

business such as dissolution, assignment or sale resulting in the emergence of a successor business, corporate or otherwise, the creation of subsidiaries or any other change which may affect compliance obligations arising out of the order.

IN THE MATTER OF
NATIONAL BISCUIT COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF
THE CLAYTON ACT

Docket 5013. Complaint, July 20, 1943—Decision, Aug. 23, 1971

Order and opinion denying exceptions filed by respondent to evidentiary ruling and conclusion of hearing examiner; adopting as the Commission's the hearing examiner's findings and conclusion; and directing that the order to cease and desist issued on Feb. 23, 1944* (38 F.T.C. 213), be treated as a consent order.

Mr. John M. Siemien and Mr. Henry M. Banta for the Federal Trade Commission.

Covington and Burling, Wash., D.C., by *Mr. J. Randolph Wilson* and *Mr. Peter B. Archie* for respondent.

CERTIFICATION OF RECORD AND REPORT CONTAINING FINDINGS AND
RECOMMENDATION BY WILLIAM K. JACKSON, HEARING EXAMINER

MARCH 19, 1971

PRELIMINARY STATEMENT

By order dated July 1970, the Commission directed that hearings be held in this matter to determine whether or not the Order to Cease

*On May 19, 1972, the United States Court of Appeals for the Fifth Circuit (459 F. 2d 1023) rendered its decision accepting the Federal Trade Commission's determination that the cease-and-desist order issued against Nabisco in 1944 was a consent order. The court rejected Nabisco's contention that the matter should be remanded to the Commission for resolution of additional issues raised in the petition for review. The court agreed with the Commission that none of these additional issues were ripe for consideration either by the court or the Commission and that, accordingly, the Commission's 1954 order (50 F.T.C. 932) should be set aside and its 1967 compliance hearing (71 F.T.C. 1674) should be terminated.

The Federal Trade Commission on August 1, 1972, issued its order in compliance with the foregoing decision (81 F.T.C. 196).

and Desist issued on February 23, 1944 [38 F.T.C. 213], against respondent was a consent order.

Several prehearing conferences were held by the hearing examiner with the parties for the purpose of resolving certain procedural matters, exchanging lists of witnesses and documents which the parties intended to use in the hearing, ruling on certain requests for discovery and the issuance of subpoenas *duces tecum*.

On September 25, 1970, the hearing examiner granted respondent's motion requiring the production of certain documents from the Commission's files. Counsel for the Commission appealed from said order, but the appeal was denied by the Commission on December 18, 1970. Compliance with the hearing examiner's order for production was completed by Commission counsel, on February 5, 1971.

Thereafter, evidentiary hearings were held on February 19 and 22, 1971, in Washington, D.C., and the record has been closed. On March 9, 1971, the parties filed proposed findings of fact and conclusions.

SUMMARY OF THE PROCEEDINGS

The record of the proceedings consists of 161 pages of testimony (Tr. 1-161), four exhibits for the Commission (CX A through CX D), and four exhibits for the respondent (RX AA, RX BB, RX DD, and RX EE). Counsel for the Commission in presenting their case-in-chief called no witnesses and relied solely on the documentary evidence submitted. Respondent in presenting its defense called two witnesses: George A. Mitchell, former comptroller and executive vice president of National Biscuit Company, retired (Tr. 32-81), and John T. Haslett, former trial attorney with the Federal Trade Commission (Tr. 102-159), both of whom actively participated in the events leading up to and surrounding the issuance of the February 23, 1944, cease and desist order against respondent. Commission counsel called no rebuttal witnesses.

FINDINGS OF FACT

Nature of Proceeding: Complaint and Answer

1. The Commission issued its complaint in Docket 5013 on July 20, 1943, alleging that National Biscuit Company (hereinafter "Nabisco") had sold crackers and cookies at discriminatory prices in violation of Section 2(a) of the Clayton Act as amended. (RX BB, 1108-1114.) The only price discriminations challenged in the complaint were those arising from a particular quantity discount which was

graduated from 1 percent up to $4\frac{1}{2}$ percent and was based on customers' monthly purchases of Nabisco cookies and crackers. (RX BB, 1110-1112.) It was called a "headquarters discount" (RX BB, 1110; Tr. 33), pursuant to which chain stores were permitted to aggregate or "lump" the purchases of all of their individual retail stores to determine their rate of discount. (RX BB, 1125-1127.)

2. John T. Haslett was a trial attorney on the Commission's staff in 1943 with a position entitled "Principal Trial Attorney;" Mr. Haslett drafted the complaint in Docket 5013 and was thereafter placed in charge of the proceedings on behalf of the Commission. Mr. Haslett's superiors on the Commission's staff were Mr. William T. Kelley, who held the position and title of "Chief Counsel," and Mr. Walter B. Wooden, who was the "Assistant Chief Counsel." (Tr. 107-108.)

3. On September 25, 1943, Nabisco filed an answer in Docket 5013 denying the material allegations of the complaint and alleging defenses based on cost justification and meeting competition. (RX BB, 1115-1122.)

Negotiation of Settlement Agreement Between Nabisco's Representatives and Commission's Trial Staff

4. On July 28, 1943, counsel for the respondent conferred with Mr. Haslett by telephone and advised that there was a possibility of stipulating the full facts in this proceeding and then the respondent submitting cost data in an effort to justify the cumulative quantity discount. Respondent's counsel requested a conference with Mr. Haslett within the near future in New York with the view of obviating the necessity of taking testimony. (CX A, 0680, Tr. 109-110.)

Sometime prior to October 11, 1943, attorney John T. Haslett of the Commission's trial staff attended a conference with three representatives of Nabisco, *i.e.*, the vice president in charge of sales (Mr. Frank Montgomery), the comptroller (Mr. George A. Mitchell), and general counsel (Mr. George H. Coppers); such conference concerned the possibility of settling the case in Docket 5013 by Nabisco's submitting a detailed accounting cost justification of the headquarter's discount schedule challenged in the complaint. (CX A, 0682; Tr. 111-112.)

5. Thereafter, Nabisco accumulated its cost figures to attempt to justify the challenged headquarters discounts, and arrangements were made for Mr. Haslett, together with a Commission accountant, to survey those cost figures at a further conference in New York with representatives of Nabisco sometime during the first week of November 1943. (CX A, 0682; Tr. 37.)

6. By October 13, 1943, Mr. William J. Warmack, a Commission accountant, was instructed to work with attorney John T. Haslett in the Nabisco matter, Docket 5013. (CX A, 0683; Tr. 111.)

7. Beginning in November 1943 and continuing through the end of 1943, there were several conferences between the representatives of Nabisco and the representatives of the Federal Trade Commission. In addition to the Nabisco representatives identified in Paragraph 4 above, Nabisco's outside attorneys (Messrs. John W. Davis and Edwin Foster Blair) attended some of the meetings. The Commission's representatives were Messrs. Haslett and Warmack. All of the persons attending such meetings are now deceased, except for Mr. George A. Mitchell and Mr. John T. Haslett, both of whom appeared as witnesses herein. (Tr. 34-36; 110.)

8. At one of the earlier meetings, Nabisco's comptroller (Mr. Mitchell) and the Commission's accountant (Mr. Warmack) reviewed Nabisco's cost justification for the pre-1944 headquarters discounts challenged in the complaint, and both concluded that some of the challenged discounts were justified by the cost data, whereas others were only partially cost justified. (Tr. 37-38.)

9. At a subsequent meeting of the parties in November 1943, Mr. Haslett, the Commission's attorney, suggested that if Nabisco would be willing to develop and adopt a new discount schedule acceptable to him and Mr. Warmack, it might then be possible to reach an overall settlement of the proceeding in Docket 5013. (Tr. 112-113.) Mr. Haslett further suggested that such a new discount system should provide for a substantial reduction in the purchase volume requirements for the headquarters discount and should include a new and separate store discount payable on the per-store purchases of customers (rather than on the "lumped" purchases of all stores in a chain), thereby extending discounts to many additional customers previously not receiving discounts. (Tr. 113-114.) Mr. Haslett believed that if the suggested new discount schedule were to be adopted, Nabisco's cost justification data would in great measure support the resulting price differences, and that any remaining unjustified price differences would be so small they would not have the required effect of adversely affecting competition. (Tr. 113-114.)

10. In response to Mr. Haslett's suggestion, Nabisco developed the details of a proposed new system of discounts along the lines suggested by Mr. Haslett, and thereafter several additional conferences were held between Nabisco's representatives and Messrs. Haslett and Warmack to review the proposed new discount schedule and the cost justification data for that schedule. (Tr. 38-40, 114.)

11. Nabisco's cost justification data showed that the proposed new discounts were not completely cost justified, but were more nearly cost justified than the pre-1944 headquarters discount challenged in the complaint. (Tr. 39-40, 132.)

12. The series of meetings in November and December of 1943, relating to Nabisco's proposed new discount schedule and cost justification data, culminated in a settlement agreement between Nabisco's representatives and the Commission's trial staff consisting of Messrs. Haslett and Warmack. (Tr. 42, 114.) The settlement agreement was reflected in four draft documents: a Stipulation as to the Facts, Proposed Findings and Conclusion, a Proposed Cease and Desist Order, and a Proposed Report of Compliance. (Tr. 42-44, 114-115.) All of these documents were put into written form and both sides had a complete set of documents. (Tr. 116.) Mr. Haslett testified that the compliance report was negotiated first (Tr. 115), and that he considered it the most important document because without agreement on a satisfactory compliance report there would be no point in agreeing on anything else. (Tr. 105, 115, 149-150.)

13. The parties arrived at an agreement to the draft settlement documents only after an extensive "give-and-take" negotiation and discussion as to the meaning of the words and the effect of the various restrictions upon Nabisco. (Tr. 116.)

14. In connection with his negotiating authority, Mr. Haslett represented to Nabisco's representatives that Mr. Haslett had no power to bind the Commission to accept the negotiated settlement but that Mr. Haslett did have authority to recommend to the Commission, through his staff superiors, that the negotiated settlement be accepted or rejected. After he had reached a final settlement agreement with Nabisco's representatives, Mr. Haslett represented that he would in fact recommend that the settlement be approved by the Commission and that such recommendation would go to his immediate superior, Mr. William T. Kelley, the Commission's Chief Counsel. (Tr. 116-117.)

15. Nabisco's representatives were not completely satisfied with Mr. Haslett's representations concerning his negotiating authority and therefore requested a meeting with Mr. Kelley to obtain his concurrence in the negotiated settlement before Nabisco would agree to settle the case. (RX DD, 1147-1148; Tr. 117.)

Acceptance of Settlement Agreement by Commission's Chief Counsel

16. Thereafter, Mr. Haslett returned to Washington and conferred at length with the Chief Counsel, Mr. Kelley, concerning all of the documents reflecting the negotiated settlement agreement. Mr. Kelley

expressed his concurrence with the settlement negotiated by Mr. Haslett, and Mr. Kelley further agreed to the requested meeting with Nabisco's representatives. (Tr. 118.)

17. On January 31, 1944, representatives of both parties met in Mr. Kelley's office at the Federal Trade Commission in Washington, D.C. (Tr. 118.) Nabisco was represented by Messrs. John W. Davis, Edwin Foster Blair, and George H. Coppers. The Commission was represented by Messrs. William T. Kelley, Walter B. Wooden, and John T. Haslett. All of these men are now deceased except for Mr. Haslett. (Tr. 107, 110, 118.)

18. Prior to the meeting of January 31, 1944, Mr. Haslett had drafted an undated and unsigned memorandum to transmit the settlement papers to the Commission in the event that the parties reaffirmed their concurrence in the settlement agreement as previously negotiated. (Tr. 118-119.) This draft memorandum was intended to carry out the understanding that Mr. Haslett's superiors at the Commission would approve the settlement and join in the recommendation that the settlement be accepted by the Commission. Both this draft memorandum and the four documents reflecting the proposed settlement agreement negotiated by Mr. Haslett were all in Mr. Kelley's office at the meeting on January 31, 1944. (Tr. 119.) The four documents reflecting such settlement agreement were the same as those previously exchanged by the parties, and included a stipulation as to the facts, proposed findings of fact and conclusion, a proposed cease and desist order, and a proposed report of compliance. All of these documents were reviewed and discussed by the representatives of both parties attending the meeting on January 31, 1944. (Tr. 119.)

19. At the beginning of the meeting in Mr. Kelley's office on January 31, 1944, none of the documents identified in Paragraph 18 above were signed by either party. After the representatives of both parties had reaffirmed their concurrence in the proposed settlement, the following events occurred: The transmittal memorandum was sent out of the room by Mr. Kelley to his secretary and returned to the room with the date of January 31, 1944, having been inserted (CX A, 0684); Nabisco's representatives signed the stipulation as to the facts along with representatives of the Commission; and Mr. Kelley signed the transmittal memorandum with its attachments consisting of the then signed stipulation as to the facts, the negotiated findings and conclusion, and the negotiated cease and desist order. (Tr. 118-121.) Under the then prevailing practice (see findings 36-42 below), the specific document containing the negotiated compliance report was not forwarded to the Commission until the agreed-upon cease and desist order

was entered. (Tr. 149-150.) However, the Chief Counsel's transmittal memorandum of January 31, 1944, accurately set forth the substance of the negotiated compliance report which Nabisco agreed to file upon acceptance by the Commission of the package settlement. (CX A, 0684; Tr. 154-155.)

Representations Made to Nabisco by Commission's Staff on "Package"
Nature of Settlement

20. In the negotiations leading up to the settlement agreement, Mr. Haslett negotiated all four of the separate documents reflecting the settlement agreement "as a unit, as a single unit" and "as an integrated whole." (Tr. 116, 138.) Mr. Mitchell, one of Nabisco's representatives in the negotiations, understood that the documents "were all to be treated together as one package." (Tr. 44.)

21. Mr. Haslett represented to Nabisco that the Commission would either accept or reject the settlement agreement "in whole." (Tr. 139.) Messrs. Kelley and Wooden, who were Mr. Haslett's superiors and who were the highest ranking members of the Commission's staff immediately below the Commissioners themselves, made similar representation to Nabisco. (Tr. 148-149.)

22. The representations of the Commission's staff concerning the "package" nature of the settlement were made to Nabisco orally. (Tr. 153.) This was in accordance with the then prevailing informal practice of the Commission. (Tr. 155-156.)

Acceptance of Settlement Agreement by Commission

23. Following the Chief Counsel's transmittal of the proposed settlement on January 31, 1944, a Commission directive of February 2, 1944, instructed William L. Pack, a Special Legal Assistant to the Commission, to review the proposed findings and cease and desist order included in the settlement papers forwarded with the Chief Counsel's memorandum. (CX A, 0685.) Mr. Pack suggested "a few minor changes as to form" both in the negotiated findings and cease and desist order; none of these proposed minor changes affected the substance of the negotiated findings and cease and desist order, but Mr. Pack nevertheless sought Mr. Haslett's approval of them. (CX A, 0685, 0805-0808; Tr. 126-127.) Mr. Haslett then discussed the proposed minor changes as to form with Nabisco's representatives who advised Mr. Haslett that they had no objections; Mr. Haslett likewise had no objections, and hence Mr. Pack's proposed minor changes as to form were approved. (Tr. 127.)

24. On February 5, 1944, Mr. Pack addressed a memorandum to the Commission in which he expressed general approval of the settlement papers and called attention to the "few minor changes as to form * * * in both the findings and the order" which had "been discussed with Mr. Haslett, the trial attorney, and meet with his approval." (CX A, 0685.)

25. In the meantime, the matter had been assigned to Commissioner Ayres for his evaluation and recommendation. After receiving Mr. Pack's memorandum, Commissioner Ayres addressed a memorandum to the Commission dated February 17, 1944, recommending that the settlement documents "be approved and issued." (CX A, 0686.)

26. In a memorandum dated February 18, 1944, the Secretary of the Commission officially advised the Chief Counsel, the Special Legal Assistants and the Chief of the Records Division that the Commission had accepted and approved the stipulation as to the facts, the proposed findings as to the facts and conclusion, and the proposed cease and desist order, whereupon such order and findings were officially entered of record under date of February 23, 1944 [38 F.T.C. 213]. (CX A, 0687; RX BB, 1129-1137.) The Secretary's memorandum dated February 18, 1944, included two main paragraphs. (CX A, 0687.) The first was a typewritten paragraph which dealt specifically and properly, with the stipulation as to the facts; the second paragraph was part of a mimeographed or printed form dealing with the findings and order, and although the Secretary of the Commission had attempted to adjust the form language (by striking out certain provisions thereof) to fit the particular situation, the remaining form language still included erroneous statements and was not fully applicable to the settlement involved. (Tr. 128-129.)

27. The cease and desist order, the findings of fact and conclusion, and the stipulation as to the facts were officially entered by the Commission in February 1944, and were verbatim identical to the settlement documents which had accompanied Mr. Kelley's transmittal memorandum of January 31, 1944, after allowing for Mr. Pack's minor changes as to form. (RX BB, 1129-1137; CX A, 0805-0808; Tr. 122-124.)

28. Although the cease and desist order allowed Nabisco 60 days after February 23, 1944, within which to file a report of compliance, Nabisco proceeded promptly to file a report of compliance dated March 1, 1944. (RX EE, 1151-1153.) On the same date, March 1, 1944, Mr. Haslett drafted a memorandum addressed to the Commission recommending that Nabisco's compliance report should be accepted by the Commission, and such memorandum was approved and signed

by the Chief Counsel and Assistant Chief Counsel. (CX A, 0690-0691; Tr. 131.)

29. Nabisco's compliance report dated March 1, 1944, included no cost justification data. (RX EE, 1151-1153.) The reason was that Nabisco had previously given all of its cost data to the Commission accountant, Mr. Warmack, in the course of the settlement negotiations, and although such data did not fully cost justify the new discount which Nabisco submitted as compliance with the cease and desist order, it was the understanding of both parties that the settlement agreement permitted Nabisco to use the new discount as long as any noncost-justified portion of the new headquarters discount would not have the adverse competitive effect required under the Act. (Tr. 41, 131-132.)

30. In a letter dated March 8, 1944, the Secretary of the Commission advised Nabisco that its compliance "report has been received and filed." (RX EE, 1154.) This was the language used by the Commission at the time to indicate that the report had been accepted and approved. (Tr. 46, 133.)

31. The Commission's letter of March 8, 1944, also stated that "The receipt and filing of this report is not to be construed as indicating approval by the Commission or a determination by it that the report shows compliance with the provisions of the order to cease and desist." (RX EE, 1154.) It was Nabisco's understanding that the quoted language was included in the letter of March 8, 1944, to confirm that under the settlement agreement, the Commission would not be bound forever to accept the new discount system negotiated in the settlement if future conditions changed, *i.e.*, if the company changed its distribution system or something else unusual should happen. (Tr. 47.) The representative of the Commission who had negotiated the settlement agreement had the same understanding of the quoted language in the Commission's letter of March 8, 1944. (Tr. 133-134.)

32. In a letter dated September 20, 1967, Mr. Haslett undertook to state the facts relating to his participation in the events of 1943-1944 in Docket 5013; the letter described a series of negotiations between Mr. Haslett and Nabisco's representatives, culminating in an overall "consent settlement package" which was approved by the Commission's Chief Counsel and thereafter adopted by the Commission. (RX DD, 1146-1150.) Mr. Haslett's letter of September 20, 1967, was sent both to respondent's counsel herein and to the then general counsel of the Federal Trade Commission, Mr. James McL. Henderson. (Tr. 134.) At the hearings herein, Mr. Haslett's testimony was in substance the same as the facts set forth in his prior letter, and Mr.

Haslett further testified that he had recently reread his letter of September 20, 1967, and found the statements therein to be true and correct. (Tr. 137-138.)

Commission's Formal Rules and Informal Practice on Settlements during Relevant Period

Formal Rule on Admission Answers

33. The Commission's formal Rules of Practice in 1943-1944 did not specifically provide for documents expressly labelled "negotiated settlement" or "consent order." (Tr. 103-104, 143.)

34. Rule IX of the Commission's formal Rules of Practice, July 11, 1943, authorized a respondent to file a pleading commonly called an "admission answer." (CX C, 1183-1184; Tr. 143-144.) Throughout the relevant period from 1943 up to approximately 1952, the Commission's formal Rules included provisions substantially similar to Rule IX of July 11, 1943. (Tr. 24-25.)

35. In 1943-1944 an admission answer was used in two different types of situations. In one situation, the respondent could file an admission answer, consisting of a simple statement to the effect that the respondent "admits all the material facts of the complaint to be true" (Tr. 144), and then run the risk of any order that the Commission might enter. In the second type of situation, however, an admission answer could be part of an overall settlement agreement negotiated pursuant to the Commission's then prevailing informal practice described below. (Tr. 104.)

Informal Practice on Settlements

36. In 1943-1944, there was used within the Commission an informal practice pursuant to which settlement agreements, complete with an agreed to order to cease and desist, were negotiated by the Commission's staff and then submitted to the Commission for either acceptance or rejection as a package. (Tr. 104-105.)

37. Stated in summary fashion, the Commission's practice on settlements involved the following steps and procedures: The Commission's Trial Attorney in charge of the case would negotiate with opposing counsel the specific wording and meaning of four documents: a stipulation of facts (or alternatively an admission answer), proposed findings of fact and conclusions, a proposed order to cease and desist, and a proposed report of compliance; all four documents were negotiated as a part of an overall package agreement. (Tr. 104-105.) The package agreement would then be presented to the Commission's

Chief Counsel who, if he concurred, would transmit the papers to the Commission under cover of a transmittal memorandum noting that the Chief Counsel had "approved" the papers and recommended acceptance by the Commission. (Tr. 105.) The Commission's staff would orally assure respondent's counsel that the package agreement would either be accepted or rejected by the Commission as a whole. (Tr. 141-142.) Upon receipt of the transmittal memorandum, the individual Commissioners would have before them all of the negotiated documents, except the negotiated compliance report which might be summarized in the Chief Counsel's transmittal memorandum instead of being attached as a separate document. (Tr. 105-106, 151-152.) In due course, the Commission would by minute order, assign the case to one of the Commissioners for review and recommendation, and would also refer the papers to a group of lawyers, known as "Special Legal Assistants," who served as experts for the Commissioners in reviewing findings, orders and stipulations. (Tr. 104-105.) After one of the Special Legal Assistants had submitted an evaluation of the papers, the matter would then be returned to the Commissioner assigned to the case who would normally address a memorandum to the other Commissioners, recommending either acceptance or rejection of the package. (Tr. 106.) Under such informal practice, the Commission either accepted the settlement in full or rejected it in full. If accepted, the settlement papers would be officially approved and issued by the Commission exactly as negotiated. If rejected, the informal practice in 1943 was that the entire settlement would be withdrawn and would no longer have any effect, and the parties would then either engage in further negotiations or resume litigation. (Tr. 106, 140-141.)

38. The four written documents (reflecting a settlement agreement negotiated under the informal practice described above) were sufficient to carry out the agreement when approved by all concerned, but both the Commission and respondent relied upon certain oral assurances that the other party would honor the "package" nature of the settlement. (Tr. 44, 147-148.) For example, in the Nabisco settlement, the respondent relied upon oral assurances of the Commission's Chief Counsel and Trial Attorney that the settlement "would be sent to the Commission as a package" and that it was the Commission's "normal procedure" to "either accept the package as an integrated whole or reject it as such." (Tr. 148-149.) Similarly, the Commission relied upon oral assurances of respondent's counsel that Nabisco would adopt the agreed-upon method of compliance and submit the negotiated compliance report after entry of the agreed-upon cease and desist order. (Tr. 151.)

39. Such oral assurances were acceptable by both sides in the Nabisco settlement agreement because they were made by counsel of "unimpeachable integrity." Nabisco was represented by Mr. John W. Davis, whose word "was as good as his bond, and so was Bill Kelley's," the Chief Counsel of the Commission. (Tr. 152.)

40. The Nabisco settlement agreement "wasn't anything unusual." (Tr. 141.) The Commission's Trial Attorney in the Nabisco proceeding "handled many cases for the Commission on the same basis." (Tr. 145.) The informal settlement practice "was normal procedure," including the oral representations as to the package nature of a settlement. "Everybody did it." (Tr. 156.) Based on extensive experience as a Commission trial attorney from 1939 to 1945, Mr. Haslett suggested that one could find no instance where the Commission "accepted in part and rejected in part" a package settlement. Instead, the Commission "did one or the other thing and this was normal procedure." (Tr. 148.) Similarly, to characterize the oral nature of the package feature of the settlement as "sloppy" would be to "characterize the Commission's procedures, which everyone used at that time, as sloppy. If it [the practice] was sloppy, it was generally sloppy and not in this particular [Nabisco] case." (Tr. 142.)

41. The Commission's Trial Attorney, Mr. Haslett, testified that "I was authorized by Mr. Kelley and Mr. Wooden, my superiors," to negotiate the settlement agreement with Nabisco in accordance with the informal practice previously described. (Tr. 144.) Moreover, "the Commission knew I [Mr. Haslett] was doing it and every other attorney was doing the same thing." (Tr. 144.)

42. Throughout the 6-year period of Mr. Haslett's service as a trial attorney for the Commission, he never once heard of any instance where the Commission reprimanded a staff attorney for making oral representations to a respondent that the Commission would accept or reject a negotiated settlement on a package basis. (Tr. 149.)

Commission Recognition of Informal Consent Settlement Practice in Other Contemporaneous Proceedings

43. In other Commission cases both before and after with the proceeding against Nabisco in Docket 5013, the parties followed the same informal settlement practice invoked in the Nabisco case, and the Commission's ultimate actions in such contemporaneous cases were all consistent with the informal practice as previously described in findings 36 through 42.

National Tea Settlement

44. The Commission's complaint in Docket 5648 charged National Tea Company [46 F.T.C. 829] with a Robinson-Patman violation (RX BB, 1091-1095), and National Tea then filed its original answer amounting to a general denial of the alleged violation. (RX BB, 1091-1092.)

45. Thereafter, counsel for National Tea and the Commission's staff attorneys engaged in extensive negotiations which resulted in an overall settlement agreement which was partly oral and partly written. The written portion of the settlement agreement consisted of three separate documents: a Motion to Withdraw Answer, a substitute Admission Answer, and a negotiated Order to Cease and Desist. (CX A, 0990.) In a transmittal letter forwarding these settlement documents to the Commission Trial Attorney, counsel for National Tea noted that the Trial Attorney's superior, the Director of Bureau of Litigation, had not yet approved of the settlement, and the transmittal letter then stated the understanding was that if the Bureau of Litigation disapproved of the settlement, the Commission's Trial Attorney would "hold and not file" the settlement papers. (CX A, 0990.)

46. A few days later the Commission's Trial Attorney addressed a letter to counsel for National Tea and stated: "Mr. Whitely, Director of the Bureau of Litigation, is in agreement * * * and will approve my memorandum to the Commission." (RX AA, 0995.) The Trial Attorney was referring to a memorandum which he prepared to transmit the settlement papers to the Commission; such memorandum summarized the background of the case and stated that there was attached a "draft of proposed order recommended to the Commission as being * * * adequate for the disposition of the instant matter * * *." (RX BB, 1091.) The Trial Attorney's transmittal memorandum did not reveal that the admission answer and proposed order were part of an overall package settlement agreement; and made no mention whatsoever of the staff's oral assurances that the Commission would treat the settlement as a package. (RX BB, 1091-1092.)

47. At the Commission level, the National Tea settlement papers were referred to a Special Legal Assistant who had not been informed that the admission answer and proposed order were part of an overall settlement package, and this Legal Assistant then recommended a cease and desist order broader in scope than the negotiated order. (CX A, 0978-0981.) In due course the broader order was mistakenly entered by the Commission. (RX BB, 1099-b.)

48. National Tea then filed a "Petition Requesting Modification of Commission's Order" (RX BB, 1096-1099), asking the Commission to

conform its cease and desist order to the agreed-upon order. The petition described the settlement procedures followed in National Tea, which procedures were almost identical to those in the National Biscuit settlement. Thus, National Tea alleged that there "were extended conferences between counsel for the Commission and counsel for the respondent," and, as a result of such conferences, "an order * * * was drafted by counsel for both parties" and that the agreed-upon order was thereafter "submitted to the Commission as part of a memorandum filed by counsel for the Commission." National Tea also alleged that it "withdrew its denial answer * * * and submitted in lieu thereof its substitute answer admitting all of the material allegations of fact set forth in the complaint," while "relying upon the agreement with counsel of the Commission upon the terms of the proposed order." National Tea asserted that it took such a "course of action * * * in the expectation that the Commission would adopt and approve the order as agreed upon between counsel." (RX BB, 1096, *et seq.*)

49. The Commission's Trial Attorney then filed an answer to National Tea's petition; such answer did not dispute any of the allegations in National Tea's petition; instead, the Trial Attorney supported the request for entry of a modified order "in accord with the terms of the order hereto proposed," *i.e.*, the previously agreed-upon order. (RX BB, 1100-1101.)

50. National Tea's Petition for Modification was initially assigned to Commissioner Carson who had taken his oath of office as a Commissioner only a few months before. (47 F.T.C. at ii.) Commissioner Carson circulated an internal memorandum in which he asserted that "it is well known and understood that the Commission is not bound by agreements or proposals between counsel, who take their chances that the Commission will use its authority and discretion to make necessary changes in proposed orders." Commissioner Carson then stated that National Tea's "contention [on the consent-order-package] therefore lacks merit," and he recommended that National Tea's Petition for Modification should therefore be denied. (CX A, 0974.) Upon further reflection, however, Commissioner Carson prepared a second memorandum in which he repudiated his prior recommendation and urged the Commission to enter an "order which will satisfy and be in harmony with the agreement negotiated by our trial counsel and counsel for respondent." (CX A, 0976.) Commissioner Carson concluded his second memorandum with the recommendation "to the Commission that the case be returned for settlement in accordance with the final agreement between our trial counsel and counsel for respondents." (CX A, 0976.)

51. Commissioner Carson explained that he was repudiating his earlier recommendation that National Tea's consent order contention be rejected, because "I * * * have since had an opportunity to go into the merits of the matter." (CX A, 0976.) Such "opportunity" was provided by a comprehensive memorandum from Commissioner Mason (who was then beginning his second term on the Commission at about the same time as Commissioner Carson arrived). (CX A, 0978-0981.) Commissioner Mason's memorandum explained the full background; it began by noting that "the Tea case settlement was worked out on the basis of surrounding facts which we Commissioners and the trial staff were very conscious of, but which were wholly unknown to the Special Legal Assistants" who had prepared the broader order entered by "mistake." (CX A, 0978, 0980.) Commissioner Mason went on to inform Commissioner Carson that the Commission's "trial counsel * * * negotiated with National Tea an agreed order which struck down instantly the specific practice we were concerned with * * * [and hence the] Commission must weigh the practical advantage of an immediate [narrow order] * * * against a long and expensive trial aimed at a general order blanketing other practices * * *." (CX A, 0979.) Commissioner Mason assured Commissioner Carson that "These are the facts which the Special Legal Assistants [who had prepared the broad order contrary to the settlement agreement] are not in a position to be conscious of." (CX A, 0980.) Commissioner Mason further observed that "it is a great mistake in the settlement of cases to interpose the judgment of people [Special Legal Assistants] who are not informed as to the facts surrounding the offer and settlement," and such a "mistake" had occurred in the National Tea case. Accordingly, Commissioner Mason urged Commissioner Carson to withdraw his earlier memorandum recommending rejection of National Tea's consent-order contention and to "adopt the trial division's recommendation" for entry of the agreed-upon order. (CX A, 0980.) Commissioner Carson then prepared his second memorandum which followed these suggestions of Commissioner Mason. (CX A, 0976.)

52. After Commissioner Carson had circulated his second memorandum recommending that the Commission honor the "settlement * * * agreement between our trial counsel and counsel for the respondents" (CX A, 0976), the Commission vacated its prior broader order and entered the agreed-upon narrow order [47 F.T.C. 1314]. (RX BB, 1106-1107.) The Commission's accompanying opinion expressly recited that respondent's Admission Answer had been filed "with the understanding and upon the condition that the proceeding would be disposed of by the issuance of an order to cease and desist sub-

stantially in the form submitted" and that hence the original broad order "should be modified to the extent necessary to make it conform with the order agreed upon by counsel for the respondent and counsel in support of the complaint." The Commission's opinion also explained that the oral assurance concerning the package nature of the settlement "was not reflected in the record at the time of the original order." (RX BB, 1102-1103.)

The United Buyers Settlement

53. The Commission in Docket 3221 charged United Buyers Corp. [34 F.T.C. 87] with violations of Section 2(c) of the Clayton Act as amended, and there followed a series of preliminary settlement negotiations. (RX AA, 0033, 0034, 0091, 0092.) At one point in the negotiations, United Buyers attempted to follow a procedure (different from the informal settlement practice described in Findings 36 through 42 above) under which the Commission would give its separate approval of a proposed compliance report in *advance* of submitting an overall settlement package, but the Commission refused to follow such a procedure. (CX A, 0022.)

54. Settlement discussions continued, however, and United Buyers proposed "closing the case through the medium of an admission answer consenting to entry of an appropriate order to cease and desist * * *." (RX AA, 0178.) Specifically, United Buyers proposed an order "which would be so written that it would prohibit U.B.C. from rebating brokerage to buyers [as charged in the complaint] but would permit U.B.C. to continue collecting brokerage from sellers for services rendered" as permitted by the proposed compliance report. (RX AA, 0189.) Counsel for the two parties then reached an overall settlement agreement in accordance with United Buyers' proposal, whereupon stipulations were signed by United Buyers and then forwarded to the Commission for approval. (RX AA, 0034.)

55. Thereafter, the Commission entered the agreed-upon cease and desist order against United Buyers. (RX AA, 0237; RX BB, 1080-1083.) United Buyers then issued a press release announcing that the litigation had been settled upon a "satisfactory basis" and that the order was the "outgrowth of the stipulation" and was "in the general form which was anticipated." (RX AA, 0273, 0286-0287.)

56. Two days after the order was entered, United Buyers filed the previously agreed-upon compliance report (RX AA, 0238), and the report was promptly approved by the Commission. (RX AA, 0269.)

57. Almost five years later, the Commission entered an "Order Requiring Additional Reports of Compliance" (RX BB, 1057), and

shortly thereafter the Commission's staff filed a "Motion to Modify Order to Cease and Desist" which, if granted, would have substantially enlarged the scope of the original cease and desist order. (RX BB, 1058-1060.) United Buyers objected on the basis of the 1941 settlement agreement. (RX BB, 1062-1064.) However, during oral argument before the Commission on the modification issue, United Buyers consented to a portion of the proposed modification but continued to object to the remainder. (RX BB, 1079-a, 1079-b.) The Commission thereafter entered a modified order [43 F.T.C. 619] which included the changes consented to by United Buyers but excluded the proposed changes as to which United Buyers did not consent. (Compare RX BB at 1059 with RX BB at 1087.)

58. An internal memorandum by a Trial Attorney in the *United Buyers* case asserted that the Commission had issued instructions to the Chief Counsel that stipulations as to the facts and admission answers "are not to be undertaken upon any conditions such as advance approval of proposed methods of operation for the future." (CX A, 0023.) Another letter from a Commission attorney reminded the United Buyers that he had not undertaken "to bind the Commission with respect to terms and effect of the order to cease and desist which, presumably, it would enter upon your filing of an admission answer." (CX A, 0181.) These and similar documents in the *United Buyers* case do not refute the existence of the informal settlement practice previously described; such documents merely show that the Commission would not approve of a proposed compliance report in advance of submission of an overall settlement package and that the Commission's staff could not bind the Commission in advance to accept a settlement package.

The Manhattan Brewing Settlement

59. In the Manhattan Brewing proceeding (Docket 4572) [35 F.T.C. 828], the Commission's complaint attacked under Section 5 of the Federal Trade Commission Act respondent's use of the trade name "Canadian Ace" for beer which was not in fact brewed in Canada. After the respondent had originally filed an answer denying the alleged violation, counsel held settlement negotiations but apparently there was "no commitment at this time on either side * * *." (CX A, 0395.) Thereafter, following additional negotiations, the respondent withdrew its original answer and filed a substitute admission answer, whereupon the Trial Attorney transmitted the usual papers to the Commission with no indication of settlement negotiations. (CX A, 0396.) The Commission then proceeded to enter its original cease

and desist order which was different from the proposed order transmitted to the Commission. (CX A, 0398-0400.)

60. Immediately after the original cease and desist order was entered, Manhattan Brewing filed a "Petition for Modification of Order" alleging that the Commission's Trial Attorney had orally assured Manhattan Brewing that the admission answer would be used only for an order that would permit the use of the name "Canadian Ace" so long as the label stated specifically "that such products did not come from Canada." (RX BB, 1088-a-1088-o.)

61. After the Commission's Trial Attorney acknowledged the possibility of a "genuine misunderstanding" concerning the negotiations between counsel (RX AA, 0407), the Commission vacated the original cease and desist order [35 F.T.C. 828].

62. The case then went to trial and ultimately the Commission entered an order to cease and desist [37 F.T.C. 376] substantially the same as the original order which had been set aside. (RX AA, 0426; CX A, 0421-0425.)

63. Manhattan Brewing then appealed to the United States Court of Appeals for the 7th Circuit, and while the case was pending on appeal, Manhattan Brewing made another offer of settlement in which Manhattan promised to drop the appeal in return for entry of a modified order. This offer was described in an internal memorandum by one of the Commissioners as an offer conditioned upon the Commission's acceptance in advance of "a complete report of compliance." (RX AA, 0456-0457.) The Chief Counsel of the Commission sent a memorandum to the Chairman, explaining that the Commission lacked jurisdiction to modify the outstanding cease and desist order as long as the appeal was pending in court. (RX AA, 0464.)

64. While the appeal was still pending, the Commission initially declined to accept Manhattan's proposed settlement by virtue of a 2 to 2 tie vote, with Commissioner Mason not participating because of his then recent appointment to the Commission. (RX AA, 0468.) A few weeks later, after Commissioner Mason had an opportunity to read "all the testimony" and consider the arguments and briefs, he prepared a memorandum of January 14, 1946, in which he concluded that he "would not vote for the present order" then before the Court of Appeals. (RX AA, 0491.) On January 16, 1946, the Court of Appeals dismissed the pending appeal on Manhattan's motion. (RX AA, 0475.) Shortly thereafter, the Commission reopened the proceeding and entered a modified order [42 F.T.C. 226] in a form acceptable to Manhattan Brewing by virtue of a 3 to 2 vote, with Commissioner Mason casting the deciding vote. (RX AA, 0494-0495.)

Certification of Record and Report

79 F.T.C.

65. At a later date, the Commission requested the Attorney General of the United States to institute a civil penalty proceeding against Manhattan Brewing for an alleged violation of the modified order; the Commission's letter informed the Attorney General that Manhattan Brewing had "filed a waiver of hearing and consent to the entry of modified findings and order." (RX AA, 0640, 0643.)

CONCLUSIONS

1. The Commission's Rules of Practice did not provide for a formal consent procedure in 1943/44, but as a matter of fact an informal settlement procedure was utilized at that time by the staff and relied upon by the respondent's counsel in this matter.

2. The informal settlement procedure utilized by the staff in 1943/44 was not binding upon the Commission, but in practice it was generally followed by the Commission.

RECOMMENDATION

Under these circumstances, the Order to Cease and Desist issued on February 23, 1944, should be treated as a consent order.

CERTIFICATION

The record consisting of 161 pages of testimony (Tr. 1-161), four exhibits for the Commission (CX A through CX D), and four exhibits for the respondent (RX AA, RX BB, RX DD, and RX EE), together with the briefs, proposed findings, and conclusions submitted by the parties are hereby certified to the Commission.

OPINION OF THE COMMISSION

AUGUST 23, 1971

This matter is before the Commission on the Certification of Record and Report Containing Findings and Recommendation of the hearing examiner, from which respondent has filed exceptions. The hearing examiner's findings and recommendation contained in the report are based on evidentiary hearings held in response to a Commission order of July 30, 1970, directing that the hearings be conducted "in accordance with the opinion [of the court in *National Biscuit Company v. Federal Trade Commission*, 400 F. 2d 270 (5th Cir. 1968)], for the sole and limited purpose of receiving testimony and other evidence concerning the question as to whether [a Commission] order to cease and desist, issued on February 23, 1944 [against National Biscuit

Company] was a consent order." The examiner's ultimate recommendation is that the 1944 order to cease and desist "should be treated as a consent order." We agree.

Respondent does not appeal from the examiner's ultimate recommendation, nor does it take exception to the substance of the findings and conclusions of the examiner. Respondent excepts first to the examiner's ruling excluding "'so called' post-1944 compliance evidence," which respondent seeks to have admitted to show that "the original settlement was negotiated on the understanding of both parties that the order would permit compliance based on lack of competitive effect," and, second, to the examiner's conclusion that the "informal settlement procedure utilized by the staff in 1943/44 was not binding upon the Commission, but in practice it was generally followed by the Commission," which respondent maintains requires clarification.

As to its first exception, respondent does not contend that the excluded evidence affected the ultimate finding (*i.e.*, that the Commission treated the 1944 order as a consent order). Indeed, as we have noted, neither respondent nor Commission counsel have taken exception to this finding.

Instead, respondent contends that the remand proceeding was intended to settle a further factual question: Was the original settlement negotiated on the understanding of both parties that the 1944 order would permit compliance based on lack of competitive effect? Very clearly, the remand proceeding was not intended to reach this issue, as a reading of the court's description of the purpose of the remand proceeding demonstrates:

The threshold issue, acknowledged by both parties, concerns the Commission's cease and desist order entered against Nabisco in 1944 following negotiations between representatives of both parties. Nabisco argues that this order resulted from a consent settlement. The Commission denies this. The other legal issues presented by the petition have, as a starting point, the assumption that the 1944 order is or is not a consent order. Yet the facts necessary for resolution of this threshold issue have never been developed in a hearing before the Commission. They should be. We therefore remand this proceeding to the Federal Trade Commission to permit both parties to adduce evidence concerning the facts which brought about the 1944 cease and desist order. The Commission has never ruled on whether the original order was a consent order, despite Nabisco's specific requests in 1954 and again in 1967 that it do so. Nabisco is entitled to its day in court, but first in an FTC hearing—not merely through briefs and oral argument in the Court of Appeals. *National Biscuit Company v. Federal Trade Commission*, 400 F. 2d 270, 271 (5th Cir. 1968).

Later in the decision, the court pointed out the "other legal issues presented by the petition," including the question raised now by respondent concerning the competitive effects of its discount sched-

ule. The court made it clear, however, that the "starting point" is a resolution of the question as to whether the 1944 order is or is not a consent order. As previously stated, that determination has been made and the 1944 order will be treated as a consent order. This being the only issue before the Commission upon the court's remand, we agree with the examiner that the post-1944 compliance evidence, which can only bear on the interpretation of the order, should properly be excluded from the record. Accordingly, respondent's first exception is rejected.

Respondent's second exception, as noted, goes to the meaning of the examiner's conclusion that the informal settlement procedure utilized by the staff in 1944 was not binding upon the Commission. Respondent seeks to be assured that this conclusion does *not* mean that "the Commission was not bound by the settlement agreement *after* it had accepted the settlement package," and proposes that the Commission substitute the examiner's conclusions with the following:

2. The settlement agreement negotiated herein under the informal settlement procedure utilized by the staff in 1943-1944 was not binding upon the Commission before its acceptance by the Commission, but after acceptance by the Commission, the agreement did become binding as a consent settlement under the practice as it was generally followed by the Commission at the time.

Respondent's concern as to the meaning of the examiner's second conclusion appears inappropriate both because the subject conclusion of the examiner did not deal specifically with the question of the binding nature of the 1944 order once it was accepted by the Commission, and because, as respondent notes in its brief to the Commission, "doubtlessly the hearing examiner intended no such interpretation of conclusion No. 2, in light of the recommendation that the 1944 order should be treated as a consent order." Therefore, it appears unnecessary to substitute the conclusion urged by respondent for the examiner's conclusion No. 2.

An appropriate order adopting the hearing examiner's findings and recommendation will be issued.

Commissioner MacIntyre did not participate in this matter.

ORDER ADOPTING FINDINGS AND RECOMMENDATION OF HEARING EXAMINER

The Court of Appeals for the Fifth Circuit, having remanded this matter to the Commission in an opinion of August 19, 1968 [8 S.&D. 796], for hearings on the issue whether a 1944 cease and desist order issued by the Commission against respondent was a consent order, and

The Commission, by order of July 30, 1970 [77 F.T.C. 1637], having directed that evidentiary hearings be conducted for the purpose of receiving testimony and other evidence to determine said issue; and

The hearing examiner having held such hearings and, on March 19, 1971, having certified the record of the proceedings, together with his findings and recommendation, and respondent, on June 1, 1971, having excepted to an evidentiary ruling and a conclusion of the examiner; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that respondent's exceptions should be denied, and that the recommendation of the examiner should be adopted:

It is ordered, That the exceptions filed by respondent to the evidentiary ruling and conclusion of the examiner be, and they hereby are, denied.

It is further ordered, That the hearing examiner's findings and conclusion be, and they hereby are, adopted as the findings and conclusions of the Commission.

It is further ordered, That the order to cease and desist issued on February 23, 1944 [38 F.T.C. 213], be, and it hereby is treated as a consent order.

Commissioner MacIntyre not participating.

IN THE MATTER OF

BLACKSTONE SCHOOL OF LAW, INC., ET AL.*

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

Docket 5906. Complaint, July 18, 1951—Decision, Aug. 23, 1971

Order modifying an order of February 10, 1971, 78 F.T.C. 307, which required respondent to clearly disclose the limited utility of its law courses and its law degrees, staying enforcement of the latter provision (Paragraph 3), until the Commission rules on a similar question *In the Matter of La Salle Extension University*, Docket No. 5907. The Commission by its order of June 24, 1971, 78 F.T.C. 1272, issued its order in Docket No. 5907 without a similar