regardless of the size of the shrimp—but by monopoly power, is clearly opposed to the objectives of antitrust policy. The right of a monopolist to exploit his monopoly (whether such monopoly is conferred by patents or otherwise) by charging a monopolist's discriminatory price does not, in my opinion, include the right to destroy or cripple a major segment of an industry, but must yield in such a case to the policy of competition embodied in the antitrust laws. Cf. *United States v. Masonite Corp.*, 316 U.S. 265, 277; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 514. In the circumstances, respondents' refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms is an abuse of monopoly power. It has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5. Cf. *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95.²

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision, which in part sustained and in part dismissed the complaint, and upon briefs and oral argument in support of and in opposition to said appeals; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the exceptions of both parties should be denied in part and granted in part and that the initial decision of the hearing examiner should be vacated and set aside:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and set aside; the Commission's findings of fact and conclusions appear in the accompanying opinion.

It is further ordered, That Paragraphs Nine (a), (b), (c), (d), and Paragraph Ten of the complaint be, and they hereby are, dismissed.

It is further ordered, That the complaint be dismissed in its entirety as to individual respondent Andre C. Lapeyre, now deceased; individual respondent Emile M. Lapeyre in his capacity as president of Grand Caillou Packing Company, Inc.; and as to corporate respondent Grand Caillou Packing Company, Inc.

It is further ordered, That the following be, and it hereby is, entered as the Commission's order to cease and desist:

It is ordered, That the respondents, Emile M. Lapeyre, Fernand S. Lapeyre, James M. Lapeyre, Felix H. Lapeyre, and Emile M.

² So far as the charge relating to unlawful discrimination by respondents between foreign and domestic shrimp canners is concerned, I am compelled to dissent from the Commission's finding of violation. The record tells us altogether too little about the costs of foreign shrimp canners to justify an inference of competitive injury. Nor is it at all clear to what extent being able to purchase rather than lease respondents' shrimp processing machinery represents a net cost savings to the foreign canners.

Lapeyre, Jr., individually, as copartners trading and doing business as The Peelers Company, and as representatives of all of the partners in The Peelers Company, and their agents, representatives, and employees, directly or indirectly, through any existing or succeeding corporation, partnership, sole proprietorship, or other device, in connection with the distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any shrimp peeling, cleaning and separating machinery or improvements thereto now or hereafter controlled by respondents, do forthwith cease and desist from:

(1) Discriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee.

For the purposes of this proceeding, lease or rental terms which result in any lessee paying a higher rate than the rate charged any other lessee for use of respondents' machines for the same period of time or through the same number of mechanical revolutions or operations shall be deemed discriminatory.

(2) Discriminating between foreign and domestic shrimp processors by refusing to sell such machinery to domestic processors upon the same terms and conditions afforded to foreign processors.

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

Commissioner Elman's views are stated in a separate opinion. Commissioner Reilly did not participate for the reason that he did not hear oral argument.

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT

Docket C-751. Complaint, June 4, 1964—Decision, June 4, 1964

Consent order prohibiting the Nation's sixth largest producer of coarse paper—which, between 1947 and 1963 had acquired at least 45 lumber, plywood and paper companies—and its wholly owned subsidiary from acquiring, without prior Commission approval, any company engaged in producing, converting or selling (1) coarse paper or finished products thereof or (2) container-

Lapeyre, Jr., individually, as copartners trading and doing business as The Peelers Company, and as representatives of all of the partners in The Peelers Company, and their agents, representatives, and employees, directly or indirectly, through any existing or succeeding corporation, partnership, sole proprietorship, or other device, in connection with the distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any shrimp peeling, cleaning and separating machinery or improvements thereto now or hereafter controlled by respondents, do forthwith cease and desist from:

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board or its products for a period of 10 and 7 years, respectively, with exceptions as stated; and requiring them annually to make available or sell to independent jobbers and converters for 5 years at least 100,000 tons of coarse paper per year (the approximate amount produced at the Crossett, Ark. mill, acquired in 1962), and, for the succeeding 5 years, 75,000 tons annually, all at delivered prices offered by its named major competitors.

COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondents have acquired the assets and stock of The Crossett Company, a corporation, in violation of Section 7 of the Clayton Act, as amended, (U.S.C. Title 15, Sec. 18); and therefore, pursuant to Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

I.

DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. "Coarse paper" is a category of paper generally relating to the packaging and wrapping field, where a flexible type of packaging material is appropriate or desirable, including but not limited to, wrapping, bag and sack papers and converting paper.

b. "Kraft paper" is a high strength bleached or unbleached coarse paper made by the sulphate process, which constitutes the vast majority of all coarse paper.

c. "Grocers bags and sacks" are bags and sacks, made from Kraft coarse paper, used primarily by retail food stores to package groceries for customers.

II.

Respondents

2. Respondent Georgia-Pacific Corporation is a corporation organized and existing under the laws of the State of Georgia, with its principal office located in Portland, Oregon.

3. Respondent Georgia-Pacific Paper Corporation, a wholly owned subsidiary of Georgia-Pacific Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at Crossett, Arkansas. Georgia-Pacific Corporation and its wholly owned subsidiaries are hereinafter sometimes referred to as Georgia-Pacific.

4. Georgia-Pacific is, and for many years has been, engaged in the manufacture and sale of various forest products, including but not

limited to, lumber and plywood, Kraft coarse paper, container board, grocers bags and sacks, corrugated products and hardboard.

5. In 1947, Georgia-Pacific had net sales of \$24,075,982 and total assets of \$6,466,844. By 1962, net sales had increased to \$324,987,000 and total assets climbed to \$476,996,000. The major part of the great increase in the sales and assets of Georgia-Pacific between 1947 and 1963 resulted from Georgia-Pacific's acquisition of at least 45 lumber, plywood and paper companies for which Georgia-Pacific paid a combined consideration of approximately \$584,714,000.

6. Georgia-Pacific entered the paper industry in 1958 with the construction of a mill for the production of Kraft pulp, Kraft coarse paper, and container board at Toledo, Oregon. This mill represented an initial investment of approximately \$21,000,000 and when completed had a daily capacity of 250 tons of such coarse paper and container board. In 1960, this capacity was enlarged to 600 tons daily, and is currently being expanded to 800 tons. In 1962 this mill produced about 47,000 tons of Kraft coarse paper and 143,579 tons of Kraft container board. Prior to July, 1962 coarse paper produced at this mill was marketed principally on the West Coast; however, regular and substantial shipments were made to the Midwest and to the East.

7. In 1961, Georgia-Pacific acquired the Imperial Bag and Paper Company (Imperial), a manufacturer of grocers bags and sacks, with its plant located at Pine Bluff, Arkansas. Imperial had been a purchaser of Kraft coarse paper. In 1961, sales of grocers bags and sacks manufactured at the former Imperial plant amounted to \$3,037,841. Such sales were made principally in the Midwest.

8. In 1962, Georgia-Pacific maintained 58 manufacturing plants located in the western, midwestern and southern regions of the United States. It distributes its line of over 250 forest products through at least 74 company-owned distribution sales branches (warehouses) located in 33 states and 50 other sales offices located throughout the United States. Kraft coarse paper and other paper products accounted for about 22% of Georgia-Pacific's sales in 1962.

9. At all times relevant herein, Georgia-Pacific sold and shipped Kraft coarse paper, grocers bags and sacks, as well as other forest products, in interstate commerce.

III.

The Crossett Company

10. Prior to July 1962, The Crossett Company was a corporation organized and existing under the laws of the State of Arkansas with its principal offices in Crossett, Arkansas.

11. At the time of its acquisition, The Crossett Company and its subsidiaries (Crossett), were, and for many years had been, engaged in the manufacture and sale of various forest products, including but not limited to, Kraft coarse paper, grocers bags and sacks, variety bags, shopping bags, bleached foodboard, softwood lumber, and hardwood flooring.

12. Crossett sold Kraft coarse paper throughout the eastern and midwestern United States.

13. In 1961, the year prior to its acquisition, Crossett had total sales of \$49,176,000 and total assets of \$71,420,124. Kraft coarse paper and other paper products accounted for 72% of Crossett's annual sales.

14. In 1961, at its paper mill in Crossett, Arkansas, Crossett produced 132,000 tons of Kraft coarse paper. This mill has as its source of supply a 565,000 acre forest on the Arkansas-Louisiana border, containing an estimated 2.5 billion board feet of timber. Crossett further operated a bleached foodboard mill, a lumber mill, a newly constructed flakeboard mill, and three chemical plants in connection with this forest.

15. Through a wholly owned subsidiary at Covington, Kentucky, Crossett manufactured and sold grocers bags and sacks. Crossett's total sales of grocers bags and sacks, in 1961, were \$4,659,383.

16. Crossett sold grocers bags and sacks to customers located principally in Ohio, Indiana, Illinois, Michigan, Kentucky, Tennessee and western Pennsylvania.

17. At all times relevant herein, Crossett sold and shipped Kraft coarse paper, grocers bags and sacks, as well as other forest products, in interstate commerce.

IV.

The Nature of Trade and Commerce

18. In general, grades of paper fall within the following categories: coarse, fine and newsprint. The production and sale of "coarse paper" and "grocers bags and sacks" are, respectively, the two relevant lines of commerce for the purposes of this case.

19. The coarse paper industry in the United States is substantial. In 1958 total shipments of 3,644,000 tons of coarse paper had a value of \$712,491,000. In 1962, total production of coarse paper was 4,197,499 tons.

20. There has been a marked increase in concentration in the coarse paper industry in the United States since 1952. This increase in concentration is largely attributable to numerous mergers of coarse paper producers, and acquisitions by coarse paper producers of paper bag and sack manufacturers, the principal consumers of coarse paper.

21. Moreover, the coarse paper industry in the United States is highly concentrated. With the acquisition of Crossett in 1962, Georgia-Pacific ranked sixth among the producers of coarse paper. In that year, the eight largest companies accounted for approximately 58% of the total United States production of coarse paper; the largest twelve companies accounted for about 70% of such production.

22. For the purposes of this case, the relevant sections of the country are:

a. As to the manufacture and sale of coarse paper, the United States as a whole, or relevant sections thereof, and,

b. As to the manufacture and sale of grocers bags and sacks:

That section of the United States east of the Mississippi River, plus the States of Minnesota, Iowa, Nebraska, Missouri, Kansas, Arkansas, Oklahoma, Texas, and Louisiana, or that section of the country comprised of western Pennsylvania and the States of Ohio, Indiana, Illinois, Michigan, Kentucky and Tennessee, or both of them.

Violation of Section 7 of the Clayton Act

23. In July, 1962, Georgia-Pacific Paper Corporation, and through it, Georgia-Pacific Corporation, acquired in excess of 99% of the outstanding stock of Crossett for a cash consideration of approximately \$125,356,386.

24. The effect of the acquisition of Crossett by respondents may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of coarse paper, and grocers sacks and bags, in the sections of the country set forth in Paragraph 22 above, in the following ways, among others:

a. Crossett has been eliminated as an independent competitive factor in the manufacture and sale of coarse paper, and of grocers bags and sacks;

b. Actual and potential substantial competition between Georgia-Pacific and Crossett in the manufacture and sale of coarse paper, and of grocers bags and sacks, has been eliminated;

c. Concentration in the coarse paper industry in the United States as a whole has been substantially increased;

d. Entry into the coarse paper industry may be inhibited or discouraged;

e. Concentration in the manufacture and sale of grocers bags and sacks has been substantially increased, and the entry of new manufacturers may be inhibited or discouraged;

f. The trend of acquisitions and mergers in the coarse paper industry has been or may be encouraged and stimulated;

g. The integration of coarse paper producers with converters of coarse paper has been or may be increased;

h. Georgia-Pacific's financial and market strength has been enhanced to the detriment of its smaller competitors.

Now therefore, The acquisition of Crossett by respondents, as above alleged, constitutes a violation of Section 7 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Georgia-Pacific Corporation is a corporation organized and existing under the laws of the State of Georgia with its office and principal place of business located at Equitable Building, Portland, Oregon.

Respondent, Georgia-Pacific Paper Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at Crossett, Arkansas.

Georgia-Pacific Paper Corporation is a wholly owned subsidiary of Georgia-Pacific Corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That (i) for a period of ten (10) years from the date of service upon them of this Order, respondents shall cease and desist from acquiring, directly or indirectly, through subsidiaries or other-

wise, without the prior approval of the Federal Trade Commission, any part of the share capital or assets of any corporation engaged in commerce and engaged in the United States in the production of coarse paper, or in the converting of coarse paper into finished products, including but not limited to paper bags and sacks, or a substantial part of whose business in the United States is the sale of such finished products; and (ii) for a period of seven (7) years from the date of service upon them of this Order, respondents shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any part of the share capital or assets of any corporation engaged in commerce and engaged in the United States in the production of containerboard, or in the converting of containerboard, into finished products, including but not limited to corrugated products, or a substantial part of whose business in the United States is the sale of such finished products; provided, however, that nothing contained herein shall prohibit the purchase by respondents, in the ordinary course of business, of coarse paper or containerboard, or finished products converted from coarse paper or containerboard, or secondhand machinery or equipment, used or useful in the manufacture of coarse paper or containerboard or the conversion of coarse paper or containerboard into finished products, if such machinery or equipment does not constitute a major part of the assets of the seller.

It is further ordered, That, for the period ending December 31, 1973, respondents shall make available and affirmatively offer, in good faith at not more than the going delivered market price, to independent jobbers and converters of coarse paper in the United States, to be treated collectively as one class, and, to the extent such offers are accepted, sell (i) in each of the years 1964 through 1968, inclusive, at least 100,000 tons of coarse paper produced at the Crossett, Arkansas, mill acquired from The Crossett Company, which is the approximate tonnage of coarse paper sold by The Crossett Company to all customers in such class during the calendar year 1961 (or, if the total production of such mill in any such calendar year is less than 100,000 tons, at least 75% of the total production of such mill in such year, and (ii) in each of the calendar years 1969 through 1973, inclusive, at least 75,000 tons of coarse paper produced at such mill (or, if the total production of such mill in any such calendar year is less than 75,000 tons, then at least 75% of the total production of such mill in such year). The going delivered market price shall be determined by the average of the delivered prices offered by St. Regis Paper Company, Union Bag-Camp Paper Corporation, Hudson Pulp and Paper

Corporation and International Paper Company for similar grades of coarse paper in effect from time to time during the calendar year in question. Respondents' offers and sales shall be made on such terms and conditions of sale (including terms and conditions of credit) as respondents may establish in good faith from time to time.