

Complaint

77 F.T.C.

IN THE MATTER OF

NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S
APPAREL SALESMEN, INC., ET AL.ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8691. Complaint, July 11, 1966¹—Decision, July 30, 1970²*

Order modifying and supplementing the initial decision, but deferring the entry of a final order until further order of the Commission, against a trade association of organizations and groups of salesmen engaged in the wholesale selling of women's and children's wearing apparel.

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 more particularly named, designated, described, and referred to as respondents have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Association of Women's and Children's Apparel Salesmen, Inc., hereinafter referred to as "NAWCAS," is a corporation organized under Pro Forma Decree, Circuit Court, city of St. Louis, Missouri, with its principal office and place of business located at 515 Peachtree Palisades Building, Atlanta, Georgia.

Respondent NAWCAS, a trade association composed of sales persons, organizations and groups of salesmen, was ostensibly organized for the purpose of providing a national association of all organizations or groups composed of salesmen engaged in the wholesale selling of women's and children's wearing apparel or accessories and to cooperate with organizations composed of salesmen in kindred fields whenever practicable and preferably to the end that a strongly organized national voice of salesmen may be achieved. It also provides other services for its members including an edu-

¹ Reported as amended by hearing examiner's order of October 5, 1966, by amending Paragraph Three and Paragraph Five.

² Final order to cease and desist issued February 25, 1971, 78 F.T.C. 446.

cational program, a clearing house for the interchange of information and employment, and attempts to foster a cordial relationship between manufacturers, retailers, and salesmen.

Affiliate members of NAWCAS include organizations or groups of salesmen whose members are principally engaged in the sale at wholesale of women's and children's apparel or accessories. Effective January 1, 1961, all organizations or groups affiliated with NAWCAS were required to have all of their members become members of NAWCAS. Sales persons who otherwise qualify but do not belong to any organization affiliated with NAWCAS are eligible for membership as "individual regional members."

Respondent NAWCAS has approximately 12,500 members, which constitute a substantial number of the salesmen selling women's and children's apparel or related accessories, hereinafter referred to as merchandise. It is estimated that approximately \$3,000,000,000 worth of merchandise is bought annually through NAWCAS member salesmen and approximately \$1,000,000,000 of this merchandise is bought annually through the various NAWCAS affiliate markets representing more than 294 trade shows throughout the United States.

The membership of respondent NAWCAS constitutes a class so numerous and changing as to make it impracticable to specifically name and describe each and all of such members as parties respondent herein. The following, among others, are members of respondent NAWCAS, are fairly representative of the whole membership and have been responsible in part, for the direction and control of said respondent. They are named as respondents herein in their individual capacities, as members of respondent NAWCAS, and as representative of all members of respondent NAWCAS, including affiliate members and individual regional members as a class, including those not herein specifically named, all of whom are made respondents herein:

Robert Leipzig, 111 Meadowview Avenue, Hewlet, Long Island, New York. Respondent Leipzig served as president for the year 1963; and

William H. Miller, 3800 Dogwood Drive, Greensboro, North Carolina. Respondent Miller served as secretary for the year 1963.

Marshall J. Mantler, 515 Peachtree Palisades Building, Atlanta, Georgia, is named because he has served as executive director of respondent NAWCAS for the years, among others, from 1948 to the present and has participated in the various acts and practices which are alleged to be illegal in this complaint.

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PAR. 2. Respondent Style Exhibitors, Inc., hereinafter referred to as "Exhibitors," is a corporation organized under the laws of Illinois, with its principal office and place of business located at Pick-Congress Hotel, 520 South Michigan Avenue, Chicago 5, Illinois.

Respondent Exhibitors is an association affiliated with NAWCAS and its membership is composed of NAWCAS members who are traveling salesmen.

Respondent Exhibitors is ostensibly organized to conduct and supervise the exhibition and sale of women's and children's wearing apparel or accessories at wholesale by and for the benefit of its members and to foster such other activities as will promote the exhibition and sale of the aforesaid merchandise. To this end, Exhibitors has four "trade shows" or markets each year at which the merchandise of its members is exhibited or displayed and offered for sale, distributed and sold to retailers and buyers representing retailers. It is composed of a membership of two classes:

(a) Full members having the right and privilege of acquiring such room and space for display purposes that may be assigned to him or her by the Board of Distributors. Not more than one salesman from any one firm, using the same firm name, shall be eligible for full membership.

(b) Associate members having the same rights and duties as a full member, except that he or she may show and sell only those lines represented by the senior member (full member) with whom he or she is associated.

Respondent Exhibitors represents one of the largest wholesale markets for the promotion, offering for sale, distribution and sale of women's and children's apparel or accessories and has approximately 900 members who represent between 800 and 1,000 manufacturers of women's and children's apparel or accessories.

The number of affiliate members of NAWCAS constitutes a class so numerous as to make it impracticable to specifically name and describe each and all of said affiliates. Style Exhibitors, Inc., is fairly representative of said affiliate members and has participated in various acts and practices hereinafter set forth. It is named as a respondent herein in its individual capacity, as an affiliate member of NAWCAS, and as representative of all affiliate members of NAWCAS.

PAR. 3. The respondents have been and are engaged in acts and practices in connection with sponsoring, conducting and holding trade shows at which members representing manufacturers of women's and

children's apparel or accessories display their respective merchandise for which orders are solicited from buyers representing department stores, ladies' specialty shops, children's specialty shops and other stores where women's and children's apparel or accessories are sold at retail, throughout the United States. In addition to displaying women's and children's apparel or accessories and soliciting orders therefor at the aforesaid trade shows, the members of respondent associations also solicit orders for women's and children's apparel or accessories throughout the United States. All orders taken by members of the respondents, whether at the aforesaid trade shows or not, are forwarded to the manufacturers located in the various States of the United States where the women's and children's apparel or accessories are made or warehoused, and thereafter the manufacturers ship said merchandise or cause them to be shipped across State lines to the purchasers thereof, located in the various States of the United States.

Therefore, the respondents, and the members thereof, have carried on and are now carrying on, a constant course of trade in commerce in the aforesaid merchandise between and among the various States of the United States and in the District of Columbia.

Respondents NAWCAS, Exhibitors and the members thereof, have committed and performed, and are committing and performing, in commerce, the alleged illegal acts, practices and policies hereinafter set forth. All of the respondents named herein have been, and are now engaged in commerce in women's and children's apparel or accessories, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondents have been in substantial competition with each other in that individual members and affiliates compete, and respondents have been in substantial competition with other corporations, firms, partnerships and individuals engaged in the sale and distribution of women's and children's apparel or accessories in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 5. Respondents constitute a large, important and influential segment of the industry engaged in the manufacture, distribution and sale of women's and children's apparel or accessories. It is important for a manufacturer to be represented at the said trade shows, and for a salesman who represents manufacturers of women's and children's apparel or accessories to participate in the displaying and offering

for sale of said merchandise at the trade shows because numerous buyers representing department stores, ladies' specialty shops, children's specialty shops and other stores located throughout the United States are in attendance.

PAR. 6. Beginning in 1955, the said respondents hereinbefore named and described, and each of them, for a number of years last past and continuing to the present time, have by means of agreements and understandings, combined and conspired and have united in and pursued a planned common course of action to adopt, place in effect and carry out, and have adopted, placed in effect and carried out, by various means and methods, a plan, scheme or policy, between and among themselves and others not named herein, to hinder, frustrate, restrain, suppress and eliminate competition in the offering for sale, distribution and sale of women's and children's apparel or accessories in the course of the aforesaid commerce.

Pursuant to, and in furtherance and effectuation of, the aforesaid agreements and planned common course of action, respondents have done and performed and are doing and performing the following acts and practices:

(1) They have adopted and have pursued a policy of refusing and threatening to refuse to promote or display or offer to sell, distribute or sell women's and children's apparel or accessories of any manufacturer who does not comply with terms and conditions established by respondents concerning the relationship between members and manufacturers, *e.g.*, the "Southwest Resolution" adopted at the 1957 Annual Convention.

(2) They have adopted, pursued and carried out a policy of inducing and coercing manufacturers of women's and children's apparel or accessories to comply with terms and conditions established by respondents.

(3) They have adopted and have pursued a policy of printing and disseminating to members, by various means, the names of "uncooperative" manufacturers, who are prevented from using the market facilities of any affiliate for the purpose of promoting or selling their women's and children's apparel or accessories.

(4) They have adopted, pursued and carried out a policy of requiring each new member and all members acquiring or attempting to acquire any new line of merchandise to enter into a written contract with the manufacturers thereof as a condition for the exhibition, offering for sale, distribution or sale by the salesman of said merchandise at any trade show or market of any NAWCAS affiliate. Said contract must contain provisions exactly or substantially similar

to those contained in the NAWCAS "standard contract" adopted at the 1960 Annual Convention and as later amended.

(5) They have adopted and pursued a policy of restricting and preventing individual members from withdrawing from one affiliate for the purpose of joining another affiliate. Similarly, members who have been expelled from any NAWCAS affiliate are restricted or prevented from joining another.

(6) They have adopted and pursued a policy of requiring affiliate (where more than one affiliate exists in the same geographical market) to agree upon trade show dates, so that they do not compete with each other.

(7) They have adopted, pursued and are carrying out a policy of restricting and preventing any member from contacting, either directly or indirectly, the manufacturer represented by any other member of respondent Exhibitors in an effort to acquire the line of merchandise of that member without the consent of that member.

(8) They have adopted and have pursued a policy of limiting, restricting or preventing the exercise of the right of members to exhibit merchandise at any show or market at any time and at any place they so desire.

(9) They have adopted and pursued a policy of restricting or limiting the number of lines of merchandise that any associate member may exhibit.

(10) They have adopted and pursued a policy of refusing to accept for admissions as members persons otherwise eligible and qualified for membership therein.

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 the respondents or others not parties hereto, and the acts and practices and methods, as hereinabove alleged, are all singularly unfair and to the prejudice of the public policy because of their dangerous tendency unduly to prevent women's and children's apparel or accessory salesmen and manufacturers from competing in the sale of this merchandise, to limit and restrict channels of distribution of this merchandise, to hinder competition, and to restrain and monopolize trade and commerce, and thereby constitute unfair methods of competition and unfair acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended.

Mr. Anthony Zabiegalski, Mr. Joseph Rutberg, and Mr. Joseph Brownman supporting the complaint.

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Mr. Raymond R. Dickey and Mr. Robert D. Roadman, Danzansky & Dickey, Wash., D.C., Mr. Sherwyn E. Syna, Atlanta, Ga., Greenwald, Landrum and Baim, Los Angeles, Calif., Silverstein & Mullens, Wash., D.C., Susman, Willer, Rimmel & Elbert, St. Louis, Mo., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

APRIL 18, 1968

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I. PRELIMINARY STATEMENT

This proceeding, brought by complaint filed by the Federal Trade Commission on July 11, 1966, charges a federated salesmen's association, its affiliated organizations, and its members with unfair methods of competition and unfair acts and practices in violation of the Federal Trade Commission Act.¹ (15 U.S.C. Sec. 41-58.)

Almost all of respondents' affiliated organizations, among other activities, organize and conduct trade shows in which their members exhibit merchandise to buyers from retail stores. The most significant issue is whether, as organizations or as representatives of salesmen, respondents are exempt from the antitrust laws, if they deny access to such trade shows to those manufacturers who refuse to comply with their demands.

The respondents are: National Association of Women's and Children's Apparel Salesmen, Inc. (hereinafter sometimes referred to as "NAWCAS"), a Missouri corporation, the federated association; Marshall J. Mantler, its executive director; Robert Leipzig and William H. Miller, individually, as officers and directors of NAWCAS and as representative of its members; and Style Exhibitors, Inc. (hereinafter sometimes referred to as "Exhibitors"), an Illinois corporation and an affiliated association of salesmen, individually and as representative of all affiliate members of NAWCAS.

¹ Section 5 of the Federal Trade Commission Act provides in part "(a)(1) Unfair methods of competition in commerce and unfair acts and practices, are declared unlawful." (15 U.S.C. § 45.)

A. The Pleadings

After identifying the respondents, the complaint charges that the affiliated organization members and the individual members of NAWCAS are so numerous that it is impractical to name all of them. They are accordingly sued as a class by naming persons claimed to be representative of the class.

The commerce alleged is the conducting of trade shows at which members of NAWCAS display merchandise to buyers of retail establishments, take orders, and transmit such orders to manufacturers. Its interstate character flows from the fact that the orders and the merchandise ordered cross state lines. The importance of the shows to manufactures is such that interference with salesmen showing the manufacturer's line at such shows unduly interferes with commerce between the states.

The illegality charged by the complaint is that respondents have combined and conspired and have pursued and placed into effect a plan to hinder competition in the sale of women's and children's apparel. The means charged are contained in ten subparagraphs to Paragraph Six of the complaint. They may be described as the respondents' actions wherein they:

1. Refused to promote or display goods of manufacturers who do not comply with respondents' terms and conditions;
2. Induced and coerced manufacturers to comply with respondents' terms and conditions;
3. Disseminated a blacklist of uncooperative manufacturers;
4. Required written contracts between members and their manufacturers;
5. Restricted members from changing affiliates;
6. Required affiliates to fix nonconflicting show dates;
7. Prevented one salesman from soliciting a manufacturer represented by another salesman member;
8. Prohibited members from showing merchandise when or where they desired;
9. Restricted the number of lines an associate member could exhibit; and,
10. Restricted membership.

On July 25, 1966, prior to filing their answers, respondents moved in the alternative for a more definite statement of the complaint or to strike certain allegations. The motion was denied August 5, 1966.

On August 19, 1966, respondents filed an answer to the complaint,

setting up four affirmative defenses and a fifth defense denying the material allegations of the complaint. The affirmative defenses were:

1. Lack of jurisdiction in the Commission because of the exemption of labor organizations and the claim that all activities of NAWCAS were in furtherance of legitimate objectives to improve wages, hours and working conditions of its member salesmen;
2. Failure to state a case;
3. Respondents' acts foster competition, therefore, are in, rather than contrary to, the public interest; and,
4. Respondents have voluntarily abandoned certain of the activities challenged.

In their fifth defense, respondents made admissions or denials of the allegations of the complaint seriatim, in effect, as follows:

They reiterated the lack of jurisdiction of the Commission, admitted the description of the corporate respondents and the addresses and offices held by the individual respondents, but denied that this proceeding could properly be brought against the members and affiliated organizations as a class action. Respondents admitted that NAWCAS had approximately 12,500 members and that its affiliates held approximately 294 trade shows annually. Exhibitors admitted it had approximately 900 members. Denied were statistical data concerning the number of manufacturers represented or the volume of women's and children's apparel sold in the United States and that sold through the trade shows.

The rest of the complaint was also denied except: 1) NAWCAS admitted that it had adopted a policy of disseminating to its members lists of uncooperative manufacturers but claimed it had not done so for approximately two years; 2) NAWCAS and Exhibitors admitted that new members were required to enter into NAWCAS-approved contracts with manufacturers, and old members to enter into such contracts for new lines, as a prerequisite to exhibiting a manufacturer's merchandise at a trade show; and, 3) respondents admitted that members who had been expelled from one NAWCAS affiliate were restricted from joining another for two years, unless the cause was earlier removed or waived.

B. Issues Presented by Pleadings

The threshold issue, which is both factual and legal, is whether or not the Federal Trade Commission has jurisdiction over the subject matter, because respondents claim their activities are within the ex-

emption of the Clayton Act,² as affected by subsequent legislation, and because they claim that such activities are not in commerce. Subsidiary issues are whether or not:

1. A class action may properly be maintained;
2. The admitted activity with regard to uncooperative manufacturers lists has so surely ceased that the case is moot;
3. Respondents induced or coerced manufacturers to comply with respondents' terms and conditions;
4. Respondents refused to promote or display goods of manufacturers who fail to comply with respondents' terms and conditions;
5. Respondents required affiliates to fix noncompeting show dates;
6. Respondents prevented one salesman member from soliciting a manufacturer represented by another salesman member;
7. Respondent restricted their membership and the number of lines to be exhibited, and prevented members from showing merchandise when and where they desired; and,
8. The proceeding is in the public interest, because respondents claim their activity promotes rather than restrains commerce.

C. Prehearing Procedures

In view of the complexities in the complaint, the hearing examiner scheduled a prehearing conference for August 15, 1966, by order dated July 15, 1966. This initial prehearing conference was postponed at the request of the parties until October 3, 1966.

At the October 3, 1966, nonpublic conference, clarifying amendments to the complaint were made.³ The parties agreed that at trade shows the members of NAWCAS, Exhibitors, and affiliates take orders that were accepted by manufacturers, many of whom were located in states other than the state in which the show was held, and such manufacturers shipped merchandise as a result of such orders to customers, many of whom were located in states other than the state in which the manufacturer was located. It was also agreed that admissions by each respondent were binding on the

² Section 6 of the Clayton Act, 15 U.S.C. § 17 provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

³ Order amending complaint, dated October 5, 1966. Prehearing Order No. 1, dated October 5, 1966, as amended October 21, 1966.

others, provided conspiracy was established *aliunde*. And, it was further agreed that the Southwest Resolution and the uncooperative manufacturers lists were in force until approximately 2 years prior to the issuance of the complaint and that respondents had the burden of establishing their defense of voluntary abandonment. Individual respondents agreed that the policies adopted were carried out.

In addition, it appeared that considerable prehearing preparation and exchange of documents were desirable. Accordingly, a timetable for such activity was agreed upon and approved.⁴

The timetable initially agreed upon could not be met so, at an informal, unreported prehearing conference held November 3, 1966, revisions of the timetable were agreed to on condition that the parties would seek to stipulate added facts to reduce the areas of disagreement and the number of issues to be tried. A further prehearing conference was scheduled for November 17, 1966.⁵ This was later postponed on consent to December 21, 1966, and still later to January 17, 1967.⁶

At the nonpublic prehearing conference held January 17, 1967, it appeared that discovery had not yet been completed and that negotiations for further stipulations of fact were still progressing. Therefore, it was agreed that additional time was required and that hearings would be necessary at least in New York, Atlanta, and Los Angeles.⁷ Accordingly, the timetable was again revised. Due to illness of respondents' chief counsel, a further postponement was required.⁸

On February 24, 1967, complaint counsel filed a request for hearings to be held in New York, New York; Atlanta, Georgia; and Los Angeles, California. This request was certified to the Commission on February 28, 1967, and was approved by the Commission by order dated March 3, 1967.

Thereafter, and on May 1, 1967, an informal unreported conference was held at which the parties requested additional time to complete pretrial preparation and counsel for respondents indicated the necessity for a delay following the conclusion of complaint counsel's case in chief. Accordingly, an order was issued for the submission of documents and a list of witnesses by the parties and for a prehearing conference to hear objections to such documents. Certification of

⁴ Prehearing Order No. 1, dated October 5, 1966.

⁵ Prehearing Order No. 2, dated November 4, 1966.

⁶ Prehearing Order No. 3, dated November 22, 1966; Prehearing Order No. 4, dated January 18, 1967.

⁷ Prehearing Order No. 4, dated January 18, 1967.

⁸ Prehearing Order No. 5, dated January 31, 1967.

respondents' request for delay was made to the Commission by the same order.⁹ The Commission approved respondents' request for delay by order dated May 12, 1967.

By order dated June 2, 1967,¹⁰ the hearing examiner proposed rules to govern the objections to documents at a prehearing conference to be held June 27, 1967. Such documents were to be deemed genuine unless previously objected to by the parties. No objection having been made, the authenticity of all documents submitted by both parties was conceded. The order also required marking exhibits to show the portions offered (complaint counsel by red and respondents by blue). Parties were presumed to admit the authenticity of the whole of documents offered, despite the limitations of their offer to parts thereof; and objections to the use of photostats were deemed waived unless the objections were made in writing.

Each party served his adversary and filed with the hearing examiner documents that they intended to use at the trial. An extensive public prehearing conference was held on objections to such documents commencing June 27, 1967, and concluding June 29, 1967. This resulted in overruling of objections to some documents, withdrawal without prejudice of some documents and an indication that objections would be sustained as to other documents.¹¹

D. Formal Hearings

The formal hearings opened at Washington, D.C., on July 5, 1967, and by reason of the prehearing procedures theretofore adopted, some 1,388 exhibits were received in evidence or otherwise disposed of on the first day of hearings. The taking of testimony commenced at New York, New York, on July 10, 1967. Testimony and additional exhibits were thereafter received in Atlanta, Georgia, and in Los Angeles, California, with the usual brief adjournments customary in judicial proceedings, until August 4, 1967.

Respondents commenced their case in chief at Washington, D.C., on September 7, 1967. Hearings were held with the usual short adjournments customary in judicial proceedings at Atlanta, Georgia, from September 28, 1967, to October 12, 1967, and at Washington, D.C., from October 23, 1967, to December 1, 1967.

Rebuttal by counsel supporting the complaint commenced December 6, 1967, and concluded the same day. A large number of exhibits were marked by complaint counsel and by respondents' counsel. The first exhibit of complaint counsel and the first exhibit of respondents

⁹ Order Scheduling Hearings and Certifying Request for Delay Between Close of Complaint Counsel's Case and Commencement of Respondents' Case, dated May 4, 1967.

¹⁰ Order Governing Prehearing Objections, dated June 2, 1967.

¹¹ See prehearing order dictated in the transcript of the prehearing conference of

contain lists of all their exhibits. These have been amended to date to serve as indices. In ensuing paragraphs we describe very generally the evidence as it was received.

The bulk of complaint counsel's documentary evidence was offered by them on the first day of formal hearings. This contained a written record of the formation of NAWCAS in 1945 as a federated association of salesmen's associations engaged in putting on trade shows (sometimes hereinafter referred to as shows). These shows in the last stages of World War II sought to have the Office of Defense Transportation lift its travel ban on them. At the initial meeting, the group of some 21 associations, formally organized NAWCAS as their national voice. The documentary evidence also contained the organizational documents of a larger number of NAWCAS affiliates, including Exhibitors, and minutes of meetings of NAWCAS and of some affiliates, as well as copies of the NAWCAS News, brochures about NAWCAS and the affiliated shows, and copies of bulletins and correspondence. These exhibits formed the framework for the combination alleged and illustrated how certain of the restraints alleged were imposed.

Complaint counsel elicited testimony from the three individual respondents and also produced evidence from the president and former paid secretary of Exhibitors, the Chicago affiliate that had sponsored the organization of NAWCAS. All of this evidence showed how NAWCAS and the affiliates operated in practice and how the affiliates interacted with NAWCAS.

There was no contradiction of the allegations that there had been an uncooperative manufacturers list that was circulated by NAWCAS and that salesmen who represented manufacturers on the list or who had refused to enter into NAWCAS-approved contracts were barred from trade shows of the affiliated organizations. But these witnesses tended to use the language of trade unionism and to minimize the effect of the restraints imposed.

The rest of complaint counsel's witnesses described the results of the actions taken by NAWCAS and by affiliated associations on their business or their sales activities. Thus, manufacturers indicated that they could not show merchandise at any NAWCAS affiliated show if their name was on an uncooperative manufacturers list or at particular shows if there was not an existing contract with a member of that show. There was testimony about arrangements between some NAWCAS affiliated shows and merchandise marts that had the effect of preventing the leasing of space in marts except under circumstances specified by the shows. There was also testimony by

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salesmen members of shows about discipline imposed, including fines and expulsion, if they failed to conform to regulations requiring that salesrooms outside the show area to be closed during show times or to regulations relating to "pirating" another salesman's line. Show operations and salesmen's techniques, prerequisites, and responsibilities were brought out. These and the other matters deemed relevant will be discussed in greater detail later in this decision.

Respondents relied to a great extent on testimony rather than on documentary evidence, although a large part of the testimony was corroborated by contemporaneous documents. There was some explanation of some of the incidents described by the witnesses called by complaint counsel, but the main thrust of the defense was establishing that respondents were a labor organization or officials thereof. The claim was made that the challenged activity was exempt under Section 6 of the Clayton Act and related statutes because it all related to securing benefits to employees or to persons in economic interrelationship with them. Respondents showed that prior to 1960 collective bargaining was contemplated and that by 1965 an actual structural change was made in NAWCAS. Following the taking of testimony in this proceeding, an affiliation was consummated between NAWCAS and District 65 Retail, Wholesale and Department Store Union, AFL-CIO, and the New York Regional Director of the National Labor Relations Board issued a tentative decision that NAWCAS was a labor organization. These facts were stipulated into the record on January 24, 1968, and March 11, 1968.

By order dated December 11, 1967, the Commission extended the time for filing this decision to April 22, 1968.

E. Motion To Dismiss

On August 4, 1967, upon completion of complaint counsel's case, counsel for respondents moved to dismiss. Argument thereon was held September 6, 1967. After argument decision was reserved on such motion (Tr. 2119). It is now denied.

F. Motion for Stay

On January 25, 1968, respondents moved for a stay of proceedings until a decision was rendered by the National Labor Relations Board on an appeal from a tentative decision by a regional director dated December 13, 1967. The decision indicated that NAWCAS was a labor organization for the purpose of collective bargaining for

salesmen of some 31 manufacturers. The stay was denied insofar as it lay within the power of the hearing examiner and the motion for a further stay was certified to the Commission by order filed January 29, 1968, and denied by the Commission on February 9, 1968.

G. Basis for Decision

This decision is based on the entire record in this proceeding, including the proposed findings of the parties, and on the observation of the witnesses called to testify.¹²

II. FINDINGS OF FACT

A. Respondents

1. NAWCAS

Respondent National Association of Women's and Children's Apparel Salesmen, Inc. (hereinafter sometimes referred to as "NAWCAS"), is a corporation organized under Pro Forma Decree of the Circuit Court, city of St. Louis, Missouri. Its principal office and place of business is located at 515 Peachtree Palisades Building, Atlanta, Georgia (C; A; see RPF 1; CPF 1). NAWCAS has also maintained an office in New York City at the Hotel New Yorker (CX 19, p. 12; Tr. 4690-4691; RPF 2).

Its constitution provides that it shall not be operated for pecuniary profit or gain (CX 170-179; RPF 1). At the annual convention in 1965 NAWCAS was empowered to represent its members as a collective bargaining agent and to negotiate collective agreements in their behalf (RX 2-A; RPF 5).

NAWCAS comprises primarily sales persons, organizations, and groups of salesmen. It was organized in 1945 to combat ann Office of

¹² Record references are abbreviated as follows:

Tr.=Transcript page.

C=Complaint paragraph.

A=Answer paragraph.

CPF=Complaint counsel's proposed findings including references contained in reasons following proposed findings.

CCPF=Complaint counsel's counter-proposed findings.

RPF=Respondents' proposed findings including references therein.

CRPF=Respondents' counter-proposed findings.

CX=Complaint counsel's exhibits.

RX=Respondents' exhibit.

CC=Complaint counsel's conclusion.

RC=Respondents' counsel's conclusion.

In light of the bulk of the evidence and the requirements of § 3.51(a) of the rules reliance has, of necessity, been placed on citations and references made by counsel. The decision, however, is based on the impact of the evidence in its entirety.

Defense Transportation ban on conducting trade shows, and among other things NAWCAS was to provide a national association of all organizations or groups of salesmen engaged in the wholesale selling of women's and children's wearing apparel and accessories, to protect the salesmen's interests and the industry's interests, and to cooperate with organizations of salesmen in kindred fields, whenever practicable, to the end that a strongly organized national voice of salesmen might be achieved and cordial relations among manufacturers, retailers, and salesmen might be established (CX 2; RPF 3, 4).

NAWCAS has a large number of affiliated organizations that put on trade shows and a few that do not do so. The number of associations varies from year to year. Members of affiliated organizations are required to be members of NAWCAS, and there are also so-called regional members who are not members of an affiliate. The latest figures given were between 12,000 and 13,000 individual members and 65 organizations.

Greater detail and references to proof about the organizations and functioning of NAWCAS will be found under "Jurisdiction," D. 2., hereof.

2. Robert Leipzig

Respondent Robert Leipzig, who resides at 111 Meadowview Avenue, Hewlet, Long Island, New York, served as president of NAWCAS for the year 1963 (C; A). Leipzig is a member, former president, and president emeritus of Women's Apparel Club of New England (Tr. 907-08, 918-19; RPF 32), and he has served successively as delegate, regional vice president, vice president, president, chairman, and member of the Executive Advisory Council of NAWCAS (Tr. 849-50, 886-87). Leipzig is vice president and sales manager of an apparel manufacturer (Tr. 839). He was formerly a salesman (Tr. 841).

3. William H. Miller

Respondent William H. Miller, who resides at 3800 Dogwood Drive, Greensboro, North Carolina, served as secretary of NAWCAS for the year 1963 (C; A). Miller has been a member of NAWCAS since about 1948 and was successively regional vice president of the Southeastern States region, secretary, vice president, and president of NAWCAS (Tr. 1234). He was president at the time he testified in July 1967 (Tr. 1228-30). He was an active member of Carolina-

Virginia Fashion Exhibitors, and had been a member of Miami Beach National Fashion Exhibitors and Southeastern Travelers Exhibitors, Inc. (Tr. 1253), all affiliates of NAWCAS (Tr. 1271-72). He was elected a delegate to the NAWCAS convention by Carolina-Virginia Fashion Exhibitors in 1955, and he has attended every convention of NAWCAS since 1957 (Tr. 1284-85). Miller has been a traveling salesman since 1941 (Tr. 1236).

4. *Marshall J. Mantler*

Respondent Marshall J. Mantler, who has an office at 515 Peachtree Palisades Building, Atlanta, Georgia, has served as executive director of NAWCAS since 1948 (C; A). He is also general manager of Southeastern Travelers Exhibitors, Inc., an affiliate of NAWCAS (Tr. 2251). He has served in that capacity since 1946 (Tr. 2251; RPF 37).

As executive director of NAWCAS, Mantler has participated in the deliberations of the governing bodies of NAWCAS and has carried out their directions. He proposed policies for adoption and traveled extensively to visit the affiliated organizations to secure their adoption of NAWCAS programs. He and his staff took the day-to-day action for NAWCAS under broad authorization, broadly interpreted (Tr. 3497, 3502-04, 2626-27, 2588; CPF 3).

5. *Style Exhibitors, Inc.*

Respondent Style Exhibitors, Inc. (hereinafter sometimes referred to as "Exhibitors"), is a corporation organized under the laws of Illinois, with its principal place of business located at Pick-Congress Hotel, 520 South Michigan Avenue, Chicago, Illinois. (The address was later changed to 222 West Adams Street [RPF 24].) It has approximately 900 members (C; A) and is an affiliate of NAWCAS, so that all of its members are also members of NAWCAS. They must be traveling salesmen (RPF 25). Prior to 1960, some individuals who were a part of management did become members of Exhibitors. Some of them still retain their membership (RPF 26; CPF 2 A, B, C).

Exhibitors is expressly authorized by its constitution to promote, to conduct, and to supervise the exhibition and sale of women's and children's wearing apparel at wholesale and for the benefit of its members. It is also authorized to foster such other activities as will promote the exhibition and sale of such merchandise and

the general welfare of its members and to help the retailers whom they serve (RPF 28, CPF 2 D).

In carrying out its functions, Exhibitors sponsors four trade shows each year at which some 1,500 to 2,000 lines of merchandise are exhibited and displayed to retailers. Exhibitors described its activity as the nation's foremost hotel market in the wholesale women's and children's apparel field. Its shows were held for some 42 years at the Hotel Morrison in Chicago, and later at McCormick Place auditorium until the latter was damaged by fire (CPF 2 G, H, I, J; RPF 29).

Respondent Exhibitors institutes and enforces rules and regulations concerning the shows it sponsors, including rules for behavior at such shows and rules excluding its members from caravans and other competing media. (See RPF 29.)

Greater detail and references to proof about the organization and functioning of Exhibitors will be found under "Jurisdiction," D. 2., hereof.

B. Class Action

There are at present 65 affiliated organizations of NAWCAS most of which conduct trade shows. The number varies from year to year (see RPF 9, Tr. 1476, 1477, 4981A). There are approximately 2,000 individual regional members who are not members of affiliated organizations and about 11,000 individual members who are members of affiliated organizations (Tr. 1474-1477; CX 179). At the inception of NAWCAS, when Mantler became executive director, there were only about 2,200 members and 21 groups (Tr. 2265). The affiliated organizations that put on trade shows and their individual members are geographically dispersed throughout the United States (CX 179). Accordingly:

(1) The classes of affiliates that put on trade shows and their individual members are so numerous and dispersed that joinder of all of them by name is impracticable.

(2) There are questions of law and fact common to each member of the classes, that is, the affiliates that run trade shows have similar relationships and obligations to respondent NAWCAS; and their individual members also have similar relationships and obligations to NAWCAS; and both are bound by the regulations promulgated by NAWCAS (see CX 179, pp. [g]-[i]; see also Appendix A).

(3) The individual respondents Leipzig and Miller have been members both of affiliated organizations and of NAWCAS; they each have been selected as president of NAWCAS and have served in

other official capacities. The claims and defenses of these individual respondents are typical of the claims and defenses of all the individuals who are members of affiliated organizations that put on trade shows, and the defenses of these individual respondents will fairly and adequately protect the interests of all of the class. They are not antagonistic in any fashion to any of the members of the class (Tr. 838-951, 1228-1417).

(4) Similarly, corporate respondent Exhibitors, is an affiliate of NAWCAS and engages in the operation of trade shows in Chicago, Illinois. It was instrumental in the organization of respondent NAWCAS (CXs 2, 3) and the president of Exhibitors at that time became the first president of NAWCAS (CX 3). Its operation and its claims and defenses are typical of the operations and claims and defenses of the other affiliates of NAWCAS that operate trade shows; and its defenses will fairly and adequately protect the interests of such other affiliates. The position of Exhibitors is not antagonistic to the position of any other such affiliate (Tr. 500-557).

(5) Moreover, adjudication of the rights and obligations of individual respondents Leipzig and Miller will, as a practical matter, be dispositive of the interests of the other individual members of NAWCAS who are members of affiliated organizations that put on trade shows. Adjudication of the rights and obligations of respondent Exhibitors will, as a practical matter, be dispositive of the interests of the other affiliates of NAWCAS who operate trade shows.

(6) The Commission's intention to institute this proceeding was formally made known to respondent NAWCAS on or about May 15, 1964 (Tr. 2459), and NAWCAS, in turn, through its official organ *NAWCAS News*, made all of its individual members and affiliated organizations cognizant thereof. In addition, the Federal Trade Commission issued with its complaint dated July 11, 1966, a press release indicating the scope and character of the proceedings; and NAWCAS in its 21st annual convention program issued a report from its general counsel concerning the receipt of a proposed complaint by the Federal Trade Commission (CX 179, p. 10).

Accordingly, any individual member or affiliated organization who desired to intervene in these proceedings was given constructive, if not actual notice of the pendency of this proceeding and was given ample opportunity to move to intervene under Rule 3.14 of the Rules of Practice of the Federal Trade Commission if any desired

to contest this proceeding individually rather than as a member of one of the classes.

By reason of the foregoing, and all of the other evidence in this proceeding, it is found that the affiliated organizations that put on trade shows are a class and that respondent Exhibitors affords adequate representation to such class.

By reason of the foregoing, and all of the other evidence in this proceeding, it is found that the individual members of NAWCAS who are affiliated with organizations that put on trade shows are a class and that the individual respondents Leipzig and Miller afford adequate representation to such class.

C. Nature of Trade and Commerce

1. *Industry Setting*

The women's and children's apparel manufacturing industry is centered in the New York City area and is characterized in its manufacturing phase by almost complete organization of its production employees by the International Ladies' Garment Workers' Union. There is, however, a growing segment of California manufacturers, and there are some manufacturers in the Middle West (Tr. 877-78; RPF 44). The industry has a wide disparity in the size of manufacturing units.

There are four or five very large manufacturers making all or almost all types of apparel and grossing \$100 million in annual sales (RPF 39). On the opposite end of the scale are several thousand relatively small manufacturers specializing in one or more of the major types of apparel, such as casual dresses, coats, suits, sportswear, and lingerie, and having a gross annual sales of \$1 million or less (Tr. 2865-67). These small firms account for about 90 percent of the industry (*id.*, RPF 42).

Over the years, particularly in the large firms, the relationships between management and sales personnel have become less personal (Tr. 3875-76). Still today the small manufacturer may become a salesman tomorrow, and the successful salesman may decide to become a part of management (Tr. 4706-14). Management in some firms sometimes handles the selling activity itself (Tr. 4491).

Distribution is made generally by manufacturers to retailers to consumers. Dr. David Schwartz, assistant executive director of NAWCAS, testified that there were some eleven sales-method options

(Tr. 4491). One option is the trade show carried on through NAWCAS and its affiliates; another is the use of manufacturers' showrooms; and a third is the use of sales branches; and, of course, the traditional sales method is the use of traveling salesmen (Tr. 4491-92; see RPF 45; see also CPF 8 B).

Arrangements are made by some manufacturers to sell their accounts receivable to a factoring concern that determines the credit rating of the retail merchant and assumes the risk of collection for the manufacturer. The factoring firm charges a fee for its services (Tr. 828). Other manufacturers take the credit risks themselves.

The bulk of the evidence in this case relates to two types of sales: the direct sales through resident salesmen and manufacturers' salesrooms, and those made by traveling salesmen. We consider these.

2. Manufacturer or House Sales

Manufacturer direct sales to the retailer are made in several ways. Often the manufacturer maintains a salesroom at New York. In some cases, the manufacturer maintains salesrooms in other major cities staffed with house, resident, or inside salesmen, as they are variously called. Wholesale sales are made by these salesmen to retail merchants whose buyers call at the salesroom. Sometimes they are made through the services of buying groups, like Associated Merchandising Corporation (AMC), that examine the display of merchandise maintained there and write orders for future delivery. There are also a relatively few manufacturer trade shows. These wholesale sales are not as significant nor do they cover as wide a territory as sales made by traveling salesmen (RPF 46-53; CPF 8 B).

3. Traveling Salesmen Sales

Historically, and still in many companies, sales are solicited by traveling salesmen who go out to the customers and who are paid on a commission basis by one or more manufacturers whose lines are sold.

Recently, and particularly in the case of some of the very large manufacturers, salesmen have been required to specialize in selling the goods of only one manufacturer, and in some cases they have been paid a salary and have received expenses. Typically, however, the salesman is compensated on a commission basis and pays his own expenses. Except for sales meetings, which he sometimes must attend, the salesman is relatively free to determine what customers he will call

on and at what time.¹³ The manufacturer fixes the salesman's territory. It also determines when its new lines will be offered. But the salesman is expected to cover his territory with each seasonal line.

Generally, custom has fixed the times when lines are offered at retail, and the manufacturer conforms to the industry practice of having its lines available well in advance of the recognized seasons. The manufacturer also determines the price of the various articles, the terms of discount, and the credit of the customer unless he factors the account. The salesman takes orders on the basis of samples, and the samples belong to the manufacturer. The manufacturer further decides whether it will accept orders for a particular item or will discontinue manufacturing that item because of a lack of retailer interest or because of some manufacturing problem, such as its inability to secure the necessary piece goods. The manufacturer usually pays the social security tax on the basis of the salesman's salary or commission.

In connection with his selling activity, the traveling salesman customarily belongs to one or more NAWCAS affiliated organizations that conduct trade shows in anticipation of the various seasons featured. The expense of belonging to the affiliated organizations, of the show fees, and of the incidental notification to customers, which the salesman performs, are all normally borne by him. The manufacturer, on the other hand, pays the expense of advertisements in trade papers and, particularly in the case of the larger manufacturers, in national magazines. The manufacturer sends tear sheets of these advertisements to the retailers with its catalog. (See CPF pp. 204-16; RPF 54-62(w).) The standardization of the contractual relations between manufacturer and salesman has been one of the goals of NAWCAS as later findings will demonstrate. In these findings, particular clauses will be developed in greater detail. We will now consider how the trade shows affiliated with NAWCAS are operated.

4. *Trade Shows*

a. *Historical Development*

Some years prior to the formation of respondent NAWCAS, a number of salesmen determined to get together for the purpose of reducing the amount of traveling they would be required to do and

¹³ Sol Hiller, *e.g.*, testified that sometimes his company would let him know that a customer wanted to see him, but even he created the overall impression that he was relatively free to determine when and how he would cover his territory. He talked over with his sales manager when he took vacations, but he took a personal interest in insuring that his customers' orders were filled (Tr. 4575-4679).

yet of giving their accounts ample opportunity to examine the sample merchandise they carried and of writing orders for future delivery. Several so-called shows were so organized. At first the shows were very informal and merely consisted of a number of salesmen making an arrangement with a hotel to have rooms available at particular dates then sending notices to their customers of their availability. These groups were using the method still used by some salesmen in their selling operations— notifying customers of availability of the salesman at a particular place and time (Tr. 3929-33). After a period of time, these groups became more and more formally organized and there were, by the time of the formation of NAWCAS in 1945, some 21 groups of salesmen in existence (Tr. 2265; RPF 74, 75). There were also some salesmen's groups that did not run trade shows, particularly in the New York Metropolitan Area. These New York groups although originally NAWCAS members resigned in 1948 and did not reaffiliate until after 1960 (RPF 92-96; CPF p. 216-17). We now turn to the operation of these trade show groups.

b. Trade Shows Today

Today the trade shows,¹⁴ concerning which evidence has been offered, all operate in much the same way although some utilize hotels and others utilize auditoriums or merchandise marts for their loci of operations (RPF 64). Each group, running a show, is now formally organized, either as an unincorporated association with a written constitution and bylaws or as a nonprofit corporation. These groups are variously called by their names and by the places where the shows are held, or are just referred to as shows. There are elected officers and a small paid staff. Each group puts on three to five trade shows each year and usually holds an annual meeting at the time of one of these shows at which time officers and directors are elected. Directors meet several times each year usually at show time, sometimes more often. Each NAWCAS affiliate selects delegates to the NAWCAS convention, which is usually held in December, and these delegates generally make a report to the membership at the next show meeting. The membership of each affiliate acts on important recommendations made by NAWCAS and at times makes recommendations to NAWCAS for action. Either the Board of Directors or an appointed grievance committee of the group acts on complaints made against members, and the officers initially handle grievances or disputes between manufacturers and salesmen. Sometimes, these disputes are referred

¹⁴ Don Brother's explanation of a trade show gives a great deal of the detail of the operation of a hotel show (Tr. 3815-25).

to NAWCAS. Elaborate rules are adopted for the conduct of members during the trade shows and for required attendance. Some of these rules will later be discussed in connection with the findings on the restraints alleged in the complaint. There are also bylaws or other regulations governing the eligibility of salesmen for election to membership and for seniority in the choice of locations at shows. In NAWCAS affiliated shows all members are required to become and remain members of NAWCAS. With this type of organization the trade shows operate their shows.

Operation of a trade show generally involves both long-range and short-range planning; then careful supervision of the actual operation. Long-range planning consists of the selection of the hotel or other meeting place and the fixing of the dates of the show. A show usually commences on Sunday and lasts until Wednesday. Sometimes this date determination must be made years in advance to secure proper space in a hotel. In merchandise marts, long-term leases are sometimes entered into. The long-term arrangements usually provide for a guaranteed minimum of space with a flexible coverage. The long-term arrangements form the setting for the short-term arrangements for each show.

These short-term arrangements are started several months before the show date and are retained with some degree of flexibility governed in part by the requirements of printers, sign makers, etc., until the show opens. A specified time before the show date, salesmen members must send to the show staff a list that contains their names, their associates, and their lines. Then if space is available, associate or prospective members are given an opportunity to participate. The show staff assigns to each salesman a room or a space, as the case may be, for the display of the samples of merchandise for which he takes orders at the show. During the preshow period, the show staff prepares and distributes a "flyer" or announcement of the date and place of the show and sometimes other preliminary announcements to all interested wholesale buyers (*i.e.*, department, specialty and other stores) in the area from which the show draws its wholesale customers. A relatively short time before the show, a directory, or buyers' guide, showing the location of each salesman's space and the lines carried is supplied to prospective buyers and to association members.¹⁵ Sometimes the directory contains announcements of special functions: a fashion show or door prizes or other entertainment features, such as banquets, breakfasts, and often educational pro-

¹⁵ Sometimes the directory is not issued until buyers come in to the show.

grams for salesmen or for retailers. Usually, the directory is indexed by name of salesman and by name of manufacturer or line,¹⁶ so that a prospective buyer can find either the salesman he is accustomed to dealing with or a line he wants to examine.

On Saturday before the show opens, salesmen bring their samples to the show location and "set up" their samples in their booths or rooms.¹⁷ The salesmen, at this time, obtain badges and signs for their booths or rooms. They also individually hire such assistants and models as they intend to use and obtain badges for them.

As the show opens on Sunday, the buyers come in and are registered by the permanent staff of the show group, augmented if necessary, by additional personnel. Each buyer gets a badge and usually a directory if he has not already received one. Upon issuance of buyers' badges, the buyers visit the various booths. In each booth the buyer examines merchandise samples, listens to the salesman's presentation, and hopefully writes orders. Orders are then dispatched to the manufacturer for acceptance or rejection. Usually the goods ordered are not manufactured until the acceptance of the order. When manufacture is completed the goods are shipped to the customer. The order usually provides that the sale is not made until the order is accepted, and commission to the salesman is ordinarily paid only after shipment.¹⁸ The show directors supervise the operation of the show either directly or through employees and hear complaints concerning violations of rules after the show closes, usually on Wednesday or Thursday (Tr. 3815-25; RPF 65).

Turning now from operation to ownership, the NAWCAS affiliates' shows according to its contention are owned and run by and for the benefit of salesmen. This contention is accurate except for the fact that some of the manufacturer's officials or owners are members of the show, many having previously been salesmen.¹⁹ There are a few paid officials acting as managers or executive directors and staffs who derive a livelihood from the operation of the day-to-day problems of the show, maintain an office and carry out the decisions of the elected

¹⁶ There is some ambiguity in the industry as to the meaning of the word line. Sometimes it is used to mean a manufacturer and other times to mean a type of merchandise sold under a trademark or name.

¹⁷ Some shows have only a large open area which is divided into booths. Other shows have rooms available in which salesmen set up their goods. Still other shows have a combination of both open space booths and rooms.

¹⁸ Under NAWCAS' standard contract, NAWCAS sought guarantees that commissions would be equal to 85 percent of all accepted orders whether shipped or not (CX 618).

¹⁹ It is a peculiar phenomenon in the industry, heretofore described, that the rate of turnover is very heavy and a salesman may become a manufacturer one day and revert to salesman the next (*e.g.*, CPF pp. 215-16).

officials (Mantler, Tr. 2176-3150, and Leve, Tr. 501-62, are examples). Expenses of each show are generally paid for by a show fee charged to participating members (RPF 71). Such shows are widely used to aid in the wholesale sale of apparel but there are alternate means available which we now consider.

5. *Alternate Methods of Distribution*

In addition to the maintenance of sales rooms with inside salesmen and the use of traveling salesmen and trade shows, manufacturers utilize direct mail methods by circulating catalogs and order blanks to prospective wholesale customers and by nationally advertising their products. As we have seen, Dr. Schwartz referred to show options (*supra*). Some also enter into manufacturer trade shows (Tr. 3918-19) or shows promoted by advertising agents who cater to both manufacturers and to salesmen (Saxon, Tr. 1651-1763). There are also some salesmen's shows and caravans, small less formal trade shows, that are not affiliated with NAWCAS and that afford competing methods for mass exposure of merchandise to buyers. These methods are not as extensive, and presumably not as successful, as the NAWCAS trade shows in the wholesale distribution of women's and children's apparel. Our next group of findings relate to facts on which jurisdiction may be determined.

D. Jurisdiction

1. *Interstate Commerce*

While it is clear that sales are made only by acceptance of orders by the manufacturers' home office, it is equally clear that correspondence and orders are sent across state lines to and from traveling salesmen, that such orders are initiated among other places at trade shows, and that goods are shipped by manufacturers across state lines in response to such orders (see Prehearing Order No. 1, October 5, 1966). Hence, there is commerce as that term is used in the Federal Trade Commission Act. And, the acts complained of are thus in the course of such commerce. We consider now further proof about the nature of respondents and of their operations.

2. *Nature of NAWCAS and its Affiliates*

a. *Affiliates.*

Respondent Exhibitors, which represents the affiliates as a class, is incorporated as a nonprofit corporation under Illinois law. Its principal activity is putting on trade shows, and it is over 50 years old

(C-s 634-A, 637). All other NAWCAS affiliates, except those few in the Manhattan region who do not put on trade shows, have substantially similar structures and activities (see Appendix A [p. 1078 herein]).

(1) *Stated Purposes and Rules.* As appears from its constitution and bylaws, revised as of 1962, Exhibitors is organized

... for the general welfare of its members and to promote, conduct and supervise the exhibition and sale of women's and children's wearing apparel and accessories at wholesale, by and for the benefit of its members and to foster such other activities as will promote the exhibition and sale of the aforesaid merchandise and the general welfare of its members, and to help the retailers whom they serve." (CX 634-A, Sec. 3.)

Membership is limited to traveling salesmen who sell the merchandise described in the purposes quoted in the preceding paragraph. Other limitations include a requirement of membership in NAWCAS; and for full membership, traveling "... the middle-west territory for a period of no less than three years prior to ... application." (CX 634-B.)

Associate membership may be granted to a salesman participating with a full member and representing the same firm. Such an associate member after 3 years may, if he represents a different line, become a full member. Not more than one salesman from the same firm is eligible for full membership (CX 634-B.)

Applicants for both associate and full membership must be approved by Exhibitor's board of directors (CX 634-B). The directors manage and control the property, funds, and affairs of Exhibitors (CX 634-D), and they may suspend or expel members, after hearing, for violations of the bylaws "or for any act intentionally or unintentionally, that will be, in effect, detrimental to the welfare and best interests of the corporation or its members" (CX 634-B).

Members are admonished to check with Exhibitors if they change affiliation or line at least 30 days before a market to see if the new firm is in good standing. "This action will avoid representation of firms that may be unfair and prevent pirating of lines" (CX 634-B).

Under a heading "Unfair Manufacturers," the bylaws state that they incorporate the Southwest Resolution²⁰ (CX 634-I).

Two sets of rules and regulations apply. The first relates to rules for display, and the second to rules of conduct.

²⁰ Technically, the Southwest Resolution refers to manufacturers who have failed to comply with an arbitration. Practically, there is some confusion even in the printed bylaws of NAWCAS (CX 178, pp. g-h) between this and another resolution that barred the lines of those manufacturers who failed to cooperate with general counsel of NAWCAS in case of disputes.

Among the rules for display are rules requiring all members to keep their sample rooms open and to show their lines of merchandise during the full period of the show (CX 635-A, Sec. 1(b)) and forbidding the display of merchandise not regularly sold on the road (*id.*, Sec. 1(c)).

Among the rules of conduct are several rules prohibiting solicitation of buyers or entertaining of buyers (CX 635-B, Sec. 2(a) (c) (d) (e), and the following rule: "(1) No member of this corporation shall, either directly or indirectly, contact the employer of any other member of this corporation without the consent of said member, in an effort to acquire the line of merchandise carried by said member." (*id.*, Sec. 2(1).)

Two sections prohibit: members from joining caravans or groups of seven or more members jointly advertising the showing of their lines in any hotel in Chicago without consent of the Board of Directors (CX 635-C, Sec. 3); members from exhibiting lines of merchandise during the market season in any hotel other than the one in which the association is holding its show, on penalty of nonparticipation in markets (*id.*, Sec. 4).

In the operation of its shows, Exhibitors requires all lines to be listed with the secretary, also the names of associates, 30 days in advance (CX 640-A-F). Exhibitors sends out a flyer to buyers (CX 641) and prepares market week directories listing lines and salesmen (CXs 1515-24). Its budget for 1962 was over \$84,000 and of this, \$23,760 was incurred for direct mailing of announcements and directories; \$3,950, for registration; \$2,328, for a Hospitality Room; \$6,625, for Market Entertainment; \$1,400, for gratuities; and \$2,500 for a Breakfast Forum (CX 642-B).

At the January 25, 1958 "General Meeting," Exhibitors ratified the Southwest Resolution providing for arbitration and for barring a manufacturer from shows if he did not abide by the arbitrator's award (CX 643-A).

During the January 27, 1962 "General Meeting," after urging by Mr. Mantler (CX 659-A), the members adopted resolutions requiring the NAWCAS-approved contract as a prerequisite to showing a line.

Executive Secretary Leve of Exhibitors acted many times in disputes between salesmen and manufacturers, and if he could not resolve the disputes, he referred them to NAWCAS (Tr. 525).

Activities and powers of other trade show affiliates are summarized in Appendix A. This summary indicates that all affiliates operate trade shows and support NAWCAS.

(2) *Membership Characteristics.* As we have seen, the membership of Exhibitors is limited to those who have traveled the Midwest for three years (CX 634-B). Traveling salesmen are compensated in most instances by commission, that is, they share in the success of the manufacturer by obtaining a percentage of the accepted sales that are actually shipped to the customers, although in later years there has been a trend away from commission toward salary among some of the large manufacturers.

There are approximately 900 members of Exhibitors (C; A). Of these, as previously noted, full members have the right to acquire space for display purposes, but there cannot be more than one full member per firm. Associates members may sell only the lines represented by the full member with whom they are associated (CX 634; Tr. 568).

There has been some shift from salesmen representing multiple lines to salesmen representing a single line, exclusively. Respondent Mantler and his assistant director, Dr. Schwartz, estimated that the majority of salesmen now represent a single line (Tr. 1491, 4571-72).

Other characteristics of salesmen will be discussed hereafter under the description of NAWCAS.

b. NAWCAS

(1) *Purposes.* As appears from the confidential report of the proceedings in Chicago in 1945, a number of the trade show groups were brought together under the leadership of Exhibitors that year. The topic of trade shows and their early resumption was a subject in which most of the delegates were vitally interested (CX 2-B). They also discussed the limited instructions given to delegates by their organizations and the delegates' lack of appreciation of the threat to salesmen reflected in the consolidations of retail units and in the amalgamations of buying offices and cooperative buying operations.

The purpose generally, however, was stated to be "the welfare of salesmen in the women's and children's apparel field" (CX 2-C). It was clear from the discussion on the second day that the meeting had originally been called for the purpose of combating the ban that the Office of Defense Transportation had placed on the shows or markets. Apparently the delegates, while deciding that this ban should be strenuously opposed, were determined also to form the national association that resulted from the first meeting.

At the convention in 1945 there was specific discussion of a proposal that NAWCAS should not become affiliated with any labor organization or engage in collective bargaining with employers. "It

was unanimously agreed that salesmen today [December 1945] are financially stable generally, opposed to union affiliation, and definitely not interested in having NAWCAS subordinate its interests to any outside agency." However, after a vigorous discussion, a vote was taken to omit reference to labor unionism in the constitution for reasons of security (CX 3-C). Respondent Mantler, although he was not present at the meeting, testified that he was informed this was because the members were afraid of reprisals (RPF 189; CX 3; Tr. 2263-64). However, none of the persons present at the meeting were called to testify with respect to this subject, so respondent Mantler's hearsay information in this regard is given little weight.

Up until the investigation by the Federal Trade Commission, NAWCAS made numerous utterances, affirming that it was a trade association, some of which emphatically denied NAWCAS was a labor organization (see CPF pp. 226-30).

NAWCAS sought exemption from taxation as a trade association (CPF 15 N, p. 226), and it and some of its affiliates have become members of other organizations as trade associations (CPF 15 E, p. 214; CXs 171 p. 40, 172 p. 17, 173 p. 34).

The objectives, aims, and purposes of Respondent NAWCAS, set forth in its Constitution (as amended December 1965) Article III, Section 1, are as follows:

The objectives, aims and purposes of this association shall be educational and for the promotion of the best interests of its members; to provide a national association of all organizations or groups composed of salesmen engaged in the wholesale selling of women's or children's wearing apparel or accessories . . . to promote, stimulate and protect the interests and welfare of salesmen in the women's and children's fields and the industry with which they are concerned . . . to cooperate with organizations composed of salesmen in kindred fields whenever practicable and feasible to the end that a strongly organized national voice of salesmen may be achieved . . . to institute and maintain an educational program concerning itself with the welfare and future security of salesmen . . . to create a clearing house for the interchange and dissemination of pertinent information, ideas, plans and facts helpful to members of affiliated organizations . . . to establish and maintain an active employment clearing house . . . to give wholehearted support to measures that are fair, reasonable and equitable to the interests and welfare of salesmen . . . to provide information and guidance, and promote a policy of helpful services to independent retailers, and generally foster a cordial relationship between manufacturers, retailers and salesmen and to represent the members as their bargaining agents and where appropriate to negotiate collective agreements in their behalf. (RX 2-A; RPF 5.)

Prior to the revision of the NAWCAS "Constitution and By-Laws" at the 21st annual convention in December 1965, the objec-

tives, aims, and purposes of NAWCAS, as contained in Article III of the Constitution, had remained unchanged, at least since the 1959 annual convention. Prior to the revisions in 1965, Article III read exactly as set forth in the preceding paragraph, except that it did not specifically state as one purpose "to represent the members as their bargaining agents and where appropriate to negotiate collective agreements in their behalf." (RX 2; CXs 4-A, 5-A, 6-A, 7-A, 8-A, 9-A; RPF 6; CXs 170-179.)

(2) *Activity Generally.* NAWCAS publishes an official journal, the *NAWCAS News* (renamed *NAWCAS Guild News* in 1966; Tr. 1289-90; CXs 128, 134, 137); holds annual conventions of its Board of Governors, consisting of officers and delegates selected from affiliates, and semi-annual meetings of an Executive Advisory Council; maintains a legal department for the review of contracts and the adjustment of disputes between manufacturers and salesmen; maintains liaison with its affiliates through regional vice presidents; maintains contact with manufacturers through its officers and its executive secretary; prepares and promulgates pension and other insurance and benefit plans; maintains a self-insured or contributory benefit association; negotiates with individual manufacturers; on occasion, the terms to be incorporated in contracts for its members representing the lines of such manufacturers; adopts rules and regulations binding on its affiliated organizations; renders assistance to such affiliates in the operation of their markets, fashion shows, and seminars; publishes bulletins, pamphlets and other literature; conducts extensive correspondence; and performs many other services for its members (see Mantler, Tr. 2248-3148, 3333-3556; CXs 170-79).

(3) *Line of Authority.* Formal authority for governing NAWCAS is vested in the officers (consisting of president, executive vice president, one vice president from each region, secretary and treasurer), a board of governors (consisting of the incumbent national officers, the regional vice presidents, all past presidents, and accredited delegates from each affiliated local), and the Executive Advisory Council (consisting of the foregoing named officers and the three immediate past presidents of NAWCAS) (CX 4-A; RPF 10; CX 19, p. 7).

The president, executive vice president, secretary, and treasurer of NAWCAS are elected at the annual convention to a one-year term. None of the officers is permitted to serve more than two consecutive terms in any one of the offices (CXs 6-A, 19, page 7; RPF 11).

Regional vice presidents and a first assistant vice president for

each region are elected respectively, in separate regional caucuses at the annual convention of NAWCAS by the respective regional delegates (CX 9-B-C; RPF 12).

NAWCAS has ten regions as follows:

Northeastern States—New York, Rhode Island, Maine, Vermont, Massachusetts, Connecticut, New Hampshire, Pennsylvania, New Jersey, Delaware, Maryland, and the District of Columbia.

Manhattan Region—Resident groups in New York City.

Central Eastern States—Michigan, Ohio, Indiana, West Virginia, and Kentucky.

Central Western States—Wisconsin, Illinois, Missouri and Kansas.

Southeastern States—Georgia, Florida, North and South Carolina, and Alabama.

Southwestern States—Oklahoma, Arkansas, New Mexico, Louisiana, Texas, Tennessee and Mississippi.

Northwestern States—Nebraska, Minnesota, Iowa and North and South Dakota.

Far Western States—California, Arizona and Nevada.

Pacific Northwest—Washington, Oregon, Idaho, Montana, Wyoming, Colorado and Utah.

Canada—The provinces of Canada. (CXs 9-C, 19, page 8; see RPF 13).

All past presidents of respondent NAWCAS, other than the three immediate past presidents who serve on the Executive Advisory Council, are invited to attend meetings of the Executive Advisory Council and to take part in discussions at meetings. No past presidents except the three immediate past presidents have a vote on any matter coming before the Executive Advisory Council (Tr. 3375, 3812; RPF 14).

Any action of the board of governors of NAWCAS, at the discretion of the Executive Advisory Council or by request of the majority of the board of governors, is subject to ratification by two-thirds of the affiliates in good standing (Tr. 3466, 3546-47).

It has been generally the practice to subject major policy actions to ratification by the affiliates when such actions would have a significant effect upon the operation of the local affiliates (Tr. 3466, 366-67; RPF 15).

Despite this formal line of authority, in practice the day-to-day operation of NAWCAS is left to the paid Executive Director, respondent Mantler, and his salaried staff. The officers, executive council members, and delegates are engaged for the most part in the business of selling and they are not readily available (Tr. 2588). Hence, respondent Mantler and his staff take action on behalf of NAWCAS under broad authorizations of authority to help the

economic security and welfare of the membership (see Tr. 3497, 3502-04, 2626-27).

(4) *Structural Changes*. Changes were made in the basic structure of NAWCAS following formal notification by the Federal Trade Commission in May 1964 of its intention to issue a complaint. (Tr. 3481-82.)

First, at the 20th annual convention in December 1964 the board of governors passed a resolution that NAWCAS should constitute itself a labor organization and affiliate with an international labor organization provided a satisfactory arrangement could be made and subject to ratification by two-thirds of its affiliates (RPF 258; CX 52-H). Next, the Executive Advisory Council at a meeting in August 1965 "endorse[d] the formal constituting of NAWCAS" as an "Independent Salesmen's Guild" subject to secret ballot vote of two-thirds of the affiliates (see RPF 259; CX 53-C). During the fall of 1965 the local affiliates approved (see RPF 260; RXs 11-22, 72-117, 179; Tr. 2368-70). At the annual convention in 1965, NAWCAS amended its constitution and bylaws in purported compliance with federal labor laws to authorize collective bargaining, to require elections to be held by secret ballot, and to elect an executive director. The amendments also empowered the treasurer to keep the funds of the association and to cause the debts of NAWCAS to be paid and empowered the executive director to set up grievance procedures (see RPF 298). NAWCAS filed Labor Organization Information Reports (RXs 23, 24). Finally, NAWCAS formally affiliated with District 65 Retail, Wholesale and Department Store Union, AFL-CIO (see RPF 295-97).

(5) *NAWCAS Membership*. Membership in NAWCAS comprises two classes. The first includes individuals some of whom are members of the affiliated organizations and others who are not. The second class includes the organization members. Both affiliated and the unaffiliated individuals must be principally engaged in the sale, at wholesale, of women's and children's apparel or accessories. Sales persons who otherwise qualify but do not belong to any organization affiliated with NAWCAS are eligible for membership as "individual regional members" (C;A; RPF 8; CPF 1-D). Effective January 1, 1961, all organizations or groups affiliated with NAWCAS were required to have all of their members also become members of NAWCAS.

Individual members are, first, salesmen affiliated with organization members, and, second, any other eligible persons except that no new

member "who is a manufacturer, wholesaler or jobber shall be admitted to individual membership. . . ." (CX 4-A.)

Organization members or affiliates have the following qualifications:

Section 1-a. Any organization or group of salesmen whose members are principally engaged in the sale at wholesale of women's and children's apparel or accessories²¹ may become an affiliate member of this association upon application, which shall be accompanied by a copy of said organization's Constitution and By-Laws, and accompanied by the required initiation fees, per capita membership dues, and such other amounts as may be levied by determination of the Board of Governors, provided that said organization seeking membership shall provide in its Constitution and By-Laws for compulsory NAWCAS membership of all its members and shall further agree to ratify and affirm the Southwestern Resolution and to abide by the procedures of the NAWCAS uncooperative list of manufacturers; upon approval of said application by the Executive Advisory Council, such organization shall enjoy the status of temporary membership and the said application shall be presented to the Board of Governors for its final approval. * * * (CX 177, p. [b]).

NAWCAS had between 12,500 and 13,000 individual members and its 72 affiliates held approximately 294 trade shows annually in various places throughout the United States as of the date the complaint herein was filed (C; A; Tr. 1474-77, RPF 9; CPFs 1 H, 1 L; CX 179). At the time of the close of the testimony, the number of NAWCAS affiliates had been reduced to 65, primarily through mergers (see RPF 9; Tr. 4981-A).

From 1948, after several non-show groups originally affiliated with NAWCAS withdrew, until after 1960 all NAWCAS affiliates conducted trade shows (CPF 1 E; Tr. 2590). Eight non-trade show organizations became affiliated with NAWCAS between 1960 and 1962. The members of these organizations were primarily resident or house salesmen who were employees and who were organized into the Manhattan Region (CPF 1 F).

Estimates by NAWCAS of the volume of sales produced through trade shows or markets varied between \$3.5 billion and \$4.5 billion (CPF 1 L; CNs 16F, 88).

Many of the associations included among their members persons who had been salesmen and later became sales managers or persons who were principals in manufacturing concerns. Some of these persons later became members of NAWCAS by reason of the requirement in the NAWCAS bylaws that members of affiliates must become

²¹ In the constitution presented to the 21st annual convention in 1965, the words "and allied or related lines" were added after the word "accessories," and the comma and word "or" preceding the word "accessories" were deleted (see CX 179, p. [b]).

NAWCAS members. One vice president of a manufacturer, respondent Robert Leipzig (Tr. 838-951), for example, became president and later chairman of the Executive Advisory Council of NAWCAS.

When the New York group of associations resumed membership in NAWCAS, between 1960 and 1962, and became the Manhattan Region NAWCAS had: salesmen who manned salesrooms for manufacturers and who were paid on a salary basis; salesmen who traveled for one or more manufacturers and who were paid salary and commission, or straight commission (see CPF 1 J).

Thus, some of the individual members of NAWCAS were manufacturer's employees; others were principals or members of the management of firms engaged in the manufacture of women's and children's apparel (see RPF 20); and still others were self-employed or independent contractors who controlled the daily operation of their businesses as salesmen (CPF 1 J). In Appendix B we analyze the activity of a typical traveling salesman based on the evidence. The records of NAWCAS, however, do not classify its members as principals or members of the management of firms, self-employed, persons, independent contractors, or persons representing lines of multiple manufacturers (Tr. 2601, 2607). Estimates made by NAWCAS officials during their testimony are regarded as not reliable because of the lack of adequate records and because of the wide variation in estimates made at different times (CPF 1 K). Estimates of the number of members who were part of management of manufacturers, for example, varied from 50 to 200 (RPF 20). Estimates of the number of traveling salesmen members who worked exclusively for one manufacturer varied from 50 to 60 percent (RPF 23). And estimates of the members who were self-employed or independent contractors varied from 90 percent (CX 19, p. 35) to less than 1 percent (fn. 3 of NLRB Regional Director's Interim Decision attached to Stipulation dated January 24, 1968. See pleading file, Docket 8691).

There were also, as we have seen, associations whose primary function was the operation of trade shows and other associations whose membership consisted of salesmen who utilized other means to accomplish sales of women's and children's apparel and who did not operate trade shows.

Having described the membership of NAWCAS, we concern ourselves now with further analysis of activities in which it engages.

(6) *Labor-Union-Type Activity.* Today, NAWCAS in its representation of the employee resident salesmen, in its demand for collective bargaining, and in its collection of some 4,000 authorization

cards (RPF 288) is clearly a labor organization.²² There has been, however, no showing that NAWCAS or any affiliate has ever attempted to bargain for specific wage rates or specific working hours. Fringe benefits are all it thus far has been interested in.

Almost since its inception NAWCAS has handled grievances of its members against manufacturers (RPF 170) and, since 1948, has recommended a standard NAWCAS contract for its members, with the compensation left blank, to be negotiated by each salesman (RPF 103-110). Prior to the reaffiliation of the resident salesmen's groups in 1960, a large part of NAWCAS's operations was on behalf of multiple-line salesmen who were self-employed, independent contractors and a nonlabor group (CX 19; RX 156; see also CXs 95-A, 1578-A-C, 126.²³ While NAWCAS purported to represent all salesmen, it never has taken effective action even on behalf of those resident salesmen who are clearly employees. In fact, the NAWCAS Standard Contract (CXs 618-A-B) contains a provision that tends to discourage manufacturers from setting up salesrooms for resident salesmen. Subparagraph (e) of Section 2 provides:

(e) The Company agrees to give Salesman credit for all sales made in Salesman's territory or to customers therein, whether the orders for such sales are sent in by Salesman, received by the Company through the mails, or taken at the Company's place of business, or otherwise.

This clause results in materially decreasing the benefits obtained by a manufacturer from setting up a salesroom with a salaried employee in charge because in addition commissions are still due to the traveling salesman from whose territory the buyers come.

Moreover, NAWCAS did not distribute a proposed contract specially applicable to resident salesmen until May of 1961 (RPF 124) and did not actively pursue the matter until the following year (RPF 131-133). It had no success in 1962 (Tr. 4780; RPF 133). At the 1962 convention, recommendation was made that the matter be further pursued (RPF 134-137). However, it was not until August 1963 that a meeting with manufacturers to discuss contracts for resident salesmen took place (RPF 139). That meeting and the subsequent action to get manufacturers' approval in 1963 was unsuccessful (RPF 141). Only one contract²⁴ between a manufacturer and resi-

²² This was admitted by complaint counsel on final argument February 26, 1968 (Tr. 5262-63). See also Interim Decision of Regional Director of National Labor Relations Board, December 13, 1967, attached to Stipulation dated January 24, 1968.

²³ Respondent Mantler's estimates are not accepted because NAWCAS keeps no records on this subject. Mantler was admittedly inaccurate on dates and figures (Tr. 3388; CX 1550-A, CCPT, pp. 95-122).

²⁴ See RXs 207-B, 214-A-C, 216, 218-D for examples of forms of NAWCAS Resident Salesman's Standard Contract.

dent salesman on the NAWCAS Standard Resident Salesman's Contract form could be located. A second contract not on the form was not approved (RPF 142). Respondent Mantler claimed that only half a dozen such contracts might have been signed (Tr. 4689). When Carl Rosen, president of Puritan, one of the largest manufacturers, asked respondent Mantler whether failure to sign such a form for the resident salesman would affect Puritan's right to participate in a show, Mantler's reply was negative (Tr. 4916-17). Respondents' counsel's only explanation for this was that Mantler had poor advice (Final Argument, Tr. 5200).

NAWCAS negotiated with a few manufacturers for contracts that set up fringe benefits for all their traveling salesmen, but NAWCAS was itself not a party to such agreements and it obtained no specific authorization from the salesmen of the firms concerned (CPF pp. 120-125).

NAWCAS explored the desirability of affiliating with labor organizations as early as 1956 (RFP 194-201), but it did not become formally affiliated with a recognized labor organization until January 10, 1968, well after the close of the testimony in this case (Stipulation dated January 24, 1968).²⁵

NAWCAS held a number of meetings "on the summit" in 1956, during which unsuccessful attempts were made to have the manufacturers create an association to deal with NAWCAS on salesmen's problems (RPF 202-210). In 1965, long after the Federal Trade Commission's notice of intent to commence this proceeding, NAWCAS held another abortive meeting with manufacturers (RPF 265-273).

During the entire period of its existence, NAWCAS has interested itself in improving the lot of salesmen's families through collection of death benefits (RFP 147), in setting up of various insurance programs (RPF 148-150) and in attempting to secure agreement from manufacturers to undertake programs for the pay-

²⁵ There has been a serious charge that respondents' action in becoming a labor union was solely due to the pendency of the Federal Trade Commission investigation (CPF pp. 230-36). Undoubtedly, this investigation lent some impetus to respondents' activity in that direction (CX 50-O-P). But it is equally clear that respondents had been frustrated by the attitude of the manufacturers at the meetings held with them (RPF 139; RPF 268-80); and as Professor George Brooks pointed out, historically the unions in the labor movement, in the several instances he described, had started out as benevolent-type groups and over a period of years (differing in different circumstances) had become full-fledged labor organizations (Tr. 3559-3797, 4293-4424). Thus, it cannot be found that the FTC investigation was the sole guiding force behind the metamorphosis. Moreover, as we view the matter, it is relatively unimportant how respondent NAWCAS became a labor organization since it eventually did become one.

ment of pensions for salesmen (RPF 152, 153). Although some success has been obtained in some programs, there has been an almost complete failure to interest manufacturers in NAWCAS most comprehensive program (RPF 165). Only one manufacturer, (RPF 167) Dalton of America, has agreed to undertake this comprehensive program; Dalton had some NAWCAS members among its managerial group (Appendix E to CCPE).

NAWCAS also has published *NAWCAS NEWS* (later called *NAWCAS Guild News* with varying degrees of frequency since its inception.

Having summarized the evidence of the activities of NAWCAS that clearly resemble the activities of recognized labor organizations, we turn to those activities that are associated with trade and commerce rather than with wages, hours, working conditions. In passing we note that some activities are characteristic of both trade associations and labor organizations. The publication of newspapers, bulletins, and brochures is an activity common to both as is the circulation of black lists or unfair lists of manufacturers with, however, differing legal consequences. NAWCAS standard contracts similarly have some clauses that seem to regulate working conditions and others that bear little or no relationship to legitimate union activity. Grievance procedure is also not an activity solely confined to labor unions. We take official notice that arbitration and the settlement of disputes are well recognized activities of trade associations, so is the securing of group insurance for members.

(7) *Trade-Association-Type Activity.* NAWCAS "Rules and Regulations" and "The NAWCAS Code of Ethics," which bind each of the affiliated organizations and each of the individual members of NAWCAS, are for the most part pointed directly at the business of operating trade shows and at the business of making sales (CX 170-179).

Take as an example the rules contained in the program book prepared for the December 1962 convention (the last such document before the investigation of the Federal Trade Commission became public) (CX 176). These rules deal with prohibiting members' transferring from one show to another, with fixing the dates of shows when there is a conflict, with maintaining "historical" dates for shows, with settling grievances through arbitration, with issuing uncooperative manufacturers' lists, and with barring manufacturers so designated from shows.

NAWCAS Standard Contracts or equivalent contracts for new members and for old members exhibiting new lines are a prerequi-

site to these members' exhibiting their manufacturer's line at a NAWCAS affiliate's show.²⁶ Cooperative advertising charged to a salesman without his approval, knowledge, or consent is considered an unfair practice. Affiliates are requested to check with NAWCAS before granting courtesy showings to a manufacturer. NAWCAS members must affiliate with the local affiliates of NAWCAS under pain of an unethical conduct charge, if they intend to exhibit in any metropolitan area during a market in which a NAWCAS affiliate is running the show unless the affiliate is unable to accommodate such members. There is also an express prohibition against NAWCAS members who have resigned from the affiliate from maintaining showrooms in the same building where the affiliate is exhibiting if the affiliate does not have a master lease control. In their qualifications for membership, affiliates are prohibited from accepting as a member anyone who has failed to become a member of NAWCAS or who has an outstanding obligation to NAWCAS or to one of its affiliates or who has been expelled from another affiliate until a period of at least two years has passed without specific membership approval or waiver from the affiliate that expelled him (CX 176).

These rules and regulations have a specific impact on the operation and on the membership of the trade shows, and a large number of these rules have persisted even after this proceeding was commenced (*e.g.*, see Tr. 939-40).

The code of ethics similarly pertains in large part to the salesman's performing his function in a manner that will benefit the manufacturer he represents or the public he serves. "The NAWCAS Code of Ethics" bears on its face, despite some employer-employee references, unmistakable characteristics of a trade association code rather than a labor union code.²⁷ For one year (1964) the ethics

²⁶ As of January 1, 1967, all members were supposed to have written contracts with their manufacturers. This requirement, however, has not been fully enforced (RPF 115).

²⁷ *The NAWCAS Code of Ethics, Adopted Ninth Annual Convention, December, 1953*:

1. Honest performance of salesman's duties and the obligation of the salesman to perform a full and complete day's work.
 2. Intelligent, truthful and conscientious representation of his product.
 3. Diligent effort at all times to bolster the reputation of his firm, refraining from derogatory remarks.
 4. Create goodwill in order to promulgate a better relationship between salesman, manufacturer and buyer.
 5. Notification to employer of termination of employment in sufficient time for replacement.
 6. Fair notice to the manufacturer on termination of contract during the season.
 7. Return all samples within a reasonable time.
 8. Refrain from promises to buyers that the firm will not be able to fulfill.
 9. Carry additional lines only with the full knowledge of his employer.
 10. Honor and fulfill any agreements made between himself and his employer.
- (CX 176.)

code contained a number 11 provision that prohibited NAWCAS members from committing line piracy. That is, one independent salesman member of NAWCAS might not seek to secure the representation of the line of any manufacturer then being represented by another NAWCAS salesman (CX 49-G).

Despite the deletion of number 11 from the code of ethics, line piracy continued to be forbidden by NAWCAS and by its affiliates (Tr. 3439-40; see also RPF 313). The NAWCAS News continually inveigher against it (CXs 122-B [March 15, 1965], 133-B [December 27, 1965], 140-A [February 14, 1966]). A number of affiliates had adopted rules specifically forbidding it (Appendix A).

The NAWCAS Standard Contract (CX 618-A-B, dated September 30, 1966) is further evidence that NAWCAS played a dual role in its operations since it was interested in the trade shows as commercial operations as well as being interested in the working conditions of salesmen. Although respondents claim that the standard contract is a contract providing for fringe benefits or improved working conditions for salesmen as employees, there are only five clauses (see pars. 1, 8, 3, 9, and 4(b)) in the contract that use the language of employer-employee relations. In clause 1 "the Company employs the salesmen . . .", this is a generic use and of little significance. The most important of these, the second, is paragraph number 8. That clause constitutes an agreement by the manufacturer (company) that for the purpose of certain statutes "the Salesman shall be considered an employee and covered under said Acts." This language could equally support the proposition that but for such paragraph the salesman could not be considered an employee for any purposes whatever. The third clause using the language of employer-employee, paragraph 3, is an agreement for a drawing account and in it the manufacturer (company) agrees to advance the salesman an amount (to be filled in by the parties) "per week (per month), which is to be used by a Salesman to cover his traveling expenses and incidental expenses in his employment. . . ." This drawing account is, however, to be deducted from amounts due the salesman as commissions, except that an excess of payments over commission at the end of the agreement cannot be charged against the salesman. The fourth clause containing such employer-employee language is paragraph 9. This is an agreement that the writing constitutes the entire agreement "with reference to employment and representation. . . ." It repeats the phrase "employment and representation" to qualify the word "compensation," and it uses the words "employment, representations and compensation"

to modify that part of the complex sentence that relates to the merger of all understandings and agreements into the written contract. A fifth clause is paragraph 4(b) in which the company agrees to furnish the salesman with samples, etc., necessary to the "employment." In the last three clauses mentioned the word "employment" is generic in character and cannot be taken as specific support for the proposition that the salesman is an employee rather than an independent contractor.

Taken as a whole, the contract supports complaint counsel's position that the salesman is an independent contractor and thus that NAWCAS and the other respondents, in supporting it, are supporting the commercial interests of independent contractors. Many of the paragraphs are the so-called boiler plate of commercial contracts and thus favor neither respondents' contention nor complaint counsel's. Paragraph 2(a), however, very successfully grants to the salesman, whether he is employed on salary and on an exclusive basis or compensated only on commission and representing many lines, a status as an independent contractor. It grants to the salesman the exclusive right "to determine, select or otherwise designate the times and places, including organized apparel shows or salesmen's group exhibits, where the line will be shown or exhibited." Thus the manufacturer expressly abdicates its authority to direct how or when the salesman shall exhibit the manufacturers' line. A greater degree of independence would be difficult to imagine. In addition, paragraph 2(c) expressly requires the salesman not to make "representations, warranties or commitments binding the Company" without its consent thus excising another attribute usually associated with the employer-employee relationship. Three other subparagraphs (d), (e), and (g) of paragraph 2 sound in commercial contract rather than in employer-employee relations. Subparagraph (d) requires the company to refer to the salesman for attention all inquiries from the described territory. Hence, the manufacturer gives up its right to make sales in the salesman's territory. Subparagraph (e) of paragraph 2 grants to the salesman commission on all sales to customers in his territory, whether received by mail or made at the company's place of business. And, subparagraph (g) of paragraph 2 provides that an order will be deemed accepted by the manufacturer unless the company notifies the salesman of its rejection within the number of days to be inserted in a blank space.

Subparagraph (f) of paragraph 2 of the NAWCAS contract was hailed by respondents as a great advance in manufacturer-

salesmen relations. This paragraph provides that the company may reject orders and that commissions shall be paid only on orders shipped and "accepted by the purchaser." Then there is a proviso that the company agrees to pay the salesman commissions on 85 percent of all accepted orders whether shipped or not. Although clearly advantageous to the salesman, this clause would be entirely appropriate to any commercial agreement.

The most significant clause in the NAWCAS Standard Contract, from the point of view of this proceeding, is contained in the third sentence of paragraph 2. This states:

The Company further agrees that if the Salesman belongs to any organized apparel shows or salesmen's groups within said territory that the Company's line will be exhibited only at such shows or with such groups: provided, that this provision shall not require a Company which has its principal place of business within said territory and maintains a show room on its premises to close such show room.

In sponsoring this clause NAWCAS lent material support to the trade function of its affiliates. For, in effect, it channeled the manufacturers' sales efforts through the trade shows when and where such shows were operating, because salesmen members under the "Failure to Affiliate" rule (CX 176, p. [h]) were required to belong to the local NAWCAS affiliate if they exhibited in any metropolitan area during a market of such affiliate. Despite the later revocation of this rule, it was reenacted in December 1965 with the proviso that it should not become effective until it was approved by NAWCAS legal staff (CX 55-G). Manufacturers moreover, were, in effect, required to utilize a NAWCAS trade show affiliate rather than use their own salesrooms under the threat of being barred from other markets as late as August 1966 (CX 158-B).

Again returning to the contract terms, paragraph 7 provides: "The Salesman may carry additional lines only with the full knowledge of the Company, provided that no additional line be a conflicting line." (CX 618-B.) This further emphasizes that the salesman is an independent contractor, not an employee, because it is he who has the option to carry additional lines over which, of course, the manufacturer has no control. The sole restriction is that the company be notified and that the line not be a conflicting one. The specification that the line should not be a conflicting one emphasizes again that NAWCAS's concern is with the commercial aspect of the salesman's job and that the salesman shall not help the manufacturer's competitor by taking on a competing line. A very large proportion of the contracts surveyed had just such a provision (RX 174-B).

In its operations, as well as in formal documents, NAWCAS assisted the affiliates in making their trade shows more effective. Dr. Schwartz, for example, attended some 25 sales seminars (Tr. 4459-61) at which salesmen members of affiliates were given "A training experience designed to improve the skill of the individual to the end that he can hopefully increase his income through more effective presentation." (*id.*) NAWCAS also assisted by supplying a notice of new store openings (Tr. 4441). This enabled the affiliates to keep their lists of prospective buyers up to date. Most significant, NAWCAS acted as arbiter between show groups when the question of one group raiding another took place (*e.g.*, CXs 175, p. [10], 45-B). NAWCAS resolved difficulties between affiliates as to show dates and determined which affiliate should be recognized as having "the historical date" (CX 45-B). NAWCAS also interested itself in making recommendation to its affiliates for handling the merchandise marts, which proved a threat to the merchandising activities of the affiliates (CXs 882-B-D, 863-C). Its rules entitled "Permanent Show Space" passed at the convention in 1961 (CX 176, pp. [h]-[i]) and amended in 1963, after NAWCAS had notice of these proceedings (CX 179, p. [i]), clearly related to commercial matters²⁸ and were enforced by NAWCAS affiliates through fines and expulsions (CPF pp. 148-50). We consider now some aspects of the trade shows.

²⁸ "7-1. That any member who resigns from an affiliate and who maintains permanent space in the same building in which said affiliate is exhibiting will, upon complaint from said affiliate, be subject to disciplinary action in accordance with Article IV, Sections 7 and 7a of the By-Laws of NAWCAS (4, 17th Ann. Conv., 1961; Amended, 19th Ann. Conv., 1963).

"7-2. Line or lines exhibited by, for, or through a NAWCAS member in a permanent office or showroom outside of his affiliate's market location during that affiliate's organized NAWCAS market in the same metropolitan area, may not be exhibited at any other NAWCAS affiliated market, except:

a) During market showings when space is not and cannot be made available to the NAWCAS member at his affiliate's market location.

b) The By-Laws, Constitution, Rules or Regulations of the affiliate to which the member belongs specifically, permits the member to exhibit in such permanent show space, or the member has historically exhibited in such permanent show place during the conduct of that affiliate's markets or such affiliate has consented thereto. And upon complaint from any affiliate such member or members, or affiliate who fails to comply, may be subject to disciplinary action in accordance with Article IV, Sec. 7, of the By-Laws of NAWCAS.

Provided that when two or more NAWCAS affiliates exhibit at the same time in the same market area, a particular line may be shown at only one of said shows—provided this rule shall not affect those NAWCAS affiliates which operate in permanent showrooms. In the event of a conflict and the shows cannot agree among themselves, then, the matter shall be referred to NAWCAS for arbitration under the provisions of Rule 14 of the Rules and Regulations of NAWCAS. (19th Ann. Conv., 1963)."

3. *Nature of Trade Shows*

As we have seen from the description of trade shows "Nature of Trade and Commerce," C. 4., *supra*, they assist the salesmen members in obtaining commissions, they assist the manufacturers in obtaining orders for merchandise, and they assist the retailers who attend them in finding competitive goods assembled at a single point for their convenience.

Thus they have a clear commercial purpose and are anything but eleemosynary institutions.

Concededly, the orders taken at such shows are transmitted in interstate commerce and the goods ordered, after manufacture, are also shipped in interstate commerce (Prehearing Order No. 1).

These shows are in commercial competition with shows set up by manufacturers and with shows set up by competing groups, such as caravans, about which we shall have more to say later in this decision. They are used as an instrumentality of the sale of the manufacturer's merchandise; and practices that interfere with that instrumentality, of necessity, interfere with the free flow of interstate commerce.

In putting on trade shows Exhibitors and the other trade show affiliates, which it represents, are engaged in an activity that is wholly commercial (see "Jurisdiction," D. 2. a., hereof). In aiding, guiding or obstructing this activity NAWCAS and its members are also engaged in a commercial operation (see "Jurisdiction," D. 2. b., hereof, and particularly "Jurisdiction," D. 2. b(7)).

* * * * *

From all of the foregoing we find that respondents are engaged in commerce and that the matrix of their activity in connection with trade shows is commercial in nature. We shall now consider the factual proof relating to activity alleged to constitute unfair acts and practices.

E. Alleged Unfair Acts and Practices

The charge of unfair acts and practices is grounded on a combination and conspiracy among respondents and others based on agreements and understandings "to adopt, place in effect and carry out, . . . a plan, scheme or policy, . . . to hinder, frustrate, restrain, suppress and eliminate competition" in the sale and distribution of women's and children's apparel in commerce, pursuant to which the

10 various acts alleged in the complaint were performed (see "Preliminary Statement," A. *supra*).²⁹

The formal, organizational documents of NAWCAS and of its affiliates received in evidence have established that there was a combination by formal agreement among the individual members and the affiliated organizations of NAWCAS for the very broad purposes heretofore described (see "Respondents," A., and "Jurisdiction," D. 2. b., hereof) and, that NAWCAS established rules and regulations binding on all of its members (CXs 170-179). Exhibitors was one of the founding members of NAWCAS (CXs 2, 3) and its bylaws required all of its members to be members of NAWCAS (CX 634). Exhibitors and all the members of the class Exhibitors represented passed various resolutions and took various actions to change bylaws conformable to NAWCAS' recommendations (see Appendix A [p. 1078 herein]). In addition all new members signed application forms for membership in Exhibitors and, at the same time, for NAWCAS. The NAWCAS application form expressly states that the applicant agrees "to abide by the rules and regulations governing this association" (CX 1424-C). Thus there was formal agreement by affiliates and by individual members to abide by the NAWCAS rules and regulations.

The evidence showed that respondents not only had the formal arrangements that they carried out but that they also had less than formal methods by which this combination of respondents and others carried on its operation. For example, although the reinstated "Failure to Affiliate" rule (heretofore discussed under "Jurisdiction," D. 2. b.(7), hereof) was not to be operative until approved by counsel, the delegates to the 1962 convention knew about and carried back to the affiliates they represented, a report of the necessity for this rule, which had been explained to the board of governors. Then, the affiliates enforced the rule locally. Similarly, the board of governors tabled the Carolina Resolution (CX 46-F) that was directed toward the Aileen Sales Corp. (Aileen), although worded generally to bar from the shows the manufacturers who discharged commission salesmen and hired salaried salesmen to replace them. Yet, respondent Mantler

²⁹ We note in their proposed findings that complaint counsel makes reference to a conspiracy to monopolize and to attempt to monopolize (CPF 71). In light of the language of the complaint we feel it unnecessary to differentiate between such a conspiracy and a conspiracy to restrain trade because to monopolize is of necessity to restrain trade.

before action by the board of governors sent bulletins out to the affiliates on the basis of complaints (RXs 234 and 235) and the affiliates took action to approve the resolution (CXs 868-D, 981-F, 980-A, 102-B; CXs 1453-A-B, 1494-C, 1438-E, 940-L, 941-R).

One show, using as an excuse alleged contractual deficiencies, prevented (Tr. 1806-15) some of the Aileen salesmen from exhibiting the Aileen line at their shows (see testimony of Gerald Striker, Tr. 1799-1878; CXs 1104-13, 1102, 867-B). Pacific Coast Travelers (PCT), after refusing Gerald Striker, the Aileen sales manager, the right to exhibit in its shows, dropped him from membership because he had not done so (CX 1107). And, when he tried individually to secure a room at the Biltmore Hotel in Los Angeles in which to sell his line he was informed that he could not get a room because PCT had a show there (Tr. 1828; CX 1102). The minutes of PCT showed that PCT had sought cooperation from the Biltmore to have nonmember salesmen excluded from the hotel during their shows (see CXs 846-47). The examiner believes the testimony of Gerald Striker despite the skillful attempt by respondents' counsel on cross-examination to discredit the witness. His testimony about the conversation he had with Oscar Levinson (Tr. 1873-74), in which Oscar Levinson told Mr. Striker that it was the regulation that prevented Striker from showing, even though Striker pointed out to Levinson that the contract was not unfair is entirely credible.

Respondent Mantler testified on recross-examination about the Aileen situation that he had sent out bulletins (which might well be the (Tr. 3525-25) "Regulation" referred to). These bulletins give credence to Mr. Striker's testimony (RXs 234, 235).

Another indication of the operation of the combination through informal rather than formal channels is found in connection with a case in which attempts at design piracy took place at shows (CPF pp. 99-100). The injured manufacturer complained, and respondent Mantler got a copy of this complaint (Tr. 3521), which charged that a representative of Parfait Originals, Inc., went through the show area sketching and writing descriptions of competitive lines at the Miami show and at the San Francisco show (RX 248). Respondent Mantler thought someone had a camera (Tr. 3521). A few days after receiving this complaint, respondent Mantler received a letter from Don Brothers of West Coast Salesmen's Association (WCSA). WCSA had just had its show in San Francisco. The letter stated that the lines of Parfait and Ala Mode, a Parfait subsidiary, were being deleted from the January show listings and would not be permitted in any WCSA shows (RX 247). Three days thereafter NAWCAS' counsel wrote to Parfait Originals, Inc., re-

questing it to advise NAWCAS "... that you have informed your staff not to participate in such activities in or at subsequent NAWCAS affiliated markets." (RX 245.) At the January 15, 1965, meeting of WCSA, the grievance committee chairman reported "Jay Serrett's [Parfait Originals' salesman] room would be checked to be sure the Parfait line was not being shown." (CX 992-A.) Apparently the check showed that Serrett was attempting to sell the Parfait line from catalogs. for at the meeting of June 16, 1965, the Board of Directors of WCSA received such a report and "Agreed that Mr. Serrett be suspended from the September Market Week with right of appeal." (CX 996-A; see also Tr. 3523.)

Respondent Mantler testified that the only written information that he had on record was from Southern Apparel and West Coast Salesmen's Association (Tr. 3519-20) but that he had had "... conversation with people from the Miami show that there was a great deal of visiting between booths—manufacturers come to the Miami show. They brought designers down there and they were walking around from booth to booth ..." Southern Apparel Exhibitors said there were "quite a few" and "[i]t was bad enough so that they wanted to bar all manufacturers from coming to their market and I told them not to do that." (Tr. 3520.) When asked for suggestions, respondent Mantler "recommended that a letter be written by the association to all of the manufacturers who attended, telling them that they would be welcome to be in the show, but that they had to follow the rules and the regulations about staying in their booth and not visiting other booths." (*id.*) Here was a matter that Marshall Mantler testified was not NAWCAS' concern but the concern of manufacturers. Yet, though there were never rules and regulations made about it because it was not a NAWCAS problem, NAWCAS did not like design piracy and "asked the manufacturers to leave one of our markets for not behaving himself." (Tr. 3524.)

Accordingly, we find from the foregoing examples and from our study of all of the evidence that respondents were engaged in a combination—sometimes formal, at other times informal, occasionally assisted by hotel managers, and as we shall see later, by merchandise marts. We also find that this combination affected the distribution of women's and children's apparel. But, we need not burden the point. On final argument the respondents frankly admitted that if the acts established by the proof had been taken by a trade association they would amount to a conspiracy in restraint of trade among NAWCAS and its members—both individual and association

members (Tr. 5181). Respondents' counsel had some reservation about the rule and practice that fixes the dates of shows in contiguous areas. He thought such a rule was reasonable and therefore not illegal (Tr. 5181-82).

Leaving the combination question we now consider the particular acts charged, which in passing we note also corroborate the existence of the combination and conspiracy. Initially, we consider the activities admitted by respondents but claimed in their answer to have been abandoned or discontinued.

1. *Practices Admitted but Allegedly Abandoned*

Respondent NAWCAS in its answer admitted (and the other respondents agreed that it had carried out the alleged policies (Pre-hearing Order No. 1, as amended)) that it had circulated lists of "uncooperative" manufacturers who were prevented from using trade shows to promote or sell their merchandise.³⁰ But NAWCAS denied that such lists had been made or that manufacturers had been prevented from using show facilities for approximately two years last past.

The proof established that the circulation of lists of uncooperative manufacturers was a function of the NAWCAS General Counsel's office. It was contemplated that such circulation should take place only after the manufacturer "continually ignores the efforts of NAWCAS counsel to work out a dispute" (CX 60; see also CX 59, p. 8; RPF 173).

The evidence indicates that respondents had ceased formal circulation of uncooperative manufacturers lists through articles in the NAWCAS News by the latter part of 1961 (Tr. 2274). However, NAWCAS continued to send names of uncooperative manufacturers to affiliates until approximately 1963 (Tr. 2275). This was about the time that the investigation by the Federal Trade Commission became apparent to respondents (Tr. 2452-56). Moreover, it continued to be the responsibility of NAWCAS' counsel to recommend manufacturers for the uncooperative list as late of December 1964 (CX 178, p. [11]) and at the December 1965 annual convention, General Counsel Earl Susman reported: "... five manufacturers who had previously been considered uncooperative resolved the disputes and

³⁰ Paragraph Six, subparagraph 3, of the complaint reads as follows:

(3) They have adopted and have pursued a policy of printing and disseminating to members, by various means, the names of "uncooperative" manufacturers, who are prevented from using the market facilities of any affiliate for the purpose of promoting or selling their women's and children's apparel or accessories.

paid substantial amounts to the salesmen who had filed complaints against them." (CX 179, p. [9]; CPF pp. 171-76).

NAWCAS in its published rules and regulations has continued to retain a clause on uncooperative manufacturers (CX 9-A; RX 2-A; CPF p. 172) and has continued to seek to obtain settlements from manufacturers by writing letters that bear a close resemblance to those used prior to the alleged discontinuance of the "uncooperative" lists (CPF p. 111). In any event, both General Counsel Susman in 1963 (CX 48-C) and President Don MacLellan in December 1964 urged that NAWCAS should continue to operate as before until stopped by the Federal Trade Commission (Tr. 1354-56). Furthermore, respondent Mantler made it clear that he intended to recommend reinstatement of the uncooperative manufacturers lists, or similar procedure, if the NLRB or the Federal Trade Commission held NAWCAS to be a labor union (Tr. 3365-67).

Thus, this uncooperative manufacturers procedure, which was formally adopted and which was ratified by the affiliates and was carried out by them, illustrates very clearly the working of the combination.

Let us consider the rules (we use here the December 1962 rules found in CX 176 as the last published rules before the Federal Trade Commission investigation became known to respondents (Tr. 2452-56)). A rule, numbered 1, under the heading "Arbitration" (CX 176, p. [g]) provides that an association "may" take steps to prohibit the lines of "manufacturers who are uncooperative . . . from showing or exhibiting . . . until . . . NAWCAS advises . . . that said manufacturers have cooperated."³¹ Another rule, numbered 4, under the same heading³² required all affiliates to cooperate with NAWCAS and its general counsel "in disciplining, suspending or expelling its members or their lines barred as the case may be," upon the request of NAWCAS or its general counsel "in accordance with the pro-

³¹ The full text of the rule is as follows:

1. That the Association, upon being advised by NAWCAS of Manufacturers who are uncooperative in matters involving differences between salesmen and manufacturers may take steps to prohibit the line or lines of said manufacturers from showing or exhibiting with members of the Association until such time as NAWCAS advises this Association that said manufacturers have cooperated, (12th Ann. Conv., 1956) (Also known as "California Resolution").

³² The full text of the rule is as follows:

4. All affiliates shall cooperate with NAWCAS and its general counsel in disciplining, suspending or expelling its members or their lines barred, as the case may be, upon request of NAWCAS or its general counsel in accordance with the procedure heretofore adopted and known as Uncooperative Manufacturers' List and Southwest Resolution, (4, 15th Ann. Conv., 1959).

cedure heretofore adopted and known as Uncooperative Manufacturers' List and Southwest Resolution."²³ (CX 176, p. [h].)

Proof established that the California Resolution was approved by NAWCAS affiliates, and according to the report of the NAWCAS general counsel at the 1961 convention, it was vigorously executed. Counsel Susman stated: "This last year all trade shows of NAWCAS cooperated fully in the enforcement of the list of uncooperative manufacturers, . . ." (CX 175, p. 15) so that a previously recalcitrant manufacturer was forced after five years delay to come to terms.

Several of the affiliates whose bylaws were received in evidence expressly included references to their cooperating in the enforcement of the uncooperative list either in their rules and regulations or in other formal documents (CPF pp. 73-74).

A generous sampling of the lists of uncooperative manufacturers of the correspondence and bulletins in connection therewith, and of the testimony of witnesses who had knowledge of the enforcement of the listings against their firms was received in evidence (see CXs 59-169-B; Tr. 705-59; CXs 1405-18; Tr. 687-705, 796).

Accordingly, we find that NAWCAS and its affiliates, with the approval of their members, joined together to coerce manufacturers who had refused to discuss the settlement of claims by salesmen by the circulation of unfair lists and by barring such manufacturers from trade shows. And, they continue to threaten to do so.

We turn now to the practices that respondents completely or qualifiedly admitted.

2. Practices Admitted in Whole or in Part

a. Contract Requirement.

Respondents NAWCAS and Exhibitors admitted that they required any new member and any member acquiring a new line to each enter into a written contract with his manufacturer on the NAWCAS Standard Contract form or on a form substantially similar to the NAWCAS Standard Contract as a condition to ex-

²³ In passing we note that the Southwest Resolution (see CPF pp. 74-75) related to the procedure for and enforcement of a type of arbitration proceeding (RPF 177) and that it was used infrequently due to its high cost (RPF 179). It was, however, to be enforced through banning the goods of a manufacturer from NAWCAS affiliated travel shows and was sometimes confused, as we have heretofore stated, with the California Resolution which authorized the uncooperative listings. Admittedly there was sometimes confusion between the California and the Southwest Resolutions (Tr. 4059).

hibiting at any trade show run by a NAWCAS affiliate (C; A).³⁴ In effect, NAWCAS members, and the manufacturers they represented, were effectively prevented from using trade shows as a means of distributing their goods, unless the salesmen entered into written contracts with their manufacturers and unless such contracts so entered into were approved by NAWCAS' counsel and the show affiliates in which the salesmen maintained membership were notified. As we have demonstrated (under "Jurisdiction," D.2.b.(7), hereof) the NAWCAS Standard Contract form in its latest revision (618-A-B) created a status for the salesman as an independent contractor and left for further negotiation between the individual salesman and the manufacturer the rates of commission to be paid and the territory to be covered. The contract dealt with such fringe benefits as: the termination notice, the effect of the drawing account, the guarantee of commissions on 85 percent of accepted orders, the presumptions that orders were accepted, and compulsory arbitration.

As was the case in connection with the uncooperative manufacturers requirement, the written contract requirement was adopted by resolution at the NAWCAS convention in 1960 and thereafter ratified by the affiliates. The resolution was later clarified, and amended, at the 1961 convention.³⁵

*The text of the allegation appears in Paragraph Six (4) of the complaint and reads as follows:

(4) They have adopted, pursued and carried out a policy of requiring each new member and all members acquiring or attempting to acquire any new line of merchandise to enter into a written contract with the manufacturers thereof as a condition for the exhibition, offering for sale, distribution or sale by the salesman of said merchandise at any trade show or market of any NAWCAS affiliate. Said contract must contain provisions exactly or substantially similar to those contained in the NAWCAS "standard contract" adopted at the 1960 Annual Convention and as later amended.

*Under the heading "Contracts," the full text of this rule reads:

1. RESOLVED, that no new member may exhibit in an affiliate group, nor shall a present member exhibit a line new to him unless said new member or present member exhibiting a new line shall first file with the affiliate group a written contract of employment in the form of the NAWCAS Standard Contract or a substantially similar agreement. (3, 16th Ann. Conv., 1960)* Amended by: 1, 17th Ann. Conv., 1961. Clarified by: 8, 17th Ann. Conv., 1961.

2. RESOLVED, that each new member of NAWCAS, or any present member desiring to exhibit a line new to him, shall cause his contract to be sent directly to the National Office of NAWCAS for determination as to whether or not that contract complies with Resolution No. 3 and for the purpose of enabling the National Office to notify each trade show of which the salesman is a member that he has a contract in compliance with Resolution No. 3. (1, 17th Ann. Conv., 1961).*

3. RESOLVED, that by "substantially similar agreement" it is meant that each of the following items, namely:

- | | |
|--------------------------|-------------------------------|
| A. Compensation | F. Arbitration |
| B. Draw | G. Responsibility for samples |
| C. Termination | H. Term of contract |
| D. Territory | I. Other lines, if any |
| E. Guaranteed Deliveries | |

There is ample evidence that without such contracts manufacturers could not have their lines of merchandise exhibited at shows except with NAWCAS' permission (CXs 668-69, 673-A-B, 1142-78; Tr. 759-69; Tr. 1546-48; CXs 1498; Tr. 1805-08; CX 1112). Each contract was approved by NAWCAS' counsel on a NAWCAS "Certificate" that was then sent to the salesman with copies to all affiliates concerned (CXs 1427-31; Tr. 972-73; CXs 1142-78).

A number of affiliates whose formal documents were received in evidence also adopted the contract requirement as part of their organizational documents (see Appendix A).

Accordingly, we find that the combination required that any new members and also any member acquiring a new line must each enter into a written contract with his manufacturer in a form acceptable to NAWCAS as a prerequisite to the manufacturer's line being exhibited at NAWCAS affiliates' shows.³⁶

We now consider the allegation regarding restricting membership.

b. Restrictions on Affiliate Members.

Respondents admit that a member who has been expelled from one NAWCAS affiliate is restricted or prevented from joining another NAWCAS affiliate until the cause of the expulsion is removed or two years have passed from date of suspension or the cause of expulsion is waived by the expelling affiliate (C; A). However, respondents deny any policy of preventing or restricting individual members from withdrawing from one affiliate for the purpose of joining another.³⁷ A basis for this allegation is also found in the rules and regulations of NAWCAS which appeared in the 1962 convention program booklet.³⁸

shall be a basic requirement of each contract for compliance with Resolution No. 3, and that each of said items shall be listed in the contract and where said listed item is not applicable, notation shall be made in said contract that this item is not pertinent to the situation. For example, if a member is not to receive a drawing against commission, it should be so stated in the contract. It is the purpose and intent of this resolution that each of these basic items be listed or the omission of same be noted (8, 17th Ann. Conv., 1961). (CX 176, p. [1].)

³⁶ As we noted earlier in this initial decision, NAWCAS adopted a rule but did not enforce it to require all members to have contracts by January 1, 1967.

³⁷ The allegation concerned—subparagraph (5) of Paragraph Six of the complaint—reads:

(5) They have adopted and pursued a policy of restricting and preventing individual members from withdrawing from one affiliate for the purpose of joining another affiliate. Similarly, members who have been expelled from any NAWCAS affiliate are restricted or prevented from joining another.

³⁸ Under the heading "Affiliate Relations" the text of the rules and regulations reads in part:

1. No affiliate shall accept for membership a person who has been a member of another affiliate in the same city within twelve months of the time he withdraws from

In addition to the formal rules on the subject, on several occasions NAWCAS appointed committees that undertook to resolve disputes among affiliates (CXs 176, p. [8], 45-B, 50-S, 40-D-F), sometimes one affiliate would charge that it was "raided" by another affiliate (CXs 681-82; see CXs 647-B, 676-77, 175, p. [10]). This practice of attempting to resolve such disputes was crystalized into a rule at the 1960 convention.³⁹

c. Limitation of Number of Lines.

Respondent Exhibitors admits that it restricts the number of lines a salesman may exhibit (C; A.).⁴⁰ And, a number of other affiliates have similar restrictions (see Appendix A). This type of provision is authorized by implication in rule numbered 3 under the heading "Arbitration," the last paragraph of which provides:

It is understood that nothing herein contained shall limit nor affect the rights of a trade show affiliated with NAWCAS to discipline its own members for

membership provided that this regulation shall be inapplicable if such member had a legitimate business reason for his withdrawal or if such other affiliate or affiliates in the same city shall execute, a waiver in writing as to any applicant. (2, 15th Ann. Conv., 1959) (Superseded by: 4, 16th Ann. Conv., 1960).

* * * * *

3. RESOLVED, that no affiliate group shall accept for membership a person who has been a member of another affiliate group in the same city within twelve (12) months of the time he withdraws from membership. This regulation shall be subject to negotiations between the affiliates involved, provided, that this regulation shall be inapplicable if the applicant shall obtain a written waiver from the affiliate group from which he is withdrawing. (4, 16th Ann. Conv., 1960). (CX 176, p. [g].) And, under the heading "Membership," starting with rule numbered 3, the rules read:

3. No member of a NAWCAS affiliate who has been expelled or barred from any NAWCAS affiliate shall be allowed admission into another NAWCAS affiliate until a period of at least two years has passed, or upon his prior reinstatement, and all facts pertaining to his dismissal have been submitted to the membership of said affiliate, or upon waiver from the group from which he was expelled. (6, 15th Ann. Conv., 1959.)

4. No affiliate shall accept a new member into their organization who has an outstanding obligation to NAWCAS, its subsidiaries or another NAWCAS affiliate, and each affiliate should incorporate into its membership application a statement to that effect. (7, 15th Ann. Conv., 1959.) (CX 176, p. [h].)

³⁹ Under the heading "Affiliate Relations" the full text of this rule reads:

4. RESOLVED, that when any controversy or dispute between two shows in the same region can not be resolved between themselves, it shall be referred to the Regional Vice President, unless said Regional Vice President is a member of one of the affiliate groups involved in said controversy or dispute, in which case the matter will be referred to the First Assistant Vice President. If the Regional Vice President or the First Assistant Regional Vice President is unable to resolve the matter, the controversy or dispute shall be submitted to arbitration by the Executive Advisory Council at the said Executive Advisory Council's next regularly scheduled meeting, the decision of the Executive Advisory Council to be final—provided that this regulation will not be applicable to matters of a strictly internal nature (5, 16th Ann. Conv., 1960). (CX 176, p. [g].)

⁴⁰ Subparagraph (9) of Paragraph Six of the complaint reads as follows:

(9) They have adopted and pursued a policy of restricting or limiting the number of lines of merchandise that any associate member may exhibit.

violation of its particular rules and regulations. (2, 15th Ann. Conv., 1959). (CX 176, p. [h].)

We now consider the proof concerning practices that respondents denied in their Answer.

3. *Practices Denied*

Respondents in their answer specifically denied six of the ten allegations of the complaint, paragraph six, describing specific acts and practices. Several of these allegations are general statements that include specific practices already admitted. The practices denied can conveniently be grouped under three headings: "Restrictions on Manufacturers," "Restrictions on Affiliates," and "Restrictions on Individual Members." We now deal with these seriatim.

a. *Restrictions on Manufacturers.*

As we have already seen ("Alleged Unfair Acts and Practices," E. 1. and E. 2. a., hereof), respondents admit that they adopted the practices of listing manufacturers as uncooperative and of barring them from shows and that they required a written contract, equivalent to the NAWCAS Standard Contract, to be executed in specified cases as a prerequisite to the exhibition of a manufacturer's line at an affiliate's trade show. These practices and the contract requirement, although in terms they are imposed on the NAWCAS affiliate and the NAWCAS individual members, actually pinch the manufacturer. This was demonstrated by the earnest manner in which even the largest manufacturers sought to comply with the contract requirements and negotiated "courtesy showing" rights in the meantime (Tr. 759-88, 801-36, 3406; see also CXs 1253-1310; Tr. 4916).

Since respondents' activity, however, was not limited to the admitted methods, the broader allegations in the complaint were justified.⁴¹

Perhaps the most important of the acts covered by these broad allegations (and the furthest removed from legitimate labor union

⁴¹ Subparagraphs 1 and 2 of Paragraph Six of the complaint relating to manufacturers charge the following:

(1) They have adopted and have pursued a policy of refusing and threatening to refuse to promote or display or offer to sell, distribute or sell women's and children's apparel or accessories of any manufacturer who does not comply with terms and conditions established by respondents concerning the relationship between members and manufacturers, e.g., the "Southwest Resolution" adopted at the 1957 Annual Convention.

(2) They have adopted, pursued and carried out a policy of inducing and coercing manufacturers of women's and children's apparel or accessories to comply with terms and conditions established by respondents.

practice⁴² were those allegations that comprehend the interest NAWCAS and several affiliates exhibited in preventing one manufacturer from copying another manufacturer's designs (see description of the Parfait Originals incident under "Alleged Unfair Acts and Practices," E. hereof (Tr. 3520-25; CPF pp. 99-100; RXs 247, 245; CX 996-A)). Prohibition of design piracy was to be enforced at the affiliate level by requiring manufacturers' officials, who might visit the shows with their salesmen, to stay in the sales booths, as were salesmen, by a seemingly innocuous no-buttonholing rule apparently designed to prevent salesmen from preempting customers' attention. In applying that rule in this fashion, the combination could effectively prevent design piracy. Through its use, an offending manufacturer could be removed from the show (see Tr. 3524) and the salesman expelled from the affiliate if he tried to circumvent the ruling (Tr. 3523; CX 996-A).

Another practice already discussed ("Jurisdiction," D. 1. b. (7) hereof) was that of requiring manufacturers to close their salesrooms, except the one in their principal office, when a trade show was being conducted by a NAWCAS affiliate in the city in which the manufacturer's salesroom was located. As we have seen this became crystalized as a clause in the NAWCAS Standard Contract.⁴³ Hence, even though it appears as a restriction on the salesman, it was enforced by withdrawing the manufacturer's line from the trade show if he failed to sign the contract and by imposing a fine on the salesman whether or not he had the power to comply with the showroom-closing rule (Tr. 1538-59, 1625-26; CXs 1091-1100; Tr. 1627, 1768-85; CXs 1500-01; Tr. 1883-91; CXs 1508, 1083-84, 1088, 1509).

NAWCAS and its affiliates with the aid of certain of the more recently erected "merchandise marts"⁴⁴ obtained a further hold on manufacturers and on salesmen through the execution of master leases (between the affiliate trade show and the mart) that bound the mart to require other tenants, who desired to lease space in the mart building to operate in accordance with the wishes of the affiliate holding the master lease (Tr. 993-96; CXs 707-A-K, 746-A-K,

⁴² Respondents' counsel on final argument made no attempt to justify NAWCAS' action in this regard (Tr. 5210-12).

⁴³ CX 618-A, par. 2a.

⁴⁴ A merchandise mart is a multistoried building specially designed for conventions, trade shows, and similar operations. It has a number of salesrooms rented by salesmen or manufacturers and a large open space capable of division into groups. It forms an ideal location for a trade show and there are a large number of such marts in existence or contemplated in cities throughout the United States (Tr. 1227, 1012-13, 1578, 1020; CX 57-A; CPF p. 70).

1053-A-B; Tr. 1018-87; CXs 713-45, 1438-C-D, 1480-83; Tr. 1134-40, CXs 750-63; Tr. 1141-66). These arrangements channel the sale of the manufacturer's line through the affiliate trade show.

That NAWCAS intended the master lease to be used to channel the distribution of merchandise through trade shows is demonstrated by the NAWCAS rule⁴⁵ providing that a NAWCAS member who resigns from an affiliate will be disciplined if he thereafter shows in a building where the affiliate has a show but no master lease. The theory is: if the affiliate had a proper master lease, as Mantler and others recommended,⁴⁶ then it would effectively channel the manufacturers' merchandise through the affiliates' shows. But, when there was no such lease, the salesman was to be disciplined if he maintained a showroom in that building.⁴⁷

The impact of these rules on manufacturers is demonstrated by the fact that a California mart association which witness Daniel Saxon, an advertising executive, operated, and which included manufacturers and salesmen, rapidly fell to pieces because its members feared reprisals by PCT, the NAWCAS affiliate in the area (Tr. 1650-1763; CXs 1070-71, 1073, 1076, 1078-A; Tr. 1666-81).

The Aileen case, heretofore discussed ("Alleged Unfair Acts and Practices," E. hereof) is another example of the coercion exercised on manufacturers through the combination's action against salesmen representing such manufacturers.

In light of the foregoing examples and the evidence in this case as a whole, we find that respondents have adopted and pursued a policy of threatening to refuse to display a manufacturer's merchandise and have otherwise induced and have coerced manufacturers to comply with the terms and conditions established or suggested by respondents.

⁴⁵ Under the heading "Permanent Show Space," the text of the rule reads:

1. That any member who resigns from an affiliate which *does not* have a master lease control and who maintains permanent space in the same building in which said affiliate is exhibiting will, upon complaint from said affiliate, be subject to disciplinary action in accordance with Article IV, Sections 7 and 7a of the By-Laws of NAWCAS. (4, 17th Ann. Conv., 1961.)

2. Line or lines exhibited by a NAWCAS member in a permanent year around show or place during any organized NAWCAS market in the same metropolitan area, may not be exhibited at other NAWCAS markets; unless:

a) The affiliate has refused to permit exhibitor of said line or lines in its markets.
b) This regulation shall not apply to NAWCAS affiliates with master lease control of permanent year around showrooms or places, or permanent showrooms or places approved by the local NAWCAS affiliates and further provided that non-affiliated groups organized in such permanent year around show places shall not be eligible for admission to NAWCAS. (5, 17th Ann. Conv., 1961.) (CX 176, pp. [h] [i].)

⁴⁶ See CXs 882-C-D, 57-B-C, 863-E.

⁴⁷ CX 176, pp. [h] and [i], quoted next to last preceding footnote.

We now consider restrictions placed on affiliates.

b. Restrictions on Affiliates

As we have already seen, the uncooperative manufacturer rule was specifically applicable to the affiliates and was to be enforced by them through their excluding the exhibition of such uncooperative manufacturers' lines at the affiliates' shows. The affiliates were thus restricted as to the lines that could be exhibited at their shows by a NAWCAS policy determination of which manufacturers were uncooperative (see "Alleged Unfair Acts and Practices," E. 1. hereof).

Similarly, NAWCAS' rules requiring written contracts on the NAWCAS standard form, or its equivalent, restricted the affiliates in the same way. The affiliates were required to prevent the exhibition of the merchandise of any manufacturer who had failed to sign a contract whenever one was required or who had signed a contract that NAWCAS disapproved (see "Alleged Unfair Acts and Practices," E. 2. a. hereof).

In like manner, the informal operations of the combination had as their sanctions actual barring of manufacturers salesmen from the affiliates' shows or threatening that such results might be expected (*e.g.*, Rosen in 1965 felt that he would be excluded from the San Francisco show if he did not acquiesce in Mantler's request that he continue to exhibit with PCT in Los Angeles (CX 158-B; compare Tr. 3339-50)). So we infer that the affiliates were bound to back up NAWCAS in appropriate circumstances. This was a restriction on them no matter how willingly assumed.

In addition, and as specifically charged in the complaint⁴⁸ and denied in the answer, respondents since the 1959 convention have required affiliates by rules to agree upon show dates where there is more than one affiliate in the same geographical market and to refrain from choosing a new show date rather than conforming to "historical show dates."⁴⁹

These rules were clarified in the 1961 convention by adding a

⁴⁸ Subparagraph (6) of Paragraph Six of the complaint reads:

(6) They have adopted and pursued a policy of requiring affiliate (where more than one affiliate exists in the same geographical market) to agree upon trade show dates, so that they do not compete with each other.

⁴⁹ Under the heading "Affiliate Relations," the text of rule numbered 2 reads:

2. No affiliate (in a city where more than one affiliate in the same "field" exhibits) shall choose a NEW show date which does not conform to the historical show dates prevailing in that particular city. In the event new dates are proposed, these affiliates shall meet together and decide amicably. (8, 15th Ann. Conv., 1959) (Clarified by: 7, 17th Ann. Conv., 1961). (CX 176. p. [g].)

definition of "historical show dates"⁵⁰ and the practice of securing agreement to these dates in the event of a dispute was specifically placed in the hands of the regional vice presidents of the various regions.⁵¹ That this set of rules was placed in effect is apparent from a report to the 1964 convention of NAWCAS by Mr. C. C. Jameson, the regional vice president of the Pacific Northwest, (CX 51-C) who stated "that all problems involving conflicting shows had been resolved" (*id.*)

Rowland Glenn, president of Exhibitors, described a tri-regional conference in the Midwest (Tr. 974-76). In that area there are three major markets, each in a different region, all served by the same salesmen. One is in Minneapolis, one in Detroit, and the third in Chicago. These affiliates get together to fix non-conflicting show dates so that one salesman can participate in all the shows (Tr. 975-76). William H. Miller, the president of NAWCAS, described how show dates were worked out by representatives from affiliates in the Southern States (Tr. 1265-67). A schedule of show dates for NAWCAS affiliates from 1962 to 1966 demonstrates that non-conflicting dates were the rule rather than the exception (CX 1388-A-L). Respondent Miller explained that this was to prevent hardship on members who might want to attend more than one show (Tr. 1265-67).

A variation of this arrangement exists in Chicago. There Midwest Fashion Exhibitors and respondent Exhibitors put on their shows at the same time but have a mutually satisfactory arrangement not to permit the same lines to be exhibited in both shows (CXs 646-B, 649).

We find that NAWCAS requires the affiliates to agree on non-conflicting show dates and that in practice the affiliates do so. In the case of Chicago where both NAWCAS affiliates show at the same time in different hotels, there appears to be an amicable arrangement that prevents lines from being shown in both places (CXs 648-A, 647-B).

We pass now to the charges concerning restrictions on individual members.

c. Restrictions on Individual Members

Just as we have seen, under the preceding findings, that NAWCAS' restrictions on uncooperative manufacturers and its requirements

⁵⁰ Under the heading "Affiliate Relations," the text of rule numbered 6 reads:

6. "Historical show dates" as set forth in Rule No. 8 adopted at the Fifteenth Annual NAWCAS Convention be interpreted to include "both opening and closing dates of the respective dates." (7, 17th Ann. Conv., 1961.) (CX 176, p. [g].)

⁵¹ See rule numbered 4, quoted in footnote 38, *supra*.

for written contracts constitute restrictions on the affiliates, so too such rules constitute restrictions on the individual members. The individual members, indeed, bear the brunt because their livelihood is dependent, in part, upon their ability to show the lines of the manufacturers they represent at trade shows. Hence, the individual members are clearly prevented from exhibiting in the shows in cases where the uncooperative manufacturers list or the contract rules are enforced. This accords with one of the allegations in the complaint.⁵²

In addition to the general allegation, which has been established by the proof heretofore discussed, under the headings "Restrictions on Manufacturers," and "Restrictions on Affiliates," there are two more specialized allegations in the complaint relating to the prevention of competition among salesmen members of NAWCAS and to the adoption of restrictive qualifications for membership.⁵³ Although expressly denied by the answer, both allegations are amply supported by the proof. We deal with them now.

Respondents clearly and continuously sought to prevent one salesman from seeking to represent a line that was represented by another salesman. This practice was euphemistically described as "line piracy," and we have discussed some of the proof concerning it under "Jurisdiction," D. 2. b. (7) hereof. At one point in time during 1964 NAWCAS incorporated the rule against line piracy as number 11 in its Code of Ethics that are expressly binding on all members (CX 49-G). Rule number 11 lasted only a year (CX 52-E). But, NAWCAS continued a crusade against line piracy in the NAWCAS News (CPF pp. 83-84; CXs 122-B, 140-A). A number of affiliates adopted rules against line piracy (CXs 922-R, 923-V-W, 635-B, 925-L, 926-N, 927-F, 928-I, 929-G, 769-Z-1-2, 943-N) and punished line pirates through their grievance and other procedures (CXs 658-A, 838-C, 842-B, 846-A, 864-A, 849-A-B, 850-A, 852-A, 858-B, 966-C-D, 877-B, 905-B, 997-B and D, 998-D).

Respondent Mantler at the formal hearings, in this proceeding,

⁵² Subparagraph (8) of Paragraph Ten of the complaint alleges:

(8) They have adopted and have pursued a policy of limiting, restricting or preventing the exercise of the right of members to exhibit merchandise at any show or market at any time and at any place they so desire.

⁵³ Subparagraphs (7) and (10) of Paragraph Ten of the complaint allege:

(7) They have adopted, pursued and are carrying out a policy of restricting and preventing any member from contacting, either directly or indirectly, the manufacturer represented by any other member of respondent Exhibitors in an effort to acquire the line of merchandise of that member without the consent of that member.

(10) They have adopted and pursued a policy of refusing to accept for admission as members persons otherwise eligible and qualified for membership therein.

testified that he intended to reinstate the rule against line piracy if NAWCAS was held to be a labor organization (Tr. 3365-67). Moreover, by its rule requiring affiliates to clear manufacturers with its national office before permitting them a courtesy show, NAWCAS maintains machinery through which it can determine whether line piracy is being committed and can prevent a manufacturer that switches its salesman, and as a consequence its newly hired salesman, from obtaining a courtesy show.⁵⁴

Turning now to the charge about restrictive qualifications for membership, we find that this charge is established in part through the proof concerning the activities of affiliates in restricting membership and in part through the proof concerning the NAWCAS rules regarding membership. We have already discussed some of the proof concerning these restrictions under "Jurisdiction," D. 2. a. (1) and (2), and D. 2. b. (7) hereof; and under "Restriction on Manufacturers," E. 3. a.⁵⁵

Restrictions by NAWCAS on persons who are eligible for affiliate membership were adopted at the 15th annual convention in 1959 and were still in force at the 1965 convention.⁵⁶ We note from these restrictions that 1) no manufacturer can be admitted even though he himself acts as a traveling salesman, 2) affiliates cannot accept members unless they first become NAWCAS members, 3) a salesman who has been expelled from one NAWCAS affiliate cannot become a member of another NAWCAS affiliate, with certain im-

⁵⁴ Under the heading "Courtesy Shows," the text of the rule in the 1962 program book reads:

5-1. That affiliates of NAWCAS that grant courtesy showings, do not grant courtesy showings without first clearing the manufacturer involved through the Association's national offices. (3, 17th Ann. Conv., 1961). (CX 176, p. [h].)

⁵⁵ *E.g.*, a salesman condoning design piracy, a salesman whose manufacturer refused to close its salesrooms, a salesman who resigns from an affiliate—all were placed under restrictions.

⁵⁶ Under the heading "6-Membership," the text of rules numbered 1, 2, 3, and 4 in the 1965 NAWCAS book read:

6-1. Hereafter, no NAWCAS affiliate shall accept a manufacturer as a member or associate member. (1, 15th Ann. Conv., 1959.)

6-2. No new members shall be taken into an affiliate of NAWCAS until such time as they have become members of the national association or have included their NAWCAS dues checks to the affiliate for membership. (5, 15th Ann. Conv., 1959.)

6-3. No member of a NAWCAS affiliate who has been expelled or barred from any NAWCAS affiliate shall be allowed admission into another NAWCAS affiliate until a period of at least two years has passed, or upon his prior reinstatement, and all facts pertaining to his dismissal have been submitted to the membership of said affiliate, or upon waiver from the group from which he was expelled. (6, 15th Ann. Conv., 1959.)

6-4. No affiliate shall accept a new member into their organization who has an outstanding obligation to NAWCAS, its subsidiaries or to another NAWCAS affiliate, and each affiliate should incorporate into its membership application a statement to that effect. (7, 15th Ann. Conv., 1959.) (CX 179, p. [i].)

material exceptions, and 4) a salesman who has obligations to NAWCAS or to any affiliate cannot be accepted by any other affiliate.

Affiliates also restrict their membership in various ways. An associate member of Exhibitors, for example, is limited to selling only those lines sold by the full member with whom he is associated (CX 634, Art.II, Sec. 2). Other affiliates have similar restrictions (see Appendix A [p. 1078 herein]). The admission of members in some cases took on aspects that are reminiscent of "prep school" fraternities. WCSA, for example, barred a prospective member because of his brother's unethical activity (CX 957-C); another prospective member was barred because he was regarded as a troublemaker (CX 845-A). The class of salesman members who gained seniority because of their participation as members of San Francisco Fashion Industries (a small manufacturers group that had a special arrangement for participating with WCSA (see Tr. 3918, 3988, 4042)) were given half the number of seniority points as regular applicant members (CXs 973-B, 974-C).

Similarly, in the handling of grievances, the rules seem to have been administered by the combination on an arbitrary and unreasonable basis. One salesman witness, for example, was disciplined because a creditor's committee refused to close the showroom of the manufacturer he represented (Tr. 1625-27; CXs 1091-1100). He was later expelled (Tr. 1627).

Another witness was fined because the manufacturer he represented kept a salesroom open over which the salesman had no control. He was harrassed (Tr. 1770, 1778, 1780; CXs 1500-01) and finally expelled (Tr. 1780-85; CXs 1504-06). Some of the action was apparently quite contrary to the bylaw provisions of the affiliate involved (Tr. 1794).

Gerald Striker, the Aileen western regional manager was refused permission to display on the ground of alleged irregularities in his contract (CX 1112; Tr. 1857-59) although in reality he was refused because of the affiliate's approval of the Carolina Resolution (Tr. 1811-13). He later was dropped for inactivity because he had not participated in the requisite number of shows even though he had tried to participate. (Tr. 1816-19; CXs 1106, 1107, 1111, 1113).

A fourth witness described how his salesman, because the company had kept its salesroom open while the salesman's affiliate organization had its showing, was fined even though the salesman had no control over the company's acts (Tr. 1883, 1884, 1905-09; CXs 1083-88, 1508-09).

Many affiliates have restrictions based on a minimum period of time that a salesman must have traveled a particular territory before being admitted to membership (see Appendix A [p. 1078 herein]). Thus this rule prevented a new salesman from coming into a territory. It also required a manufacturer to hire a salesman from the association that was putting on the local trade show as a condition to showing the manufacturer's line at that show. NAWCAS did attempt to ameliorate the lot of the salesman member in good standing who was transferred from the territory of one affiliate to the territory of another, but only to a limited extent.⁵⁷ The local show regulations, the availability of space, and the number of other NAWCAS salesmen awaiting election had to be considered. (*id.*) So, clearly, NAWCAS was aware of the affiliates' restrictions and NAWCAS continued them in effect.

In addition, by its "Failure to Affiliate" rule (discussed under "Jurisdiction," D. 2. b. (7) hereof) NAWCAS forced any members who exhibited in any metropolitan area during an affiliate's trade show to affiliate with that local NAWCAS affiliate at the time of the trade show (see CX 176, p. [h]).

Clearly, NAWCAS and its affiliates brooked no competition from smaller groups of members who formed into caravans, or from unaffiliated promotional groups or merchandise marts (see CX 144-A). Salesmen were thus prevented from using these shows to display their manufacturers' merchandise. Opposition to caravans, which are small groups of salesmen advertising and exhibiting merchandise as a group in intermediate areas (Tr. 570, 3951, 514, 521), was fully discussed at NAWCAS conventions by NAWCAS committees (CXs 42-C, 43-L) and presumably caused the adoption of the "Failure to Affiliate" rule which was passed at the 1961 convention (CXs 44-C-D). But, discussion of caravans continued thereafter (CXs 49-M, 38-F). Exhibitors and PCT had express rules against caravans (CXs 635-C, 646-B, 765-B) and NAWCAS publicized these restrictions on caravans (CX 102-C) and indicated its opposition to them

⁵⁷ Under the heading "Affiliate Relations," the text of the rule in the NAWCAS program book for the 1962 convention provides:

5. RESOLVED, that a member of NAWCAS affiliate group who has been in good standing with his organization for a period of not less than one year and whose territory has been changed either by his firm or because of a change in employment shall be eligible for membership in the NAWCAS affiliate group operating in the territory to which he has been assigned. Provided that such member himself is a member in good standing of NAWCAS and eligible for membership in such NAWCAS affiliate group, and, further subject to the local show regulations and availability of space, and provided further that such transferee shall not receive preference over local NAWCAS salesmen who are awaiting membership acceptance. (6, 16th Ann. Conv., 1960.) (CX 176, p. [g].)

(CXs 845-E, 144-A). The affiliates often prohibited them (see Appendix A). A specific example of action by Exhibitors' president (well after the Commission's notice of intention to commence this proceeding) in attempting to curtail the effectiveness of a caravan operating in Illinois was described by the witness William Sally (Tr. 573-75, 577-78). There was no effective contradiction to his testimony by Exhibitors' president who was also called as a witness (Tr. 951-82).

We have described the NAWCAS activity of warning affiliates of the danger to their trade shows inherent in merchandise mart operations, and the affiliates activity in securing the assistance of marts through restrictive covenants in master leases negotiated with them.⁵⁸ And, we have referred to the testimony of Daniel Saxon (Tr. 1651-1763) who described the manner in which a trade show group, consisting of manufacturers and their salesmen that held room leases in a merchandise mart, was rejected for NAWCAS membership and was stripped of members through the opposition of PCT.

From the foregoing we find that the respondents have combined to prevent salesmen from exhibiting merchandise at any show or market they desired and that the respondents have refused admission to salesmen who were otherwise eligible and qualified.

Let us now consider how the individual respondents are implicated.

4. Implication of the Individual Respondents

Each of the individual respondents, Marshall J. Mantler, Robert Leipzig and William H. Miller has individually participated in and furthered the activities of the combination with full knowledge of the character thereof (see CPE pp. 189-98).

Respondent Marshall J. Mantler, as we have already noted, was the person who took the day-to-day action on behalf of NAWCAS. He proposed policies for adoption by the governing bodies of NAWCAS and by the affiliates. He traveled extensively and held conferences with manufacturers and affiliates and their officers to place into effect the policies of the combination. He was privy to the deliberations of the governing bodies of NAWCAS. He undertook similar duties on behalf of Southeastern Travelers Exhibitors, Inc. ("Respondents," A. 4. hereof). In his capacity as editor of the NAWCAS News, he disseminated information regarding the operation of NAWCAS and its affiliates and strongly influenced the salesmen members, the manufacturers, and the affiliated organizations (Tr. 1465-66).

⁵⁸ See under heading "Restrictions on Manufacturers," E. 3. a. hereof.

Respondent Robert Leipzig was president of NAWCAS in 1963, and at the same time he was a part of the management of Smoler Brothers, a dress manufacturer (Tr. 839, 933). The bar against manufacturers acting as officers was specifically lifted so that he might serve (Tr. 942). He is president emeritus of Women's Apparel Club of New England (Tr. 907-08, 918-19; RPF 32) and was previously its president and a delegate to NAWCAS. As delegate to NAWCAS and later as its regional vice president he acted as liaison between NAWCAS and the affiliates and reported to each what occurred at meetings of the other (Tr. 851-53). Respondent Leipzig personally participated in trade shows while a salesman in New York and New England, and after he became president of NAWCAS he visited trade shows.

Following his term as president of NAWCAS in 1964, he became chairman of the Executive Advisory Council and remained a voting member of the Council until 1967. Thus, he was familiar with the detailed operation of the combination and took steps in furtherance of it (see "Respondents," A. 2. hereof).

Respondent William H. Miller has been a salesman for about 27 years and has been active in trade shows (Tr. 1236, 1254). In addition, he was regional vice president for the Southeastern States (Tr. 1232); and for the past 20 years, he attended every NAWCAS convention. Thus, he has intimate knowledge of the working of the convention.

When respondent Miller became president of NAWCAS, at the time of Don MacLellan's death in 1965 (Tr. 1229-30, RPF 35), he was aware of the statement of intent of the Federal Trade Commission to institute this proceeding, and he was aware of the expressed intent of the former president and the NAWCAS general counsel to continue operating as before until stopped by the Federal Trade Commission. Since respondent Miller from 1964 until after he testified in this proceeding was the president of NAWCAS, he acted on behalf of the combination with full knowledge of the alleged illegality of its operation (see "Respondents," A. 3. hereof).

On the basis of the foregoing and of all the evidence in this proceeding we find that each of the individual respondents was personally implicated in the combination and conspiracy charged.

We consider now the interest of the public in this proceeding.

5. *Public Interest*

It has been the public policy of the United States since the passage of the Sherman Act in 1890 to prevent unreasonable restraints of

trade. And, this policy is further implemented by the passage of the Federal Trade Commission Act in 1914 that seeks to prevent incipient restraints while they are still in the initial stages of development and amount merely to unfair acts and practices.

In this instance, as we have seen, the sales volume of trade shows through NAWCAS members is somewhere between \$3.5 and \$4.5 billion. These sales are made directly through offers received at the trade shows put on by NAWCAS affiliates; in addition, customer interest is created through the exhibition of the lines of merchandise and that interest undoubtedly is of assistance in securing orders when salesmen call on individual customers after the trade shows. So the amount involved is a very significant part of the commerce of the United States.

In the operation of the "uncooperative manufacturers" lists there is a complete stoppage of the channel of sales to such manufacturers through the trade shows. This is clearly an unreasonable restraint prohibited by the Sherman Act unless exempted from that act. Similarly, if rate-of-commission competition between salesmen seeking to represent a manufacturer is prevented through the adoption and enforcement of the prohibitions against "line piracy," then the price of the service that the salesman renders is tampered with. This restraint also is clearly unreasonable and a matter that is most difficult to justify on any theory. Justification of price fixing is particularly difficult in those cases in which the salesmen involved represent many lines or are, by the terms of the contracts with their manufacturers, clearly independent contractors.

Other restraints are ancillary to these restraints because they are, in general, designed to confine offers for sales during market weeks to the local trade shows or to strengthen the trade shows in other ways. Hence, although particular practices or isolated rules might seem reasonable or even promotive of competition, they are all integral parts of a plan designed to control this instrumentality of selling apparel for the benefit of the salesmen involved. In addition, we cannot say that salesmen, in general, with incomes ranging from \$7,000 to \$80,000 (Tr. 4414)—despite Arthur Miller's tragic play "Death of A Salesman" quoted so eloquently by counsel for respondents (Tr. 5192-93)—are in a position of utter economic dependence. Accordingly, unless there be adequate factual or legal justification, it appears to the hearing examiner that the public interest compels Commission action in this case.

We now pass to the facts urged to be in justification for respondents' joint action.

6. *Justification*

In justification of their activity respondents⁵⁹ take the position that NAWCAS is a labor union, that it has acted alone without combining with nonlabor groups, and that, in addition, the acts in which it has engaged are reasonable and not in violation of the antitrust laws.

We find, as we have already stated, that NAWCAS is now acting as a labor union insofar as it represents employees⁶⁰ and that subsequent to the close of the testimony in this case it became affiliated with a recognized labor union.⁶¹

It is equally clear that over the years of its existence NAWCAS has been concerned with its members' grievances, and it has taken action on grievances for its members and for manufacturers against its members, primarily through its general counsel, but sometimes initially through its affiliates' officers and its elected representatives or its executive director and his staff.

At first that action was conciliation (RPF 170), but after 1960 or thereabouts it became compulsory through the operation of the California and the Southwest Resolutions about which we have heretofore made findings (see "Alleged Unfair Acts and Practices," E. 2. and E. 3. hereof).

This type of activity regarding grievances was, however, primarily on behalf of persons who were not shown to have been employees. Although at the initial meeting of the group of associations that met to form NAWCAS, there were some organizations that included resident salesmen (CX 2), these resident salesmen's organizations withdrew from NAWCAS before 1948 (Tr. 2590) and did not re-affiliate until after 1960 when their efforts to secure union assistance failed (RPF 90). At that time, according to Marshall Mantler's letter to the Screen Actors Guild (RX 156), which we accept as a record in preference to relying on his recollection or estimates, NAWCAS was composed of independent contractors each representing several manufacturers.

A year later, Dr. David Schwartz, the NAWCAS assistant director, in a study on salesmen described NAWCAS as "composed of independent contractor salesmen,"—and functioning—"as a trade association" (CX 1568, p. 22). We likewise credit this recorded description in Dr. Schwartz's study rather than his later recollections particularly since a greater part of the associations affiliated with

⁵⁹ Respondents' brief dated February 5, 1968, Index pp. 1 and 11.

⁶⁰ See heading "Jurisdiction," D. 2. b. (6) hereof.

⁶¹ Stipulations dated January 24, 1968, and March 11, 1968.

NAWCAS at that time comprised traveling salesmen who had gathered together primarily for the purpose of putting on trade shows.⁶²

Similarly, action in connection with contracts was undertaken by NAWCAS on behalf of independent contractors. Since at least June 15, 1962, the NAWCAS Standard Contract (CXs 616-A-B, 618-A-B) has contained a clause that the salesman may not carry other nonconflicting lines without the full knowledge of the manufacturer. Such a clause is pregnant with permission to the salesman to carry the lines of other manufacturers with such full knowledge. And, even according to the survey (RX 174-B) conducted by NAWCAS after this proceeding was commenced, the vast majority of contracts from 1963 to 1967 followed the form of the NAWCAS Standard Contract and thus presumably contained an agreement that permitted the salesman to act for other manufacturers.⁶³ From the very form of this contract, we may presume that they were entered into by independent contractors and not by employees. In fact, it was not until sometime in 1961 that a draft of a resident salesman's contract was even circulated to the resident salesmen (RPF 124) and not until April 1962 that it was advertised to the trade (RPF 131). Then, as we have seen the effort to win approval of such a contract met with practically no success (RPF 142; see "Jurisdiction," D. hereof).

If we view the membership situation of NAWCAS as of 1960, it seems entirely clear that it comprised predominately traveling salesmen members who were independent contractors. This fact explains the repeated references to NAWCAS as a trade association (CPF pp. 226-30), because as of 1960 it could not properly be regarded as anything else. Nor could Marshall Mantler very well have told Dr. Schwartz in August 1959 that he was building a labor union if he already had one (Tr. 4437). True there was at least one NAWCAS regional member, Elliot Colby, who was a resident salesman for a part of his career (Tr. 4697-4701, 4836). But even Elliot Colby who is now the New York assistant executive director of NAWCAS (RPF 2) did not know how many resident salesmen were members of NAWCAS at that time (Tr. 4837) although he knew of no rule or practice against such salesmen becoming members (*id.*).

⁶² Admittedly until NAWCAS readmitted the resident salesmen's groups and formed the Manhattan Region its affiliates all put on trade shows (CPF 1 E; Tr. 2590). Trade show activity is peculiarly helpful to the traveling salesman and not generally used by resident salesmen.

⁶³ This survey, of course, may only be relied upon with caution since it is based on unapproved as well as approved contracts. With regard to the NAWCAS Standard Contract form it is safe to infer approval.

Colby was also a partner in a manufacturing firm for a time (Tr. 4707). And, as we have noted, there are other manufacturer members even today, despite a rule passed at the 1959 convention against affiliates accepting manufacturers as new members (CX 179, p. [i]). These excrescences to the contrary, as of 1960 the members of NAWCAS and of its affiliates were primarily independent contractor traveling salesmen, and as of that time certainly NAWCAS was a trade association of traveling salesmen who were independent small businessmen and most of them represented several manufacturers. As late as 1963 NAWCAS in its "NAWCAS Member Guide Book" (CX 19) described itself as over 90 percent self-employed persons.

Hence, at the time NAWCAS started its metamorphosis it was clearly a trade association. As such it adopted and placed into effect a number of practices that were admittedly illegal if carried on by trade associations. The uncooperative manufacturers list, the requirement for form contracts for individual independent contractors, the compulsory arbitration, the design piracy prohibition, and the rules forbidding line piracy, were all in this category.⁶⁴ Most important was the studied effort⁶⁵ to maintain the affiliates' trade shows as the exclusive channel of mass exposure of merchandise that could be used by manufacturers.

The trade-association condition that NAWCAS found itself in with its illegal overtones could not be justified by later activity in bringing in the resident salesmen and securing the assistance of a recognized labor union. It constituted only the use of a labor organization to attempt to circumvent an illegal, trade-association activity.

NAWCAS at no time had established a set of wages and hours applicable to resident salesmen, thus it had no pre-existing standard to protect.⁶⁶ To the contrary, it had an illegal set of trade restraints.

⁶⁴ See "Jurisdiction," D. 2. b (7), and "Alleged Unfair Acts and Practices," E. 1., 2. and 3., hereof, for detailed findings in regard to such practices.

⁶⁵ *id.*

⁶⁶ Respondents' "expert" witnesses expressed the opinion that resident salesmen bear an "economic interrelationship" to traveling salesmen (see RPF 99-101). We regard findings based on such testimony as both argumentative and immaterial, therefore, we do not accept them. The resident salesmen who were clearly employees did not play any substantial part in the affairs of NAWCAS and its affiliates until well after 1960. In the meantime, the independent contractors, groups of traveling salesmen, had set up their noncompetitive structure. As independent contractors, they were not eligible for union membership. So, the combination at that time was not a labor union in any sense. Since there could be no labor union standards to protect, it is immaterial whether the resident salesmen are economically interrelated to the traveling salesmen.

However, there is considerable doubt that the traveling salesmen have such a relation to the resident salesmen.

True, selling through traveling salesmen and selling in manufacturers showrooms were options open to manufacturers. But, by signing the NAWCAS Standard Contract

These were designed to prevent competition for commission rates among its independent contractor members. There was also a carefully designed method of enforcement of its scheme against manufacturers through withdrawal of exhibition privileges to the lines of those manufacturers who failed to cooperate. The so-called metamorphosis did not change the pre-existing illegal trade restraints, it merely created a labor union adjunct to NAWCAS comprising the employee resident salesmen for whom NAWCAS might seek to bargain collectively, and secured an affiliation with a recognized labor organization that promised to assist NAWCAS in its organization drive.

Viewed in the light in which we have just described their activities, respondents' elaborate and well-developed contentions do not amount to justification. NAWCAS went through the motions of becoming a labor union described in respondents' very detailed and for the most part accurate proposed findings.⁶⁷ Most of these we have previously dealt with to the degree which seemed necessary under "Jurisdiction," D. 2. b. (4) hereof. They do not, however, constitute justification for their pre-existing illegal activity at all, but do constitute merely the addition of various labor groups to assist in the pre-existing illegal scheme. Hence, what results is a pre-existing, monopolistic activity among independent contractors assisted by a labor group; not a labor group acting alone.

Moreover, NAWCAS through its affiliates secured the assistance of hotels and merchandise marts in its plan to channelize the trade-show type of operations only through its affiliates (see "Alleged Unfair Acts and Practices," E. 3. a. hereof). Hence, NAWCAS can-

a very large number of manufacturers had sterilized the resident salesman's competition by providing that the traveling salesman got his commission even though the sale was made by the resident salesman (CX 618). Moreover, a large number of department and chain store buyers such as the AMC members have their own buying organization that makes it more economical for them to approach the manufacturer directly (see Tr. 4570). The traveling salesman, in such circumstances, is completely bypassed by act of the customers. There is in such circumstances no economic interrelationship between traveling and resident salesmen. Hence, the possibilities of selling merchandise through the traveling salesman route, through sales shows, through merchandise marts, or through manufacturers' resident salesmen in the manufacturers' main offices are not true alternatives so that one alternative is a complete substitute for the others. We accordingly do not find that there is a true economic interrelationship. Even Sol Hiller could only recall vaguely that there were inside salesmen presently members of NAWCAS (Tr. 4616). And, only one witness who had been a resident salesman, Elliot Colby, was called to testify by respondents. He is now an official of NAWCAS.

⁶⁷ Attached as Appendix C [p. 1086 herein] is a list by number of respondents' proposed findings, commencing with p. 32, that although deemed unnecessary to this decision, may be taken as an accurate unargumentative reflection of the plausible proof offered. We believe the findings herein adequately deal with the material on earlier pages of respondents' proposed findings even on respondents' theory of justification.

not properly be described as acting alone without assistance from these clearly commercial groups.

We consider now respondents' claim of justification that the acts undertaken by NAWCAS and its affiliates promote rather than restrict competition and therefore are not unreasonable restraints (see respondents' brief dated February 5, 1968, pp. 61-67). This claim likewise does not constitute justification.

Regardless of how reasonable certain of respondents' activities may seem in isolation, they are all part of a much larger scheme to prevent effective competition in the sale of women's and children's apparel through trade shows. All such activities contribute to the channelization of mass-exposure selling through the affiliates, and such activities cannot be considered separately but must be regarded against the backdrop that resulted from considering them all together.

* * * * *

Hence, we find that there is no justification for the activities undertaken by the combination. These activities created commercial restraints in a commercial setting; and the fact that they were accompanied by certain legitimate labor activity cannot properly affect the nature of the restraints.

We now consider the effects produced.

F. Effects

As we have seen under "Alleged Unfair Acts and Practices," E. 1., E. 2., and E. 3. hereof, respondents have through their activities completely barred some manufacturers from offering to sell their apparel at any show run by any affiliate of NAWCAS. They have prevented affiliates from permitting some manufacturers to exhibit and thus have restrained the manufacturers freedom to trade. And, they have circumscribed the activities of salesmen to such an extent that some salesmen have been completely barred from earning their livelihood through sales of women's apparel in trade shows affiliated with NAWCAS.

It is difficult, if not impossible, to measure these effects quantitatively. But credible testimony has established at least some of the manufacturer witnesses suffered a distinct drop in sales (*e.g.*, Tr. 712, 693). All manufacturers, even the largest, feared possible effects and yielded to respondents' compulsion (*e.g.*, Tr. 634-789; see also "Alleged Unfair Acts and Practices," E. 1., E. 2., and E. 3. hereof).

Buyers also, and through them the general public, were affected.

A trade show draws a fantastic number of merchants from the surrounding cities and states (CPF pp. 57-58). Sometimes as many as 9,000 attend (Tr. 980-81). The small merchants find the Sunday opening of a trade show a welcome opportunity to examine the competing merchandise there exhibited (see Tr. 1550), which they would not otherwise see. Conceivably the very small stores in out-of-the-way places would have no other means of obtaining an opportunity to choose from competing lines, because it would not be worth the expense for competing salesmen to call on them. The public served by such small stores located far from metropolitan areas would thus, of necessity, be deprived of an opportunity to buy the merchandise of a manufacturer whose line was barred from exhibiting by action of the combination (see CCPF pp. 46-48). So the ultimate consumer may well be directly affected by being deprived of a chance to buy desirable merchandise as well as by being forced to bear the cost of the resultant reduction in competition caused by the combination at the wholesale and retail levels.

We consider now the reasons for this decision.

III. REASONS FOR DECISION

During the preceding discussion we have combined our ultimate findings of fact with our factual reasons for them. In this section, we consider the application of the legal precedents to the ultimate facts that lead us to the conclusions stated in the succeeding section and to our form of order.

Our initial concern is about the jurisdiction of the Federal Trade Commission. This is also our ultimate concern because, on the facts as we have found them, there is clearly an unreasonable restraint of trade under applicable precedents⁶⁸ and respondents frankly admit that absent their claims of exemption as a labor organization and of justification there would be a violation of the Sherman Act.⁶⁹ The claim that a suit was improperly brought as a class action also need not detain us. The right to bring such a class action on the facts in this case is clear under the decisions of the courts and the Commis-

⁶⁸ It is hornbook law that associations of businessmen, who exercise legislative functions and enforce them with sanctions resulting in a restraint of interstate trade, usurp the function vested in Congress by the Constitution itself. See *Sugar Institute v. United States*, 297 U.S. 553 (1936); *Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963); *Fashion Guild v. Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Eastern States Lumber Dealers Assn. v. U.S.*, 234 U.S. 600 (1914); *Radiant Burners, Inc. v. Peoples Gas Co.*, 364 U.S. 656 (1961).

⁶⁹ Final Argument, Tr. 5181.

sion⁷⁰ and respondents make no serious contrary point in their principal brief.

Respondents' argument that jurisdiction is lacking is based on two contentions: first, that primary original jurisdiction over all labor matters is vested in the National Labor Relations Board; and second, that respondents are entitled to exemption from the Sherman Act as to substantially all their activities because they are a labor organization or officers thereof. Respondents also contend that the balance of their activities are justified as promotive of competition. We take these contentions up now noting in passing that interstate commerce is present and that the acts charged took place in the flow of such commerce.⁷¹

The contention that the National Labor Relations Board has primary original jurisdiction has neither factual nor precedential support. Factually, Congress created two equally expert bodies.⁷² The earlier, the Federal Trade Commission has a more than half century of expert experience in the field of trade restraints and the later National Labor Relations Board possesses no special experience in this field—its jurisdiction being principally confined to preventing unfair labor practices and passing on questions of representation.

Moreover, in our view the matrix of this controversy is the propriety of the exclusion of manufacturers from trade shows. This controversy clearly is over trade and commerce and not over wages, hours, working conditions, representation, or unfair labor practices. So the factual reason in the cases that require reference to the National Labor Relations Board is lacking. The case is not in the area of the Labor Board's special competence. The precedents are in accord.⁷³

We consider now respondents' second contention that respondent NAWCAS and its affiliates are labor organizations and the other respondents are officials of labor organizations and thus all are exempt under the Clayton Act and related legislation from any claim

⁷⁰ *Community Blood Bank of the Kansas City Area, et al.*, Docket No. 8519 (1966) [70 F.T.C. 728]; *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673, 684 (8 Cir. 1926); *Advertising Specialty National Association v. Federal Trade Commission*, 238 F. 2d 108 (1 Cir. 1956).

⁷¹ See Findings of Fact, "Jurisdiction," D. 1.

⁷² 15 U.S.C. § 45; 29 U.S.C. § 1.

⁷³ *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965); *Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Columbia River Co. v. Hinton*, 315 U.S. 143 (1942). See also American Bar Association Antitrust Section Report, Volume 13.

that their activities furthering legitimate labor objectives are illegal.⁷⁴

In the present factual frame of reference there is no need to consider respondents' position that certain activity is promotive of competition and accordingly not in unreasonable restraint of trade because all activities are part of the same scheme or plan alleged in the complaint. The legality or illegality of the plan as a whole will be determinative of this proceeding and the fact that certain activity standing alone might be unobjectionable is wholly immaterial because none stands alone as a factual matter.⁷⁵

At present, there can be no serious doubt that respondent NAWCAS is a labor organization insofar as it represents the resident salesmen who are employees of manufacturers.⁷⁶ The proof as to the affiliates is not as compelling. Their operation is primarily a commercial enterprise—the operation of trade shows. The decision that NAWCAS is a labor union in that circumstance is not, in any event, an end to the matter.

Respondents claim that NAWCAS and its affiliates, as bona fide labor organizations, are exempt under Sections 6 and 20 of the Clayton Act.⁷⁷ They further claim that the Norris-LaGuardia Act, 29

⁷⁴ See "*Crossroads of Antitrust and Union Power*" by Dean W. Wallace Kirkpatrick, Vol. 34 Number 2, The George Washington Law Review, December 1965. Dean Kirkpatrick, after describing the history of the doctrine divides into three subdivisions his discussion of the areas in which the doctrine is not applicable: Labor Activities for Non-Labor Objectives, Non-Labor Groups, Labor Activities for Commercial Objectives.

⁷⁵ See "Alleged Unfair Acts and Practices," and *Eastern States Lumber Dealers Assn. v. U.S.*, 234 U.S. 600 (1914).

⁷⁶ See Tr. 5262-4; *National Labor Relations Board v. Cabot Carbon Co.*, 360 U.S. 203 (1959); Interim Decision of New York Regional Director of NLRB; (see Stipulation January 24, 1968).

⁷⁷ Sec. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (15 U.S.C.A. § 17.)

Sec. 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

Footnote 77 continued on next page.

Initial Decision

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U.S.C.A. §§ 101-15, grants support to that position,⁷⁸ and that both acts should be read with the National Labor Relations Act, 29 U.S.C.A. § 151. This statutory complex, they assert, curtails the broad reach of the Federal Trade Commission Act,⁷⁹ even as it was held to prevent the Attorney General from initiating a criminal

⁷⁷ continued

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any persons engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. (29 U.S.C.A. § 52.)

⁷⁸ No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90 § 4, 47 Stat. 70. (29 U.S.C.A. § 104.)

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title. Mar. 23, 1932, c. 90 § 5, 47 Stat. 71. (29 U.S.C.A. § 105.)

⁷⁹ Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. (15 U.S.C.A. § 45.)

distinctions in cases involving labor organizations based upon the prosecution.⁸⁰

The decisions, however, do not go that far, courts have made fine distinctions in cases involving labor organizations based upon the facts in each case so that any such general rule cannot be invoked without a critical analysis of the character of the organization and its members and the nature of the action taken.⁸¹ Similar factual distinctions have been made in connection with agricultural associations whose exemption also appears in part in Section 6 of the Clayton Act and in part in the Capper Volstead Act (7 U.S.C. § 291).⁸² Such distinctions are further apparent in the case of other nonprofit organizations.⁸³

Three applicable principles emerge from the cases. The first is that Congress has in large measure attempted in its various enactments to place the resolution of labor union problems involving employer-employee relations in the hands of the parties. The parties are required to bargain collectively among themselves with the National Labor Relations Board (NLRB), which has expertise in this field, acting as umpire. This keeps such problems out of the courts, and by like reasoning, presumably, out of the hands of administrative agencies other than the NLRB.⁸⁴

The second principle is that this curtailing of the jurisdiction of the courts and this conferring of jurisdiction on the NLRB is

⁸⁰ *United States v. Hutcheson*, 312 U.S. 219 (1941).

⁸¹ *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945); *Carroll v. American Federation of Musicians of U.S. & Can.*, 372 F. 2d 155 (2d Cir. 1967) cert. granted Oct. 9, 1967, 36 L.W. 3143, argument held March 4, 1968; *Columbia River Co. v. Hinton*, 315 U.S. 143 (1942); *Meat Drivers v. United States*, 371 U.S. 94 (1962); *Taylor v. Local No. 7, Inter. U. of Journeymen Horseshoers*, 353 F. 2d 593 (4 Cir. 1965) cert. denied 384 U.S. 969; *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91 (1940); *Aetna Freight Lines v. Clayton*, 228 F. 2d 384, (2 Cir. 1955) cert. denied 351 U.S. 950; *United States v. Fish Smokers Trade Council*, 183 F. Supp. 227 (S.D.N.Y. 1960); *Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965); *Cedar Crest Hats, Inc. v. United Hatters, Cap & Mil. Wkrs. I.U.*, 362 F. 2d 322 (5th Cir. 1966); *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Meat Drivers v. United States*, 371 U.S. 94, 103 (1962); *Senn v. Tile Layers Union*, 301 U.S. 468, 476 (1937); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487 (1940); *Hunt v. Crumboch*, 325 U.S. 821 (1945); *United States v. American Federation of Musicians, et al.*, 318 U.S. 741 (1943) 47 F. Supp. 304; *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967).

⁸² *Milk Producers Assn. v. United States*, 362 U.S. 458 (1960); *United States v. Borden Co.*, 308 U.S. 188 (1939); *Sunkist v. Wickler & Smith*, 370 U.S. 19 (1962); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 369 F. 2d 449 (9th Cir. 1966).

⁸³ *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673 (8 Cir. 1926), 1 S.&D. 502; *In the Matter of Community Blood Bank of the Kansas City Area, et al.*, Docket 8519, Order Sept. 28, 1966 (appeal pending) [70 F.T.C. 728].

⁸⁴ *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *United States v. Hutcheson*, 312 U.S. 219 (1941); *In the Matter of California Sportswear and Dress Assn., Inc. et al.*, 54 F.T.C. 835 (1957).

only with respect to matters where a labor dispute is the matrix of the controversy. Thus, although a labor union may be involved, it is not protected in its entrepreneurial operations⁸⁵ and it may not join with nonlabor groups in the creation of a monopoly or in the perpetuating of a nonlabor group's restrictive practices.⁸⁶

The third principle is that although independent contractors cannot by statute be regarded as employees, it may be entirely proper for a union to bring into its orbit and to place union-type restrictions on such independent contractors who are part of the same labor group in that their interrelated economic influence on the wages, hours, and working conditions makes the union-type restrictions necessary to protect its employee-labor-union members.⁸⁷

Respondents seem to claim that the first and third principles apply because NAWCAS comprises some individual members who are independent contractors and some who are representatives of manufacturers. NAWCAS had for many years the welfare of all salesmen, both employees and independent contractors, uppermost as its goal. Moreover, NAWCAS endeavored to secure agreement among employer groups to supply fringe benefits in the form of pensions, guaranteed deliveries of orders accepted, and definite, written contracts with reasonable provisions for termination notice and pay; and, NAWCAS dealt with grievances. These activities, NAWCAS states, are legitimate labor objectives, and since all salespeople are economically interrelated, these activities may properly control the independent contractors and the incidental manufacturers by rules and regulations preventing competition among them. And, NAWCAS contends it may also utilize its collective economic power wherever located, so long as it does so alone, to gain its ends.

⁸⁵ Separate Opinion of Mr. Justice Goldberg in *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 733 (1965).

Nor does my view mean that where a union operates as a businessman, exercising a proprietary or ownership function, it is beyond the reach of the antitrust laws merely because it is a union. On the contrary, the labor exemption is inapplicable where the union acts not as a union but as an entrepreneur. See, e.g., *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602 (E.D. La.); *United States v. Seafarers Sea Chest Corp.*, 1956 CCH Trade Cases Para. 68,298 (E.D.N.Y.). Therefore, if a union is found by sufficient evidence and under proper instructions to have participated as a proprietor in actions violative of the antitrust laws, it is no more shielded from antitrust sanctions than any other business participant.

See also *Office Employees v. Labor Board*, 353 U.S. 313 (1957), where it was held that the National Labor Relations Board could not grant a blanket exemption to labor organizations from the requirements binding on employers when the union was engaged in bargaining with its own employees.

⁸⁶ *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945).

⁸⁷ *Aetna Freight Lines v. Clayton*, 228 F. 2d 384 (2 Cir. 1955), cert. denied, 351 U.S. 950; *Teamsters Union v. Oliver*, 358 U.S. 283 (1959).

Respondents further claim that the history of NAWCAS—like that of other labor organizations—has been from a benefit-type association to a true labor union and that the changes made were a natural outgrowth from economic circumstances and not a camouflage designed to oust the Commission of jurisdiction.

Complaint counsel, however, seem on the other hand to take the position that the second principle applies in that this dispute involves trade and commerce and not labor at all. They contend that the affiliates of NAWCAS that run trade shows are engaged in a business enterprise for the purpose of facilitating the sale of goods and that NAWCAS is merely a central agency to make and enforce regulations to reduce competition among traveling salesmen, most of whom were, prior to the issuance of the complaint, independent entrepreneurs and not employees at all.

Complaint counsel further claim that this reduction of competition has been accomplished with the assistance of hotels and merchandise marts with whom restrictive agreements were made and that respondents are not seeking to protect wages, hours, and working conditions of employees at all. Rather, claim complaint counsel, respondents have sought to use their bargaining attempts and their subsequent acceptance of some inside salesmen, who were clearly employees, to justify in some way the clearly illegal trade restraints. These restraints the independent contractor salesmen agreed to long prior to permitting employees to join. Thus, say complaint counsel, the aid afforded by District 65 after the filing of the complaint, is aid by a labor group to a nonlabor group and clearly within the exception spelled out in *Allen Bradley*⁸⁸ and *Hutcheson*.⁸⁹ There is no labor dispute nor labor group here, simply rules by a federated association binding on its members to prevent competition among them and to blacklist manufacturers who fail to acquiesce in their desires.

In our opinion respondent NAWCAS, in this case, is in much the same position as a labor organization bargaining with its own employees. So far as that activity is concerned, a union is treated as any other employer.⁹⁰ So here when respondent NAWCAS attempts to use the commercial activity engaged in by its affiliates, that is, the organization and operation of trade shows, which are primarily commercial in their nature; then, so far as that commercial activity is concerned, respondent NAWCAS is in precisely the same position as

⁸⁸ *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945).

⁸⁹ *United States v. Hutcheson*, 312 U.S. 219 (1941).

⁹⁰ *Office Employees v. Labor Board*, 353 U.S. 313 (1957).

any trade association and it may not use the threat of withdrawal of a commercial advantage, which a manufacturer obtains from having his line exhibited in such shows, no matter how desirable may be the goal that it seeks to accomplish.⁹¹

Yet, respondent NAWCAS may properly regulate its members now and might in the past have taken into membership independent contractors, if such independent contractors had been economically interrelated to employees, so that the gains that the employees obtained for themselves would be lost through the competition of the independent contractor group. That has not occurred in this particular setting because there has been no pattern of agreements with respect to the wages, hours, or even the working conditions of the inside-salesmen employees so that there are no economic interests on their part which require protection through the regulation of independent contractor traveling salesmen. Moreover, there is doubt that such employees are economically interrelated. There is only one area thus far shown where there may have been agreements between employers and employees that might have such an economic interrelation. That is, in cases where the traveling salesmen are paid on a salary basis, are paid their expenses, and are entirely subject to the control of the manufacturer for whom they are required to act as exclusive representatives. There has been no proof that this relationship has actually existed; and even the shift from commission to salary was late in coming. In such circumstances, these employees would have had an interest in having a written contract and guarantees, as heretofore described, and a definite termination clause. Such an interest might have been undermined unless the independent contractor traveling salesmen were also similarly protected. It would not matter that the changes in the industry that allegedly created this economic interrelationship did not occur until after this proceeding was commenced.⁹²

However, careful scrutiny of the facts found demonstrates that in reality a different set of circumstances existed. Shortly after its inception all NAWCAS affiliates that did not run trade shows withdrew. These were the affiliates who had resident salesmen. After that time there was no convincing proof that there were any employees at all who were members of NAWCAS and its affiliates. NAWCAS keeps no records differentiating, among its salesmen members, between employees and independent contractors. In fact, the activities

⁹¹ *Fashion Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

⁹² See *Arrow-Hart & Hegeman Electrical Co. v. Federal Trade Commission*, 65 F. 2d 336 (2 Cir. 1933), *rev'd*. 291 U.S. 587.

of the traveling salesmen no matter how compensated are those of independent contractors under common law principles.⁹³ So, during the time NAWCAS first circulated the uncooperative manufacturers lists, thus creating a boycott of such manufacturers, NAWCAS was not a labor organization. Also, during the time NAWCAS imposed the requirements for written contracts on the NAWCAS standard form or its equivalent (for new members and for old members undertaking to represent new lines) as a prerequisite to exhibiting the line of any manufacturer, which was another form of boycott, NAWCAS was not a labor organization. When very much later NAWCAS took in the resident salesmen and affiliated with a recognized labor organization it was in effect utilizing the labor format to perpetuate the pre-existing series of restraints to which independent contractors had agreed. Thus, it is the very reverse of the situation in which a labor union is imposing restraints on independent contractors to protect the economic interests of its employee members who have established working conditions that would otherwise be undermined. Here, the conditions are illegal ones maintained by the independent contractors in combination. The reasoning inherent in the *Aetna, Oliver*,⁹⁴ and *Carroll*⁹⁵ cases is thus inapplicable.

Moreover, NAWCAS and its affiliates have sought and obtained assistance from their own manufacturer members and also from the merchandise marts and hotels in enforcing their restrictive practices, so the case appears to be squarely within the exceptions enunciated by the Supreme Court in the *Hutcheson* and *Allen Bradley* cases⁹⁶ as well as completely outside the area of legitimate union activity and within the area of business activity.⁹⁷ Hence the hearing examiner is of the opinion that the Federal Trade Commission possesses jurisdiction to regulate the activities of NAWCAS and of the other respondents insofar as they are utilizing a commercial activity to attain noncompetitive results. Yet, the Federal Trade Commission has no jurisdiction to attempt to regulate respondents' activities

⁹³ See Appendix B [p. 1082 herein] *Labor Board v. United Insurance Co. of America et al.*, 36 L.W. 4218 (1968).

⁹⁴ *Aetna Freight Lines v. Clayton*, 228 F. 2d 384 (2 Cir. 1955); *Teamsters Union v. Oliver*, 358 U.S. 283 (1959). See also *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91 (1940).

⁹⁵ *Carroll v. American Federation of Musicians of U.S. & Can.*, 372 F. 2d 155 (2 Cir. 1967). Decision pending in Supreme Court, argued March 4, 1968.

⁹⁶ *United States v. Hutcheson*, 312 U.S. 219 (1941); *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945); see also *United States v. Fish Smokers Trade Council*, 183 F. Supp. 227 (S.D.N.Y. 1960).

⁹⁷ *Columbia River Co. v. Hinton*, 315 U.S. 143 (1942); *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602 (U.S.D.C.E.D. La. May 22, 1958); see *Meat Drivers v. United States*, 371 U.S. 94 (1962); *Mine Workers v. Pennington*, 381 U.S. 657 (1965).

that deal with the settlement of grievances and the securing of fringe benefits, wages, hours, or working conditions for employees who are NAWCAS' members since these are legitimate activities of a labor organization.

We now turn to the order. On the basis of the foregoing reasons any order that is issued must carefully distinguish between respondents' activities in the operation of the commercially-oriented trade shows and their activities in the labor field. Since NAWCAS has improperly utilized the commercial end of its affiliates' operation to force manufacturers, by blacklists or threats of blacklists, to acquiesce in its demands, it must be prevented from doing so in the future.

A first reaction is that NAWCAS and its affiliates should have their commercial activities completely severed from NAWCAS' activities as a labor organization. This would entail the issuance of an order requiring NAWCAS and its affiliates to cease and desist from operating trade shows.⁹⁸ Such an order would effectively prevent respondents from utilizing the important weapon of exclusion from trade shows. This the evidence demonstrates even the largest manufacturers fear.

The second reaction is that adoption of such a remedy might have the effect of completely destroying NAWCAS and its affiliated organizations. It would prevent NAWCAS from affording information concerning new store openings and recommending and conducting seminars with respect to salesmanship. So long as these activities are not in furtherance of a conspiracy, they might tend to increase rather than decrease competition. Thus they should not be prevented in the public interest.

The order is also circumscribed by statutory language that prevents the issuance of injunctions against certain specified activities.⁹⁹ In these circumstances, it seems desirable to afford the respondents an opportunity either to completely cease to maintain all connection with trade-show activities or to undertake as a condition for continuation of such shows adequate restrictions to prevent the continuation of unlawful practices.

A final question about the order is its application to respondents Robert Leipzig, William H. Miller, and Marshall J. Mantler in their individual capacities. Clearly all of them were implicated in the illegal activities but if the order is entered against respondents

⁹⁸ See *Federal Trade Commission v. Eastman Kodak Co., et al.*, 274 U.S. 619 (1927); *Federal Trade Commission v. Dean Foods*, 384 U.S. 597, 606 fn. 4 (1966).

⁹⁹ See 29 U.S.C. § 104; *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945).

Leipzig and Miller as officers and directors and as members of NAWCAS and in their representative capacity that should be adequate as far as those two respondents are concerned. Because NAWCAS is a well-established organization and there is no indication that it will be dissolved and another organization formed, an order against the impermanent salesmen officers, in their individual capacity, is not deemed necessary.

To the contrary, an order should be entered against respondent Mantler in his individual capacity. He is a permanent employee of NAWCAS and of an affiliate, and he has exhibited a great deal of initiative in carrying on the day-to-day operations of the combination continuously from 1948 to date.

We pass now to the conclusions.

IV. CONCLUSIONS

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

2. The number of individual members and the number of affiliated associations of NAWCAS are each so large a group that it would be impracticable to join all of them. The members of the affiliated organizations running trade shows and such affiliated organizations were each properly named as members of a class, and the representation of the named respondents was adequate and not antagonistic to the members of each of the classes.

3. Respondents NAWCAS; Marshall J. Mantler (individually and as executive director), Robert Leipzig and William H. Miller (as representatives of all the individual members of NAWCAS who also belong to affiliates' operating shows), and Style Exhibitors, Inc. (individually and as representative of all affiliate members of NAWCAS operating trade shows), have by means of agreements and understandings, combined and conspired between and among themselves, and with others, in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. §§ 41-45).

4. The agreements, understandings, and combinations that we have found respondents entered into between and among themselves and with others are unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

5. It is in the public interest to eliminate the acts and practices set forth in the complaint and in the findings herein and engaged in by respondents.

6. Respondent NAWCAS is a trade association in connection

with its involvement in the trade show activities carried on by its affiliates. Respondent NAWCAS is also a labor organization in connection with its representation of employee members within the meaning of the Norris-LaGuardia Act (29 U.S.C. § 101); the National Labor Relations Act (29 U.S.C. § 151); and the Clayton Act (15 U.S.C. § 17).

7. The activities complained of are in restraint of trade and are carried out in connection with the commercial operations of trade shows. A labor union carrying on commercial activity is bound by the requirements of the Federal Trade Commission Act.

8. The alleged activities complained of are activities carried out by respondent NAWCAS and its affiliates in the commercial interest of their members; respondents have acted in combination with non-labor groups in two respects—certain of NAWCAS members who act with it are representatives of management of manufacturers, and certain other members are self-employed independent contractors who are themselves employers. Agreements with merchandise marts and with hotels were made by affiliates in aid of NAWCAS' operations.

9. Many resident-salesmen members of NAWCAS are "employees" within the meaning of the National Labor Relations Act (29 U.S.C. § 151).

10. Traveling-salesmen members of NAWCAS are not "employees" within the meaning of the National Labor Relations Act (29 U.S.C. § 151), but are independent contractors, specifically excluded. Respondents have not shown that any traveling salesmen were employees.

11. A definition of a "labor organization" is contained in Section 2(5) of the National Labor Relations Act, as amended, and reads:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (20 U.S.C.A. § 152(5).)

12. The National Labor Relations Board (NLRB) does not have exclusive primary jurisdiction over deciding whether an organization is a labor organization.

13. NLRB has exercised jurisdiction with regard to whether NAWCAS is a labor organization for the purpose of representing employees of some 31 manufacturers. In a decision headed in pertinent part "... INTERIM RESOLUTION OF FACTS AND APPLICABLE LEGAL

PRECEDENTS" (on the status of NAWCAS as a labor organization) the regional director for the second region of the NLRB, on December 13, 1967, found preliminary at least, that NAWCAS is a labor organization within the language of the Act quoted hereinbefore.

14. This Commission is not bound by the ruling of the regional director in such proceeding because an entirely different question is presented here, *i.e.*, whether NAWCAS is engaged in illegal commercial or entrepreneurial activity.

15. By action of District 65 in January 1968, NAWCAS has become affiliated with a recognized labor organization.

16. It is not material whether or not NAWCAS affiliated with District 65 in an attempt to avoid the jurisdiction of the Federal Trade Commission, because the purpose of the Commission is to correct rather than punish and because the facts that exist in this case as of the date of the order to be issued are controlling on the Commission's power to act, not the facts as of the date of the issuance of the complaint.

17. The Federal Trade Commission Act is one of the "antitrust laws" as those words are used in 15 U.S.C.A § 17 and is, of course, a "law of the United States" as those words are used in 29 U.S.C.A. § 52.

18. The individual respondents Robert Leipzig and William H. Miller, have been responsible in part for the direction and control of NAWCAS as officers of NAWCAS or members of its Executive Advisory Council, Respondents Leipzig and Miller are fairly representative of the individual members of NAWCAS who also belong to affiliate organizations operating trade shows as a class.

19. Respondent Mantler, at the direction or with the subsequent approval of the controlling bodies of respondent NAWCAS, has engaged in activities in furtherance of illegal objectives of NAWCAS and its affiliates.

20. Respondent Style Exhibitors, Inc. (Exhibitors), is an affiliate of respondent NAWCAS and is fairly representative of the NAWCAS local affiliates operating trade shows as a class.

21. Respondents NAWCAS, Exhibitors, and Mantler are engaged in the operation of or assisting in the operation of trade shows that are instrumentalities of trade and commerce in women's and children's apparel or accessories, as "commerce" is defined in the Federal Trade Commission Act.

22. Respondent Exhibitors competes with other NAWCAS affiliates. Exhibitors also is in substantial competition with other cor-

porations, firms, partnerships, and individuals engaged as instrumentalities in the sale and distribution of women's and children's apparel or accessories in "commerce" as that term is defined in the Federal Trade Commission Act.

23. Respondent William H. Miller, in his individual capacity as a salesman representing a manufacturer, offers for sale in commerce (as "commerce" is defined in the Federal Trade Commission Act) women's and children's apparel or accessories. He competes with other individual salesmen offering for sale women's sportswear of other manufacturers in the same territory covered by respondent Miller. As an individual he is an instrumentality for the sale of such merchandise in commerce.

24. Respondent Robert Leipzig in his individual capacity offers for sale in commerce (as "commerce" is defined in the Federal Trade Commission Act) women's and children's apparel or accessories. He competes with other persons who offer for sale the goods of other manufacturers on a so-called "executive sales" level. As an individual, he is an instrumentality for the sale of merchandise in commerce.

25. Respondents Marshall J. Mantler, NAWCAS, and Exhibitors are not engaged in the manufacture or sale of women's and children's apparel or accessories but are engaged in the operation of facilities through which such sales are made in commerce.

26. Respondents Robert Leipzig and William H. Miller are not personally engaged in the manufacture of but are instrumentalities for the distribution of women's and children's apparel or accessories.

27. Respondents Robert Leipzig and William H. Miller are engaged in offering for sale women's and children's apparel or accessories. They take orders therefor that are subject to acceptance or rejection by the manufacturers by whom each of said respondents is employed.

28. All respondents have combined and conspired, and have united in and pursued, a planned common course of action of adopting, placing in effect, and carrying out a plan, scheme, or policy between and among themselves and others including hotels, merchandise marts, and manufacturers, to hinder, frustrate, restrain, suppress, and eliminate competition in the offering for sale, distribution, and sale of women's and children's apparel or accessories in commerce.

29. All respondents in combination and conspiracy with others, by the adoption of rules and regulations, customs, and practices against "line piracy," have tampered with the prices of services rendered by salesmen by preventing competition for the rate of commissions to be paid for such services.

30. It is unnecessary to issue an order against respondents Robert Leipzig and William H. Miller in their individual capacities. It is adequate that they be ordered to cease and desist as officers, directors, and as representatives of members of NAWCAS.

31. The following order should be issued:

ORDER

I

It is ordered, That respondents National Association of Women's and Children's Apparel Salesmen, Inc. (hereinafter referred to as NAWCAS), a corporation, its officers, representatives, agents, and members of its board of governors and of its Executive Advisory Council; the members of said NAWCAS and their agents, representatives, and employees; Marshall J. Mantler, individually and as executive director of NAWCAS; Robert Leipzig and William H. Miller, as officers, directors, and as representatives of the entire membership of NAWCAS who belong to affiliate members that operate trade shows; Style Exhibitors, Inc. (hereinafter referred to as Exhibitors), a corporation, individually and as representative of all the affiliated members of NAWCAS that operate trade shows—all of the foregoing—directly or indirectly, individually and as representative of all members of NAWCAS or as members, officers, or directors of other respondents, or through any corporate or other device, in connection with the promotion, offering for sale, sale or distribution of women's and children's apparel or accessories in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from entering into, cooperating in, carrying out, or continuing the operation of any trade show organized for the exhibition and offer for sale of women's and children's apparel or accessories, or from assisting in such operation, or from attending any such trade show unless and until the bylaws, rules and regulations, and practices of NAWCAS and of each of its affiliated organizations operating trade shows be amended to prevent, and such respondents shall take effective steps to prevent, any respondent or any member of a respondent from:

1. Refusing or threatening to refuse to promote, display, offer to sell, distribute, or sell at any trade show women's and children's apparel or accessories, supplied by any manufacturer who did not give consideration to or did not comply with any demand that NAWCAS or any of its affiliated members made, suggested, or urged upon said manufacturer on behalf of one or more of their members.

2. Prohibiting or forbidding a manufacturer from having his merchandise displayed, exhibited, sold, or offered for sale by a member of any trade show or any affiliate or authorized NAWCAS group.

3. Restricting, regulating, or limiting any member in the selection of any merchandise that said member may wish to display, offer for sale, or sell at any trade show or exhibition.

4. Inducing or coercing any manufacturer of women's and children's apparel or accessories to give consideration to or comply with any demand, term, or condition that NAWCAS or any of its affiliated members made, suggested, or urged upon said manufacturer on behalf of one or more of their members.

5. Preparing, printing, publishing, or otherwise communicating by any methods or means any "uncooperative manufacturers list," or any name of any manufacturer, if the effect thereof may be to discourage or prevent the promotion, display, offering for sale, or sale of the merchandise of any such manufacturer by any member of NAWCAS.

6. Prohibiting or forbidding any member of NAWCAS from soliciting the representation of any line of merchandise produced by any manufacturer.

7. Prohibiting or forbidding any member of NAWCAS from representing any line of merchandise produced by any manufacturer because said member replaced another member of NAWCAS as a representative of said manufacturer.

8. Prohibiting or forbidding the merchandise of any manufacturer from being promoted or displayed or offered for sale, distribution, or sale by any member of NAWCAS because said member replaced another member as a representative of said manufacturer.

9. Forbidding or prohibiting any member of NAWCAS from showing any merchandise of any manufacturer at any trade show organized by any affiliate or other NAWCAS group unless said member enters into and obtains a contract from the manufacturer he represents containing terms or conditions established by and acceptable to respondents.

10. Restricting or limiting any affiliate or NAWCAS group from accepting as members any person who transfers from another affiliate or otherwise is eligible or qualified to sell merchandise of any manufacturer.

11. Requiring any affiliate or other NAWCAS group to agree with any other affiliate on dates when or places where merchandise may be displayed or exhibited, offered for sale, or sold,

except that nothing shall prevent affiliates from continuing to utilize the dates at which such affiliate customarily held its shows.

12. Denying or granting courtesy or provisional showing of merchandise to any manufacturer unless said manufacturer is first cleared by NAWCAS or one of its affiliates.

13. Prohibiting or forbidding any merchandise of any manufacturer who may be represented by a member of NAWCAS from being promoted, displayed, exhibited, offered for sale, or sold at any place or any time by said manufacturer or any other representative designated by said manufacturer.

14. Prohibiting, restricting, or limiting any person or firm engaged in the offering for sale, distribution, and sale of women's and children's apparel or accessories from obtaining any room, rooms, or office space at any time in any facility where any NAWCAS affiliate group conducts any trade show.

15. Refusing to accept for membership in NAWCAS or any of its affiliates anyone who is eligible or qualified for membership.

16. Continuing to retain any provision in its constitution, bylaws, code of ethics, or rules and regulations which contravenes or conflicts in any way with any of the above prohibitions.

17. Becoming or remaining a member unless served with a copy of this order within sixty (60) days of the effective date of this order in the case of present members and on making application in the case of new members.

II

It is further ordered, That respondent NAWCAS shall cease and desist from hereafter offering assistance of any nature and description or from remaining affiliated with any member operating a trade show unless it shall:

1. Within ten (10) days from the effective date of this order mail to or otherwise cause to be served on each of its members a conformed copy of this order.

2. Within sixty (60) days from the effective date of this order:

A. Withdraw from all members all lists of names of all manufacturers who have been deemed at any time to be uncooperative, and file with the Secretary of the Federal Trade Commisison an affidavit within thirty (30) days thereafter reporting the destruction of all such lists of names.

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B. Notify all manufacturers who have been deemed in the past to be uncooperative that their merchandise is no longer prohibited from being shown by members at trade shows of respondents.

C. Make restitution to members and ex-members who have been fined by respondents since May 30, 1964, for violation of any rule, regulation, or policy relating to the time, place, or method by which the member or ex-member sold his merchandise.

D. Offer membership to any ex-member who was expelled or suspended since May 30, 1964, for the violation of any rule, regulation, or policy relating to the time, place, or method by which the ex-member sold his merchandise.

3. At the next midyear meeting of the Executive Advisory Council of NAWCAS, following the effective date of this order, recommend the adoption of a revision of the bylaws to incorporate each of the prohibitions contained in subparagraphs 1-17 of part I hereof.

4. At the next annual convention of NAWCAS, following the effective date of this order, approve the revision of the bylaws referred to in subparagraph 3 hereof and inaugurate a program for the effective enforcement of such amended provisions.

5. Continue to enforce the prohibitions contained in each of subparagraphs 1-17 of part I hereof.

III

It is further ordered, That respondent Exhibitors and the other affiliate members of respondent NAWCAS shall cease and desist from operating any trade show unless each shall:

1. Notify all manufacturers who have been deemed in the past to be uncooperative that their merchandise is no longer prohibited from being shown by members at trade shows of respondents.

2. Withdraw from and cancel in any agreement, lease, or contract with any merchandise mart or other facility all provisions or restriction that prevent or limit the time, place, or method by which any other lessee determines to offer for sale and sell his merchandise.

3. Make restitution of the amount of their fines to members and ex-members who have been fined by respondents since May 30, 1964, for the violation of any rule, regulation, or policy relating to the time, place, or method by which the member or ex-member sold his merchandise.

4. Offer membership to any ex-member who was expelled or suspended since May 30, 1964, for the violation of any rule, regulation, or policy relating to the time, place, or method by which the ex-member sold his merchandise.

5. At the next meeting of its board of directors, or other governing body, following the effective date of this order, which meeting shall not be delayed more than three months, call a meeting of its members within 60 days thereafter and recommend to such members the adoption of a revision of its bylaws to incorporate each of the prohibitions contained in subparagraphs 1-17 of part I hereof.

6. At the general meeting of its members called pursuant to subparagraph 5 hereof to adopt the revision of its bylaws referred to in said subparagraph 5 hereof and inaugurate a program for the effective enforcement of such amended provisions.

7. Continue thereafter to enforce the prohibitions contained in each of subparagraphs 1-17 of part I hereof.

IV

It is further ordered, That respondents Marshall J. Mantler, individually and as executive director of NAWCAS, and Robert Leipzig and William H. Miller, as officers, and as representatives of all members of NAWCAS, and all officers, and members of NAWCAS, shall cease and desist from in any way assisting in or attending any trade show operated by any affiliate member of NAWCAS unless and until respondent NAWCAS and each of its members shall take the action required by Parts I, II, and III hereof.

V

It is further ordered. That nothing contained in this order shall prevent respondent NAWCAS, acting alone in its capacity as a labor organization, from representing its members who are employees in collective bargaining with the employers of such employee members, and from taking such other lawful action in behalf of such employee members as, for example, that is authorized by the Constitution of the United States, the Norris-LaGuardia Act (29 U.S.C. § 104), or any other law of the United States. Nor shall this order prevent affiliated members from retaining, adopting, and enforcing reasonable regulations for the registration and conduct of members and buyers at trade shows so long as such regulations are not misused as devices to unreasonably restrain trade.

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APPENDIX A
SIGNIFICANT BYLAW PROVISIONS OF AFFILIATES LISTED

Conducts shows	Limits lines	Limits members to traveling salesmen	Specific approval of NAWCAS recommendations			NAWCAS Ethics code
			NAWCAS membership required	Uncooperative list	Southwest resolution	Contracts required
Bluefield Buyers Mart, Bluefield, W. Va. (CX 930 A-1)	×	×	×	-----	-----	×
Florida Fashion Mart, Inc., Tampa, Fla. (CX 940 A-1)	×	×	×	×	-----	×
Intermountain Travelers' Assn., Denver, Colo. (CX 923)	×	×	×	×	×	
Metropolitan Juvenile Style Mart, Inc., Manhattan, New York, N.Y. (CX 931 A-1)	×	×	×	×	×	
Mid-Atlantic Fashion Exhibitors, Inc., Philadelphia, Pa. (CX 938 A-P)	×	×	×	×	×	×
Midwest Fashion Exhibitors, Inc., Chicago, Ill. (CX 930 A-P)	×	×	×			
New York Sportswear Association, Inc., Manhattan, New York, N.Y. (CX 933 A-O)	×	×				
New York State Infants and Children's Wear Assn. Inc., New York, N.Y. (CX 934 A-J)	×	×				
Pacific Coast Travelers, Inc., Los Angeles, Cal. (CX 968-798, 804)	×	×	×	×	×	×
Pacific Northwest Apparel Assn., Seattle, Wash. (CX 925)	×	×	×	×	-----	×
Philadelphia, Baltimore & Washington, D.C. Childrens Wear Show, Inc. (CX 935)	×	×	×	×	×	×
Portland Apparel Association, Portland, Ore. (CX 928 A-1)	×	×	×	×	×	×
Rose City Apparel Assn., Portland, Ore. (CX 927 A-R)	×	×	×	×	×	×
Southern Apparel Exhibitors, Miami Beach, Fla. (CX 941 A-R)	×	×	×			
Southern Mart of Infants and Children's Wear Exhibitors, Inc., Atlanta, Ga. (CX 939 A-X)	×	×	×			
Southern Mart of Infants & Children's Wear of the Carolinas, Inc. (Virginia N. & S. Car.), Charlotte, N.C. (CX 937 A-N)	×	×	×			
Southeastern Travelers Exhibitors Inc., Atlanta, Ga. (CX 1003-4)	×	×	×	×	×	×
Style Exhibitors, Inc. (Exhibitors), Chicago, Ill. (CX 634, 643-646, 647, 652-654, 659; RX 3)	×	×	×	-----	-----	×

¹ Provision in CX 634, Earlier Constitution & Bylaws; not in current edition (CX 3).

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APPENDIX A (continued)

	Carolina resolution	Limitation on members	Nonconflicting show dates	Prohibits unauthorized shows	Line piracy prohibition	Must attend shows	Other indication of cooperation with NAWCAS
Bluefield Buyers Mart, Bluefield, W. Va., (CX 936 A-J)				X			
Florida Fashion Mart, Inc., Tampa, Fla. (CX 940 A-L)	X	X	X	X			
Intermountain Travelers' Assn., Denver, Colo. (CX 923)				X	X		
Metropolitan Juvenile Style Mart, Inc., Manhattan, New York, N.Y. (CX 931 A-J)		X		X		X	X
Mid-Atlantic Fashion Exhibitors, Inc., Philadelphia, Pa. (CX 938 A-P)							X
Midwest Fashion Exhibitors, Inc., Chicago, Ill. (CX 930 A-P)						X	
New York Sportswear Association, Inc., Manhattan, New York, N.Y. (CX 933 A-O)		X		X			X
New York State Infants and Children's Wear Assn. Inc., New York, N.Y. (CX 934 A-I)		X		X			X
Pacific Coast Travelers, Inc., Los Angeles, Cal. (CX 669, 769, 804)		X			X		
Pacific Northwest Apparel Assn., Seattle, Wash. (CX 925)				X	X	X	
Philadelphia, Baltimore & Washington, D.C. Children's Wear Show, Inc. (CX 935)		X		X			
Portland Apparel Association, Portland, Ore. (CX 928 A-I)				X	X		
Rose City Apparel Assn., Portland, Ore. (CX 927 A-R)				X	X	X	
Southern Apparel Exhibitors, Miami Beach, Fla. (CX 941 A-R)	X	X	X	X			X
Southern Mart of Infants and Children's Wear Exhibitors, Inc., Atlanta, Ga. (CX 939 A-X)						X	X
Southern Mart of Infants & Children's Wear of the Carolinas, Inc. (Virginia, N & S Car.), Charlotte, N.C. (CX 937 A-N)				X		X	
Southeastern Travelers Exhibitors Inc., Atlanta, Ga. (CX 1003-4)				X			
Style Exhibitors, Inc. (Exhibitors) Chicago, Ill. (CX 634, 643-646, 647, 652-654, 680; RX 9)			X	X	X		
Temple Square Travelers Assn., Salt Lake City, Utah, (CX 924) No longer an affiliate.	X			X	X	X	
Washington Market Association, Inc., Seattle, Wash. (CX 926)				X	X	X	
West Coast Salesmen's Association, San Francisco, Cal. (CX 942, 943)				X	X		X

APPENDIX A (continued)

Western Children's Brand Wagons, San Francisco, Cal. (CX 920 A-J)	×	×	×	×
Women's Apparel Club of New York State Inc., New York, N.Y. (CX 992)	×	×	×	×
Carolina-Virginia Fashion Exhibitors, Charlotte, N.C. (CX 1448)	×	×	×	×
Northwest Salesmen's Association, Minneapolis, Minn. (CX 922 A-S)	×	×	×	×
Pittsburgh Children's Apparel Caravan, Pitts- burgh, Pa. (RX 4)	×	×	×	×
Tri-State Commercial Travelers Assoc., Pitts- burgh, Pa. (RX 5)	×	×	×	×

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APPENDIX B

ANALYSIS OF TRAVELING SALESMEN'S RELATIONSHIP TO MANUFACTURERS

1. *NAWCAS Standard Contract Requirements*

Under the requirements laid down by NAWCAS all salesmen were required by January 1, 1967, to have a written contract on NAWCAS Standard Contract form, or its equivalent. As a practical matter, this requirement has not been enforced. But, NAWCAS claims to have a total of over 15,000 contracts on file (approved and not approved) so that its standard form is of some significance insofar as it specifies the relationship between the salesman and the manufacturer. This form has been changed from time to time (CXs 616-618). It is not possible from the survey data in evidence (RX 174) to determine how many contracts on each particular form are outstanding at the present time. We accordingly take the latest form available (CX 618-A-B) as illustrating the present requirements of NAWCAS. Under this form:

The period of employment is fixed in the contract at one year but the contract is terminable by either salesman or manufacturer by a notice preceding the next selling season by sixty days and the contract is automatically renewed (Par. 1, 5(a)-(b)).

The rate of commission is a matter to be agreed upon between each salesman and the manufacturer (Par. 2(a)).

The territory is also to be agreed upon and once agreed upon:

The Salesman has the exclusive right and authority within the territory herein described, to determine, select or otherwise designate times and places including organized apparel shows or salesmen's group exhibits, where the line will be shown or exhibited. The Company further agrees that if the Salesman belongs to any organized apparel shows or salesmen's groups within said territory that *the Company's line will be exhibited only at such shows or with such groups*; provided, that this provision shall not require a Company which has its principal place of business within said territory and maintains a show room on its premises to close such show room. (Emphasis supplied.)

(Note earlier contracts did not contain this clause (Par. 2(a)). In addition, the company agrees to refer to the salesman all inquiries (Par. 2(d)) and to give the salesman credit for sales made in his territory or received from customers therein (Par. 2(e)).

Right to reject orders is reserved to the Company,¹ and commissions are not due except on orders shipped by the Company and accepted by the purchaser; but the Company guarantees to pay commissions

¹ This is the term used for the manufacturer in the contract.

on at least 85 percent of accepted orders (Par. 2(f)), and an order will be deemed accepted unless rejected within the number of days agreed upon between the parties (Par. 2(g)).

A drawing account is provided for in an amount to be agreed upon to cover expenses and to be deducted from commissions earned. If the contract is terminated at a time when the drawing account exceeds the commissions, the salesman is not liable for the difference (Par. 3).

No reduction in commissions may be made on nationally advertised merchandise groups and items, nor may advertising allowances be charged against the salesman (Par. 2(b)).

The salesman agrees to work the territory diligently (Par. 4(a)) and not to make representations on behalf of the Company without its prior written consent (Par. 2(c)).

The Company agrees to furnish samples, sample bags, hangers, cases, and other paraphernalia which the salesman agrees to return unless stolen or damaged without negligence (Par. 4(b)), to give the salesman invoices on the 15th of each month covering the previous month and to pay commissions on sales even though shipment occurs after termination of the contract (Par. 6(b)).

Additional lines may be carried by the salesman if they are not conflicting lines and if the Company has full knowledge of them (Par. 7).

The salesman is considered an employee by Company agreement for social security contributions and for other Acts similar to Social Security (Par. 8).

The writing constitutes entire agreement (Par. 9).

Disputes are to be arbitrated (Par. 10).

2. Other Proof

Testimony was received from a number of witnesses as to the practical relations between manufacturer and salesman.

Practices differed to a degree among companies and among salesmen. We list here only responsibilities that appear to be established by a preponderance of the proof:

a. *The Manufacturer.*

(1) Sets the prices at which each style in a line is to be sold (RPF 62(b));

(2) Determines to which retailers credit is to be extended and the terms of such credit, and bears credit losses (except where the accounts are factored) (RPF 62(c), (o));

(3) Bears the expense of goods lost in transit, damaged goods, or goods of improper cut (RPF 62 (e));

- (4) Establishes the return policy on merchandise (RPF 62(f));
- (5) Determines whether to accept or reject orders (RPF 62(g), CCPF p. 22);
- (6) Furnishes samples to the salesman (RPF 62(h), CCPF p. 24);
- (7) Usually retains responsibility for collection of accounts receivable (RPF 62(j), CCPF p. 25) and sets the discount policy (RPF 62(t), CCPF p. 31);
- (8) Establishes availability of promotional or close-out merchandise (RPF 62(l), CCPF p. 26);
- (9) Issues commission statements to the traveling salesman (RPF 62(m), CCPF p. 26);
- (10) Determines the nature, extent, and style of the line and which styles to discontinue (RPF 62(n), CCPF p. 26);
- (11) Establishes the national advertising policy (RPF 62(q), CCPF p. 28);
- (12) Sometimes suggests that traveling salesman call upon particular accounts (RPF 62(r), CCPF p. 29);
- (13) Retains exclusive right to make representations, warranties, or commitments unless prior consent is given (RPF 62(v));
- (14) Retains same rights as salesman to terminate relationship unless there is a contract (see 1 hereof, "The Period of Employment,"; RPF 62 (v), CCPF p. 32);
- (15) Determines territory of salesman unless covered by contract (see 1 hereof, "The Territory," (RPF 62 (w)).

b. The Traveling Salesman.

- (1) Conducts the day to day representation of manufacturer's line in his territory (CX 618; Tr. 610, 607, 1131, 1239, 4211-12, 4556, 4620-31).
- (2) Determines what accounts to call on (Tr. 607, 646, 665, 835, 1014, 1239, 4630-31, compare Tr. 648, 4630).
- (3) Determines in what shows to exhibit the manufacturer's line subject to the rules of the affiliates involved (CX 618; Tr. 665, 835, 1007, 1131, 1304-05, 4602).
- (4) Maintains responsibility for care and return of samples or purchases and resells them at the season's end (CX 618; Tr. 612, 603, 679, 1004, 1203).
- (5) Pays expenses including travel, automobile maintenance and operation, gas and oil, salesroom rent, porter fees, hotel, lodging and meals, show fees, notification to customers, hire of assistants, and hire of models (Tr. 611, 604-05, 664-65, 834-35, 1089-90, 1001, 1013-14, 3805, 1262, 1269, 4175, 4233-34, 4245, 4212, 4556, 4606, 3933, 3913, 3908, 1558, compare RX 230; Tr. 1876-77).

(6) Determines what articles of merchandise are to be exhibited at shows (Tr. 610, 773, 1131, 4237-38, 4517).

(7) Determines what line or lines are to be exhibited when calling on customers (Tr. 610, 773, 834, 1131, 4651).

(8) Controls details of itinerary (Tr. 607, 1116, 1239-40, 1242-43, 4211-12, 4227-30; see Tr. 4533-34).

(9) Determines how to approach the customer (Tr. 607, 4651).

(10) Determines, subject to show rules (*e.g.*, Tr. 768, 835) that prescribed hours at shows what hours to work each day (Tr. 1013, 1116, 1239-40, 1242-43).

(11) Shares with the manufacturer the risk of the success or failure of a line through acceptance of a job on commission rather than on a salary basis (Tr. 1014, 795-96, 4612, see Tr. 1393, 4671). (Except to the extent of his drawing account and except in those cases where a salary and expenses are paid by some of the larger manufacturers (Tr. 1876-77). There is testimony that this type of representation is increasing (Tr. 4571-72), but no satisfactory basis for a statistical judgment (Tr. 4926).

(12) Determines whether or not to return to manufacturer's office for sales meetings (Tr. 659, 660, 753-54, 1103, 830-31, 4666) (except in cases in which compulsory attendance is required and the expense of returning to the main office is paid by the manufacturer (Tr. 609, 1006, 1207, 1247, 4629, see Tr. 4523).

(13) Determines, subject to the manufacturer's right to discontinue the relationship, at the conclusion of the contract, whether or not to carry additional nonconflicting lines (Tr. 4217, 4535-36, 1541, compare Tr. 605). (There is testimony that the tendency exists today toward single-line representation but no satisfactory statistical information appears to be available on the subject. The statistical data on contract approvals would indicate that the vast majority of contracts do not prohibit the salesman from carrying additional lines (RX 174)).

(14) Determines what emphasis should be placed on selling any particular line, if he carries lines for more than one manufacturer (Tr. 1131, see Tr. 4219-25, 4237-38, 4517).

(15) Determines, subject to the requirements of the territory and the seasonal lines to be carried, when to take a vacation (sometimes in consultation with the manufacturer (Tr. 4635-36, see Tr. 1131, 1239-40; contra Tr. 4630)).

(16) Determines the necessity for the use of models or assistants at shows (Tr. 605, 825, 1395, 4647-49, 3905-06, 1549-50).

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(17) Selects the models or assistants to be used (Tr. 605, 825, 4647-48, 3905-06, 1549-50).

(18) Controls the conduct of all present in the sales booths or rooms at shows, subject to the rules and regulations of the affiliate involved (CX 634-B; Tr. 1395).

APPENDIX C

RESPONDENTS' FINDINGS APPROVED BUT NOT INCLUDED IN THIS INITIAL DECISION

Respondents' numbered proposed findings of fact (commencing at page 32 and ending at page 119) that may be taken to be a reasonably accurate, unargumentative reflection of the credible evidence received but that have been excluded as immaterial, repetitive, irrelevant, or unnecessarily detailed are as follows:

87-91	220
93-94	223
96-97	231—1st sentence only
104-110	232-235
114	238
115 except last sentence	242-243
117-118	248-251
120-139	252 correction CX 1263
142-143	253-254
146-164	257 correction 1964 instead of 1946,
166	1st line
168	258-284
171-172	287-288
175-177	290-291
179-182	(292-297 are not found because in-
184-185	complete or argumentative; entire
187-188	stipulations are in pleading files)
194-201	
202-206	298 if words "so" on 2nd line thru
207	"following" on 4th line are stricken
209	and "as follows" substituted
212-217	

OPINION OF THE COMMISSION

JULY 30, 1970

I

Respondents herein, a national association of women's and children's apparel salesmen, its local affiliates and certain individuals, are charged with a violation of Section 5 of the Federal Trade Commis-

sion Act by combining and conspiring to restrain trade in the sale of women's and children's apparel and accessories. The hearing examiner generally found the allegations of the complaint sustained and the case is now before us on respondents' appeal from that decision.

Respondents have raised a number of questions for consideration on review. The main thrust of the appeal is directed to the issue of whether the challenged practices of NAWCAS and its fellow respondents are within the antitrust exemption for labor organizations; the remaining questions bear on the propriety of the examiner's order entered below. Respondents do not challenge the examiner's findings that they agreed and combined to restrict the times, places and conditions under which clothing manufacturers may show and sell their merchandise, and that the NAWCAS affiliates and their individual members, as well as individual salesmen, have been similarly restricted. Nor do respondents challenge the conclusion that these practices standing alone constitute antitrust violations in contravention of the Federal Trade Commission Act.¹ They contend, however, that their activities as those of a labor organization are within the scope of labor's antitrust exemption and therefore beyond the Commission's jurisdiction.

II

Before turning to the threshold issue, the applicability of the antitrust exemption for labor organizations, a brief outline of the industry background and the nature of the function of respondents is in order. It should be noted at this point that although we differ with the examiner's legal conclusions on the relevance of the NLRB proceeding involving NAWCAS, the Commission adopts his factual findings, which are based upon an unusually thorough and comprehensive review of the record.

The women's and children's apparel industry is comprised of some 10,000 manufacturers of women's and children's apparel and accessories in the United States. The focus of the industry is centered in the New York City area, but the industry is also growing in California and there are some manufacturers in the Midwest. Approximately five firms have annual gross sales in excess of 100 million dollars. Ninety percent of the manufacturers in this field, however, have gross annual sales of one million dollars or less. Despite its fragmented nature, respondents assert there is a trend toward con-

¹ Respondents' counsel, in oral argument before the hearing examiner, conceded that if NAWCAS were a trade association the practices established by the record would constitute a conspiracy in restraint of trade (tr. 5181).

centration in this industry, which has put salesmen at an economic disadvantage vis-a-vis the larger firms.

The industry has a number of sales options available to it. The manufacturers may sell direct in their own sales room or through so-called resident or inside salesmen usually compensated on a straight salary basis. In addition, goods are sold by traveling salesmen paid on, generally, a commission basis and who may represent one or more manufacturers. Customarily, traveling salesmen belong to one or more NAWCAS affiliates, which conduct the trade shows which are central to this proceeding. Other sales methods are available to the industry, but it is with these channels of distribution that this proceeding is concerned.

Respondent National Association of Women's and Children's Apparel Salesmen, Inc. (NAWCAS), is a corporation comprised primarily of wholesale clothing salesmen, affiliated organizations, and groups of salesmen. It was organized in 1945 and its membership varies from year to year, the latest data in the record showing between 12 to 13 thousand individual members and some 65 affiliated organizations. The bulk of NAWCAS' individual membership consists of traveling salesmen.

Most of the local NAWCAS affiliates, with the exception of those in the Manhattan region, are comprised of traveling salesmen in the women's and children's apparel field and are organized primarily for the purpose of putting on trade shows where merchandise is sold at wholesale to retail buyers. Typical of the respondent affiliates is Style Exhibitors, Inc. (Exhibitors), of Chicago, Illinois, which sponsors four trade shows a year, at which some 1500 to 2000 lines of merchandise are shown.² Its 900 members, who must be traveling salesmen, are also members of NAWCAS. Exhibitors institutes and enforces the rules and regulations governing its shows, including the rules for behavior at such shows and rules excluding its members from competing events and sales outlets. As already noted, it is respondents' operation of trade shows and restrictions on the participation and the manner of participation in these events which gave rise to this proceeding.

As the hearing examiner found, trade shows assist "the salesmen members in obtaining commissions, they assist the manufacturers in obtaining orders for merchandise, and they assist the retailers who attend them in finding competitive goods assembled at a single

² The examiner's finding that the NAWCAS-affiliated organizations that put on trade shows are a class and that respondent Exhibitors affords adequate representation to such class is not challenged on appeal.

point for their convenience" (I.D., p. 1032); moreover, the trade shows of the respondent affiliates are in commercial competition with the shows set up by the manufacturers and those of competing groups, a finding of the examiner with which we agree.

The crucial importance of NAWCAS and the trade shows of its affiliates for the women's and children's apparel industry is documented by respondents' own estimate that their seventy-odd markets with some 294 shows account for \$3.5 to \$4.5 billion dollars of annual ready-to-wear sales.³ Clearly the amount of trade affected is substantial.

NAWCAS, in addition to coordinating and supporting respondents' trade shows, engaged in a number of other activities also designed to further the economic well being of its individual members. Certain of these had a direct bearing on the restrictions inherent in the operations of respondents' trade shows challenged in this proceeding. As the examiner found, NAWCAS maintains a self-insured or contributory benefit organization, an arbitration procedure for handling the disputes of its members against manufacturers,⁴ and recommends a standard form of contract to be negotiated by its salesmen. As noted below, attempts to enforce the arbitration procedure and the standard contract program was tied into the operation of respondents' trade shows and led to the institution of certain of the restraints alleged illegal in the complaint by denying access to this channel of distribution to those manufacturers deemed uncooperative by NAWCAS, in the case of the arbitration procedure, or who refused to enter approved contracts.

III

It is respondents' trade shows which permitted them to fasten the challenged restraints on the wholesale sale of women's and children's apparel. Respondents' utilization of the so-called "uncooperative manufacturer" lists is, perhaps, the clearest illustration of the illegal combination. The record sustains the finding that respondents circulated among themselves lists of "uncooperative manufacturers" for the purpose of precluding them from using trade shows to promote and sell their merchandise.⁵ Apparel manufacturers and NAWCAS

³ CX 16-F.

⁴ CX 59, "The Arbitration Story."

⁵ Respondents had ceased formal circulation of lists of uncooperative manufacturers through the medium of the NAWCAS News in 1961, but they continued to circulate such lists until approximately 1963, when they became aware of the Federal Trade investigation in this proceeding. Moreover, NAWCAS' published rules and regulations continued to retain an uncooperative manufacturers clause.

members were further restricted in their participation in respondents' trade shows by the requirement that any new member or any member acquiring a new apparel line enter into the standard NAWCAS contract or a substantially similar agreement as a condition to participating in any trade show operated by a NAWCAS affiliate. This requirement, as the examiner found, effectively prohibited manufacturers and members without approved contracts from utilizing respondents' trade shows as a vehicle for distributing their goods. The policing mechanism to enforce this requirement, described in detail by the examiner, was systematically enforced and effective.

Manufacturers, in addition to the restrictions surrounding the NAWCAS contract program, were subjected to regulations designed to prevent them from engaging in "design piracy" (*i.e.*, copying their competitors' design) and restricted in the operation of their salesrooms when a NAWCAS trade show was operated in the same city. Moreover, NAWCAS and its affiliates, through the execution of master leases, in certain merchandise marts required such marts to operate in accordance with the wishes of the affiliate holding the lease, thus channeling the sale of the manufacturer's line through the affiliate's trade show.

Reinforcing these restrictions were restrictions on the affiliate members, preventing the expelled member of one affiliate from joining another until the cause of the expulsion had been removed, two years had passed from the date of suspension, or the cause of expulsion waived by the expelling affiliate. Certain affiliates also restricted the number of lines which a salesman could exhibit at trade shows. Affiliates which were required to enforce the uncooperative manufacturer's rule and NAWCAS' rules on contracts, were of necessity restricted in their own operations as the result of such combination in the number of lines which could be exhibited at their shows. In addition, as the examiner found, the affiliates were required to coordinate the dates of showing to prevent conflicts.

The same restrictions bearing on manufacturers and the respondents' affiliates bore even more heavily on the individual members. As the examiner noted:

. . . The individual members, indeed, bear the brunt because their livelihood is dependent, in part, upon their ability to show the lines of the manufacturers they represent at trade shows. . . . (I.D., p. 1047.)

In addition, the record documents a combination among respondents to restrain competition between individual salesmen by seeking to prevent one salesman from representing those lines already represented by another (line piracy) and by restrictive qualifications on

membership, which in turn may restrict the manufacturers' opportunity for sales. Moreover, some of the regulations were, as the examiner found, administered in an arbitrary and unreasonable manner, *e.g.*, one affiliate barred a prospective member because of his brother's alleged unethical activity. In another instance a salesman was fined because the manufacturer he represented kept a salesroom open, over which the salesman had no control.

IV

The examiner found that NAWCAS is a trade association in its involvement in trade show activities, but that the respondent is also a labor organization insofar as it represents employees within the meaning of the Norris-LaGuardia, National Labor Relations and Clayton Acts. He concluded that the restrictive practices challenged in this proceeding were carried out in connection with respondent's commercial operation of trade shows and thus within the scope of the Federal Trade Commission Act. He also found that these activities had been taken in concert with nonlabor groups.⁶ In reaching his decision the examiner concluded, in addition, that the National Labor Relations Board does not have exclusive primary jurisdiction in determining whether NAWCAS is a labor organization and that a prior decision by an NLRB regional director on this point⁷ is not relevant to this Agency's determination of whether respondents are engaged in illegal commercial entrepreneurial activity.

Throughout the proceeding respondents have consistently maintained that the Labor Board "has exclusive original jurisdiction to determine whether an organization is a 'labor organization' within the meaning of the National Labor Relations Act as amended . . . [and] that it is the duty of other tribunals to defer to the NLRB's determination that an organization is a 'labor organization' until and unless such determination has been authoritatively rejected by the courts or by the NLRB itself."⁸

⁶ *I.e.*, NAWCAS members who are representatives of management, members who are self-employed independent contractors who are themselves employers, as well as merchandise marts and hotels.

⁷ *Bamburn Fashions, Inc.*, Cas. No. 2-RC14631 et al., Dec. 13, 1967, a proceeding limited to the issue of whether NAWCAS is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act as amended.

⁸ Respondents' Appeal Brief, p. 7. Subsequently, respondents did oppose the introduction into this record of the Board's decision. That opposition was apparently grounded not on a change of heart on respondents' part that the Commission, as a general rule, should defer to the NLRB's decision on this point, but, rather, that the Board's decision is simply wrong in this instance. In this connection, respondents assert that they will seek to appeal the NLRB's ruling and that the evidence in the Labor Board proceeding is more limited than the data in this case relating to the status of traveling salesmen.

The Regional Director's decision that NAWCAS is a labor organization within the meaning of the National Labor Relations Act was appealed to the Labor Board. That agency, by order and decision of October 30, 1969, while not specifically reversing the Regional Director's finding that NAWCAS is a labor organization, held nevertheless that the respondent association is disqualified from acting as a labor organization under the laws entrusted to it for enforcement. Accordingly, it dismissed the joint petition for certification under the National Labor Relations Act. The Board's action has direct relevance to this proceeding for an organization found disqualified by the NLRB from acting as a labor organization cannot shelter behind labor's antitrust exemption. That result follows, since the applicability of the labor antitrust exemption is to be determined on the basis of a joint consideration of the antitrust and labor laws in order to harmonize the policies embodied therein.⁹ We agree with respondents that we should defer to the finding of the Board on the issue, since, after all, it is the national agency charged with the administration of federal labor law.¹⁰ To that extent we modify the initial decision before adopting it. We turn now to the Board's decision dispositive of this issue.

NAWCAS and District 65, Retail Wholesale and Department Store Union, AFL-CIO (District 65), filed a joint petition for certification by the NLRB under the National Labor Relations Act. The employers, in opposition to the joint petition, contended that NAWCAS is not qualified to act as a labor organization because:

(1) its primary function is the operation of a business in direct competition with the Employers, (2) high ranking officials of NAWCAS, who set major policies, are also representatives of management or employers in the industry in which NAWCAS seeks certification, (3) most members of NAWCAS are independent contractors, (4) NAWCAS uses coercive means to obtain and retain members, and (5) NAWCAS seeks certification to avoid prosecution by the Federal Trade Commission in a restraint of trade complaint proceeding. . . .¹¹

We reject these contentions. The finding of the Board that the respondent associations are dominated by traveling salesmen with the status of independent contractors is consistent with the record of this case, as the examiner's findings demonstrate. The Board's conclusion that NAWCAS is disqualified as a labor organization and that trade shows are a commercial enterprise in competition with manufacturers rests essentially on that finding. The fact that a different conclusion may or may not be justified as to the relationship of traveling salesmen to a few of the larger manufacturers, as respondents assert, does not vitiate the Board's decision on that score.

⁹ See *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 806 (1945).

¹⁰ Cf. *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 181 (1962).

¹¹ *Bambury Fashions, Inc.*, 179 NLRB No. 75 (Oct. 30, 1969), slip op., p. 2.

In reversing its regional director and determining that NAWCAS is disqualified from acting as a labor organization within the scope of the National Labor Relations Act, the Board made, essentially, two findings. First, the Board found that the traveling salesmen, constituting the great majority of affiliates holding shows, are independent contractors rather than employees; and, second, that the trade shows, insofar as they are operated for the benefit of such independent contractors, are in competition with the manufacturers.

In reaching this result the Board applied the common law, right of control test, which "turns essentially on whether the person for whom the services are performed retains the right to control the *manner* and *means* by which the result is to be accomplished, or controls *only* the result. If the *latter*, the status is that of an independent contractor. The resolution of this question depends on the facts of the case. No one factor is determinative."¹² In its determination that under the right of control test the majority of NAWCAS traveling salesmen should be held to be independent contractors, the Board relied primarily on the NAWCAS standard contract. Traveling salesmen, under the terms of that contract,¹³ the Board found, "are granted the right to control the means by which the manufacturer's line of apparel is sold within a defined territory, and the manufacturer retains the right to control only the result . . . Accordingly, we find that the traveling salesmen who participate in NAWCAS trade shows are independent contractors."¹⁴ With that determination, which is entirely consistent with the findings of the examiner below, we are in full agreement. It is these salesmen, as the Board found, who, through their elected delegates to NAWCAS, exercise substantial majority control over that respondent. Those salesmen who are employees, as the Board found, clearly have a minority voice in the affairs of NAWCAS.

It is true that not all individual traveling salesmen who are members of show-holding affiliates are under the precise form of the standard contract on which the Board relies (C- 618 A-B). Use of that form commenced in 1966, superseding prior forms, and, on occasion, contracts with differing provisions were negotiated with certain manufacturers and approved by NAWCAS. Nevertheless, the presumption is that the terms of the "standard" contract accurately reflect the status of the great majority of the traveling salesmen who are mem-

¹² *Bambury Fashions, Inc.*, *supra* note 11, at 8, n.11. (Emphasis in original.)

¹³ CX 618 A-B.

¹⁴ *Bambury Fashions, Inc.*, *supra* note 11, at 8-9.

bers of NAWCAS and its affiliates.¹⁵ In this connection it may be noted that NAWCAS and its officials, in documents, prior to the litigation, frequently referred to the traveling salesmen as independent contractors.¹⁶ Moreover, as the Board noted, the recitation of the record facts in this proceeding pertaining to the relationship of traveling salesmen to manufacturers, set for in Appendix B of the initial decision, is consistent with the right of control over the manner and means of their work granted traveling salesmen in the NAWCAS-sponsored contracts.

Finally, as far as the salesmen's conduct in the multi-billion dollar trade show market is concerned, this is completely and minutely subject to respondents' rules and regulations, which, of course, ultimately depend on the consent of the individual members, the traveling salesmen. As far as this crucial segment of the women's and children's apparel market is concerned, the manufacturer's right of control is clearly nonexistent on the basis of the respondents' own rules and regulations, a fact recognized in respondents' proposed findings.¹⁷ The Board's finding that NAWCAS is substantially comprised of independent contractors, depending in large part on the same evidence contained in this record, is consistent with the record herein and we make the same finding.

The Board further found, in concluding that NAWCAS is dis-

¹⁵ As the examiner found:

"Under the requirements laid down by NAWCAS all salesmen were required by January 1, 1967, to have a written contract on NAWCAS Standard Contract form, or its equivalent. As a practical matter, this requirement has not been enforced. But, NAWCAS claims to have a total of over 15,000 contracts on file (approved and not approved) so that its standard form is of some significance insofar as it specifies the relationship between the salesman and the manufacturer. This form has been changed from time to time (CXs 616-618). It is not possible from the survey data in evidence (RX 174) to determine how many contracts on each particular form are outstanding at the present time. We accordingly take the latest form available (CX 618-A-B) as illustrating the present requirements of NAWCAS." (I.D., Appendix B, p. 1082.)

¹⁶ For example, the assistant executive director of NAWCAS, in a "research paper", "Does Present-Day Selling Meet Professional Standards" (1961) (CX 1568, p. 22), stated, "[NAWCAS] composed of independent contractor salesmen, functions as a trade association." Similarly, the executive director of NAWCAS stated unequivocally, "Our men are independent contractors . . ." (letter, August 11, 1960, to Executive Secretary of the Screen Actors Guild (RX 156)). We note here that the examiner, who had the opportunity to observe the testimony, stated that he accepted the recorded description in these exhibits rather than the later recollection of the witnesses (I.D., pp. 1054-55). According to the "NAWCAS Member Guide Book", over 90 percent of the members are self-employed (CX 19, p. 35).

¹⁷ ". . . NAWCAS and its members realized that to most manufacturers, the laboriously and cooperatively built prestige of the trade shows sponsored by the local NAWCAS affiliates throughout the country and under the control *not* of the *manufacturer* but of the salesmen themselves, through their membership in the sponsoring local NAWCAS affiliates was considered an important element in promoting the sale of manufacturers' merchandise . . ." Respondents' Proposed Findings, p. 28. (Emphasis in original.)

qualified from acting as a labor organization, that NAWCAS "in its trade show activities in behalf of independent contractors traveling salesmen members, is engaged in the business of selling apparel in direct competition with apparel manufacturers."¹⁸ Supporting this finding, as the Board noted, are the provisions of the NAWCAS Standard Contract providing that manufacturers are prohibited from engaging in showroom sales of their line in the same city while the traveling salesman is exhibiting the line at a trade show¹⁹, and paragraph 2 (e) which restricts manufacturers in their use of selling alternatives to sales through the traveling salesmen in the latter's territory by requiring them to credit such salesmen for any sales of the line made.

The commercial nature of the trade shows as a business enterprise, as we have already noted, is clear, for "they assist the [independent contractor] salesmen members in obtaining commissions, they assist the manufacturers in obtaining orders for merchandise, and they assist the retailers who attend them in finding competitive goods assembled at a single point for their convenience."²⁰ The very scale of these trade shows, with an annual sales volume of \$3.5 to \$4.5 billion, compels the same finding.

The Board, ruling that on this set of facts NAWCAS is disqualified from acting as a labor organization, held:

... what disqualifies a union from acting as such when it also conducts a business enterprise in the same industry, is the latent danger that it may bargain, not for the benefit of unit employees, but for the protection and enhancement of its business interests which are in direct competition with those of the employer at the other side of the bargaining table.²¹

We are compelled to defer to that ruling. Under the circumstances, the labor antitrust exemption is not available to NAWCAS. The

¹⁸ *Bambury Fashions, Inc.*, *supra* note 11, at 10.

¹⁹ "... The Company further agrees that if the Salesman belongs to any organized apparel shows or salesmen's groups within said territory that the Company's line will be exhibited only at such shows or with such groups; provided, that this provision shall not require a Company which has its principal place of business within said territory and maintains a show room on its premises to close such show room" (paragraph 2(a), NAWCAS Standard Contract, CX 618-A).

This restriction on sales by competing manufacturer's outlets which "became crystallized as a clause in the NAWCAS Standard Contract", as the hearing examiner found, "was enforced by withdrawing the manufacturer's line from the trade show if he failed to sign the contract and by imposing a fine on the salesman whether or not he had the power to comply with the showroom-closing rule" (I.D., p. 1043).

Moreover, NAWCAS trade shows are in competition with shows set up by manufacturers (I.D., p. 1032).

²⁰ I.D., p. 1032.

²¹ *Bambury Fashions, Inc.*, *supra* note 11, at 10.

policy behind that exemption clearly envisages that it apply only to those organizations which can function in accordance with the statutory requirements spelled out in the federal labor laws, and a cease and desist order should issue to prevent repetition of the law violations documented in this proceeding.

V

We turn now to the question of remedy. The first objection that the order is unenforceable because of the Norris-LaGuardia Act's provisions prohibiting injunctions against labor unions is patently untenable in light of our finding that the antitrust exemption does not extend to NAWCAS. Clearly the anti-injunction provisions of the Norris-LaGuardia Act do not shelter organizations not within the scope of the exemption and whose antitrust violations arise essentially out of a commercial enterprise.²²

The Commission, nevertheless, is of the opinion that it should not make a final decision on the form of the order before giving the parties a further opportunity to file their recommendations, with supporting data, regarding proposals for provisions to be included in a cease and desist order to terminate this proceeding. We take that position because respondents' trade shows, with annual sales volume in excess of three billion dollars, obviously comprise a vital segment of the women's and children's apparel market. The order should therefore eliminate the practices found unlawful while facilitating the continuance of the competitive function of respondents' trade shows. In short, the Commission needs further information on which to base an appropriate remedy in the light of the impact which a cease and desist order in this proceeding may have on the industry. Understandably, perhaps, in light of the parties' preoccupation with the question of the applicability of the antitrust exemption, these questions have not been fully discussed on appeal.

In addition to the foregoing, the parties should address themselves to the following issues. In light of the administrative burden involved in seeking compliance as to a shifting population of some 12,000 individual members of respondents, could not the same results be achieved

²² As Mr. Justice Goldberg stated: "... The labor exemption is inapplicable where the union acts not as a union but as an entrepreneur." Concurring opinion, *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, et al. v. Jewel Tea Co., Inc.*, 381 U.S. 676, 733 (1965). See also *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602 (E.D. La. 1958).

by limiting the coverage of the order to NAWCAS, its affiliate, and their officers, agents and representatives? Respondents also object that the order entered by the examiner is so vague that it is not possible to distinguish permissible from impermissible conduct. Respondents' contentions on this point, apparently embracing the whole order, are themselves somewhat indefinite.²³ Without passing on the merits of respondents' assertions on this question, we feel both parties should have the opportunity to draft proposals for an order prohibiting the practices found illegal herein, incorporating such standards as would facilitate compliance for respondents and enforcement for the Commission.

We do not agree that paragraph II (C) and (D) and paragraph II (3) and (4) are punitive. These prohibitions require that members fined or expelled since May 30, 1964, pursuant to respondents' illegal practices, be recompensed or reinstated. We are of the view, however, that further information is desirable to establish whether such provisions are necessary to dissipate the effect of the illegal combination. The parties should also submit information on whether such requirements would be practical in terms of the enforcement effort required and the impact they would have on respondents' future organization of trade shows. Pertinent data on this point would include the number of ex-members and present members who would be affected by the proposed restitution and reinstatement provisions, as well as the expense involved in administering these provisions. In this connection, respondents, if they are able to do so, should bring to the Commission's attention more specific information with respect to their contention that the reinstatement provisions would require the expulsion of certain individuals comprising the current membership of NAWCAS and its affiliates. In short, while we disagree that these proposals are punitive, we are concerned with getting as much relevant data as possible to determine the practical impact of these provisions.

Accordingly, we direct the parties to submit proposed forms of order with supporting briefs presenting relevant views, data and argument within 30 days of the receipt of this opinion and order. When this information is before it the Commission will issue its final order.

Chairman Weinberger did not participate.

Commissioner Elman did not concur.

²³ The only concrete objection on this issue refers to paragraph I (15) of the order.

Order

77 F.T.C.

ORDER ADOPTING FINDINGS AND CONCLUSIONS AND DEFERRING
ENTRY OF FINAL ORDER ¹

CONCLUSIONS

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair acts and practices in commerce, including agreements, understandings and combinations in restraint of trade.

3. The agreements, understandings and combinations documented by this record, between and among respondents and with others, are unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

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

It is further ordered, That the findings of fact and conclusions of law contained in the accompanying opinion be, and they hereby are, adopted as additional findings and conclusions of the Commission.

It is further ordered, That complaint counsel and counsel for respondents shall each file, within 30 days after the receipt of this order, a proposed form of order and briefs in support thereof, in accordance with the directions contained in the accompanying opinion.

It is further ordered, That entry of the final order in this matter be deferred until further order of the Commission.

By the Commission, with Chairman Weinberger not participating and Commissioner Elman not concurring.

IN THE MATTER OF
ZALE CORPORATION

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

Docket C-1774. Complaint, July 30, 1970--Decision, July 30, 1970

Consent order requiring a Dallas, Texas, retail jeweler operating through 439 retail outlets and 110 additional outlets under other trade names to cease using deceptive pricing practices, savings claims, and false guarantees.