

Complaint

IN THE MATTER OF

TELEVISION SERVICE ASSOCIATION OF
DELAWARE VALLEY ET AL.

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

Docket 8623. Complaint, May 13, 1964—Decision, Feb. 19, 1965

Order requiring a trade association of television and radio repairmen and its members, of Philadelphia, Pa., engaged in the repair service of television sets, radios, and other electronic devices, to cease entering into and carrying out any planned course of action to coerce, intimidate, or boycott wholesalers or distributors of electronic equipment or component parts who also sell such products at retail, to refrain from interfering with the practices in which such wholesalers conduct their business, and to cease using a policy to "black list" wholesalers or distributors who sell such products at retail and to "white list" wholesalers or distributors who refuse to sell such products at retail.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Sec. 41, et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties hereinafter referred to as respondents have violated the 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Television Service Association of Delaware Valley, a corporation, sometimes hereinafter referred to as TSA of Delaware Valley, is a non-profit trade association, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with offices and its principal place of business at 4710 Old York Road, Philadelphia, Pennsylvania. Respondent TSA of Delaware Valley was organized and is maintained ostensibly to promote the welfare and mutual interest of the radio-television and electronic industry. The membership of said respondent constitutes a class so numerous and changing as to make it impracticable to name individually each and every member as a respondent herein. Accordingly, the following members of respondent TSA of Delaware Valley are herein named as respondents in their individual capacities, as members of respondent TSA of Delaware Valley, as past or present officers, directors or in other official capacities of said corpo-

rate respondent, and as fairly representative of all members thereof, as a class, all of whom are made respondents herein:

Herman Shore, 1218 W. Girard Avenue, Philadelphia, Pennsylvania, served as director of respondent TSA of Delaware Valley from 1959 to 1960, as vice president from 1960 to 1961 and as president from 1961 to 1962.

Raymond Fink, 7819 Rugby Street, Philadelphia, Pennsylvania, served as recording secretary of respondent TSA of Delaware Valley from 1959 to 1960 and served as a director of said respondent from 1960 to 1961 and from 1961 to 1962.

PAR. 2. Meetings are held by members of respondent trade association for the purpose of transacting the business of the association. These meetings are held periodically, generally once a month, within the community wherein the trade association has its principal place of business.

PAR. 3. All or virtually all of the members of respondent trade association are individuals or corporate or other organizations engaged in the business, among others, of repairing and servicing electronic devices and equipment including those designed and employed for the reception of radio and television broadcast signals. In the course and conduct of the business of so repairing and servicing such devices and equipment, various supplies are required by members of respondent association including different component parts thereof such as radio and television tubes. Such component parts are sold and shipped by the manufacturers thereof to wholesalers or distributors in states other than the states of manufacture or other than the states where shipment originated. Those wholesalers or distributors in turn resell them to members of the corporate respondent and also to ultimate consumers. Some of the sales so made by such wholesalers or distributors are or have been made to members of respondent trade association, or to others who are non-members, but who are similarly engaged in repairing and servicing television, radio or electronic devices and equipment, or to ultimate consumers, with places of business or residences in States other than those wherein the places of business of such wholesalers and distributors are located.

PAR. 4. Respondent TSA of Delaware Valley for some years last past has published a monthly magazine called "TSA NEWS" which it has distributed to its members and to others in the radio, television and electronic industry both within the Commonwealth of Pennsylvania and in States other than the one wherein it or its members maintain their principal places of business. Members of respondent trade association, or some of them, in order to further carry out,

engage in, pursue or implement the acts, practices, methods of competition, combination, agreement, conspiracy, or planned common course of conduct, as hereinafter more particularly described and alleged to be unfair, in derogation of the public interest and in violation of law, have themselves traversed boundaries separating one state from another state or states, or have from points in one state or states employed channels of communication such as the United States mail or telephone lines extending to points in another state or states, or both. Respondent trade association and all of its members who are responsible for the acts and practices of said association, either actively participating and collaborating or tacitly acquiescing therein, are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Members of respondent trade association and others similarly engaged have been, and are now, in competition with wholesalers or distributors from whom they purchase component parts for use in their business of repairing and servicing television, radio or electronic equipment or devices for the business of the ultimate consumer of such parts or devices except to the extent competition between them may have been prevented, eliminated, injured or impaired as a result of various unfair acts, practices or methods of competition engaged in, followed, pursued or adopted by or through the corporate respondent and by the members thereof as hereinafter more particularly alleged. Included among and illustrative of such acts, practices or methods of competition so engaged in, followed, pursued or adopted were the following:

At least as early as 1959, the impact of competition for the business of the ultimate consumer with wholesalers of television, radio and electronic devices and parts therefor became a matter of concern to members of respondent TSA of Delaware Valley. In March of that year said members, or some of them, caused respondent TSA of Delaware Valley to commence publication of articles and editorials in "TSA NEWS" denouncing and criticizing such wholesalers for selling at retail to the ultimate consumer and claiming such consumer was or should be the exclusive customer of individuals or organizations engaged in repairing and servicing such television, radio and electronic devices. Through the vehicle of "TSA NEWS" members of respondent TSA of Delaware Valley, or some of them, no later than September of 1959 caused it to commence publication of editorials or articles exhorting individuals or organizations engaged in repairing or servicing television, radio or electronic devices to unite and combine against such wholesalers of such devices or component

parts thereof, and to employ the threat of the combined and collective withdrawal of their purchases therefrom as a device to force such wholesalers to refrain from selling to the retail trade in competition with such members or others engaged in repairing or servicing such devices.

PAR. 6. Respondents, as hereinbefore named and described, in or about February 1960 combined, conspired, agreed or reached a common understanding with each other and others not named as parties hereto, including Television Service Dealers Association of Delaware County, Television Service Dealers Association of Delaware, Allied Electronic Technicians Association, Inc., and Radio Servicemen's Association of Trenton, N.J., Incorporated and their members, or some of them, to act in concert and collaboration to hinder and suppress the sale and distribution by wholesalers of television, radio or electronic devices, equipment or component parts thereof. Such combination, conspiracy, agreement or common understanding was entered into, or reached by and between said respondents and others, and has been pursued, followed, furthered implemented in interstate commerce and through utilization of the channels thereof. More particularly, the purposes sought to be accomplished by respondents through such combination, conspiracy, agreement or common understanding was the restriction and limitation of the channels of distribution employed in the marketing of television, radio and electronic devices, equipment or component parts by the elimination or diminution of sales thereof by wholesale distributors to the ultimate consumer. Illustrative of and included among the acts and practices designed to accomplish such purposes which were engaged in and pursued by respondents, or some of them, with the approval or acquiescence of all others, were the following:

(a) Communicated to such wholesale distributors threats of concerted withdrawal of patronage therefrom by television, radio and electronic equipment, service and repairmen;

(b) Combined and united to boycott such wholesale distributors to coerce them to discontinue selling television, radio and electronic devices or component parts thereof at retail to the ultimate consumer in competition with individuals or organizations engaged in the servicing and repair of such devices;

(c) Dictated or attempted to dictate practices to be followed or eschewed or discontinued, by such wholesalers in the conduct of their business involving such matters as hours of operation, display windows, and advertising;

(d) Caused publication to be made of a "white" list or lists of wholesalers who cooperated with respondents in refusing to sell at retail to the ultimate consumer;

(e) Policed sales made by wholesale distributors of television, radio and electronic devices or component parts thereof by employing individuals or committees for the purpose of shopping at the business establishments of distributors;

(f) Advocated, urged and preached, by way of published slogan, exhortation and appeal, that independent servicemen, both members of respondent association and non-members, should discontinue purchasing from wholesale distributors thereof who sold television, radio and electronic devices or component parts thereof, at retail to the ultimate consumer.

PAR. 7. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreement or common understanding entered into or reached between and among them or others not parties hereto, and the acts and practices engaged in and followed pursuant thereto and in furtherance and implementation thereof by respondents as hereinbefore alleged, constitute unfair acts, practices and methods of competition, the effect of which has been, is now or may be to injure, impair, frustrate, eliminate, or prevent competition between respondents and others engaged in the distribution of radio, television, or other electronic equipment, or devices or component parts thereof, or to tend to create a monopoly in respondents in the distribution of such equipment, devices or parts, or to unduly obstruct, hamper or impede the current of commerce in such equipment, devices or parts between and among the several states, or to deprive members of the public who have purchased, do purchase or may purchase such devices, equipment or parts of the advantage and opportunity to so purchase from vendors engaged in active and *bona fide* competition unimpeded by artificially imposed restraints, or to curtail the breadth of choice of vendors from which such members of the purchasing public may buy, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Richard E. Ely and *Mr. Bruce E. Lovett* for the Commission.
Mr. Sidney H. Black of Philadelphia, Pa., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER
 JANUARY 5, 1965

On May 13, 1964, the Federal Trade Commission issued its complaint against Television Service Association of Delaware Valley, a

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corporation (hereinafter called TSA), and its members, and Herman Shore and Raymond Fink, individually, as members, officers or directors, and as representative members of the entire membership of TSA, charging them with a conspiracy to boycott in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents. The complaint alleges in substance that respondents entered into a conspiracy to boycott, *i.e.*, refuse to purchase from or deal with, those wholesale distributors who sold at retail in competition with respondent servicemen.

Respondents appeared by counsel and filed answer admitting the corporate and certain other factual allegations of the complaint but denying the commerce allegations and the alleged violation. Pursuant to notice, a prehearing conference and hearings were held before the undersigned hearing examiner duly designated by the Commission to hear this proceeding.

Both parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record and to file proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. Counsel for respondents did not so file. All of the findings of fact and conclusions of law proposed by counsel supporting the complaint not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following findings of fact, conclusions and order.

FINDINGS OF FACT

I. The Business of Respondents, Other Co-Conspirators, and Their Suppliers

TSA is a nonprofit corporation, a trade association organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its offices and principal place of business at 4710 Old York Road, Philadelphia, Pennsylvania. It was organized and is maintained to promote the welfare and mutual interests of the radio, television and electronic service industry and to improve the financial stability and professional standing of its members. Its membership is limited to servicemen, *i.e.*, service dealers, actively engaged

¹ 5 U.S.C. 1007(b).

in the repair and servicing of television, radio or electronic devices in the Delaware Valley. Other persons may become associate members, but they have no voting privilege (Answer; CX 2 A-B; CX 4 J, p. 1).²

The number of members of TSA varied from 30 to 50, all servicemen. As of June 1961 there were 35 members listed on its roster plus an additional eight who were dropped as of February 23, 1960 for nonpayment of dues, and one dropped in April 1959 because he had gone out of business. From time to time new members are elected (CX 3 A-C; CX 2 A; CX 4 C, p. 10; RX 108, p. 19; Tr. 738).

The geographical area with which this case is concerned is known as the Delaware Valley. As found above, and as the name of TSA connotes, it accepted as members any servicemen located in the Delaware Valley. The Delaware Valley has no fixed or legally delineated boundaries, such as an incorporated municipality, county or other legal territory, but it is a term in common usage and well known both to the public and in this industry, particularly in the Philadelphia area. In general, it comprises the tri-state area of the valley surrounding the Delaware River, extending from, and including, Trenton, New Jersey on the north, to and including Wilmington, Delaware on the south, and encompassing Philadelphia, its suburbs, Chester, Pennsylvania, and Camden, New Jersey (CX 4 I, p. 3; CX 4 J, p. 1; RX, 108 pp. 14-15; RX 107 G, p. 2; Tr. 662-3).

Respondent Herman Shore, a Philadelphia serviceman and member of TSA served as a director of TSA in 1959, 1960 and 1961, its vice president in 1960, and its president in 1961. Respondent Raymond Fink, a Philadelphia serviceman and member of TSA, served as a director of TSA in 1959, 1960 and 1961, its secretary in 1959, and as editor of its official publication, TSA News, in 1959, 1960 and 1961 (Answer; CX 4 A-4 Z(4)). Because the membership of TSA is a class too numerous and changing to make it practical to name each member individually as a respondent, in accordance with well established principles and practice,³ the complaint named respondents Shore and Fink not only as individuals, members and officers of TSA but also as representative of all members of TSA as a class as respondents.

TSA publishes, and during 1959 through 1961 published, a monthly magazine or trade journal called TSA News. TSA News is the official

² The following abbreviations are used throughout this decision: CX (Commission exhibit); RX (Respondents' exhibit); Tr. (Transcript); and P. Tr. (Prehearing transcript).

³ *Chamber of Commerce of Minneapolis v. F.T.C.*, 13 F. 2d 673 (8th Cir. 1926); *Advertising Specialty National Ass'n v. F.T.C.*, 238 F. 2d 108 (1st Cir. 1956); *National Macaroni Mfrs. Ass'n*, 65 F.T.C. 583, Docket No. 8524 (1964).

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publication of TSA. TSA distributes the News by United States mail to its members and thousands of others, primarily servicemen but including wholesale distributors, both in the State of Pennsylvania and in other States. Approximately 2,000 copies of TSA News are thus distributed, free of charge (Answer; CX 4 A-Z(6); CX 4 S, p. 3; RX 107 A-L; RX 108, p. 49; Tr. 129, 491, 698, 753).

In addition to the above respondents, the complaint named others as co-conspirators but not respondents, namely: Television Service Dealers Association of Delaware County (Pennsylvania), (hereinafter called the Chester Association); Television Service Dealers Association of Delaware (hereinafter called the Wilmington Association); Allied Electronic Technicians Association, Inc. (hereinafter called the Camden Association); Radio Servicemen's Association of Trenton, New Jersey, Inc. (hereinafter called the Trenton Association); and their members or some of them. Said associations, like TSA, are comprised of electronic industry servicemen as members and are trade associations organized for the same general purposes as TSA (CX 41 A-B; CX 42 A; CX 56 A-B; CX 60 A; CX 72 B, E, F).

The above four associations comprise the membership of a joint group known as the Tri-State Council. During 1960, the president of the Tri-State Council was the president of the Wilmington Association, the vice president of the Council was the secretary of the Camden Association, and the secretary of the Council was the secretary of the Chester Association. During 1960, the Tri-State Council's official publication was a monthly trade journal called *The Vanguard*, edited by Tony De Franco, vice president of the Camden Association, and distributed free of charge (CX 36; CX 37, pp. 1-2; CX 45; CX 101, p. 2; Tr. 129, 491).

Approximately 50 wholesale distributors of television, radio, and electronic equipment and parts supplied the servicemen throughout the Delaware Valley (CX 4 J, p. 2). Said wholesale distributors were in direct and substantial competition with servicemen in the Delaware Valley, including respondents and their alleged co-conspirators, in the sale of television, radio and electronic parts at retail to the ultimate consumer, except to the extent that such competition may have been impaired or eliminated as a result of the conspiracy to boycott hereinafter found (CX 4 N, p. 1; CX 4 O, p. 1; Tr. 263).

II. *Interstate Commerce*

As previously found, the servicemen purchased their needed television, radio and electronic parts from the wholesale distributors in

the Delaware Valley. Except as otherwise indicated, all of the distributors hereinafter named were located in Philadelphia or its suburbs. Mr. John Stern wholly owned the Radio Electric Service Co. of Philadelphia and Wilmington, and owned a one-third interest in the Radio Electric Service Co. of New Jersey. Almo Radio had branch stores in Wilmington, Camden, and Trenton; Allied Parts had a branch store in Trenton; and Radio Electric Co. had branch stores in North Philadelphia and West Philadelphia (CX 22 A; CX 24 E; CX 4 G, p. 6; CX 95; Tr. 266-7). In addition, Wholesale Electronics, a distributor in Wilmington, sold parts in Maryland and Pennsylvania as well as Delaware; Raymond Rosen & Co. sold parts in New Jersey, Delaware, and Pennsylvania; and Radio Electric Service Co. of Philadelphia frequently exchanged parts in short supply with Radio Electric Service Co. of Wilmington (Tr. 125-8, 266-7, 588).

The wholesale distributors purchased their television, radio, and electronic parts and equipment from various manufacturers, most of whom were located in States other than Pennsylvania. Approximately 80% to 99% of all such parts and equipment were purchased outside the State of Pennsylvania and shipped to such distributors. A substantial majority, approximately 85% to 95%, of such products were resold to servicemen in the manufacturers' original cartons or packages, normally, of course, in smaller quantities than purchased from the manufacturers by said distributors (Tr. 91, 123-5, 263-5, 339-41, 464-5, 477-8, 569-72).

It is concluded and found that such distributors were engaged in interstate commerce and that the sale of parts by them to servicemen was in interstate commerce.⁴

Assuming *arguendo* that such sales by distributors, or purchases by servicemen, were not in interstate commerce, nevertheless the alleged conspiracy was among persons of diverse citizenship, *i.e.*, the associations and their members in the States of Pennsylvania, New Jersey and Delaware; and as such was an "unfair method of competition in commerce," as specified in Section 5 of the Act. As the court observed in the *Salt Producers* case:

The production of salt is a local transaction, but an *agreement* between many producers, of diverse citizenship, to limit their respective productions is an unfair method of competition *in* interstate commerce.⁵

Even if the servicemen were not engaged in interstate commerce, the alleged conspiracy to boycott the distributors was a direct re-

⁴ *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951).

⁵ *Salt Producers Ass'n v. F.T.C.*, 134 F. 2d 354 (7th Cir. 1943).

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straint on their sales in commerce. The Supreme Court has found upon substantially similar facts that such sales were in interstate commerce, and that such a conspiracy to boycott, by refusing to deal with wholesalers, was a direct restraint of trade in violation of the Sherman Act. The Court held:

The trade of the wholesalers involved covers a number of States, and there is no question but that the supplying of lumber to the large number of retailers in these associations in different states is interstate trade * * *.⁶

It is, of course, well settled that violations of the Sherman Act constitute violations of Section 5 of the Act.⁷

Furthermore, the means and instrumentalities used to effectuate and carry out the alleged boycott, as more fully found hereinafter, were in commerce. The TSA News was mailed to servicemen and others in many States, and was the principal vehicle by which the conspiracy was organized and carried out. In addition, The Vanguard, correspondence and notices in furtherance of the conspiracy were sent through the mails to various States; and a number of meetings were held in the three States comprising the tri-state area and attended by representative servicemen from all of the associations.

Finally, the alleged conspiracy to boycott was ultimately joined by certain distributors who agreed to abide by the demands of the servicemen, as more fully found hereinafter, and thus was made up of some persons allegedly not engaged in commerce, *i.e.*, the servicemen, and others, *i.e.*, the distributors, obviously engaged in commerce. The Supreme Court in the *Cement Institute* case held that the Commission has jurisdiction over all parties to such a conspiracy, including those over whom it would not otherwise have jurisdiction.⁸

For all of the foregoing reasons, it is concluded and found that the alleged unfair method of competition was "in commerce", as commerce is defined in the Act.

III. The Unfair Practices

A. The Issue

The basic issue in this matter is whether respondents and certain alleged co-conspirators, all television servicemen and their trade associations, entered into a conspiracy or agreement to boycott, *i.e.*, refuse to purchase from, certain wholesale distributors to cause them to cease selling electronic parts at retail to the ultimate con-

⁶ *Eastern States Retail Lumber Dealers' Ass'n v. U.S.*, 234 U.S. 600 (1914).

⁷ *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948); *F.T.C. v. Motion Picture Advtg. Service Co.*, 344 U.S. 392 (1953).

⁸ Note 7, *supra*.

sumer in competition with such servicemen.⁹ Fundamentally, the objection of the servicemen was to retail sales by the distributors, their suppliers, at wholesale prices. The relevant period of time encompassed by the issues is from 1959 through 1961.

B. The Conspiracy to Boycott

1. Identification of Specific Individuals

For the purpose of clarity, the following finding identifies certain officers and officials of TSA and the four alleged co-conspirator trade associations, and certain distributors, all of whom played a more or less active part in the events hereinafter found.

TSA

Herman Shore, director, 1959-61; vice president, 1960; president, 1961.

Raymond Fink, director, 1959-61; secretary, 1959; editor, TSA News, 1959-61.

Louis Smith (deceased), director, 1959-61; corresponding secretary, 1959; president, 1960; associate editor, TSA News, 1959-61. (Respondents stipulated that Messrs. Shore and Fink believed that Mr. Smith used the pen name Allen Roberts in TSA News.)

Tony D'Annibale, director, 1959-61; vice president, 1959.

Dave Krantz, director, 1959-61.

Charles Sonnenberg, director, 1960; corresponding secretary, 1960.

John McCloy, Jr., director, 1959-61; treasurer, 1960.

(CX 4 A-4 Z(4))

Chester Association

Peter Rapagnani, vice president, 1959; president, 1960-61.

William Jordan, president, 1959.

William Boyd, vice president, 1960-61.

Leon Skalish, secretary, 1959-60; advisory board, 1961.

(CX 73)

⁹ Most of the testimony of the witnesses, primarily representatives of wholesale distributors, called by counsel supporting the complaint, was corroborated by the testimony of other persons present at the events, the written admissions of respondents and co-conspirators, such as TSA News, The Vanguard, correspondence and notices, and the testimonial admissions of servicemen called by both sides, or was un rebutted. To the limited extent that such testimony was rebutted and uncorroborated, the undersigned credits the testimony of said wholesale distributor representatives based upon his observation of them.

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Wilmington Association

James Mayhart, president, 1960.

Ralph Brinton, vice president, 1960.

(CX 47)

Camden Association

Joseph Papovich, director and secretary, 1959-61.

Tony De Franco, director, 1959-61; vice president, 1960; president, 1961.

(CX 57 B)

Trenton Association

H. F. Leverage, director, 1959-61; vice president, 1959; president, 1960-61.

Lewis Edwards, director, 1959-61; chairman of program and public relations committee, 1959-61.

(CX 61 B; CX 64)

Distributors

A. G. Radio, Amil Gumula; Albert Steinberg & Company, Albert Steinberg; Almo Radio, Morris Green; Allied Parts, Frank Zuschlag; A. C. Radio, Joseph Branca; Lee Electronics, Eli Goldstein; Radio Electric Service Co. (Philadelphia), Harry Fallon and James Foti; Radio Electric Service Co. (New Jersey), Joseph Berman; Radio Electric Service Co. (Wilmington), Sol Furman; Kass Electronics, Albert Kass; and Raymond Rosen & Co., Titus Yonker (Tr. 90, 93, 122, 262-3, 277, 475, 480, 488, 577).

2. The Inception of the Conspiracy

In January 1959, TSA began a campaign in its official publication, TSA News, against the distributors' practice of retail selling to the ultimate consumer at wholesale prices in competition with their customer servicemen, urging servicemen not to buy from distributors who did so. A first page editorial in the January issue of TSA News advocated collective action by servicemen against distributors who did not "cooperate" with them. After pointing out the formidable power collective action gave the servicemen, the editorial stated, *inter alia*:

Industry-wide the annual service business purchasing power mushrooms out to a fabulous \$1,140,000,000 at the retail level. Collectively, this huge purchasing power places a potent economic weapon in your hand. *Buy from the jobber who cooperates with you, * * * Rest assured that a serious drop of business resulting from your buying elsewhere, coupled with hundreds of outspoken*

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letters, *will force a policy shift to your favor.* (Emphasis added.) (CX 4 A, p. 1).

In the same issue appeared this statement by "Allen Roberts":

* * * some * * * Parts Distributors spend a great deal of money for newspaper and radio advertising directed to the public. Why must they compete with their Dealer customers?

Succeeding issues of TSA News during 1959 made ever more clear TSA's program to have its members and all servicemen not buy from distributors who sold at retail and instead engage in "selective buying" from those distributors who "cooperated," *i.e.*, did not sell at retail in competition with servicemen. Ultimately, "start selective buying" became an increasingly reiterated slogan. In the February issue, Allen Roberts stated:

Each month I have been receiving many letters asking why I haven't had more to say about our local Parts Distributors' practice of selling wholesale to anyone who can drag himself to their counter with a buck held between his teeth.

In the same column appears a quote from a letter to Mr. Roberts.

"* * * I believe that now is the time for the Service Shop Owners to get together and try to get our Distributors to clean up their practice of selling wholesale to one and all."

And later:

* * * His [Marty Fox] biggest gripe is about the Parts Distributors, who recklessly sell without discrimination to anyone at trade discounts. He would like to see something done to get these Parts Distributors selling only to those with established places of business. He suggested that if they will not cooperate, then the service shop owners should use selective buying.

Mr. Roberts further reported that another serviceman had said that "he has been facing the same problems most of us have and that is wholesale selling of electronic parts and equipment to the retail trade." In the same issue of TSA News, a cartoon depicted the distributors as picking the pockets of servicemen by "sales to retail" (CX 4 B, pp. 6, 7, 12).

In the September TSA News it was stated:

* * * Practice Selective Buying in YOUR purchases of tubes and parts.
* * * No manufacturer or distributor, in light of their recent statements, has any right to expect you to continue to buy parts or tubes from him if he is also competing with you for your customers. (CX 4 I, p. 2).

In October, the feature editorial of TSA News was entitled "LOOSE DISTRIBUTION DESERVES JUST RETRIBUTION." The editorial stated, *inter alia*:

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There are SOME VERY CO-OPERATIVE DISTRIBUTORS in Philadelphia. I don't mean the ones who co-operate with YOUR CUSTOMERS AND MINE. I do mean the distributors who REFUSE TO SELL "WHOLESALE" to individuals.

* * * We suggest it is rather foolish to buy from those who OPENLY SELL TO YOUR CUSTOMERS.

The time has come. WE NO LONGER HAVE TO WORK WITH THEM.

THEREFORE, let us FORGET the distributor who VALUES RETAIL CUSTOMERS SINGLE TUBE SALES. LET HIM HAVE HIS "RETAIL" CUSTOMERS. LET HIM SELL ONE TUBE AT A TIME. LET HIM SELL, AND INSTALL THE BATTERIES IN THE RADIO.

The next time you WAIT IN LINE BEHIND THE RETAIL CUSTOMERS REMEMBER THESE WORDS—YOU NO LONGER HAVE TO—*THERE ARE OTHER DISTRIBUTORS.*

(CX 4 J, pp. 1-2).

On December 5, 1959, Leon Skalish, as secretary of the Chester Association, called and wrote Harry Fallon of Radio Electric complaining of a Philadelphia newspaper advertisement by the latter offering hi-fi equipment for sale because the advertisement included Radio Electric's address, and thus retail customers would be advised of an outlet where parts could be purchased wholesale. He advised Fallon that 100 copies of the advertisement were being circulated to dealers, distributors and members of the Chester Association in Delaware County (Tr. 271-2; CX 82 A-B; CX 83 A-B).

On December 29 and 30, 1959, respectively, Skalish, as secretary of the Chester Association, wrote to Morris Green of Almo Radio and to Joseph Branca of A. C. Radio as president of the National Electronic Distributors Association (NEDA), complaining of and requesting corrective action with respect to distributors' advertisements to servicemen's customers setting forth television parts, net wholesale prices and store locations, and advising that the advertisements had been called to the attention of the other servicemen's associations in Philadelphia, Wilmington, Trenton, and Camden (Tr. 449; CX 84, 85). As a matter of fact, Skalish, although not a member, went to a TSA meeting to call this activity to the attention of its members, who were equally disturbed by it (Tr. 455).

The January 1960 TSA News reported the above activity by the Chester Association, pointed out that TSA had been trying to get its local distributors to cease such "unethical" quoting of "net" (wholesale) prices, and noted that "future action on the matter will soon be forthcoming" (CX 4 M, p. 4). The TSA News editorial in the same issue, in reviewing the accomplishments of 1959, observed:

We have seen closer cooperation between various service associations, and we have found a key to some of our problems in what might become the battle cry of the organized service industry, "Stop Your Crying—Start Selective Buying." (CX 4 M, p. 2).

In a Chester Association special-meeting notice dated January 16, 1960, Skalish as secretary reported that one member had lost a regular customer because of lower prices from a local distributor. The notice further stated:

You can not serve two masters. It's about time the distributors should be made aware that if they want the retail trade they can have it, but at a loss of there [sic] wholesale customers. (Tr. 435; CX 87).

The progress of the "Selective Buying" campaign was reported by Allen Roberts in the February issue of TSA News:

"As you sow, so shall you reap" is an old proverb which we now have seen come true. Last month a group of independent service dealers in this city, who were fed up to the ears with the under-handed business methods as practiced by the major electronic parts distributors in this city, decided to take positive action as individuals against these flagrant violators of good business practices. Through the concerted efforts of certain independent service dealers, the word quickly spread throughout the city like wildfire, that they have embarked on a program of Selective Buying from small parts distributors who have assured them of selling to the trade only. Furthermore, their places of business would not be open in the evening to supply part timers and hobbyists. This wave of resistance flowed over the boundaries of Metropolitan Philadelphia into surrounding counties and into the states of New Jersey and Delaware. Service dealers in many of the surrounding areas supplied by the branches of these major distributors were quick in lending support to this movement.

Subsequently, in the same column, Roberts in effect admitted that "Selective Buying" was synonymous with boycott. He quoted a distributor as having said: "Selective buying is un-American," when the distributor in fact had said "Boycott is un-American," as conceded elsewhere in the same issue of TSA News (CX 4 N, p. 5, 2d column, 2d para.; CX 4 N, p. 3).

Perhaps the clearest admission of a conspiracy to boycott the distributors and clarion call to all servicemen in the Delaware Valley to join the boycott is found in the first page editorial of the February 1960 TSA News entitled "WHOLESALE OR RETAIL." It stated, *inter alia*:

One of the thorns in the side of the independent service industry has been the wholesale selling to retail customers by electronic parts distributors. This unfair competition * * * precipitated a selective buying campaign by a large number of independent service dealers * * * The service dealers * * * have taken a stand. They are making use of the one course available to them—SELECTIVE BUYING. All those engaged in electronic service work are urged

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to BUY FROM THOSE DISTRIBUTORS WHO SELL TO THE TRADE ONLY. * * * You will have to support this issue to survive. * * * United we stand—divided, we fall. * * * SELECTIVE BUYING IS YOUR ONLY ASSURANCE OF SURVIVAL.

3. The First Joint Meeting of Servicemen and Distributors

On February 8, 1960, a meeting was held at the Drake Hotel in Philadelphia between many local distributors and servicemen from all of the associations. The meeting was called by the servicemen and attended by numerous distributors because of their concern about the selective buying program. Louis Smith, president of TSA, presided as chairman. Other servicemen present were: Shore, Fink, Krantz, Skalish, Papovich, Mayhart, Rapagnani and De Franco. It will be noted that all five servicemen associations had representatives present. Representatives of the distributors in attendance included Gumula, Steinberg, Fallon, Foti, Branca, Berman, Green, Kass and Zuschlag (Tr. 92-3, 103, 276-8, 478-81).

Skalish, by agreement with Smith, had prepared a mimeographed list of the servicemen's complaints against the distributors. This was read by Smith at the meeting and copies were distributed. The list contained 12 specific complaints, summed up at the end as three main points.

1. Selling retail openly and highly promoted.
2. Quoting net prices on the telephone.
3. Quoting net prices in mailings.
4. Opening on Saturday and evenings.
5. Windows not blacked out, actually heavily displayed.
6. Signs reading "for the trade only" instead of "wholesale only."
7. Selling wholesale to individuals who have no tax no.
8. Discount cards circulated.
9. Large yellow page directory ads.
10. Misuse of cooperative advertising money.
11. Disposition of the buying status of the ham, audiofile [sic] and the holder of a citizen band license.
12. Listing of branch stores in Hi-fi ads.

To sum it up it adds up to the following three statements—

1. THE DISTRIBUTORS ARE WHOLESALERS AND RETAILERS.
2. THEY ARE SELLING TO US AND TO THE PUBLIC.
3. THEY ARE IN COMPETITION WITH US.

(CX 33; Tr. 103, 278-80, 440-1).

After the list had been read, Smith, Shore and Fink spoke criticizing the distributors' practices vehemently. The general atmosphere at the meeting between the servicemen and the distributors was hostile rather than friendly. The term "boycott" was used five or six times. Whenever this happened, Smith, Shore or Krantz said:

"We told you not to use that word. The word is selective buying." (Tr. 102-3, 280-1, 483-4.)

Ultimately several of the distributors spoke. Gumula stated that he could "live with" some of the 12 demands but not all of them. Steinberg's reaction to all of the demands was negative. Other distributors were disturbed by them. Fallon said he would not agree to the three major demands, which he identified as numbers one, four and seven (Tr. 102, 289-90, 483). Fallon, because he felt the servicemen were stating they would not buy from the distributors unless they met the 12 demands and would try to influence others to cease buying, stated: "Boycott is un-American. You association men are using this to hold a club over our heads." Thereupon Fink said: "We are not talking about boycott, we prefer the words selective buying." (Tr. 280-1.) The meeting terminated by the distributors advising the servicemen they would take the 12 demands under consideration and report back later. The servicemen agreed they would report the details of the meeting to their respective associations. Members of TSA and the Camden, Chester, Trenton, and Wilmington Associations in attendance did so report (CX 4 N, p. 3; 48 B; 58; 67 A; 75 A-B).

The February 1960 issue of TSA News, published about March 1st, contained a full report of the above meeting, including a quotation of Fallon's accusation of boycott. After stating that the "meeting was held * * * to discuss the selective buying campaign instituted by the individual servicemen," the report characterized the purpose of the meeting as follows:

The primary purpose of this meeting was to discuss the complaints of the Independent Servicemen on the selling of Wholesale by WHOLESALE DISTRIBUTORS TO RETAIL TRADE. (CX 4 N, p. 3.)

The same issue of TSA News carried a block notice in large print listing four "cooperating" distributors who had been "found" to be selling "wholesale to the trade" only. Roberts' column also stated:

I have been informed that a *retail* shopping service has disclosed that they have been unable to buy wholesale from Jem * * * , Lee * * * and Otter. [Three of the four companies listed in the block notice.] Further reports on the shopping service will be forthcoming.

In addition, the same issue carried a 1/3 page notice in large print stating:

Stop Your Crying—Start Selective Buying—Protect Your Business—Buy From Those Distributors Who Cooperate With You. (CX 4 N, pp. 3, 5, 14; CX 88.)

4. Subsequent Events—Individual Threats

Shortly after the first joint meeting on February 8, 1960, Keen TV in Philadelphia, one of Radio Electric's servicemen accounts, advised Fallon that Keen would not buy from Radio Electric until the 12 demands were met. Fallon had noted a substantial decline in Keen's purchases. The owner of Keen was not a member of TSA. Fallon told him of the Drake meeting, but the owner said the complaints had not been answered and he was not going to buy from Radio Electric until he "got the word." The owner was a brother-in-law of D'Annibale, a director of TSA, and regularly received TSA News (Tr. 282-4, 704-7).

Shortly thereafter, Herbert Goldstein, a serviceman and member of TSA, advised Fallon and Foti of Radio Electric that he wanted to continue buying from them but did not want other members of TSA to know it. Although Goldstein had purchased over \$1,000 in parts from Radio Electric from January 1960 to February 4, 1960, he purchased nothing from February 4 to March 10, 1960 (Tr. 418, 783-6, 791-5, 795-800; RX 116 A-D).

Fallon also was told by another customer, Marvin Levy, not a member of TSA, that he had heard of the trouble, thought the servicemen were right, and wanted to know what Radio Electric was going to do about it. Fallon told him they could not meet all 12 demands but had answered some of the major objections. Fallon also was called by another serviceman not a member of TSA, Henry Perzan, who said he had been called by a person he refused to identify and told to stop buying from Radio Electric, but that he did not intend to do so (Tr. 293-7).

Albert Steinberg & Company's records of daily reports by salesmen revealed that during February and March some servicemen customers, both members and nonmembers of TSA, stated they would not buy from Steinberg because of TSA, others did not buy, others reduced their purchases, and some bought even though told not to do so by others (CX 38 A-R; Tr. 491-4, 496-7). Sonnenberg, a TSA director, discussed with Steinberg at length the decision of TSA not to buy from distributors who would not accede to the demands and the fact that he, Sonnenberg, would not be able to purchase from Steinberg until such differences were resolved (Tr. 478-9, 497-9; CX 38 I).

A few days after the Drake meeting, Gumula was told by three servicemen separately, Al Obenland, John Gross, and William H. Brown, that he would be boycotted. Only Brown was a member of TSA. He admitted that he had complained to Gumula about his

selling wholesale to retail customers. Brown further said he quit TSA because he did not agree with its plan of action with respect to such sales by distributors (Tr. 105, 108-9, 178-80; CX 3 C; Tr. 808-16).

Sometime between January and March 1960, Melvin Katin, a Philadelphia distributor, received several calls from Shore, advising Katin that he had been "shopped" and complaining about his selling to retail customers without a Pennsylvania sales tax number. Katin and his partner agreed with Shore to do some of the things he desired, including blacking out the store windows and not selling to retail customers. As a result that store lost "street" business, which was a contributing factor in its subsequent closing (Tr. 467-73).

5. The Distributor Meeting and Counterproposals

As previously found, some distributors agreed to the demands of respondents and their co-conspirators, resulting in such distributors being publicized in a TSA News white list as "co-operating" dealers (CX 4 N, p. 3). Although the distributors originally had planned not to answer the demands presented at the first joint meeting, the subsequent pressure created by the concerted refusals to buy, threats of adverse publicity in the TSA News, and the white list caused them to reconsider (Tr. 282, 292-9, 334-5, 511, 519). Patently the agreement by some distributors not to sell retail customers exerted additional pressure on the other distributors, who could expect to (and did) lose many servicemen customers to such "cooperating" distributors as a result of the boycott (CX 35; CX 94 A).

As a result, the distributors held a meeting at the Drake Hotel in March 1960, about four to six weeks after the first joint meeting, to formulate answers or counterproposals to the demands of the servicemen presented at the first meeting. Among those present were Fallon, Foti, Green, Steinberg, Branca, Gumula, Berman, Eli Goldstein, and Zuschlag. The distributors discussed the 12 demands of the servicemen, formulated a reply to each demand, and the majority agreed to a counterproposal of some six items, which were:

1. The distributors will discourage sales to retail trade. Any such sales will be made at the retail price and the distributor will credit the difference between such sale price and the dealer's price to the service located nearest the purchaser's home address.
2. All cash purchase slips will contain name and address of purchaser.
3. All "part-timers" will be urged to sign and use tax-exemption forms and obtain sales tax number, pursuant to the sales tax law.
4. Hi-Fi users shall pay retail price for replacement parts and supplies.

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5. All literature mailed to dealers will be in closed envelopes.

6. Ads will be eliminated in classified telephone directory excepting for "bold-type" listings.

Fallon and Gumula would not agree to credit the difference between sales made at the retail price and the wholesale price to the nearest serviceman (Tr. 166, 219, 291-2, 303-4, 311-3; CX 39 A-B; CX 40; CX 4 O, pp. 1, 9; CX 36, pp. 1, 5).

6. The Second Joint Meeting—Accord—Publicity

In late March 1960, a committee of the Philadelphia distributors met at the Drake Hotel with a committee of the servicemen. Distributors present included Fallon, Branca, Steinberg, and possibly Zuschlag. Other distributors were present including one from Trenton named Dragon. Servicemen present included Shore, Fink, Skalish, Mayhart, Papovich, and some from the Trenton Association (Tr. 299-301; CX 90; 91 A). After apologizing for the delay, the distributors presented their answers and the six counterproposals. The servicemen contended that such proposals did not go far enough, but the distributors said it was the best they could do, and the meeting ended on that note (Tr. 301-4).

After this meeting, respondents and their co-conspirators gave extensive publicity to the "accord" brought about by their selective buying campaign. Such publicity necessarily had the effect of causing other distributors to join the "accord" and other servicemen to join the concerted selective buying program. The March TSA News carried a lead editorial entitled "Service and Distributors Reach Accord." It stated, *inter alia*:

A selective buying program was instituted by a large group of independent service dealers against the local wholesale electronic parts distributors. They protested the abuse exercised by these same distributors in selling wholesale to the retail trade. They protested against the deviation from the basic concepts of wholesale distribution. It is the belief of the independent electronic service industry that their suppliers or parts distributors should not be in competition with them. They deplore the selling by the parts distributors to their (the service industry's) potential customers, while at the same time soliciting business from the service dealer. The independent service industry believes a tacit agreement occurs when a supplier comes in to sell them; that the supplier would not and should not compete with the service dealer for the retail business.

The editorial then listed the above found six counterproposals as the program agreed to by the distributors. The same six-point accord was publicized in the May 1960 Vanguard (CX 4 O, pp. 1, 9; CX 36, pp. 1, 5; CX 4 O, p. 8; CX 4 P, p. 9).

On March 15, 1960, Skalish, as secretary, sent a letter on the Chester Association letterhead to all Delaware County servicemen, which stated, *inter alia*:

"Most servicemen are aware of the slogan "STOP CRYING—START SELECTIVE BUYING." Selective buying has become an actual fact at least, in the Philadelphia, New Jersey, Delaware, and Delaware Co. areas.

There are electronic parts wholesalers in the Delaware Valley area who are not selling to your customers. This type of distribution improves your earning power because receiving tubes, picture tubes and other parts are then sold by you to the ultimate consumer YOUR CUSTOMER.

* * * * *

For you to help yourself in this matter, that concerns the entire TV service industry, each of you should take an active part by cooperating with the manufacturers parts distributors who are interested in serving you with the same spirit of respect we show our valued customers.

If you wish more information, we would welcome your calling the nearest association member as listed on the yellow pages of the Delaware Co. telephone book * * *.

On April 15, 1960, Krantz, chairman of TSA's Industry Relations Committee, wrote identical letters to the executive secretary of the National Alliance of Television and Electronic Service Associations in Chicago and the editor of its trade publication in Detroit, enclosing a copy of the March TSA News, calling attention to TSA's successful campaign against the distributors and suggesting many of NATESA's members would be interested in the results (CX 4 O; CX 5 E; CX 7; CX 8; Tr. 768).

7. The Effect of the Boycott

Although effect is not essential as a matter of law to the proof of an illegal conspiracy to boycott, proof of the effect in this record not only tended to corroborate the existence of such a conspiracy, but also showed clearly why some distributors were forced into "cooperating," and why the distributors as a group agreed to some of the demands of the servicemen. For example, the sales of Radio Electric to certain previously good customers who were members of TSA or participating in the concerted refusal to deal declined drastically during February and March 1960, roughly the period between the first joint meeting at which the demands were made and the second joint meeting at which the "accord" was reached. Keen TV, which as found above had advised Radio Electric it would not buy until the demands were met, purchased \$6 and \$14 in parts in February and March, respectively, as against an average of about \$1,000 a month in the three preceding months, and \$500 a month in the two succeeding months (Tr. 286-8; CX 105 B-G).

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Other normally regular accounts of Radio Electric also substantially ceased purchasing, as follows:

Alert TV—Jan. 21, 1960 to April 13, 1960—nothing;

Leon Skalish, trading as Leon's TV—Jan. 29, 1960 to April 7, 1960—\$2.25;

Stewart Electric—Jan. 21, 1960 to April 6, 1960—nothing (Tr. 332; CX 96 C; 97 B; 100 A; 106).

Herbert Goldstein, who had purchased between \$500 and \$1,000 in preceding months, purchased nothing from February 4, 1960 to March 10, 1960, and \$358 from March 10 to March 25, 1960 (Tr. 418, 783; RX 116 A-D).

Albert Steinberg & Co.'s records showed the following declines, *inter alia*, in purchases in 1960 as compared to prior and subsequent purchases:

Alert TV (D'Annibale) from an average of about \$190 a month to nothing in March, and \$17 in April; Fink, from an average of about \$215 a month to \$120 in February, \$11 in March, and \$115 in April; Apartment TV (Sonnenberg) from an average of about \$285 a month to \$4 in March (Tr. 497, 507-8, 684; CX 3; CX 107).

8. Policing of the Accord

In order to ascertain whether the distributors were living up to the six counterproposals agreed to at the second joint meeting, TSA and its members "shopped" the distributors' stores to see if sales were being made contrary to the agreement, e.g., retail sales at wholesale prices. This was done by having some person unknown to the distributor attempt to so buy without identification. At another joint meeting in June 1960 attended by officers of TSA and a number of the distributors, the latter were accused of not living up to the agreement, told they had been shopped, and presented with cash sales slips claimed to represent retail sales at wholesale prices to unidentified customers in violation of the agreement (Tr. 119-20, 317-24, 339-43, 500-3, 642, 650-1; CX 3 A-C, 10 A, 24 I). Much the same sort of meeting, including the presentation of sales slips from such shopping, occurred between the Wilmington Association and their distributors (Tr. 584-6).

9. The Wilmington Meetings

On March 16, 1960, various servicemen members of the Wilmington Association held a joint meeting in Wilmington with their distributors. The Association had issued a written notice of the meeting to all Wilmington distributors stating:

There will be a meeting between this Association and the local Electronic Distributors on Wednesday, March 16, 1960 at 7 PM at the Town House Restaurant, 913 Shipley Street, Wilmington, Delaware. This Association wants to do business with the local electronic distributors as customers, not competitors. We believe selective buying hurts us as much as it hurts you.

We would like a settlement at the meeting on the following subjects:

1. Yellow Page Advertising
2. Newspaper Advertising
3. Net Prices in all mailings
4. New Discount Identification Card System
5. Close 5:30 PM weekdays and all day Saturday and Sundays. (CX 34)

Distributors represented at the meeting included Radio Electric, Wholesale Electronics, Delaware Electronics, and Almo Radio. Mayhart and other officers of the Wilmington Association were present. The topics specified in the notice, plus the blacking out of distributor store windows, were discussed, with the servicemen requesting agreement by the distributors. As at the TSA meetings, the principal objective was the cessation of sales by the distributors at wholesale prices to nonservicemen. One distributor refused to discuss it and walked out. Another refused to attend the meeting upon advice of counsel (Tr. 136, 576-80).

In the following month or two, two more joint meetings were held in Wilmington, resulting in an agreement to use a discount card system under which cards of different colors were issued by the Association to various customers of the distributors, designating the discount from list price which the customer was to be given, and if the customer had no card, requiring he be charged the full list price. As found above, the Wilmington Association also policed compliance by shopping the distributors (Tr. 581-7).

10. The Chester Meeting

Sometime in early April 1960, a joint meeting was held in Chester between members of the Chester Association, including Skalish, Jordan, Boyd, and Rapagnani, and substantially the same distributors who had attended the first joint meeting at the Drake Hotel in Philadelphia. In fact, Fallon of Radio Electric suggested this Chester meeting because he believed the members of the Chester Association, who were very good customers of Radio Electric, had not been correctly informed by Skalish of the six counterproposals the distributors had offered at the second joint meeting at the Drake. As found above, Skalish had been very active in support of the selective buying campaign, sending out the letters of December 5, 29 and 30, 1959 and the notice of January 16, 1960 found above in Part III-B 2,

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and the notice of March 15, 1960 (Part III B 6), as well as appearing at a TSA meeting (Part III B 2). The distributors again presented their six proposals and pointed out why they could not agree to all of the 12 demands presented at the first joint meeting. On April 12, 1960, the Chester Association passed a motion that letters be sent to the distributors accepting their six-point proposal. This motion was then modified to read:

The members of our Association appreciate your program as presented. The electronic parts distributors are to be complimented for their expressed spirit of cooperation concerning our mutual problems.

The next day Skalish, as secretary, wrote such a letter to Kass, a distributor, and also requested notice in the future if the program was altered in any way (Tr. 305-9; CX 76 A, B; CX 102).

11. The Trenton Meeting

Sometime in May 1960, joint meeting was held between distributors and members of the Trenton Association. Among the distributors present were Radio Electric, Allied Parts, and several New Jersey distributors including Dragon. Much the same discussion concerning selective buying, the demands of the servicemen and the six-point agreement of the distributors took place as occurred at the Chester meeting. In response to an objection by one distributor, Zuschlag, to a certain demand, a serviceman replied: "You're going to do what we tell you or else." The parties agreed to meet every six to eight weeks thereafter (Tr. 314-7).

12. The Mt. Ephraim, New Jersey Meeting

On October 6, 1960, a joint meeting was held in Mt. Ephraim, New Jersey between distributors and servicemen from TSA and the Chester, Wilmington, and Camden Associations, including Shore, Smith, Krantz, Rapagnani, Papovich, De Franco, Mayhart, and Skalish. Distributors attending included Zuschlag, Green, Fallon, Steinberg, Branca, Gumula, and Kass. Selective buying was discussed as well as a review of the servicemen's demands and what the distributors were doing in that respect. Radio Electric, while agreeing not to sell at wholesale prices to unidentified customers, continued to refuse to rebate the difference in price between retail and wholesale to the nearest serviceman. A report of the meeting was published in *The Vanguard* of November 1960 (Tr. 114-8, 321-2, 325-30, 505-6; CX 37, p. 1).

Between October 17 and 22, 1960, Smith as president of TSA wrote letters to various distributors complaining of their failure to live up to their promises and the accord. Smith concluded by stating:

There is a growing wave of discontent, and steadily mounting undercurrent of bitterness against the distributors and it may soon get out of hand. We inform you of this situation since we feel we will not be able to control our members, and others, if the policies of the distributors remain unchanged and events go on unabated. This may result in unfavorable publicity.

Such letters were received by Gumula, Kass, Steinberg, and Yonker (Tr. 120-1, 131-3, 507; CX 30; CX 95).

13. Respondents' Contentions

In addition to their contentions with respect to commerce, previously considered, respondents also contend that the Commission has no jurisdiction over TSA because it is a "nonprofit" corporation, and as such is exempt under the provisions of Section 4 of the Act, which states, *inter alia*:

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

At the conclusion of the case-in-chief, respondents' motion to dismiss for the above reason was taken under advisement. All of the members of TSA were engaged in business for profit. Patently, evasion of the antitrust laws could be accomplished with the utmost simplicity if a conspiracy effectuated through a nonprofit association made up of members engaged in business for profit were exempt from the Commission's jurisdiction. In the *Chamber of Commerce of Minneapolis* case,¹⁰ the court ruled upon the same contention.

The first ground is that the Chamber is not organized for profit. This is true. But it is a legal entity which can and does act and it is legally responsible for its acts and entirely amenable to lawful control. It is capable of entering into a combination or conspiracy or of being an effective instrumentality to execute the purpose of a combination or conspiracy formed by others (p. 684).

In the *Associated Press* case, a conspiracy to boycott, the Supreme Court stated:

It is further said we reach our conclusion by application of the "public utility" concept to the newspaper business. This is not correct. We merely hold that *arrangements or combinations designed to stifle competition cannot*

¹⁰ Note 3, *supra*.

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*be immunized by adopting a membership device accomplishing that purpose.*¹¹

In addition, there is no question but that the members of TSA and other parties to the conspiracy were engaged in business for profit. In the *Cement Institute* case,¹² the Supreme Court held that the Commission has jurisdiction over all parties to a conspiracy engaged in by some over whom it has jurisdiction and others over whom it would not otherwise have jurisdiction. Accordingly, respondents' motion is denied.

Respondents also urge that there is no liability on the part of the individual members of TSA for its acts, including the items published in TSA News. That TSA together with TSA News was the principal vehicle used to effectuate the conspiracy is well established in the record. It seems clear that the members of TSA must be responsible for its acts, much as a principal is for those of his agent. The active participation of many members has been detailed above. With respect to other members, TSA News was regularly distributed to all members and they were fully aware of TSA's selective buying program, as found above. To permit them to escape responsibility for the acts of their association would be an exercise in futility. The Commission recently held with respect to a similar contention:

As to the other members, including those that were present but unidentified at these various incidents and the rest that could not have failed to know about them, "the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put." *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 139 F. 2d 393, 396 (2d Cir. 1943).¹³

14. Conclusions

It is of course Hornbook law that a conspiracy in restraint of trade may be proved by circumstantial evidence and that direct evidence of an express agreement is not required.¹⁴ While not required, this record contains an abundance of direct evidence of a conspiracy to boycott in the form of admissions by the various parties. In

¹¹ *Associated Press v. U.S.*, 326 U.S. 1 (1945). Cf. *Eastern States Lumber Dealers Ass'n v. U.S.*, 234 U.S. 600 (1914); *Fashion Originators Guild v. F.T.C.*, 312 U.S. 457 (1941); and *National Harness Mfrs. Ass'n v. F.T.C.*, 268 F. 705 (6th Cir. 1920).

¹² Note 7, *supra*.

¹³ *Washington Crab Ass'n, et al.*, 66 F.T.C. 45, Docket No. 7859 (1964).

¹⁴ *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1938); *Theatre Enterprises, Inc. v. Paramount*, 346 U.S. 537 (1954).

Conclusions

addition, there is a wealth of circumstantial evidence which leads inevitably to the conclusion that a conspiracy to boycott by refusing to deal was both organized and carried out. It must now be considered well settled that a conspiracy to boycott is illegal *per se*, a violation of the Sherman Act, and a violation of Section 5 of the Act. The Supreme Court has so held upon numerous occasions.¹⁵

In many respects this record presents a picture of a classic conspiracy to boycott much like that struck down by the Supreme Court in *Eastern States Retail Lumber Dealers Ass'n*.¹⁶ There, as here, retail dealers through their associations conspired to boycott, *i.e.*, refuse to buy from, those wholesalers who sold directly to consumers in competition with the retailers. There, black lists were used; here, white lists accomplished the same result. There, as might equally well apply here, the Court observed:

* * * [H]e is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. * * *

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondents and the other alleged co-conspirators, *i.e.*, the Chester, Wilmington, Camden, and Trenton Associations and some or all of their members, have entered into a combination, conspiracy, agreement or common understanding to boycott, *i.e.*, not purchase from, those distributors who sold at retail in competition with servicemen, in violation of Section 5 of the Act.

CONCLUSIONS OF LAW

1. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and competition, are *per se* illegal under the Sherman Act, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

2. This proceeding is in the public interest and an order to cease and desist the above-found acts and practices should issue against respondents.

¹⁵ *Eastern States Retail Lumber Dealers Ass'n v. U.S.*, 234 U.S. 600; *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291; *Fashion Originators' Guild v. F.T.C.*, 213 U.S. 457; *Kiefer-Stewart Co. v. Seagrams*, 340 U.S. 211; *Times-Picayune Publg. Co. v. U.S.*, 345 U.S. 594; *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207; *White Motor Co. v. U.S.* 372 U.S. 253; and *Silver v. New York Stock Exchange*, 373 U.S. 341.

¹⁶ Note 15, *supra*.

Final Order

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ORDER

It is ordered, That respondent Television Service Association of Delaware Valley, a corporation, its officers, directors, representatives, agents, employees, members, successors, and assigns, and respondents Herman Shore and Raymond Fink, individually and as officers, directors or members of respondent Television Service Association of Delaware Valley, directly or through any corporate or other device, in or in connection with the purchase or sale, or with or in connection with the offer to purchase or sell, or in connection with the distribution of television, radio or electronic devices, equipment or parts or kindred merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, cooperating in, carrying out, or continuing in a planned common course of action, understanding, agreement, combination or conspiracy, between or among any two or more of said respondents or among or between any one or more of said respondents and another or others not parties hereto, to do or perform any of the following acts, practices or things:

(1) Coercing or intimidating in any manner or by any means, including boycott or threat of boycott, any wholesale or other distributor of television, radio or electronic devices or equipment or component parts thereof from doing business with, or soliciting business from, any customer or class of customers; or

(2) Coercing or intimidating in any manner or by any means, including boycott or threat of boycott, any wholesale or other distributor to engage in, cease to engage in, or refrain from engaging in, any acts or practices relating to the conduct of the latter's business including hours of operation, window displays or advertising; or

(3) Adopting any policy or program to black list any wholesale or other distributor of television, radio or electronic devices, equipment or component parts thereof, who has sold, sells, or offers to sell such products to any customer or class of customers, or adopting any policy or program to white list any wholesale or other distributor of television, radio or electronic devices, equipment or component parts thereof, who refuses, has refused, or does not offer to sell such products to any customer or class of customers.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been perfected under Section 3.22 of the Commission's Rules of Practice (effective August 1, 1963); and the Commission on February

12, 1965, having ordered that the effective date of the initial decision be stayed until further order of the Commission; and the Commission now having determined that the case should not be placed on its own docket for review, and that pursuant to Section 3.21 of the Rules of Practice the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 19th day of February, 1965, become the decision of the Commission.

It is further ordered, That Television Service Association of Delaware Valley, a corporation, and Herman Shore and Raymond Fink, individually and as members, officers or directors of said corporation, shall, within sixty (60) days of the service of this order upon them, file with the Commission a report in writing, signed by each respondent named in this order, setting forth in detail the manner and form of their compliance with the order to cease and desist.
