

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

IN THE MATTER OF
BEATRICE FOODS COMPANY

ORDER AND OPINION OF DISMISSAL, ETC., IN REGARD TO THE ALLEGED
VIOLATION OF SECTION 7 OF THE CLAYTON ACT

Docket 8814. Complaint, April 30, 1970—Decision, September 28, 1972.

Order and opinion dismissing a complaint alleging violation of Section 7 of the Clayton Act by a Chicago, Illinois, dairy company. The Commission concluded that the evidence is insufficient to support a finding that a violation of Section 7 has been shown in the "national market" of institutional dry foods wholesaling.

COMPLAINT

The Federal Trade Commission, having reason to believe that Beatrice Foods Co. has acquired John Sexton & Co., a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C., Section 18), and/or in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C., Section 45), hereby issues this complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C., Section 45(b)), stating its charges in that respect as follows:

I

DEFINITIONS

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

Complaint

81 F.T.C.

(a) *Dry Grocery Products* are processed packed foods, including all foods canned in tins or glass or preserved in a dry state, but excluding fresh or frozen products such as fresh or frozen meat, fruit, vegetables, fluid milk and bread.

(b) *Institutions* are organizations preparing and serving, or serving, food for consumption on or off the premises, or meals away from home, including but not limited to restaurants, cafeterias, hotels, schools, colleges, hospitals, nursing homes, industrial feeding concerns, automatic merchandising concerns, clubs, and air lines.

(c) *Wholesalers of Dry Grocery Products* are merchant middlemen who buy various dry grocery products from food processors, producers and manufacturers and sell such products to retail food and grocery stores.

(d) *Institutional Dry Grocery Wholesalers* are merchant middlemen who purchase various dry grocery products from food processors, producers and manufacturers and sell such products to institutions.

II

RESPONDENT

2. Beatrice Foods Company (Beatrice), a respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 120 South LaSalle Street, Chicago, Illinois.

3. Beatrice was founded in 1897 in Beatrice, Nebraska. Beatrice is engaged in the business of producing, processing and/or distributing dairy, grocery and confectionery products, among others, and the operation of refrigerated warehouses. During its fiscal year ending February 29, 1968, about 45 percent of Beatrice's net sales were derived from sales of dairy products, about 37 percent from grocery and confectionery products and about 10 percent represented rentals from its public refrigerated warehouses. Prior to December 20, 1968, Beatrice sold dry grocery products to John Sexton & Co. and it also sold and is now selling such products to other institutional grocery wholesalers, some of whom competed with John Sexton & Co. and compete now with Beatrice. Beatrice also sells other products to institutional wholesalers and directly to institutions.

4. During its fiscal year ending February 29, 1968—

(a) Beatrice's net sales totaled \$1,052,431,480, exceeding one billion dollars for the first time. In conducting its business, Beatrice has over 23,000 employees, markets over 5,000 products, and operates about 500 plants and branches.

(b) Beatrice was the 46th largest national advertiser. Among its better known trade names and products are the following:

Dairy Division:

"Meadowgold" milk and frozen deserts

"Louis Sherry" ice cream
"Dannon" yogurt

Grocery Division:

"Bonds" pickles and relishes
"Ma Brown" pickles and relishes
"L&S" pickles and relishes
"Rainbo" pickles and relishes
"American" pickles and relishes
"Ma Brown" jellies and preserves
"L&S" jellies and preserves
"Ruby Bee" jellies and preserves
"Mario's" olives
"Fisher's" nut products
"Adams" snack foods
"Rudolph's" snack foods
"Pepis" snack foods
"Time-4" snack foods
"Treat" snack foods
"Pik-Nic" snack foods
"Kobey's" snack foods
"Liberty" maraschino cherries and glazed fruits

"La Choy" chinese foods
"Temple" chinese foods
"Gebhardt's" Mexican foods
"Rosarita" Mexican foods
"Shedd's" margarine and salad dressing
"Lambrecht" frozen foods
"G-W" pizza pies
"Lambrecht" pizza pies
"Burney Bros." baked foods
"Aunt Nellie's" glass packed vegetables and fruit drinks
"Lady Betty" glass packed vegetables and fruit drinks
"Murray" cookies
"Mother's" cookies
"Sugarine" artificial sweetener
"Miracle White" laundry products

Confectionary Division:

"Clark" candy bars
"Richardson" mints

"Holloway" milk duds and caramels
"Jolly Rancher" candy bars

(c) Substantially all of Beatrice's non-dairy business, and most of its dairy business, is the result of acquisitions made over a period of time. Since January 1, 1960, Beatrice has acquired among others the following non-dairy firms:

1960
M. J. Holloway & Co.
Gebhardt Chili Powder Co.
Mitchell Syrup & Preserve Co.
Grand Trunk Warehouse & Cold Storage Co.

1961
Adams Corp.
Pik-Nik Company
Rosarita Mexican Foods Co.
Liberty Cherry & Fruit Co.

1962
Fisher Nut Co.
Cal-Compack Foods, Inc.

1963
G-W Food Products Corp.
Burney Bros., Inc.
Deppe-Vienna Baking Co.

1964
Southland Pecans
Liberty Baking, Inc.

Complaint

81 F.T.C.

Cincinnati Fruit & Extract Works,
Inc.
The Sugarine Co.
Speciality Foods, Inc.
Bloomfield Industries
Regal By-Products Co.
Chicago Produce Terminal

1965

Chesterton Candy Co.
Aunt Nellie's Foods
Murray Biscuit Co.
Stiffel Co.
Stahl Finishing Co.
Vigortone Products
Colorado By-Products Co.

1966

Switzer Licorice Co.
Jolly Rancher, Inc.
Temple Frosted Foods
Knickerbocker Mills
Rudolf Foods
Mid-West Forging & Manufacturing
Co.
Ross-Wells, Inc.
Geerpress Wringer Co.
Quincy Market Cold Storage Co.
Tampa Cold Storage Co.
Inland Underground Facilities, Inc.

1967

Mother's Cookies
Golden Cookie Co.
J. Warren Bowman, Inc.
Julian Bail Industries
South Georgia Pecan Co.
General Water Conditioning, Inc.
James H. Rhodes & Co.
Airstream, Inc.
Melnor Industries, Inc.
Tekni-Craft Inc.
Indiana Moulding & Frame Co.
Charmglow Products, Inc.
World Dryer Corp.
Imperial Oil & Grease Co., Inc.
Southeastern Reduction Co.
Lone Star Rendering Co.

1968

Buttercrust Bakeries
Oswald Jaeger Bakery
East Coast Foods
Farboil Co.
Hart Ski Manufacturing Co., Inc.
Morgan Yacht Corp.
Max H. Kahn Curtin Co.
Vogel-Peterson Co.
Hi-Temp, Inc.
Market Forge
San Angelo Bay Products Co.
Lubbock Rendering Co.

Pre-1960 acquisitions include but are not limited to D. L. Clark Co., Thos. D. Richardson Co., La Choy Food Products, Bond Pickle Co., Mario's Food Products, Squire Dingee Co., Tasty Foods, Inc., Shedd-Bartush Foods, Inc., A. F. Thiboden Co., Detroit Refrigeration Co., and Lackawanna Cold Storage Co.

5. At all times relevant herein, Beatrice sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence Beatrice was, and is, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

III

JOHN SEXTON & COMPANY

6. John Sexton & Company (Sexton) was, on December 20, 1968, a corporation organized and existing under the laws of the State of Illinois with its principal office and place of business located at 4700

South Kilbourn Avenue, Chicago, Illinois. It is now operated as a division of Beatrice.

7. Sexton was originally established in 1883 in Chicago, Illinois and incorporated in 1898. It was on December 20, 1968, an institutional dry grocery wholesaler, distributing dry groceries to restaurants, clubs, hospitals, schools, colleges, hotels and other purveyors of prepared food services. It operated thirteen warehouses which served as distribution centers, servicing over 70,000 customers throughout the continental United States, in the West Indies and Hawaii. Nearly all the products distributed by Sexton were sold under its own trade names or brands and labels. About 27 percent of the products distributed by Sexton were manufactured or processed and packed, bottled, or canned by Sexton in its own plants. Sexton purchased other dry grocery products from food manufacturers, including Beatrice.

8. Sexton operated a laboratory for the systematic testing of "quality" in the products it produced, the products it distributed and for the development of new products. Sexton had developed, and placed on the market since July 1, 1967, a number of new convenience products including "Jet Set," an instant gelatin, canned "Chopped Chicken Livers" and "Spoon-Redi," a line of puddings to be spooned directly from the can into dessert dishes.

9. During its fiscal year ending June 28, 1968, Sexton had net sales of \$91,053,770 and net earnings of \$2,000,945. Sexton was on December 20, 1968, the largest independent institutional dry grocery wholesaler in the United States and the only such wholesaler distributing nationwide and manufacturing a significant portion of its products. Sexton's position had in part been attained by the acquisition of a number of distributors and a food manufacturer including the following:

(a) In August 1943, J. C. Stewart Co., an institutional wholesaler located in Pittsburgh, Pennsylvania.

(b) In 1964, National Brands, Inc., Grocery Department, an institutional wholesaler then located in Miami, Florida.

(c) In 1965, Cincinnati Foods, Inc., an institutional wholesaler located in Cincinnati, Ohio.

(d) In January 1953, The Columbia Conserve Company, a food manufacturer located in Indianapolis, Indiana.

10. Sexton sold dry groceries to institutions located in over 150 Standard Metropolitan Statistical Areas (SMSA), as defined by the Executive Office of the President, Bureau of the Budget, and in over 60 other localities. Sexton had nationally a market share of approximately 5 percent in the institutional dry grocery wholesale industry,

Complaint

81 F.T.C.

and in a number of the SMSA's and other markets which it serves Sexton has market shares ranging from 10 percent to about 50 percent.

11. At all times relevant herein, Sexton sold and shipped products in interstate commerce throughout the United States; and on December 20, 1968 Sexton was engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

IV

TRADE AND COMMERCE

12. The institutional dry grocery wholesaling industry consists primarily of a number of small independent concerns operating in local or regional markets, generally from one warehouse or at most three or four warehouses, each concern selling for the most part products bearing its label. The industry is characterized, on the whole, by (a) the solicitations of orders by a street salesman, (b) the extension of credit by the wholesaler, and (c) the delivery of dry groceries to the premises of the purchaser, either by common carrier or in the truck of seller.

13. Since 1960 a merger trend has been developing in the institutional dry grocery wholesale industry. Among others, Sexton has acquired two institutional dry grocery wholesalers during that period, Consolidated Foods Corporation has acquired during this period at least three, and Food Corporation of America has acquired one.

14. In the Chicago SMSA, a number of institutional dry grocery wholesalers have entered, or are now planning to enter, the institutional frozen food wholesale industry. Prior to December 20, 1968, Beatrice was and is now an institutional frozen food wholesaler in the Chicago SMSA, and prior to December 20, 1968, Sexton had contemplated entry into the institutional frozen food industry and was a potential entrant in that industry.

V

ACQUISITION

15. On or about December 20, 1968, Beatrice acquired the business and assets of Sexton, exchanging therefor approximately 375,000 shares of Beatrice's preferred convertible preference stock valued at the time at about \$37,500,000.

VI

EFFECTS OF ACQUISITION

16. The effect of the acquisition by Beatrice of Sexton may be to lessen competition substantially or to tend to create a monopoly or to restrain competition in the institutional dry grocery wholesale industry and/or in the institutional frozen food wholesale industry, in the United States, or sections thereof, in the following, among other ways:

(1) Actual and potential competition between Beatrice and Sexton in the manufacture of dry groceries and the direct or indirect distribution of dry groceries to institutional purchasers has been, or may be eliminated.

(2) Sexton has been eliminated as a substantial independent competitive factor.

(3) Sexton has been, or may be, foreclosed as a customer for independent packers of dry groceries.

(4) Beatrice has been, or may be, foreclosed or otherwise unavailable as a source of supply for other institutional dry grocery wholesalers.

(5) Sexton has been eliminated as a potential independent entrant into the institutional frozen food wholesale industry.

(6) Beatrice will be substituted for and take over Sexton's large institutional dry grocery wholesale market shares in individual SMSA's and other markets.

(7) The merger trend in the institutional dry grocery wholesale industry may be further accelerated.

(8) As a manufacturer of utensils and equipment for institutions, a seller of bakery and dairy products to institutions, and a public warehouse operator, Beatrice has, or may have, decisive competitive advantages over its competitors in the institutional dry grocery wholesale industry.

(9) Barriers to entry into the institutional dry grocery wholesale industry have been or may be heightened.

(10) Barriers to entry into the manufacturing of dry groceries for the institutional market and into the wholesaling of dry groceries to the institutional market may be heightened as a result of Beatrice's substantial financial resources, its advertising capabilities and the combining of the nationally known Beatrice Foods and Sexton names.

Initial Decision

81 F.T.C.

VII

VIOLATION

17. The acquisition of Sexton by Beatrice, as alleged above, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. 18) as amended, and/or a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as amended.

Mr. Carl J. Batter, Jr., Mr. Lewis F. Parker, and Mr. William M. Sexton, supporting the complaint.

Mr. Edward L. Foote, Mr. Terry M. Grimm, Mr. John C. Malugen, of Winston, Strawn, Smith & Patterson, and Mr. John P. Fox, Jr., Chicago, Illinois, for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

MAY 14, 1972

STATEMENT OF PROCEEDINGS

On April 30, 1970, the Commission issued its complaint against respondent charging it with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. Section 45).

A copy of the complaint and notice of hearing was served upon respondent, and respondent thereafter appeared by its counsel and filed an answer admitting certain of the allegations of the complaint but denying that it had violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Hearings were thereafter held, at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the examiner, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent. Oral argument was also heard by the examiner.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings, conclusions and briefs submitted by both parties, the examiner, based upon the entire record, makes the following:

FINDINGS OF FACT

*Jurisdictional Facts*¹

1. Beatrice Foods Company (Beatrice) is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 120 South LaSalle Street, Chicago, Illinois.

2. At all times relevant to this proceeding, Beatrice sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence Beatrice was, and is, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

3. John Sexton & Company (Sexton) was on December 20, 1968, a corporation organized and existing under the laws of the State of Illinois with its principal office and place of business located at 4700 South Kilbourn Avenue, Chicago, Illinois. It is now operated as a division of Beatrice.

4. At all times relevant to this proceeding, Sexton sold and shipped products in interstate commerce throughout the United States; and on December 20, 1968, Sexton was engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

5. On or about December 20, 1968, Beatrice acquired the business and assets of Sexton, exchanging therefor approximately 375,000 shares of Beatrice's preferred convertible preference stock valued at the time at about \$37,500,000.

Beatrice

6. Beatrice is engaged in the business of producing, processing and distributing dairy products and specialized food products sold through its Grocery Products Division primarily to retail grocers, and also operates cold storage or refrigerated warehouses. Its sales to the retail grocery trade are made primarily through food brokers, of which it has 1400 throughout the United States, and it is one of the largest suppliers of dairy and grocery products to this trade. Based upon 1959-1960 data, the Commission found in 1965 that Beatrice was the third largest dairy company in the United States and a large supplier of other food products, *Beatrice Foods Co.*, Docket 6653 (Dec. April 26, 1965) [67 F.T.C. 473]. It has over the years enjoyed a substantial growth, more than tripling its net sales between 1961 and 1970. During its fiscal year ending February 29, 1968, about 45 percent of Beatrice's net sales were derived from sales of dairy products,

¹ The complaint alleges and the answer admits the essential jurisdictional facts.

about 37 percent from grocery and confectionery products and about 10 percent represented rentals from its public refrigerated warehouses. In 1970, dairy products accounted for 31 percent of its total sales, and grocery and confectionery products amounted to 31 percent of its net sales in 1970. Its Warehouse Division owns and operates 22 refrigerated and three dry storage warehouses in major cities of the United States. Revenue from this operation amounted to 4 percent of net sales in 1970. Beatrice also has an agri-products, chemical and manufacturing and international divisions which accounted for 34 percent of its sales in 1970. Beatrice's net sales for fiscal year ending February 29, 1968 were \$1,052,431,480. In 1970 Beatrice's total sales were \$1,576 million with total assets of nearly \$632 million. Beatrice was ranked 83rd in a list of 500 largest industrial corporations in 1969 (CX 40E, 126). In conducting its business, Beatrice has over 23,000 employees, markets over 5,000 products, and operates about 500 plants and branches.

7. The Beatrice Grocery Products Division, of which Sexton became a part, was created by acquiring specialty food processors with relatively high margins of profit compared to the Beatrice Dairy Division. Beatrice in the pleadings admitted that the acquisitions set forth in Paragraph 4 of the complaint in fact occurred and are responsible for the development of the Grocery Products Division.²

8. In addition to its principal sales to the retail grocery trade, Beatrice packs many of its grocery products in the larger institutional sizes and sells these products through its brokers to the institutional trade either direct to the institutions or through institutional grocery wholesalers. These sales in 1967 amounted to approximately \$13 mil-

² M. J. Holloway & Co.; Gebhardt Chili Powder Co.; Mitchell Syrup & Preserve Co.; Grand Trunk Warehouse & Cold Storage Co.; Adams Corp.; Pik-Nik Company; Rosarity Mexican Foods, Co.; Liberty Cherry & Fruit Co.; Fisher Nut Co.; Cal-Compac Foods, Inc.; G-W Food Products Corp.; Burney Bros., Inc.; Deppe-Vienna Baking Co.; Southland Pecans; Liberty Baking, Inc.; Cincinnati Fruit & Extract Works, Inc.; The Sugarine Co.; Specialty Foods, Inc.; Bloomfield Industries; Regal By-Products Co.; Chicago Produce Terminal; Chesterton Candy Co.; Aunt Nellie's Foods; Murray Biscuit Co.; Stiffel Co.; Stahl Finishing Co.; Vigortone Products; Colorado By-Products Co.; Switzer Licorice Co.; Jolly Rancher, Inc.; Temple Frosted Foods; Knickerbocker Mills; Rudolf Foods; Mid-West Forging & Manufacturing Co.; Ross-Wells, Inc.; Geerpress Wringer Co.; Quincy Market Cold Storage Co.; Tampa Cold Storage Co.; Inland Underground Facilities, Inc.; Mother's Cookies; Golden Cookie Co.; J. Warren Bowman, Inc.; Julian Ball Industries; South Georgia Pecan Co.; General Water Conditioning, Inc.; James H. Rhodes & Co.; Airstream, Inc.; Melnor Industries, Inc.; Tekni-Craft Inc.; World Dryer Corp.; Indiana Moulding & Frame Co.; Charmglow Products, Inc.; Imperial Oil & Grease Co., Inc.; Southeastern Reduction Co.; Lone Star Rendering Co.; Buttercrust Bakeries; Oswald Jaeger Bakery; East Coast Foods; Farboil Co.; Hart Ski Manufacturing Co., Inc.; Morgan Yacht Corp.; Max H. Kahn Curtin Co.; Vogel-Peterson Co.; Hi-Temp, Inc.; Market Forge; San Angelo Bay Products Co.; Lubbock Rendering Co.; D. L. Clark Co.; Thos. D. Richardson Co.; La Choy Food Products; Bond Pickle Co.; Mario's Food Products; Squire Dingee Co.; Tasty Foods, Inc.; Shedd-Bartush Foods, Inc.; A. F. Thibodeau Co.; Detroit Refrigeration Co.; and Lackawanna Cold Storage Co.

lion. (See App. A.) Beatrice likewise is in a position to sell its dairy products direct to institutional buyers throughout the United States from its various dairy operations. In Chicago, Beatrice owns and operates Burney Bros. which is one of the largest bakery products manufacturers and distributors in Chicago. It sells both fresh and frozen bakery products in substantial volume to both the retail and institutional trade (Tr. 530-40). In Chicago Beatrice also owns Produce Terminal and Food Marketers, both of which distribute frozen foods in substantial amounts to the institutional trade. Consequently, Beatrice had institutional sales of approximately \$12 to \$13 million from these 3 wholly-owned operations in Chicago prior to acquiring Sexton, which had sales of \$21 million from its Chicago warehouse. (CX 1, 174; Tr. 530-40) Other operations of Beatrice sell a wide variety of products ranging from house trailers to skis. (CX 40E, pp. 14, 15)

Sexton

9. On December 20, 1968, Sexton was and had been for many years in the food service industry distributing dry groceries to institutions *i.e.*, restaurants, cafeterias, clubs, hospitals, schools, colleges, hotels, in-plant feeders and other purveyors of prepared food to the public. Prior to its acquisition by Beatrice, it operated 13 warehouses which served as distribution centers throughout the continental United States.³ Since the acquisition it has opened a new warehouse in Minneapolis. Nearly all the products distributed by Sexton were sold under its own trade names or brands and labels. During its fiscal year ending June 28, 1968, Sexton had net sales of \$91 million and net earnings of \$2,000,945. Sales during its last fiscal year ending February 1970 were approximately \$100 million. Sexton operated and still operates food processing plants in Indianapolis, Indiana, and Englewood, New Jersey. The plant in Indianapolis processes food products which are sold exclusively by Sexton under its own labels. The principal products are soup, soup mixes, canned meats, jams, jellies and preserves, pickles and pickled products, mayonnaise, fruit juices, ready-to-mix desserts. (See App. B.) The Englewood, New Jersey, plant handles imported products, principally coffee, tea and spices (CX 6). Total sales of products from these plants to Sexton warehouses were approximately \$11 million in 1963 and \$16 million in 1967. Its own manufactured products are about 25 percent of total Sexton sales. (Complaint and Answer, Para. 7) The remainder of Sexton sales are of dry (canned) grocery products and other res-

³ Atlanta, Boston, Chicago, Cincinnati, Dallas, Detroit, Los Angeles, New York, Orlando, Philadelphia, Pittsburgh, St. Louis and San Francisco.

taurant supplies, such as paper products, cleaning detergents and chemicals. These products are purchased from a large number of other manufacturers or processors, including other divisions of Beatrice (CX 15). The record indicates that the amount of sales made by Beatrice to Sexton was about \$1 million a year or less (CX 15). These sales must have been and remain relatively small, since the record does disclose that Beatrice canners and processors sold primarily to the retail trade and only incidentally canned for the institutional trade (Tr. 1289-91, 1705). Sexton does not handle any fresh or frozen products of any kind in its business. Sexton sells its products by means of street salesmen who call upon the restaurants and other institutions, promoting Sexton products, taking orders for products which are then delivered to the institutions on Sexton trucks or by common carrier. (Tr. 1268, *et seq.*) In the early 1960's Sexton established a sales division to deal with a development in the institutional trade, the establishment of a considerable number of multi-unit institutional buyers. This division differed from the usual street salesman division since it was dealing with large volume buyers with feeding units scattered over a large area (city, state, several states, or even nationwide), but with a central buying office employing trained and sophisticated buyers, who required different types of services from its suppliers than that provided by a street salesman selling in a limited area. (RX 25; Tr. 1621) Sexton, with its 14 warehouses and its two manufacturing plants, was and is the largest institutional wholesaler in the United States. In its 1967 Annual Report (CX 41C, p. 4). Sexton reported to its stockholders:

There is a marked trend toward chain food service operations, this study reveals. Products of uniform quality, and their availability to every outlet across the country, are of prime importance to chain buyers. As the industry's only full-line national distributor selling exclusively to the institutional market, Sexton is in an ideal position to capitalize on this trend.

(See also CX 41C, p. 2; CX 41D, p. 8.)

The Merger

10. With regard to the background and purpose of the acquisition of Sexton by Beatrice the president of Beatrice, Mr. William G. Karnes, testified as follows (Tr. 1699):

Q. Now directing your attention, Mr. Karnes, to the Sexton Company, can you tell us briefly how you got interested in the Sexton Company and who you discussed it with in the company, in Beatrice Foods.

A. You mean who I discussed it with in Beatrice Foods?

Q. Yes.

A. Well, over a period of time we knew the Sexton people. I personally knew the officers of Sexton. In fact I was personally acquainted with three of the past presidents of Sexton. We put their figures together with ours and on a pro forma basis we could see that by joining with Sexton we would increase our earnings per share about four or five percent.

Q. Can you explain that, on a pro forma basis? What do you mean on a pro forma basis you would increase your earnings per share?

A. Well, we take our P&L and our earnings with the number of shares outstanding and we add it to, add their earnings in the last known fiscal year. We had their annual report. And on the basis of the stock we were going to offer them, which happened to be a convertible preferred stock, after paying the dividend on the convertible preferred, which was a fixed dividend, the remaining earnings of Sexton would be consolidated into Beatrice, and that consolidation of remaining earnings would raise all of our common shares outstanding at that time about four or five cents.

So it met that test that I mentioned earlier, that all these situations have to. I mean is it a good investment. We felt that Sexton was a good investment.

But going further, as we explored it, we were particularly interested because of the fast growing phase of their business which were the multifoood units, food service units. I think they are referred to in the trade as the Mufso accounts. And we saw the tremendous growth of this type of account.

We are in the food business. We have been in the food business for a number of years. And this was a portion of the food business that we were not in and it was growing very rapidly. And as officers of a publicly owned company we felt we should be in this business. We discussed it with our economist, a man by the name of Eli Shapiro, who is at the present time a professor of finance at Harvard Graduate School of Business, and he, too, pointed out the fast growing business of the multi-units.

Now, it is true that Sexton only had a beginning in there. They weren't very large in it. Actually nobody is very large in this business. Sexton had a beginning in it. So it gave us a foothold in that very large growing segment of the food business.

We saw that Kraft was in it, Consolidated was in it, General Foods, Armour, almost anybody in the 500 Fortune Magazine group in the food business had entered it, and we found we weren't in it and it was an area of business we should be in.

Mr. Karnes also pointed out (Tr. 1703) that there were some disadvantages in acquiring Sexton since it would result in Beatrice sell-

ing to the institutional trade in competition with certain of its customers who were purchasing Beatrice products for sale to the same trade. Mr. Karnes testified further (Tr. 1721-22) :

Q. Mr. Karnes, in terms of your decision to recommend to the board to buy Sexton, did you give any consideration at all to the competitive structure of the entity?

A. Yes, we did. As I said yesterday, we took a look at it. We had been in the food business ever since the inception of our company. We were food manufacturers and food processors and we know that the Sexton was in, as I said yesterday, at least two different types of business. They were in the traditional type of business with routes and street salesmen with all of the problems that entails with the union and distribution difficulties. That portion of the business we were not interested in. If that had been all that Sexton had had, we would not be interested in it.

But we were also aware of this, that the multi-unit accounts were growing. It was growing very fast. And I can't stress that too much, that this was our principal reason for being interested in Sexton.

Here we are, a food business. We had been oriented to, as I say, supermarkets and the retail. Here's a fast growing part of the business with more of the food dollar being spent away from home year after year and we were not in it.

As we looked around, we saw other food companies, the Krafts and the General Foods and Consolidated Foods and many others that had established the institutional business over the years. They had products where they were branded. They had the Kraft brand or they had the General Foods brand and they were accepted. They had sold some of these over the years through distributors but now were in this fast growth of the multi-unit accounts which would become almost a national type of selling crossing geographic lines. They had gone direct with their own sales forces and gone beyond the distributor and developed their own direct business with their own sales force.

We just felt that if we didn't get into this and get a foothold that we were passing up a very important segment of the food business.

Market Involved

11. The broad field with which the complaint deals is the manufacture and distribution of food and related products to the institutional trade. The institutional trade historically consisted of all types of organizations preparing and serving, or serving food for consumption on or off the premises (so-called "food away from home"). These include restaurants, cafeterias, hotels, clubs, schools and colleges, hospitals, nursing homes, religious organizations, industrial feeding con-

cerns, automatic vending companies, and airlines. (CX 71; Tr. 232, *et seq.*). The food processors or packers who supply this trade pack special packages of products for this trade, generally in larger sizes than that supplied to the retail grocery trade, *e.g.*, #10 cans of vegetables and fruits.

12. The institutional trade buys all types of products, including meats, seafood, vegetables, fruits and dairy products. The majority of these products at the present time can be supplied to the institution either in the form of fresh food, frozen food, or dry (canned) food. Some products, *e.g.*, lettuce or anchovies can only be supplied in one form—lettuce must be fresh—anchovies must be canned. In addition to food products, institutions purchase a wide variety of related products. These include paper products of all kinds, soaps and detergents, chemicals, cooking utensils, dishes and silverware, lighting fixtures and supplies.

13. Products are procured by the institutional trade in two ways. Food processors or packers and manufacturers of related products sell and ship directly to the institutions by utilizing food brokers as sales agents or by means of their own sales force. The record contains little data concerning these direct sales, however, they must be considerable, particularly in fresh and frozen meats. Dairies and bakeries also sell substantial amounts of their products direct to institutional users at the local level (*e.g.*, Beatrice Bakery Division, CX 7, pp. 7-9). The second method of distribution, and the one involved in this proceeding, is the purchase and resale of grocery and related products by institutional wholesale distributors to the institutional trade.

14. The typical institutional wholesaler operates its business from a single location or warehouse. A number of institutional wholesalers may have two or three warehouses in a limited geographic area. These wholesalers typically employ street salesmen, calling on the trade and taking orders. Credit is usually extended and orders are delivered by truck either wholly-owned or by contract common carrier. The area of distribution for an institutional wholesaler is limited by the distance it is economically feasible to deliver by truck. This is roughly within 100 to 150 miles of the wholesaler's warehouse. (Par. 12, complaint and answer; Tr. 255, 256, 269, 279-280) Historically the institutional wholesaler has been somewhat of a specialist in that it limited itself to a single line of products, either dry groceries or frozen groceries or fresh produce. This was because of the specialized handling required by each of these lines, particularly frozen and fresh groceries which require refrigeration and are generally delivered more frequently and over a smaller trading area (Tr. 232, 244, 247, 249, 1714)

15. In recent years commencing about 1958, the institutional trade has shown a substantial increase. This is largely accounted for by the growth in what are termed "Multi-Unit Food Service Operators," usually referred to as "Mufso" accounts and the increasing trend of more people eating away from home in these establishments (Tr. 232). These types of accounts are characterized by having a number of units where food is sold to the public. They include "in plant" feeding organizations, such as A.R.A., Saga Foods, Automatic Canteen; large chain restaurants, such as Stouffer's; chain retail stores, such as F. W. Woolworth, Walgreen Drug Stores, and S. S. Kresge; airlines, such as United who operates Sky Chef restaurants and supplies itself and other airlines for in flight meals; chain franchise organizations, such as McDonald's, Burger Chef, Burger King; chain cafeterias, such as S. and W.; chain hotel and motel organizations, such as Holiday Inn and Howard Johnson's. (CX 71; Tr. 234, 236) In addition, in recent years schools and colleges have to a great extent centralized their food buying practices as a result of the growth of school populations and the increase in school feeding programs.

16. These large chain type organizations are distinguished from the traditional type institution, in that they have employed trained buyers at central locations who buy for their food outlets which may be scattered over a large geographic area, a state, parts of several states, a whole region or the entire United States (RX 16). These buyers are sophisticated and purchase, after conducting tests, the products they feel are best suited to their particular operation. The institutional wholesalers and food processors changed their selling practices to meet this new demand in the market. Specially trained salesmen, more sophisticated than the usual street salesmen, were required. For example, Sexton in the early 1960's put in a separate division to handle these national accounts or house accounts (Tr. 2046-47). Trade associations, such as the Association of Institutional Distributors (AID) (CX 2) were formed. These organizations were formed by institutional wholesalers to enable them to have a representative who could call on the various Mufso accounts and meet their requirements of delivering uniform products over a much larger trading area than was covered by any one wholesaler member (Tr. 16, 237, 282).

17. The growth of these Mufso accounts is demonstrated by a 1970 structural analysis of Mufso (CX 71) which shows a growth stated in retail sales value by such organizations from approximately \$9 billion to \$18 billion. In effect, Mufso sales doubled in five years, 1965 to 1970.

18. As a result of this demand the sales of institutional wholesalers increased considerably at the same time. Institutional wholesalers ex-

panded their lines. A number of dry institutional wholesalers have added frozen food lines to meet demand (Tr. 232). Likewise a number of institutional frozen food wholesalers have added dry groceries to their lines.⁴ (Tr. 331, 415, 552, 661, 822-23, 1713-14, 2052-53). Food retailers (chains) are also interested in entering the food service field (Tr. 2398; CX 45A).

19. Complaint counsel contend that the relevant market involved in this case is limited to the sale and distribution of full line institutional dry products. Excluded by complaint counsel are all frozen and fresh products, and all products sold by specialty houses or wholesalers who operate on a cash and carry basis. (Prop. Findings 45-55, incl.) They contend that the market involved is confined to the activities of institutional dry grocery wholesalers. Their case was tried on this basis in view of the industry definitions set forth in Paragraph 1 of the complaint and the limits placed on the trade and commerce involved by Paragraph 12 of the complaint. Paragraph 12 defines the relevant industry as "a number of small independent concerns operating in local or regional markets, generally from one warehouse, or at most three or four warehouses, each concern selling for the most part products bearing its label. The industry is characterized, on the whole, by (a) the solicitations of orders by a street salesman, (b) the extension of credit by the wholesaler, and (c) the delivery of dry groceries to the premises of the purchaser, either by common carrier or in the truck of seller."

20. The respondent, while admitting that it is engaged in this type of industry, urges that the definition is unrealistic and artificial; that the definition of dry grocery products in Paragraph 1 of the complaint may be an accurate definition as far as it goes but is not realistic since it excludes relevant and competitive product lines, frozen and fresh foods, which Sexton does not handle, but with which it must compete in the market. Respondent, as part of this argument, also contends that realistically there are two separate and distinct lines of commerce involved: the traditional wholesaler customer who is handled by street salesmen and have one or at most a few eating establishments in a small area, and second, the Mufso-type of accounts who are serviced by the wholesaler in an entirely different fashion. (Resp. Prop. Findings 1 and 2) Sexton's argument is that it is engaged in both lines and that they are separate and distinct since the competition which exists in the traditional field is altogether different from

⁴ Paragraph 14 of the complaint alleges and the record supports that "a number of institutional dry grocery wholesalers have entered or are now planning to enter the institutional frozen food wholesale industry."

that met when trying to sell to Mufso accounts. Mr. Karnes, the president of Beatrice, testified and it is found that the real reason for the merger with Sexton was to get into the rapidly growing Mufso business (Tr. 1715-18). And that had Sexton been only in the traditional street salesman type of wholesaling, Beatrice would not have been interested in the acquisition (Tr. 1721). The emphasis in Sexton has been and is to obtain as much Mufso business as it can. Sexton sales to Mufso accounts in 1968 was only about 3 percent of its total (Tr. 2047). At the present time, these have increased to about one-third of its total sales (Tr. 2046), or about \$33 million, with the remaining \$67 million still with the traditional type institutional trade.

21. In the traditional institutional wholesale market, it is found that there is very little competition between fresh, frozen and canned products. The usual restaurant, hotel, or club has little, if any, freezer space so the street salesmen selling dry groceries meet little competition other than from other dry institutional wholesalers (Tr. 1012-13). Consequently, in the traditional area it can be said, as complaint counsel contend, that the wholesaling of dry institutional groceries is a separate and distinct market from the other product lines, frozen and fresh. However, with the substantial growth of the Mufso accounts over the past ten years, the sales of frozen food products by institutional wholesalers has increased substantially. This growth is best illustrated by the number of dry institutional wholesalers who have entered into the frozen field to meet the demand for frozen products (Tr. 472-73, 1013-14, 1626, 1630, 1715-16). It is likewise true that in recent years a substantial number of institutional distributors of frozen foods have enlarged their product lines to include dry grocery products. Consequently, in the Mufso-type of buying there is much more competition across food lines—dry, frozen and fresh—and the dry groceries cannot be segregated in a real competitive sense from the other lines.

Recognizing this competitive situation in the Mufso-type of distribution between various types of food, and the fact that Mufso accounts are sold in a different fashion does not, however, preclude an examination of the dry institutional field and Sexton's position in that field, since this is the business that Sexton was and is engaged in.

Market Shares

22. The figures concerning the food industry are developed principally by the Bureau of the Census, Department of Agriculture and to some extent by the associations and publications of the industry.

The figures are quite unsatisfactory for purposes of this proceeding.⁵ Based on what is apparently the only evidence available, complaint counsel have presented statistics on which they base proposed findings as to Sexton's market shares, first in the Bureau of the Census Chicago Standard Metropolitan Statistical Area (SMSA) and second, in the entire United States. Complaint counsel subpoenaed 25 institutional dry wholesale grocers, including Sexton, selling in the Chicago market, obtaining total sales by each company and total sales in the Chicago SMSA in 1968 and 1969. (See Appendix C.) These figures show that Sexton had 16.18 percent of the sales of dry groceries in 1968 and 15.23 percent in 1969, was second largest in 1968 and third in 1969. These figures also show that the top ten wholesalers in the Chicago SMSA had 85.29 percent of total sales in 1968 and 84.57 percent in 1969.

23. Respondent attacks these figures on several grounds. First, they improperly exclude all sales of frozen and fresh foods, which are competitive, particularly in Mufso accounts. They also exclude all sales by specialty institutional wholesalers,⁶ *e.g.*, Ursini, Tr. 2029, *et seq.*, a wholesaler catering to Italian restaurants or pizza house, and sales made by some wholesalers to the institutional trade on a cash and carry basis. Respondent has also presented evidence to the effect that there are about 80 institutional distributors rather than the 25 called by complaint counsel (RX 18) and that there are 75 to 100 frozen food institutional distributors in Chicago who were never called, at least some of whom sell dry groceries (Tr. 1011, 2011, 1998-99). In addition, respondent claims that there are an unknown number of wholesalers located in other cities who come into Chicago and make at least some sales. Complaint counsel answer that some of the 25 dis-

⁵ For example, complaint counsel note in their Attachment F to their proposed findings that:

"Census data has certain limitations and involves certain problems. One problem is the reporting of sales of the same physical products by two or more levels of trade, such as manufacturers sales branches or brokers reporting the sale of the same physical products as the merchant wholesaler. A second problem is that the sale by the merchant wholesalers can include a wide variety of products but each merchant wholesaler is classified on the basis of his primary source of sales. Thus, the full line grocery merchant wholesaler may sell cleaning supplies, soft and hard goods, as well as produce, frozen foods and dry groceries. Hence non-food products are involved in the sales of most merchant wholesalers, as well as food products outside his primary line. A third problem relates to the sales by class of customers. The census report requests information on the percent of total sales to different classes of customers from each establishment. Thus, all of the sales of an establishment to the food service industry may be generated from minor products whereas the percentage may be applied, indeed can only be applied, to the total sales of the establishment which means to its primary product line. Thus the problems of the census data on the wholesale trade places severe limitations on the ways in which this data may be properly used."

⁶ It appears that while complaint counsel have excluded any sales made by specialty houses of specialty products, all of Sexton's sales of all products are included for comparison purposes, although some of them may also be specialty products.

tributors who appeared were asked who their competitors were, and that no one not called as a witness and appearing in Appendix C of this decision was identified as a competitor and that consequently this is an exhaustive list of such distributors selling in the Chicago SMSA. The examiner must reject this contention by complaint counsel. The questions asked the witness were merely to identify his competitors. No attempt was made to be exhaustive of all distributors in Chicago and there is no evidence upon which the examiner can find that these 25 are complete and represent a total universe (Tr. 276). In fact the evidence brought forward by respondent and not refuted by complaint counsel compel a finding that the list is not complete and consequently any conclusion as to market shares or concentration in the Chicago SMSA as requested by complaint counsel is not possible.

24. Complaint counsel have also presented statistical calculations to show that Sexton has about 7.85 percent of the total United States market in dry groceries. (Attachment F to complaint counsel's proposed findings.) The document appears to be based on the following procedure:

a. The Bureau of the Census shows that wholesalers have annual sales of approximately \$7 billion to the food service industry (1967, \$6.94 billion).

b. Chicago wholesalers have total sales of approximately \$440 million, representing 6.21 percent of the United States total for the year 1967.

c. This exhibit next uses the tabulation of Chicago wholesalers and concludes that the dry grocery business in Chicago (as shown by the 25 selected companies) is roughly \$75 million. Therefore, it is concluded dry groceries represent approximately 16 percent of all wholesale sales to the food industry in the United States (\$75 million ÷ \$440 million).

d. An estimate is thus obtained of total sales in the United States of dry groceries (\$1,159,034,000). [16 percent of \$7 billion.] Sexton's sales are then compared to that figure to arrive at the 7.85 percent figure.

25. As found above, the 25 wholesalers selected by complaint counsel who are general line dry wholesalers are not the only companies wholesaling such products in Chicago. Consequently, complaint counsel's projections both in Attachment F of their proposed findings and in other SMSA's in the United States as set forth in Attachment A to their proposed findings must be rejected since they based it in essential part on the 16 percent figure from their Chicago calculations as accurately representing total institutional sales of dry groceries

in other SMSA's throughout the United States. Respondent also contends with some logic that the total sales of dry groceries in the Chicago market were one-third of Commission counsel's figure of \$440 million or \$150 million, rather than complaint counsel's \$75 million figure (resp. Reply Brief, p. 21). Consequently, even if the 25 dry grocery wholesalers' sales in the Chicago SMSA were a total market figure, the Sexton share of the Chicago market of 7.85 percent is double what it should be. The examiner, therefore, must reject this contention by complaint counsel.

26. Complaint counsel have also prepared a tabulation of selected vegetable and fruit products, comparing Sexton warehouse movement (disappearance) of such products with total cannery movement (disappearance) of such products (complaint counsel Proposed Findings 39 and 40). A copy of this tabulation is attached hereto as Appendix D. This tabulation indicates that Sexton's share of the market to be in the area of 3-5 percent. Respondent in its reply brief (pp. 17-18) attacks this tabulation on several grounds including the fact that this tabulation is based upon assumptions that Sexton's inventory movement of their products is comparable to the total movement of such products. There is no record evidence one way or another on this point. Included in the tabulation are a number of so-called specialty items which complaint counsel elsewhere exclude from consideration as not being a relevant part of the market. The examiner is unable to base a finding as to market share upon this tabulation.

27. Respondent has prepared tabulations from what evidence is available in the record and concluded that Sexton in 1967 had somewhere in the area of .4 percent to 2 percent of the total institutional market, depending on the products and competitors included in the universe (resp. Prop. Finding No. 6). Respondent's figures, as those of complaint counsel, are based upon studies made by the U.S. Department of Agriculture in 1966 (CX 77) and the Bureau of the Census for 1963 and 1967 (CX 53-56). Both parties are in substantial agreement that total sales to the food industry in 1966 were approximately \$10.9 billion (CX 147; RX 23C). Attempts were made to project these figures forward based upon estimated growth of the food service industry. The parties disagree on what the rate of growth is. Complaint counsel end up with a figure of about 4 percent per year, while respondent insists, with some substantial basis, that the figure is anywhere from 8 percent to 10 percent to 15 percent per year. Using a 10

Initial Decision

81 F.T.C.

percent growth rate per year, respondent concludes that Sexton's share of the institutional market is as follows:⁷

[Figures in percent]

	1958	1967	1970
Sexton's market share of the food service industry	0.86	0.62	.615
Sexton's share of the traditional customer industry	0.9	0.8	0.9
Sexton's share of the MUFSO customer industry	0.9	0.8	0.9

28. After attempting to analyze and understand the statistical data presented by both parties, the examiner is unable to make any precise finding as to Sexton's market share of the wholesale dry grocery market to the institutional trade. The respondent claims that it is somewhere between 0.9 percent and 2.3 percent depending on what products are included in the market. (See Respondent's Proposed Finding No. 6.) Complaint counsel urge that based upon their estimates and analysis that Sexton had anywhere from 4 percent to 5 percent of the total market, based upon certain selected products which Sexton sold (see App. D) to 7.85 percent of the total dry grocery merchant wholesale market based upon their claim that Sexton had 16 percent of the Chicago SMSA sales, which claim was rejected above. The best that the examiner can find, and this is based on averaging various claims, is that Sexton was making somewhere in the neighborhood of 1 percent to 4 percent of the total dry grocery sales in the United States at the time of the acquisition.

29. Complaint counsel emphasize what they term the horizontal aspects of the merger (complaint counsel Proposed Findings 105-125). It is true that at the time of the merger Sexton was manufacturing products in its Indianapolis and Englewood, New Jersey, plants and some of them were also made by Beatrice. These, however, were chiefly specialty items, made for Sexton's own labels since they could not be acquired elsewhere. (See Appendix E). Complaint counsel's tabulation shows that Beatrice and Sexton have substantial production out of the total in a few select products: 13.03 percent of ripe and green olives, 14.69 percent of other canned vegetables, 10.99 percent of dill pickles, and 23.04 of soy sauce. However, even if these figures are accepted, the examiner is at a loss to know what finding of adverse effect could be made as to the dry grocery wholesale trade. Beatrice and Sexton were not really competitors at the time of the acquisition, although both manufactured a few of the same products, each sold

⁷ These calculations are all of record as CX 147; RX 23C, 29H, 29I, 29J. The testimony of respondent's two experts also explain in detail the methods used in arriving at these figures: Dr. Gould Tr. 2349, *et seq.*; Mr. Smith Tr. 2186, *et seq.*

to a separate and distinct market, and were not seeking any of the same customers.

Other Mergers in the Institutional Wholesaling Industry

30. First National Stores, Inc., of Massachusetts, a supermarket chain (Tr. 168), in 1969 acquired Suffolk Grocery Co., Inc., an institutional dry grocery wholesaler with sales of about \$7.5 million at the time of acquisition, and in 1970 Albert Richmond Company, a frozen food distributor and meat purveyor with annual sales of from \$2-\$3 million at the time of acquisition (Tr. 169-70). Super Valu Stores, Inc., of Minnesota, acquired in 1965 Institutional Wholesale Grocers, Inc., of Des Moines, and Food Marketing Corp., of Fort Wayne, and in 1964 Chastain Roberts, of Anniston. The latter two concerns also sold to food stores, but total institutional sales acquired by these three purchases were about \$7.5 million (Tr. 173-178). Super Valu has expanded internally into the institutional wholesaling industry in the Minneapolis-St. Paul area (Tr. 179, 1653).

Kane Miller, of New York, acquired Economy Restaurant Supply, also of New York, an institutional dry grocery distributor, K&S, of Liberty, New York, which handled institutional dry groceries and produce, Dimyan Foods, of Danbury, Connecticut, an institutional distributor of frozen food and dry groceries, Yavner Brothers, of Norfolk, Virginia, an institutional dry grocery wholesaler and Multi Wholesale Grocery, and Leotis and Company, of Brunswick, Georgia, an institutional distributor (Tr. 241). Kane Miller has, by these acquisitions, made between 1961 and 1967, obtained \$10-\$12 million of sales in institutional distribution (Tr. 241).

31. Since May 1967, Consolidated Foods has acquired three institutional distributors: Pearce-Young Angel Company, Greenville, South Carolina; Premier Distributing Corporation, Detroit, Michigan; and Snow Queen Foods, Inc., of Los Angeles. By these three acquisitions, Consolidated Foods obtained over \$45 million of annual institutional sales (RX 179).

Continental Coffee Company acquired J. P. Michael, an Indianapolis institutional wholesaler, in 1969 (Tr. 208) and E. J. Byman, a Chicago institutional distributor, in 1970 (Tr. 997).

S. E. Rykoff, of Los Angeles, has made a number of acquisitions between 1964 and 1970. These include Maret Foods, San Francisco; Bi-Rite Company, Fresno; Arizona Foods, J. W. Linder Co., Sacramento, R. M. Warren Co., Stockton, and two San Francisco organizations, the Institutional Distributing Division of Echo Foods, and the Institutional Division of S&W Fine Foods (Tr. 617).

Other acquisitions include the purchase of Obee, Chicago, by National Tea Co. in November 1966 (Tr. 819), and the acquisition of Ellenbee Foods, in Cincinnati, by Frances A. Legitt, also of Cincinnati, both institutional dry grocery wholesalers (Tr. 889). Kraftco (Kraft Foods), through internal expansion, has entered into the institutional wholesaling market, selling its products (Tr. 1154, *et seq.*).

CONCLUSIONS OF FACT

1. Sexton's share of the institutional dry grocery wholesale trade is not large (1 percent to 4 percent) when compared to the total of such business in the United States.

2. Sexton was and is the largest institutional dry wholesaler in the United States with sales in excess of \$100 million a year.

3. The institutional dry wholesaling business is substantially fragmented with active competition for the institutional trade, both the traditional trade and the more recently developing Mufso organizations.

4. The institutional wholesaling trade is not characterized as being concentrated in the hands of any few large organizations.

5. The record does not permit a finding that Beatrice has conferred upon Sexton any advantages so significant as substantially to lessen competition in the institutional dry wholesale trade.

6. Beatrice was and is one of the largest food suppliers in the United States to the retail grocery trade, with total annual sales primarily of food products of \$1½ billion.

7. Beatrice has had many years of experience in the food business, selling to retail grocery stores and to some extent to institutions and institutional dry wholesalers. It also has a substantial network of warehouses throughout the United States. These facts in combination with the testimony of Mr. Karnes, president of Beatrice, quoted above, compel a finding that Beatrice was not only a potential entrant when it acquired Sexton but had in fact decided to enter the institutional field to get a share of that business, particularly the rapidly growing Mufso business. The only question was how to enter.

8. As a result of its acquisition of Sexton, Beatrice eliminated itself as a potential competitor of Sexton and the other institutional dry wholesalers in the industry.

DISCUSSION AND CONCLUSIONS OF LAW

1. The leading cases dealing with potential competition in mergers found invalidity in situations where the merging firm was definitely

a likely or potential entrant. These decisions and subsequent authorities have developed the applicable principles, so that, for a merger to be barred because of its effect in eliminating potential competition between the merging companies, the following four factors or at least some of them have been established: (1) the particular market has been shown to be substantially concentrated; (2) the merging firm within the market has been shown to be a leading or major factor in that market; (3) the merging firm outside the market has been shown to be a likely entrant by internal growth or by a relatively small acquisition as alternative to the proposed merger; and (4) the latter has been shown to be the most likely entrant, or one of such likely entrants. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), 389 U.S. 308 (1967); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *Bendix Corp.*, FTC Docket 8739, opinion June 18, 1970, 3 CCH Trade Reg. Rep. ¶ 19,288 [77 F.T.C. 731].

2. To emphasize the factors principally relevant here, the firm within the market (Sexton) has been found to be a leading or major factor. It was the largest institutional dry wholesaler in the United States at the time of its acquisition. Consequently the merger cannot be justified as entry by a valid "foothold" or "toehold" acquisition. *Bendix Corp.*, *supra*. The company outside the market (Beatrice) has been found to be a likely or potential entrant. In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, the Supreme Court called for an assessment of a company's nearness to the market, its eagerness to enter that market and its resourcefulness to enter that market. In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964), the Court emphasized the outside company's resources and know-how, its capacity to enter, its long-sustained interest in entering and its competitive and economic reasons to do so. There can be no doubt that Beatrice had the distinctive capabilities, resources, incentives, and interests to enter the institutional dry wholesaling market.

3. Consequently it is concluded that the acquisition of Sexton by Beatrice constitutes a violation of Section 7 of the Clayton Act, as amended, since the effect of such acquisition may be substantially to lessen competition in the institutional dry wholesale line of commerce.

4. As charged in the complaint, the acquisition likewise violates Section 5 of the Federal Trade Commission Act.

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Beatrice Foods Company (Beatrice), through its officers, directors, agents, representatives and employees shall divest, within six (6) months from the effective date of this order, absolutely and in good faith all right, title, and interest and all assets, properties, rights and privileges, tangible and intangible, including without limitation all plants, warehouses, offices, equipment, machinery and operating facilities, inventory, customer lists, trade names, leaseholds, trademarks and good will obtained by Beatrice as a result of its acquisition of the John Sexton & Company (Sexton), together with all additions and improvements thereto of whatever description which have been added to Sexton, so as to assure that Sexton is reestablished as a separate and viable competitor engaged in the business of producing, processing or distributing institutional dry grocery products or any other products added to its line after its acquisition by Beatrice.

II

The divestiture ordered in Paragraph I of this order shall not be effected, directly or indirectly, to anyone who at the time of divestiture is an officer, director, employee or agent of, or otherwise under the control or influence of, Beatrice, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding stock of Beatrice.

III

In effectuating Paragraph I of this order, Beatrice shall complete divestiture in the following manner and subject to the following conditions:

A. Beginning promptly on the effective date of this order, and for a period of ninety (90) days thereafter, Beatrice shall make diligent efforts to effectuate the divestiture required by Paragraph I of this order.

B. If Beatrice fails to effectuate such divestiture within that ninety (90) day period, Beatrice shall within thirty (30) days thereafter submit a plan in form and substance acceptable to the Commission for the formation of a new and separate corporation (New Sexton) restoring Sexton as a viable entity and competitive factor in the institutional dry grocery wholesale industry in substantially the manner and form it was at the time of acquisition or has attained subsequent to its acquisition by Beatrice, such plan shall contain provision for:

1. Transfer to New Sexton of all business and assets required to be divested by Paragraph I of this order;
2. Distribution of the capital stock of New Sexton to the public or to the shareholders of Beatrice;
3. Divestiture by any direct or indirect holder of more than one (1) percent of the outstanding and issued capital stock of Beatrice of all stock or other interest in New Sexton within thirty (30) days from the date of receipt of such stock or interest.
4. Distribution of the capital stock of New Sexton within not more than one (1) year from the effective date of this order.

Providing, however, That the method of divestiture set forth in this subparagraph B may be effectuated by Beatrice at its discretion under the aforementioned circumstances and conditions at any time prior to the period designated herein.

IV

Within thirty (30) days from the effective date of this order and every sixty (60) days thereafter until it has fully complied with the preceding portions of this order, Beatrice shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, without limitation (a) a specification of the steps taken by Beatrice to make public its desire to divest the Sexton business and assets, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations, together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

V

Beatrice shall forthwith, pending divestiture, cease and desist from acquiring, directly or indirectly, any interest in any concern engaged in the institutional dry grocery business.

VI

Beatrice shall forthwith cease and desist for a period of ten (10) years following the approval by the Federal Trade Commission of the divestiture required by Paragraphs I-III of this order, from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission any interest in any concern, corporate or noncorpo-

Initial Decision

81 F.T.C.

rate, engaged in any State of the United States or any territory thereof or the District of Columbia in the institutional dry grocery wholesale business. Within thirty (30) days following the effective date of this order, and annually thereafter, Beatrice shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied with this prohibition on acquisitions.

APPENDIX A

Beatrice 1967 Sales to Institutional Trade

Product	Estimated percent institutional	Value of shipments, institutional
Canned meats.....	8.5	\$564,000
Canned dry beans.....	3	9,402
Canned specialties and canned nationality foods.....	7.5	1,105,300
Canned fruits.....	1.0	47,670
Canned vegetables.....	7.3	684,010
Canned fruit juices.....	2.8	159,740
Jams, jellies, etc.....	2.7	200,718
Pickles.....	12.4	2,634,008
Meat sauces.....	2.5	43,825
Mayonnaise, salad dressings.....	38.0	1,157,480
Frozen specialties.....	6.3	594,783
Flour mixes, etc.....	20.0	19,600
Cookies.....	24	71,169
Bar goods (candy).....	16.8	3,000,112
Packaged goods (candy).....	2.1	326,109
Bulk goods (candy).....	7.6	109,516
Nuts.....	1.2	420,720
Soft drinks.....	2.0	10,100
Flavorings, extracts, etc.....	2.3	26,956
Flavoring agents.....	1.5	13,455
Shortening, oils.....	3.8	9,880
Margarine.....	1.0	423,900
Chips (potato, etc.).....	.8	83,936
Chocolate and cocoa products.....	75.0	1,714,109

(CX 14D-F)

481

Initial Decision

APPENDIX B

Products Manufactured and Sold by Sexton 1963 and 1967

[Dollars in thousands]

Product description	SIC code	1963 trans- fer value to sales branches	1967 trans- fer value to sales branches
Canned meats.....	20138	\$465	\$1,297
Canned poultry.....	20154	90	233
Canned seafood.....	20310	194	258
Canned soup.....	20322	1,357	2,084
Canned dry beans.....	20323	116	138
Canned specialties.....	20324	114	573
Canned fruits.....	20331	384	342
Canned vegetables.....	20332	9	22
Canned fruit juices.....	20334	60	60
Tomato sauces.....	20336	314	297
Jams, jellies and preserves.....	20338	408	532
Soup mixes.....	20342	480	781
Pickles and other pickled products.....	20352	430	1,165
Meat sauces except tomato.....	20353	60	1,199
Salad dressings and mayonnaise.....	20354	861	1,922
Flour mixes.....	20455	3	3
Salted nuts.....	20716	12	64
Flavoring extracts.....	20871	33	33
Beverage bases, except syrups and concentrated fruit juices.....	20872	455	525
Other flavoring agents.....	20874	34	34
Roasted coffee.....	20951	1,448	1,421
Cooking oil.....	20961	2	2
Desserts, ready to mix.....	20961	800	1,118
Sweetening syrups.....	20993	4	46
Baking powder.....	20994	17	20
Vinegar.....	20996	9	9
Chocolate and cocoa products.....	20998	49	49
Other food preparations (tea, spices and miscellaneous items).....	20999	2,265	1,869
Alkaline detergents.....	28411	153	198
Synthetic organic detergents, bulk.....	28416	263	480
Specialty cleaners.....	28423	30	68
Bath essence.....	28445	50	28
Total.....		10,907	15,742

(CX 6)

Initial Decision

81 F.T.C.

APPENDIX C

Institutional Dry Grocery Wholesale Sales and Market Shares and Company Rank in the Chicago SMSA During 1968

Rank and company	Source of data	Sales of dry grocery products to institutional customers	Market share (percent)	Accumulative market share (percent)
1. B. A. Railton Co.	CX139	\$9,615,264	18.94	18.94
2. John Sexton (Subs. of Beatrice Foods as of Dec. 20, 1968).	CX134	18,216,000	16.18	35.12
3. Holleb & Co.	CX124A	7,519,477	14.81	49.93
4. Consolidated Foods	CX178A	4,576,515	9.01	58.94
5. Obee Institutional Food Service Co. (Subs. of National Tea Co.).	CX162	3,497,029	6.89	65.83
6. Kraftco Corp.	CX173A&B	2,783,010	5.48	71.31
7. R.F.B., Inc.	CX165	2,193,731	4.22	75.63
8. Wm. B. Snyder Foods, Inc.	TX431	1,775,518	3.50	79.13
9. E. J. Byman & Co. (Subs. of Continental Coffee as of June 9, 1970).	CX167b	1,732,405	3.41	82.54
10. Ryser Brothers	CX163Ab ¹	1,395,090	2.75	85.29
11. J. D. Rich Co.	TR1297 ²	955,517	1.88	87.17
12. Trapp Brothers, Inc.	TR658	848,273	1.67	88.84
13. Lawrence Foods, Inc.	CX136, TR297	759,484	1.50	90.34
14. Cambridge Coffee Co.	CX168b	743,100	1.46	91.80
15. Diamond Distributors	TR326	569,275	1.12	92.92
16. Tenney Sales, Inc.	TR1358	569,015	1.12	94.04
17. South Side Marquette	TR195 ⁴	512,946	1.01	95.05
18. Fox River Foods	CX177	512,051	1.01	96.06
19. M. L. Morgan & Co.	CX138, TR378, TR382	448,924	.88	96.94
20. Phillip Borash & Sons	TR1241 ⁵	390,694	.77	97.71
21. Ferness	CX142	317,383	.62	98.33
22. Commissary Supply	TR459	232,429	.46	98.79
23. Gage Food Products Co.	TR506	173,221	.34	99.13
24. Geoghegan's Wholesale Grocery	TR518	90,226	.18	99.31
25. Bit O' Gold Foods	TR446	38,749	.08	99.39
Others	TR2591, TR2019	310,000	.61	100.00
Total		50,775,326	100.00	

¹ Average between 1967-68 sales and Nov. 30, 1970 sales.² As corrected by subsequent stipulation.³ Total sales in SMSA in 1968—\$975,017.43. Two percent of total deducted because they were produce sales (TR 1298).⁴ Fifty-five percent of total sales since 45 percent were cash-and-carry. (TR189).⁵ Sixty percent of total sales since 40 percent were cash-and-carry. (TR1242).

481

Initial Decision

APPENDIX C

Institutional Dry Grocery Wholesale Sales and Market Shares and Company Rank in the Chicago SMSA during 1969

Rank and company	Source of data	Sales of dry grocery products to institutional customers	Market share (percent)	Accumulative market share (percent)
1. B. A. Railton Co.	CX139	\$9,953,715	18.59	18.59
2. Holleb & Co.	CX134B	8,193,683	15.30	33.89
3. John Sexton (Subs. of Beatrice Foods as of Dec. 20, 1968)	CX1Y	8,158,400	15.23	49.12
4. Consolidated Foods	CX178A	4,447,321	8.31	57.43
5. Obee Institutional Food Service Co. (Subs. of National Tea Co.)	CX162	3,959,506	7.39	64.82
6. Kraftco	CX173A&B	3,216,982	6.01	70.83
7. R.F.B., Inc.	CX165	2,087,874	3.88	74.71
8. Wm. B. Snyder Foods, Inc.	TR431 ²	2,001,391	3.74	78.45
9. E. J. Byman & Co. (Subs. of Continental Coffee as of June 9, 1970)	CX167B	1,828,444	3.41	81.86
10. Ryser Brothers	CX163AB ³	1,450,248	2.71	84.57
11. Trapp Brothers, Inc.	TR658	1,002,378	1.87	86.44
12. Cambridge Coffee Co.	CR168B	841,000	1.57	88.01
13. Lawrence Foods, Inc.	CX136	835,696	1.56	89.57
14. J. D. Rich Co.	TR297			
15. Fox River Foods	TR1297 ⁴	798,568	1.49	91.06
16. Tenney Sales, Inc.	CX177	767,468	1.43	92.49
17. South Side Marquette	TR1358	600,945	1.12	93.61
18. Diamond Distributors	TR195 ⁵	573,030	1.07	94.68
19. M. L. Morgan & Co.	TR326	567,236	1.06	95.74
	CX138 ⁶	529,538	.99	96.73
	TR378			
	TR382			
20. Phillip Borash & Sons	TR1242 ⁷	434,204	.81	97.54
21. Ferness	CX142	361,047	.67	98.21
22. Commissary Supply	TR459	249,449	.47	98.68
23. Gage Food Products Co.	TR506	175,182	.33	99.01
24. Bit O' Gold Foods	TR446	123,823	.23	99.24
25. Geoghegan's Whlsc. Groc	TR518	94,656	.18	99.42
Others	TR2591	310,000	.58	100.00
	TR2019			
Total		53,552,784	100.00	

¹ Rounded up .01 percent.² Transcribed incorrectly as \$2,139,020.³ As corrected by subsequent stipulation.⁴ Total sales in SMSA in 1969 were \$814,864.94, 2 percent of total deducted because they were produce sales. (TR 1298)⁵ 55 percent of total sales since 45 percent were cash-and-carry (TR 189).⁶ 60 percent of total sales; 30 percent is in Food (TR 378); 30 percent is in paper (TR 332).⁷ 60 percent of total sales since 40 percent were cash-and-carry (TR 1242).

APPENDIX D

A.—Commodity selected vegetable¹

(1) Source of data	Initial Decision					(7) Sexton's share Column 6 divided by column 5
	(2) 1967 carryover CX 196 (cases)	(3) 1967-68 pack CX 3 (cases)	(4) 1968 carryover CX 196 (cases)	(5) Total dis- appearance Column 1 plus 2 minus 3 (cases)	(6) Sexton's movement CX 39 (cases)	
Asparagus (March).....	278,719	437,219	92,061	423,877	23,389	5.52
Green and wax beans (July).....	680,379	10,842,620	2,544,582	8,978,417	372,092	4.14
Lima beans (August).....	44,444	732,160	289,296	507,308	14,008	2.76
Beets (July).....	417,898	2,123,329	526,546	2,020,681	103,080	5.10
Carrots (July).....	714,410	2,489,592	844,694	2,369,308	86,970	3.67
Corn (August).....	103,989	4,765,029	642,222	4,216,796	165,040	3.91
Green peas (June).....	806,744	5,291,207	1,269,019	4,838,982	163,439	3.37
Pumpkin and squash (July).....	164,938	786,463	92,460	838,936	10,480	1.25
Spinach (March).....	380,270	1,261,670	503,649	1,138,291	43,186	3.79
Tomatoes (July).....	413,933	7,886,119	1,751,891	6,548,161	155,056	2.37
Cauliflower (July).....	667,438	7,469,701	1,778,714	6,368,425	82,948	1.30
Chili (June).....	126,253	506,333	111,212	521,374	22,264	4.27
Vegetables without inventory adjustments:						
Mixed vegetables.....		700,118			31,485	4.50
Okra.....		48,746			1,648	3.38
Peas and carrots.....		105,014			3,266	3.11
White potatoes.....		1,223,970			55,118	4.50
Sauerkraut.....		1,134,413			33,505	2.95
Succotash.....		14,413			108	.75
Sweet potatoes.....		1,237,013			29,415	2.29

¹ In terms of 12½ cases, annual carryover.² Month of report.

Initial Decision

B.—Commodity

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Source of data	1967 carryover CX 195 (cases)	1967-68 pack CX 3 (cases)	1968 carryover CX 196 (cases)	Total disappearance column 1 plus 2 minus 3 (cases)	Septon's movement CX 39 (cases)	Septon's share Column 5 divided by column 4 (percent)
Apples (September).....	628,834	3,676,775	944,709	3,353,900	107,798	3.21
Applesauce (September).....	430,312	3,031,087	654,974	2,826,425	120,687	4.27
Apricots (June).....	455,661	1,394,963	455,795	1,394,729	50,731	3.64
Cherries, red-sour (July).....	42,798	1,483,836	24,523	502,111	18,035	3.59
Cherries, sweet (June).....	18,735	291,592	43,988	296,339	13,664	5.09
Peaches (June).....	1,339,578	6,386,703	1,094,152	5,632,129	224,205	3.98
Pears (June).....	1,162,697	1,491,045	543,796	2,039,846	124,758	5.94
Purple plums (June).....	140,651	1,700,747	229,355	612,043	22,659	3.70
Fruit without inventory adjustments:						
Blackberries.....		173,064			6,565	3.79
Figs.....		57,090			5,293	9.27
Fruit cocktail.....		1,872,223			89,127	4.76
Fruits for salad.....		165,873			16,618	10.02
Mixed fruit.....		207,170			29,511	14.24
Spiced peaches.....		89,104			14,361	16.12
Pineapple.....		4,979,963			127,285	2.56
Raspberries (black).....		5,826			127,600	10.39

Initial Decision

81 F.T.C.

C.—Commodity

Source of data	Total disappearance from A to B (cases)	School lunch donation CX 197 (cases)	Commercial disappearance (cases)	Sexton's movement CX 39 (cases)	Sexton's share (percent)
Green peas.....	4,838,932	425,000	4,413,932	163,439	3.70
Green and wax beans.....	8,978,417	392,000	7,613,063	372,092	4.89
Sweet potatoes.....		345,820		29,415	
Tomatoes.....	6,548,161	578,535	5,969,626	155,056	2.60
Pineapple.....		372,000		127,285	
Peaches.....	5,632,129	633,200	4,998,929	224,205	4.48
Purple plums.....	612,043	204,800	407,243	22,659	5.56
Applesauce.....	2,826,425	195,200	2,631,225	120,587	4.58

Initial Decision

APPENDIX E

The physical units packed by all domestic packers, by John Sexton Co. and by Beatrice Foods Co. and their share of total production of selected products, identified by name and 7-digit SIC number and physical units, during 1967.

Selected products	SIC number ¹	Physical units ¹	1967 Production		Share of 1967 production (percent)		
			U.S. total ¹	Sexton production ²	Beatrice production ³	Sexton	Beatrice Combined
Canned beans.....	20323-86	Million cases of 24.....	13.4	.002	714	.01	5.33
Olives, ripe and green ripe.....	20331-41	1000 case of 48.....	4.691		76,997		13.03
Do.....	20331-43	do.....	2,144.0	116	145,639		8.80
Do.....	20331-45	1000 cases.....	731.0	36,629	24,238	5.01	3.32
Other canned vegetables.....	20332-04	do.....	8,384.0	641,663	1,186,754	.50	14.19
Prune juice.....	20334-63	1000 cases of 12 (quart size).....	4,690.0		298,931		6.37
Do.....	20334-63	1000 cases (other sizes).....	4,028.0	13,311	126,820	.33	3.15
Strawberry jam and preserves.....	20338-11	millions of pounds.....	118.5	.294	2,021	.24	1.70
Other jams and preserves.....	20338-15	do.....	289.7	.393	4,918	.14	1.55
Grape jelly.....	20338-21	do.....	168.8	.545	4,899	.24	2.86
Other jelly.....	20338-25	do.....	14.8	.163	4,102	.37	3.17
Marmalades.....	20338-41	do.....	42.7	.144	2,732	1.10	3.16
Fruit butters.....	20338-51	do.....	49.1	.064	5,308	.34	6.42
Dill pickles.....	20342-11	Millions of gallons.....	8.1		244	.17	10.82
Cucumber sour pickles.....	20342-13	do.....	27.3	.181	2,214		3.26
Cucumber sweet pickles.....	20342-17	do.....	52.4		3,333	.66	8.77
Other finished pickle products.....	20352-33	do.....	37.8	108	3,353		8.36
Soy sauce.....	20353-65	do.....	69.4	.016	653	.29	8.89
Salad dressing.....	20354-11	do.....	79.6	.669	693	1.60	22.04
Mayonnaise.....	20354-23	do.....	79.6	.322	693	.67	1.12
French dressing.....	20354-31	do.....	10.8	.124	120	.41	.89
						1.14	2.25

¹ CX 108.

² CX 8, computed on the basis of the physical units used in CX 108. Pounds were converted on the basis of 16 ozs. to the pound and gallons on the basis of 128 ozs. per gallon. Number 10 cans are included on the basis of 108 ozs. in both volume and weight.

³ CX 16 (same basis as in footnote 2).

⁴ The 1967 estimate of 691,000 cases is based on an average value of \$8.80 per case.

In 1963, the smaller containers (6 oz. or less) averaged \$8.46; the larger (5.1 to 15 oz.) averaged \$10.50. In 1967, the larger averaged \$10.57. The difference of 37 cents per case was modified to 36 cents for estimating the 1967 value of the cases of small container sizes.

⁵ Less than 1/100 percent.

⁶ Including products 90092, 90126, 90143, 90169, and 90225.

The value of shipments (or production) of dry grocery products, classified on a 5-digit SIC be processed by John Sexton Co. with the total value of all domestic processors and with the value and share of the total processed by Beatrice and Sexton during 1967.

Dry grocery products	SIC 5-digit number	1967 value of shipments or production			Share of total (percent)				
		Total all processors		Beatrice and Sexton combined (thousands)	Beatrice	Sexton	Combined		
		Source of data	Value (millions)						
Canned meat products.....	20138	CX 106, p. 14.....	4,366.0	\$7,050	\$1,297	\$8,347	\$1.93	4.35	4.28
Canned poultry.....	20154	CX 106, p. 15.....	141.8	-----	233	233	-----	.16	.16
Canned seafood.....	20310	CX 106, p. 20.....	421.1	-----	258	258	-----	.06	.06
Canned soup.....	20322	CX 108, p. 21.....	698.3	-----	2,657	17,261	-----	.38	2.47
Canned specialties.....	20324	CX 108, p. 21.....	246.1	-----	138	3,292	-----	.06	1.34
Canned dry beans.....	20323	CX 108, p. 22.....	815.3	4,764	342	6,096	.68	.04	.62
Canned fruits.....	20330	CX 108, p. 22.....	967.2	9,248	22	9,270	.96	-----	.97
Canned vegetables.....	20332	CX 108, p. 22.....	413.5	626	60	686	.15	-----	.16
Canned fruit juices.....	20334	CX 108, p. 22.....	607.7	614	237	811	.10	-----	.06
Tomato sauces.....	20336	CX 108, p. 23.....	243.2	7,434	532	7,966	3.03	-----	3.25
Jam, jellies, and preserves.....	20338	CX 108, p. 23.....	76.6	-----	781	781	-----	.02	1.02
Snip milks.....	20342	CX 108, p. 26.....	260.6	21,125	1,166	22,290	8.11	.45	8.55
Pickles and other pickled products.....	20352	CX 108, p. 26.....	98.5	1,953	199	2,152	1.98	.20	2.18
Meat sauces except tomato.....	20353	CX 108, p. 26.....	373.9	3,046	1,922	4,968	.81	.51	1.33
Salad dressing and mayonnaise.....	20354	CX 108, p. 26.....	95.0	-----	64	64	-----	.07	.07
Flavoring extracts.....	20371	CX 112, p. 18.....	124.9	-----	525	525	-----	.42	.42
Liquid beverage bases, not for use by soft drink bottlers.....	20372	CX 112, p. 18.....	1,375.3	-----	1,421	1,421	-----	.10	.10
Roasted coffee.....	20551	CX 114, p. 14.....	307.4	260	2	262	.03	-----	.03
Cooking oil.....	20561	CX 116, p. 18.....	218.2	-----	1,118	1,118	-----	.51	.51
Desserts, ready to mix.....	20991	CX 114, p. 14.....	138.8	-----	46	46	-----	.03	.03
Sweetening syrups.....	20993	CX 114, p. 14.....	79.0	-----	20	20	-----	.02	.02
Baking powder.....	20994	CX 114, p. 14.....	1,073.3	-----	1,869	16,767	1.39	.17	1.56
Other food preparations.....	20999	CX 114, p. 15.....	-----	14,898	-----	-----	-----	-----	-----
Total/average.....			\$9,636.9	88,666	14,968	103,634	\$1.92	\$1.16	\$1.08

¹ CX 79.

² CX 6.

³ Detail may not total due to the rounding of numbers.

⁴ When combined with 20118, the total is \$856.4 million. This reduces Beatrice's and Sexton's share to 0.82 and 0.15 percent, respectively. Combined, their share would

represent 0.97 percent.

⁵ Less than 1/100 percent.

⁶ With the inclusion of 20118, the total would be \$10,127.3 million and the Beatrice and Sexton shares would be 0.88 and 0.15, or 1.02 percent combined.

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner*:

This matter is before the Commission on cross-appeals by both the respondent and counsel supporting the complaint from the initial decision of the hearing examiner finding a violation of Section 7 of the Clayton Act and ordering divestiture.

The complaint in this matter was issued on April 30, 1970, and alleges that respondent Beatrice Foods Company ("Beatrice") violated Section 7 of the Clayton Act¹ when it acquired the assets of John Sexton & Co. ("Sexton") on December 20, 1968. The complaint, although referring to alleged anticompetitive effects in institutional frozen food wholesaling, focuses primarily on "institutional dry grocery wholesaling" as the line of commerce affected by the merger. The complaint states that Sexton was a food wholesaler distributing dry groceries to institutions which prepare and serve meals away from home to the consuming public. Such institutions include restaurants, clubs, hospitals, schools, colleges, industrial feeding concerns, airlines, hotels and other purveyors of prepared food services. Sexton did not distribute to the retail grocery trade, *i.e.*, supermarkets or other grocery store outlets.

The complaint alleges that Sexton sold dry groceries to institutions located in a large number of Standard Metropolitan Statistical Areas (SMSA's), and alleges that as a result of the acquisition competition in the "institutional dry grocery wholesale industry and/or in the institutional frozen food wholesale industry" would be substantially lessened in various ways including the elimination of potential competition between the companies in these industries.

Hearings on the complaint were held in Chicago, Illinois, and on May 17, 1971, the hearing examiner filed his initial decision finding a violation of Section 7 and ordering divestiture by respondent of the assets and business obtained as a result of the Sexton acquisition.

The following salient facts are essentially undisputed by the parties.

The Acquiring Company

Beatrice is a large, diversified corporation which had its origins in the dairy business. In *Beatrice Foods Co.*, FTC Docket No. 6653 (April 26, 1965) [67 F.T.C. 473], the Commission found based on 1959-1960 data, that Beatrice was the third largest dairy company in the United States. During its fiscal year ending February 29, 1963,

¹ The complaint also alleges that Section 5 of the Federal Trade Commission Act was violated by the acquisition, but none of the issues in the case depends upon the inclusion of that count in addition to the Section 7 count.

about 45 percent of its net sales were derived from sales of dairy products, about 37 percent from grocery and confectionary products (sold mostly to the retail grocery trade) and about 10 percent represented rentals from its public refrigerated warehouses.

It also engages in the agri-products business and has chemical, manufacturing, and international divisions which by 1970 accounted for over 30 percent of its sales. Non-food products now sold by Beatrice range from house trailers to skis. Beatrice's net sales for fiscal year ending February 29, 1968 were \$1,052,431,480 with total assets of \$343,446,220. Beatrice was ranked 83d in a list of 500 largest industrial corporations in 1969 in terms of sales and 203d in terms of assets.

The Beatrice Grocery Products Division was created by acquiring over the years a large number of relatively small "specialty food" processors. A list of these acquisitions is set forth in the Initial Decision at p. 490 n.2. These "specialty foods" include such diverse items as Chinese foods, Mexican foods, pickles, mints, candy, nuts, and other products. Most of these products are processed and sold directly to the retail grocery trade. However, it sells some of these products to the institutional trade either through its brokers or through institutional grocery wholesalers. These sales in 1967 amounted to approximately \$13 million and represented less than 2 percent of its dry foods business. It also sells bakery products and frozen foods to the institutional trade in Chicago with total sales of about \$12 to \$13 million.

The Acquired Company

Sexton had been distributing processed dry foods to the food service industry for many years prior to the acquisition. Sexton was originally established in 1883 in Chicago, Illinois. Its principal place of business is in Chicago. Prior to the merger it operated 13 warehouses which served as distribution centers throughout most of the United States. These warehouses were located in the following cities: Atlanta, Boston, Chicago, Cincinnati, Dallas, Detroit, Los Angeles, New York, Orlando, Philadelphia, Pittsburgh, St. Louis, and San Francisco. The St. Louis warehouse was opened in 1968. Nearly all of the products distributed by Sexton were sold under its own trade names and labels. About 25 percent of the products it distributed in 1968 were manufactured or processed (packed, bottled or canned) by Sexton in its own plants. It does not handle any frozen or fresh products.

During its fiscal year ending June 28, 1968, Sexton had sales of \$91 million. Its assets amounted to \$28 million. Net earnings that year amounted to \$2 million.

Prior to the merger the amount of sales made by Beatrice's dry food processing plants to Sexton was about \$1 million a year or less. Subsequent to the acquisition Sexton has remained a separate division within Beatrice. The examiner found and the record indicates that sales by Beatrice-owned plants to Sexton have remained relatively small; that Beatrice processors continue to sell primarily to the retail grocery trade and only incidentally to the institutional trade. Dry foods for the institutional trade are generally packed in much larger size cans (#10 cans) than those supplied to the retail grocery trade, and the record indicates that different canning machinery is used in such operations.

The Acquisition

On or about December 20, 1968, Beatrice acquired the business assets of Sexton, paying approximately \$37,500,000 in preferred convertible shares of Beatrice capital stock for common stock of Sexton. The president of Beatrice testified that among the reasons which interested Beatrice in the acquisition was that Beatrice wanted to get into the wholesaling business of the rapidly growing multi-unit food service organizations, believing there was tremendous growth in this type of account. He stated:

As we looked around, we saw other food companies, the Krafts and the General Foods and Consolidated Foods and many others that had established the institutional business over the years. They had products where they were branded. They had the Kraft brand or they had the General Foods brand and they were accepted. They had sold some of these over the years through distributors but now were in this fast growth of the multi-unit accounts which would become almost a national type of selling crossing geographic lines. They had gone direct to their own sales force and gone beyond the distributor and developed their own direct business with their own sales force.

We just felt that if we didn't get into this and get a foothold that we were passing up a very important segment of the food business.

He further explained:

Here we are, a food business. We had been oriented to, as I say, supermarkets and the retail. Here is a fast growing part of the business with more of the food dollar being spent away from home year after year and we were not in it.

He stated that another reason which prompted the acquisition was that it would increase Beatrice's earnings per share about four or five percent aided by "pooling of interest" accounting.²

² It has frequently been noted that one of the incentives for acquisitions by diversified companies is to increase earnings per share on common stock. This occurs when the company which is being acquired has a lower price-to-earnings ratio than the acquiring company. Simply through acquisition of such a corporation the first company can immediately increase its earnings per share and usually the value of its stock on the market. See, e.g., Scherer, *Industrial Market Structure and Economic Performance* 114 (1970); Staff Report to the FTC, *Economic Report on Corporate Mergers* 122-138 (1969).

The Institutional Distributor

The institutional distributor is a distributor of food and other sundry products to institutional food purveyors. The distributor provides an often necessary link between food manufacturers and eating institutions, warehousing the goods purchased from the former and redistributing them to the latter.

The institutional wholesale industry has been recognized as a separate and distinct industry. It has its own trade publications and is the subject of at least three trade directories, one in preparation at the time of the hearing. Institutional wholesalers have different margins than wholesalers selling to food stores and provide different, specialized services. As previously noted, this industry deals with special institutional packs, commonly the #10 can in fruits, juices, and vegetables, to the virtual exclusion of consumer size packs. Some institutional wholesalers specialize in selling only dry grocery products and others specialize in selling only frozen or fresh food products. Others distribute both frozen and dry products. In recent years there has been a tendency for dry product distributors to diversify into frozen products and frozen food distributors to handle some types of dry products.

I RELEVANT PRODUCT MARKET DEFINITIONS ASSERTED

As previously noted, Sexton specialized in distribution of "dry" groceries to institutions. Dry grocery products are processed, packaged foods, including all foods canned in tins or glass or preserved in a dry state, but excluding fresh or frozen products, such as fresh or frozen meat, fruit, vegetables, fluid milk, and bread. Dry food products distributed by Sexton include canned fruit, vegetables and fruit juices, which account for about 32 percent of total sales, canned meat, canned fish, coffee, tea, fountain supplies, jams and jellies, cookies and crackers, fats, oils and shortenings, pie fillings, mayonnaise, and other salad dressings, Chinese foods, sauces, soups, and soup bases, nuts and paste products. The parties have also included within dry food sales other items which are commonly distributed by such wholesalers such as detergents, disinfectants, and paper products.

Institutional wholesaling can be sub-categorized in various ways, such as "full line institutional wholesaling," "cash-and-carry operations," and specialty wholesaling such as to Italian restaurants and pizza parlors. Furthermore, the record shows that a new type of selling has grown in recent years: wholesaling to "multi-unit food service organizations," known as "MUFSO" in the trade (and hereinafter

so referred to). Examples of MUFISO accounts would be chain restaurants, fast-food franchising systems, airlines, etc. Respondent contends that customer preferences between dry, frozen, and fresh forms of foods have virtually disappeared in MUFISO accounts so that dry, frozen and fresh foods should be considered as one "product market" in wholesale sales to these institutions.

In alleging full line institutional dry grocery wholesaling as the line of commerce primarily affected by the acquisition, the complaint defines this industry "as characterized, on the whole, by (a) the solicitations of orders by a street salesman, (b) the extension of credit by the wholesaler, and (c) the delivery of dry groceries to the premises of the purchaser, either by common carrier or in the truck of the seller."

During the hearings it became evident that the above definition refers to only one particular (but nevertheless substantial) segment of institutional wholesaling. This segment, as the definition suggests, centers around the solicitations and activities of street salesmen on the premises of customers in local markets and is sometimes referred to as "traditional" wholesaling operations.

On the other hand, sales to MUFISO accounts do not generally involve the use of street salesmen. Trained salesmen, more sophisticated than the usual street salesmen, are required, orders are generally larger in volume, and sales are made directly with the home office of the MUFISO account, sometimes on a competitive bid basis and sometimes in competition with food manufacturers. These accounts often require a different distribution system, such as deliveries to central kitchens or commissaries. Some wholesalers sell exclusively to MUFISO accounts and therefore do not employ street salesmen.

The record shows that MUFISO-type wholesaling commenced around 1958 and has grown rapidly. A 1970 analysis of MUFISO expansion by a trade publication estimates that retail sales from 1965 to 1970 by the top 400 MUFISO accounts increased from \$8.7 billion to \$17.4 billion (CX 71). In 1958 Sexton had less than 3 percent of its sales to multiple chain businesses. By 1970, MUFISO sales represented one-third of all the company's business. Data suggests that at the time of the hearing nearly 50 percent of sales by all institutional wholesalers were to MUFISO accounts (RX 29J).

The distinction between the traditional business and the MUFISO business has been emphasized throughout this case by respondent, which concedes that although it was a potential entrant into the

MUFISO wholesaling business, it was not interested in the "traditional" line of wholesaling.³

II ASSERTED GEOGRAPHIC MARKETS

On the question of the relevant geographic market complaint counsel presented figures as to Sexton's market shares in dry institutional sales, first as to the Chicago Standard Metropolitan Statistical Area (SMSA), which consists of the six Illinois counties of Cook, DuPage, Kane, Lake, McHenry, and Will. Second, complaint counsel submitted proposed findings as to Sexton's share of national sales of dry grocery products by institutional wholesalers.

The hearing examiner rejected complaint counsel's calculations of market share figures as to the Chicago SMSA. He noted that they had included the sales of only 25 institutional dry food wholesalers doing business in Chicago, whereas respondent had presented evidence indicating that there are about 80 such wholesalers and 75 to 100 frozen food institutional distributors in Chicago, some of which appear to sell dry groceries.⁴ In the examiner's view, complaint counsel had failed to establish by reliable evidence a complete universe of sales in the Chicago area and that any conclusion as to market share or concentration ratios for Chicago was not possible on the evidence presented.

As to Sexton's share of a "national market," the parties offered conflicting calculations. Not finding either set fully persuasive, the examiner averaged the calculations and found that Sexton was probably selling somewhere in the neighborhood of 1 to 4 percent of the total dry grocery institutional wholesale sales in the United States

³ The hearing examiner's findings on this point are inconsistent, or at least ambiguous. Accepting the testimony of Beatrice's president, the examiner expressly found "that the real reason for the merger with Sexton was to get into the rapidly growing MUFISO business * * * and that had Sexton been only in the traditional street salesman type of wholesaling, Beatrice would not have been interested in the acquisition" (I.D., p. 14 [p. 498, herein]). In other parts of his decision he construes the line of commerce in the case as limited to the traditional street salesman type of wholesaling as defined in the complaint (I.D., p. 13 [p. 497, herein]). Yet he ultimately concludes without elaboration or explanation that Beatrice was a potential entrant into this line of business as well as the MUFISO business (I.D., p. 23 [p. 504, herein]). He also agreed with respondent that frozen and fresh foods fully compete with dry foods in sales to MUFISO accounts and dry foods should not, in that segment of wholesaling, be considered a separate product market. Yet he based his final conclusion of violation on national market data entirely limited to dry products.

⁴ Respondent also argued, *inter alia*, that complaint counsel's market was tailored geographically to "traditional" wholesaling. Respondent contends that sales and deliveries to MUFISO accounts take place from a large area surrounding Chicago that is not limited to the SMSA.

at the time of the acquisition and that it was the largest institutional dry wholesaler in the United States.⁵

III ULTIMATE CONCLUSIONS BY THE HEARING EXAMINER

The hearing examiner concluded that the record showed that:

1. "The institutional wholesaling business is substantially fragmented with active competition for the institutional trade, both the traditional trade and the more recently developing Mufso organizations" (Initial Decision, p. 22 [p. 504, herein]).
2. "The institutional wholesaling trade is not characterized as being concentrated in the hands of any few large organizations" (p. 22 [p. 504, herein]).
3. "The record does not permit a finding that Beatrice has conferred upon Sexton any advantages so significant as substantially to lessen competition in the institutional dry wholesale trade" (p. 23 [p. 504, herein]).
4. Beatrice and Sexton were not competitors at the time of the acquisition (pp. 3-6 [pp. 489-92, herein]).

Notwithstanding the above findings, the hearing examiner held there was a violation of Section 7 resulting from the merger, based on the finding that Beatrice was a "likely or potential entrant" in institutional dry wholesaling and that Sexton was a leading firm in that trade (Initial Decision, p. 24 [p. 505, herein]). The hearing examiner was apparently of the view that these two factors alone constitute a basis for finding a violation of Section 7 despite his findings that institutional wholesaling is "substantially fragmented" and there is "active competition" in that business.

IV ISSUES ON APPEAL

A. Removal of Beatrice as a Potential Competitor in Institutional Dry Food Wholesaling

Both parties have appealed. Respondent argues that the hearing examiner, in addition to erring in not confining the case to MUFSSO wholesaling, has erroneously adopted a *per se* standard for potential competition cases that is even more stringent than the standard applied in mergers between actual competitors; that a merger between

⁵ We find no evidence in the record to support the hearing examiner's conclusion that Sexton was in fact the largest institutional dry wholesaler in the United States and respondent disputes it. It appears, for instance, that Consolidated Foods Corporation may have greater dry food wholesale sales to institutions than Sexton. There is no dispute, however, that Sexton is one of the largest institutional dry food wholesalers in terms of national sales.

a potential entrant and a firm having 1 to 4 percent of sales in an industry which is characterized by low concentration and ease of entry does not substantially lessen competition.

Complaint counsel, conceding that national sales are not concentrated, have appealed also, urging the Commission to supplement the examiner's findings on the basis of higher concentration figures which they proffered as to various Standard Metropolitan Statistical Areas in the country.⁶

Although proposed calculations as to Sexton's market shares in many of those areas are submitted by complaint counsel, the respondent disputes the priority of using SMSA's as geographic markets for the institutional wholesaling industry (as well as Sexton's purported market shares in these areas). It further objects to arguments based on any local markets outside of the Chicago area and points out that early in the hearing the examiner confined complaint counsel to the Chicago SMSA. Complaint counsel themselves stated: "Because of the large size of its eating place sales, the Chicago SMSA was chosen by complaint counsel as the one area of the country in which the impact of the Beatrice-Sexton merger would be presented through the introduction of detailed statistics showing the sales of all dry grocery wholesalers operating within the market" (Proposed Findings, p. 36).

It seems clear that to examine any other market areas would require a remand since the respondent, relying on the examiner's ruling, has not had opportunity to present any evidence in defense concerning areas of the country other than that surrounding and serving the Chicago area. Also, we note that complaint counsel's calculations of the universe of dry product sales in these other SMSA's rest ultimately on the correctness of their universe figure for Chicago. The latter was rejected by the hearing examiner, as noted below.

Accordingly, we will confine our analysis to the evidence relating to the Chicago area. There is, furthermore, no reason to believe that conditions in other urban markets would be substantially different than the Chicago market.

Chicago SMSA

Complaint counsel subpoenaed some 25 institutional dry wholesale grocers, including Sexton, who sell in the Chicago area and obtained from each company the portion of their sales to customers located

⁶ Complaint counsel also concede on appeal that since wholesale deliveries are local or regional in scope little is gained by looking at concentration figures on a national level in this case since they obviously understate the degree of concentration in true economic markets. For an illuminating discussion on the need to adhere to meaningful and consistent geographic market definitions, see Elzinga & Hogarty, "The Problem of Geographic Market Delineation in Antimerger Suits" (Paper delivered before the Southern Economic Association, November 1971).

within the Chicago SMSA for 1968 and 1969. According to these latter figures Sexton had 16.18 percent of the sales of dry groceries in 1968 and 15.23 percent in 1969 in the Chicago SMSA. In 1968 it was the second largest seller and in 1969 it was the third largest.⁷

If these companies' sales are accepted as the universe for this market area, they would establish a four-firm concentration ratio of about 59 percent and 57 percent and an eight-firm concentration ratio of about 79 percent and 78 percent for 1968 and 1969, respectively.

As indicated, however, the examiner refused to accept these figures as representing a complete universe of sales for the Chicago SMSA. He noted, among other things, that respondent had presented evidence to the effect that there are about 50 or so additional institutional wholesale food distributors in Chicago not called by complaint counsel and that there were 75 to 100 frozen food institutional distributors which were never called, some of which probably sell dry groceries. In addition, he noted that respondent claims that there are other wholesalers outside of Chicago who come into the Chicago SMSA and make sales. He found that complaint counsel had failed to show that they made an exhaustive listing of distributors in the Chicago area and that the evidence brought forward by respondent, and not refuted by complaint counsel, compelled a finding that sales by these 25 wholesalers was not a complete universe: "Consequently any conclusion as to market shares of concentration in the Chicago SMSA as requested by complaint counsel is not possible" (Initial Decision, p. 17 [p. 500, herein]).

Complaint counsel challenge this refusal of the hearing examiner to accept their market share statistics. They note that the 50 or so additional Chicago institutional distributors cited by the examiner are simply listed by name in a trade directory of institutional distributors placed in the record by respondent and the directory does not indicate whether they sell dry, frozen, or fresh grocery products. They further contend that the reason they were not called as witnesses or otherwise included in the market statistics was that none of the wholesale distributors who were called to the witness stand referred to these

⁷ In 1968, Sexton was outsold by B. A. Railton Co., which had 18.94 percent of complaint counsel's view of the market. Holleb & Company was third with 14.81 percent and Consolidated Foods ranked fourth with 9.01 percent.

In 1969, Railton was still first (with 18.59 percent). Holleb was second (15.30 percent) and Consolidated Foods fourth (8.31 percent).

Total dry food sales of the firms listed by complaint counsel were \$50,775,326 for 1968 and \$53,552,784 for 1969. See Appendix C to the Initial Decision. It should be noted that these figures (in accordance with complaint counsel's view of the market) exclude sales made by these wholesalers to institutions outside the SMSA; and sales made on a cash-and-carry basis, sales by "specialty" wholesalers, and any dry food sales by firms classified as predominantly frozen food wholesalers.

others when asked to name their competitors. Since they were not named, complaint counsel argue that they should not be considered "significant" competitors.

On the other hand, in further support of the hearing examiner's rejection of complaint counsel's market share figures, respondent cites testimony by economists whom it called. They presented calculations based in part on Census Bureau statistics which they claim indicate that nearly twice as many dry grocery sales were made by Chicago-based institutional wholesalers than what is represented by purchases by all institutions within the SMSA. From this respondent contends that the Chicago SMSA is too small an area to measure the Chicago wholesale market. Respondent also contends many wholesalers sell to customers within Chicago but have warehouses outside the SMSA area and these have not all been accounted for.

If complaint counsel's 25 wholesale witnesses are accepted as representing the total number of significant competitors in the Chicago SMSA market (and if the six-county SMSA area is accepted as a proper geographic market), it is clear that this market should be classified as concentrated since the top four firms would have aggregate sales approaching 60 percent of all sales in the market. On the other hand, if respondent's calculations of the probable universe of the relevant market—nearly double that of complaint counsel's—is accepted, the top four would probably have 30 percent or less with no one firm having more than 10 percent. Ordinarily this would be considered as low in concentration.⁸

While in some industries the difference between such disparate sets of figures as to number and size distribution of firms could be critical in determining whether an acquisition substantially lessened competition, we do not think it is necessary to decide in this case which, if any, of these two conflicting pictures of the market should be adopted. We find that complaint counsel have not shown that entry conditions in this industry are such that injury to competition can be inferred from elimination of Beatrice as a potential entrant.

*Ease of Entry as an Important Aspect of Market Structure in
Evaluating Loss of a Potential Competitor*

Complaint counsel in essence attempt to rest their case on the existence of concentration ratios alone. The test for finding injury due to elimination of a potential competitor is not simple. Additional factors enter into any analysis of the loss of a potential competitor. Among

⁸ Bain, *Industrial Organization* 14-41 (2d ed. 1968) ; Kaysen & Turner, *Antitrust Policy* 72 (1959).

these are: trends toward concentration in the market; extensive entry barriers; high probability that the lost potential competitor would have actually entered the market; whether the lost potential competitor was one of only a few such potential competitors and whether, if he had entered the market, his new competition would have had a significant impact on price and quality. Although the number of competing firms or trends toward concentration may be enough without more to condemn many horizontal mergers between existing rivals in a market, the condition of entry by new firms as well as these other factors mentioned above must be considered when dealing with elimination of a potential competitor.⁹ Even though elimination of a potential competitor may have substantial anticompetitive effects, unlike a merger between actual competitors, it does not increase one firm's existing share of the market or eliminate actual competition. The distinction between the two types of competition—actual and potential competition—must not be lost sight of.¹⁰

Injury to competition solely by removal of a potential entrant comes about by one or both of two ways. First, the existence of a potential competitor may be a significant competitive force in itself even though actual entry never occurs. Leading firms in a concentrated market may limit their prices and profit margins so as to deter entry by other

⁹ Professor Bain, who has pioneered much of the economic study in the area of potential competition, considers the condition of entry into the market, not simply the degree of concentration in the market, as determining the influence potential competitors will have on market behavior:

"Both seller concentration and product differentiation among established sellers in an industry presumably influence the market relationships among these sellers. The condition of entry into an industry, on the other hand, determines the competitive relationship between established sellers and potential entrant sellers, and thus in a sense the force of potential or latent competition by new entrants." *Industrial Organization* 251 (2d ed. 1968) (emphasis in the original.)

The fact that a market may be characterized as concentrated is not necessarily inconsistent with low entry barriers. In his study of 20 concentrated industries in which entry barriers ranged from "moderate-to-low" to "very high" Bain found evidence suggesting that firms in the lower-barrier concentrated industries were limiting their prices and profits to that near a competitive level. He concluded " * * * that seller concentration alone is not an adequate indicator of the probable incidence of extremes of excess profits and monopolistic output restriction. *The concurrent influence of the condition of entry should clearly be taken into account.*" *Barriers to New Competition* 201 (1956) (emphasis added). See also Mann, *Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries, 1950-1960*, 48 *Review of Economics and Statistics* 296 (1966).

¹⁰ As this Commission stated in an earlier case against the same respondent involved here: "[E]limination of a substantial competitor may still be undesirable from the standpoint of maintaining competition, for it can bring the market structure closer to a condition of such concentration that anticompetitive effects become foreseeable. * * * But the absorption of a potential competitor in such a market is likely to have much less competitive significance. If the market is competitive in structure, prices are likely to be at a competitive level. * * * " *Beatrice Foods Co.*, 67 F.T.C. at 716-17 (1965). In that case, involving the dairy industry, the Commission found substantial barriers to entry as well as a trend toward concentration. See also *American Brake Shoe* [1967-1969 Transfer Binder] Trade Reg. Rep. ¶18,339 (1968) at 20,716: "Actual and potential competition are not * * * interchangeable concepts."

firms. Where it is known that entry barriers are high and the number of probable entrants few, removal of a likely entrant may seriously dilute this only competitive check on monopolistic pricing. *United States v. Penn-Olin Co.*, 378 U.S. 158 (1964). Second, elimination of a potential competitor would eliminate the chance that the firm might have entered the market *de novo*, adding greater pressure for competition. *Ford Motor Co. v. United States*, 405 U.S. 562, 567-68 (1972).

It is clear, however, that the evidence in this record fails to meet the conditions of a potential competition test: in the instant case the number of potential competitors besides Beatrice was sufficiently large and entry sufficiently easy in the institutional dry grocery market that loss of Beatrice as a potential competitor could not be considered to have had a significant effect on competition.

The condition of entry into the market has been clearly recognized in the decided cases under Section 7 as a highly important structural variable when dealing with the market effects arising from the merger between potential competitors. In *United States v. Penn-Olin Co.*, *supra*, 378 U.S. at 164, 175 (1964), the Court noted the existence of entry barriers: Other than Pennsalt and Olin Mathieson who had entered by joint venture into the manufacture of sodium chlorate in the heavily concentrated Southeastern United States market, "few other corporations had the inclination, resources, and know-how to enter this market" * * * "During the previous decade no new firms had entered the sodium chlorate industry. * * *" ¹¹ In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), it was apparent that considerable resources were needed to build expensive interstate pipelines and the Court noted that after long-term distributing contracts were entered into with wholesale customers, market areas were effectively withdrawn from further entry (376 U.S. at 660, 662). See also *Ford Motor Co. v. United States*, *supra*, 405 U.S. at 571 (acquisition of manufacturer of spark plugs eliminated, *inter alia*, potential entry of Ford into aftermarket having "virtually insurmountable barriers to entry").

Barriers to new entry were found in Commission cases which involved loss of potential competition. In *Procter & Gamble*, 63 F.T.C. 1465 (1963), the Commission found that prior to the merger, requirements of national distribution and advertising which "make for dominance by Clorox of its rivals also make formidable barriers to new

¹¹ (Sentence order reversed.) Following remand and upon submission of additional evidence on the question of whether either company would have entered the market by building a plant, while the other would have remained a significant potential competitor, the district court dismissed the complaint, 246 F. Supp. 917 (1965). This was affirmed by an equally divided Supreme Court, 389 U.S. 308 (1967).

entry * * * The conclusion seems inescapable that at the time of the merger, the industry was concentrated, and barricaded to new entry, to a degree inconsistent with effectively competitive conditions" (pp. 1562-63). Entry barriers were noted in the Supreme Court's affirmance, which concluded that Procter was the "most likely entrant" and "the number of potential entrants was not so large that the elimination of one would be insignificant," 386 U.S. 568, 579, 581 (1967).¹² See also Justice Harlan's concurring opinion in that case in which he reviewed at length the importance of barriers to entry in assessing the competitive impact resulting from the removal of a potential entrant.

In the market-extension cases in the dairy industry, the Commission found barriers to entry due to economies of scale from new cost-saving technologies that could be utilized only by a few larger dairy firms. In *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1088-89 (1962), the Commission found:

The decline in fluid milk distributors, the increasingly harsh technological and market factors confronting small businesses, the advantages going to firms with large financial resources, all indicate that small dairies are having an increasingly difficult time. This speaks ill for the prospects of new entrants in this industry. As pointed out above, in decades past new competitors could enter this industry relatively easily. But, today, technology and other factors have created substantial barriers to prospective entrants.

Technological barriers to entry in the dairy industry were detailed in even greater length in *Beatrice Foods Co.*, 67 F.T.C. 473, 709-714 (1965), where it was observed that "Barriers to entry have reached a point where, it would appear, only a substantial firm can be reckoned a real competitive factor in this industry—and, as we have noted, after the big eight there are very few substantial firms." (*Id.* at 712 and see p. 714.)

In *Kennecott Copper Corp.*, 3 Trade Reg. Rep. ¶ 19,619 (1971), *aff'd* 467 F.2d 67 (10th Cir. 1972), the Commission determined that in the industry under consideration high barriers to entry existed and this was cited as a factor co-equal with the rapid trend toward concentration found in that case (p. 21,667). See also *Paper-craft Corp.*, 3 Trade Reg. Rep. ¶ 19,725 at 21,770 (1971) [78 F.T.C. 1352]; *The Stanley Works*, 3 Trade Reg. Rep. ¶ 19,646, at 21,698-99 (1971) [78 F.T.C. 1023]; and *Bendix Corp.*, 3 Trade Reg. Rep.

¹² The Court also upheld the Commission's order on the ground that Clorox was entrenched as the dominant seller of liquid bleach by the acquisition, even aside from the elimination of Procter as a potential entrant. See *General Foods Corp. v. Federal Trade Commission*, 386 F. 2d 936, 945 (3d Cir. 1967). In a later part of this opinion we deal with complaint counsel's contentions that, aside from removal of Beatrice as a potential entrant, the Beatrice-Sexton merger injured competition by "entrenchment" effects.

¶ 19,288 at 21,451 (1970), *reversed and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971).

What is clear in all of these cases, and the economic doctrine underpinning them, is that elimination of a potential competitor becomes important where conditions impede entry into the market. Where entry is easy there will usually be a large group of firms (and investors willing to form new firms) ready and able to enter the market should profits rise above competitive levels.

In this case, complaint counsel do not deny that there was ease of entry into institutional dry grocery wholesaling at the time of the acquisition and the record bears this out. Capital requirements appear to be relatively modest; essentially all that is needed by way of capital investment is warehouse space and trucks. Both items are often leased as indicated in the following table showing the number of warehouses and trucks by Chicago wholesalers. A large number of deliveries are also made without truck by common carrier.¹³

Name of distributor	Number of Chicago-area warehouses, owned or leased	Number of trucks (owned or leased)	Sales within Chicago SMSA (1969)
South Side Marquette.....	12	2.....	\$573,080
Holleb.....	1	15 to 20.....	8,193,683
Lawrence Foods.....	1	9.....	835,696
Diamond Distributors.....	1	1.....	567,236
M. L. Morgan.....	1	Leased trucks.....	529,538
B. A. Ralston.....	1	Leases 45 to 50 trucks.....	9,953,715
W. B. Snyder.....	1	5.....	2,001,391
Commissary Supply.....	1	(2).....	249,449
Ferness.....	1	1 and 1 truck leased 3 days a week.....	361,047
Geoghegan's.....	1	Uses common carrier for delivery.....	94,656
Trapp.....	1	5.....	1,002,378
Obee (subsidiary of National Tea).....	1	11.....	3,959,506
Ryser.....	(2)	30.....	1,450,248
RFB.....	2	5.....	2,087,874
Byrman.....	3	13.....	1,828,444
Cambridge Coffee.....	1	13.....	841,000
Borash.....	12	2.....	434,204
Fox River Foods.....	1	(2).....	767,468
John Sexton.....	1	(2).....	8,158,400

¹ Adjacent to each other.

² Not shown.

NOTE: No information shown as to number of warehouses and trucks for the following firms (SMSA sales in parentheses): Consolidated Foods (\$4,447,321), Kraftco (\$3,216,932), J. D. Rich Co. (\$798,568), Tenney Sales (\$600,945), Gage Food Products Co. (\$175,182), Bit O' Gold Foods (\$123,823), others (\$310,000).

¹³ For instance in 1968, Sexton shipped \$5,211,713 of dry groceries out of its Atlanta warehouse via common carrier and \$2,920,756 via its own trucks. Total shipments for all warehouse plants (except Detroit and Los Angeles) totaled \$34,688,430 via common carrier and \$18,573,778 via Sexton's trucks.

Sources of supply at nondiscriminatory prices appear to be readily obtainable, at least no evidence was presented showing this to be a problem. Economies of scale do not appear to be substantial.¹⁴ Although some differentiation undoubtedly arises from established customer relations and good will associated with brands, there is no evidence that this is substantial. Witnesses testified that advertising plays an insignificant part of this industry.¹⁵ In contrast to retailers and others who sell to the public, wholesalers are more likely to compete in terms of price, quality, and service since they face more knowledgeable customers. This is particularly true with respect to the sophisticated buyers for large MUFSO accounts.

In addition, we note that for similar reasons wholesaling in general has been viewed by observers of American business as one of the most competitively structured segments of industry. See, e.g., Bain, *Industrial Organization* 277 (1968); Holton, "Competition and Monopoly in Distribution," in *Competition, Cartels and Their Regulation* (Miller, ed. 1962). One leading study of grocery wholesaling in Los Angeles concluded that competition had intensified over the years and that institutional grocery wholesaling was the most competitive segment of grocery wholesaling—a fact that was attributed to ease of entry.¹⁶

That entry is relatively easy in institutional wholesaling is further indicated by the fact there have been recent and successful entrants in the Chicago area as well as other areas. Among complaint counsel's 25 "significant" wholesalers in the Chicago area, several entered the

¹⁴ A certain minimum sales volume is probably required to support an economical warehousing operation, but all indications are that this is not a high figure.

Evidence in the record does suggest that, as in most industries, financial economies of scale exist to some degree. One small wholesaler testified that he had trouble borrowing money to exercise the purchase option he had on the warehouse he leased. He testified that he had to pay higher than the prime rate of interest, whereas it is probable that large companies obtain capital at a cheaper rate. It does not appear, however, that the advantages of size due to imperfections in the capital market are competitively very important since this is an industry of low capital intensity.

¹⁵ See also *Economic Inquiry into Food Marketing, Part III (Canned Fruit, Juice and Vegetable Industry)* (Staff Report to the FTC, 1965) at p. 44:

"The two markets, retail and nonretail [institutional], represent essentially different outlets for canned products. In the retail market, advertising, distinctive labels, and promotional activities are employed to stimulate consumer demand and to differentiate between products of different canners. In the nonretail market [institutional], product differentiation is slight, and sales often are made on the basis of content specifications."

¹⁶ "Ease of entry seems to have been a strong factor in the increased number of operators in this class of wholesaling. * * * [O]nly a relatively small amount of capital is required to become a limited-custom [institutional] wholesaler. Those in the trade complain bitterly that the entry of the 'fly-by-nights' has caused highly disorganized competitive conditions in this area. * * *" Cassidy & Jones, *The Changing Competitive Structure in the Wholesale Trade* 47-48 (1949).

market within the recent past and have survived as profitable companies with respectable sales volume.¹⁷

Finally, witnesses familiar with the institutional food service business on a nationwide basis testified that there has been a steady influx of companies into dry grocery institutional wholesaling. These entrants include not only many small and middle-size companies but large national companies such as National Tea and Kraftco. Additional major food companies which already have interests in some aspect of the institutional food industry were named by one industry consultant as being likely candidates into institutional wholesaling. These include the Canteen Corporation, Swift & Co., Armour, General Foods, Borden, Ralston-Purina, Ogden Corporation, Carnation, Standard Brands, Norton-Simon, General Mills, H. J. Heinz, Del Monte, and others (Tr. 2078-88).

The record indicates that many wholesalers who previously specialized in distribution to retail grocery stores have gone into institutional wholesaling as have some grocery chains. A trade publication put in the record by complaint counsel further predicts that during the 1970's, 50 percent or more of supermarket chains expect to enter the food service industry. In addition, there has been a trend by frozen food institutional distributors to enter into dry grocery lines.

While it may be true that some entries into local markets have been by acquisition and horizontal mergers have occurred in some (non-Chicago) markets, there is no evidence that a trend of increased concentration has set in. Mr. Donald Karas, an experienced consultant to the industry and president of a company that has published an institutional wholesale directory as well as a trade journal for the industry, testified, and his trade directory shows, that the number of institutional distributors in the nation has grown from 1,500 to about 2,500 between 1964 and 1970. Seventy percent of these he estimates are dry grocery wholesalers. Even though this may include a number of small fringe operators, this increase, nevertheless indicates that the number of new entries has out-paced any exists via merger or other-

¹⁷ Commissary Supply Co. (1961); M. L. Morgan & Co. ("3 years ago"); R.F.B., Inc. ("12 years ago"); Gage Foods (1955); Fox River Foods (1956); Ferness (1962). R.F.B., Inc.'s total sales in 1968 were \$2,411,000, which placed it number seven in complaint counsel's ranking, just below Kraftco Corporation. The record also shows that frozen food distributors have increased in number in recent years and it appears that some of these are now selling some dry grocery products. One food broker witness testified that 30 to 40 Chicago frozen food distributors have gone into dry products in the last 10 years.

wise.¹⁸ Although this increase does not necessarily portend deconcentration, we cannot presume in light of the large number of new entrants that concentration is on the increase.

We conclude for the above reasons that there is insufficient basis in the record to find that loss of Beatrice as a potential entrant to the industry will substantially lessen competition. We emphasize, however, that our decision in this case is limited to the evidence presently before us. Should later investigations disclose facts indicating that barriers to entry or other crucial market factors affecting competition are or may be developing, future acquisitions of a similar type would of course present more serious questions of legality under Section 7. Our decision in this case should therefore not be construed as any indication that mergers in this industry will not continue to be scrutinized.

B. Alleged Entry Barriers and Entrenchment of Sexton as a Result of the Acquisition

Complaint counsel contend that even aside from potential competition arguments, the substitution of Beatrice for Sexton itself has altered the competitive structure of the industry and will deter new firms from entering and established firms from competing aggressively. We have examined the record carefully but cannot agree that there is evidence to support this view.

Complaint counsel argued during the hearing that (1) the merger would enhance Sexton's ability to service MUFSO accounts to the detriment of locally based accounts, (2) the financial resources of Beatrice would enable Sexton to expand its resources and promote and advertise the Sexton label, (3) that Beatrice-Sexton would have the advantages of available storage facilities in view of Beatrice's own warehouses, and access to Beatrice's distribution network and overall guidance from Beatrice's management, and (4) that Sexton would now be put in a position of offering a full line of Beatrice's dairy products and would be able to institute "one-stop" wholesaling programs in which it would deliver all food needs of customers—dry, fresh, and frozen foods and meat and dairy products.¹⁹

¹⁸ Mr. Karas identified the sources of new entries (Tr. 2090) :

"* * * There are more companies in dry, but with the elevation in convenience and frozen foods, and the demise of distributors serving supermarkets, we inherited a large number of distributors in the last five, six, seven years, with supermarkets developing commissaries of their own, and the distributors have headed toward the booming food service industry that is going on. This is where the additional distributors came from, and also the attraction of a new industry."

This view was confirmed by other witnesses (Tr. 2397-2399, 1701, 2181-2186).

¹⁹ Complaint counsel also argue that the ability of Beatrice to supply some dry food products from its own processing plants gives Sexton a decisive competitive advantage over other wholesalers. The evidence does not support this, as noted later in part of this opinion dealing with vertical aspects of the merger.

The evidence, however, did not tend to support the above assertions. Respondent denied that the union of Beatrice and Sexton gave it a competitive advantage in selling to MUFSSO accounts since the record showed that Sexton was already an established national wholesaler and Beatrice's experience was in selling products to the retail grocery trade. As to the expected use of the "one-stop" concept, Beatrice presented evidence that Beatrice's frozen and fresh dairy and bakery products cannot as a practical matter be delivered with the dry products sold by Sexton and there is no trend in that direction by Beatrice or other members of the industry.²⁰

The hearing examiner found that "the record does not permit a finding that Beatrice has conferred upon Sexton any advantages so significant as substantially to lessen competition in the institutional dry wholesale trade" (Initial Decision, p. 504).

On appeal, complaint counsel rely principally on a "deep pockets" argument, contending that Beatrice's financial strength will enable Sexton to outstrip all rivals in expanding its warehousing facilities to meet new and increasing demand. It is argued that "the merger has opened up a new possibility for Sexton, the interest-free transfer of capital funds from its parent."

It is not shown, however, that prior to the merger Sexton needed the resources of a "rich parent" to expand its operations to meet new demand.²¹ Secondly, it is not shown that the rate at which investible funds are borrowed has substantial competitive significance in this industry.

Although the Commission is concerned about the advantages that a large conglomerate entrant may have over smaller competitors, something more definite than absolute size must be shown to strike down an acquisition on the asserted advantage of "a deeper pocket." Congress did not declare that acquisitions by large companies are illegal as such. It must be shown specifically how the size of the ac-

²⁰ Testimony by an institutional distributor called by complaint counsel tended to corroborate respondent's evidence that one-stop wholesaling is impractical. State and local health laws and regulations, union problems, conflicting delivery schedules, the difficulty of mixing product loads and the vagaries of the buyers relating to frequency and time of delivery were cited by this witness and others as factors mitigating against one-stop wholesaling (Tr. 245, *et seq.* See also Tr. 2024-28, Tr. 2048-54).

²¹ Sexton's financial statements in the record would indicate otherwise. In 1968, its working capital amounted to \$15,441,629 (of which \$1,338,177 was cash). Long-term debt equalled \$2,389,000 and the ratio of current assets to current liabilities was 3.34 to 1. Complaint counsel themselves characterized Sexton as having "substantially and consistently expanded its volume * * * [and] in recent years proceeded with modernization of warehouse facilities" (Proposed Findings, p. 6).

quiring firm will probably bring about an adverse change in the structure or practices of the particular industry under consideration.²²

As we have previously noted, this is an industry of low capital intensity. Small companies have been able to enter and remain in this business, and the record shows that many have managed to grow and expand despite the presence of well-endowed firms in the industry.

Nor is this an "advertising-intensive" industry as was involved in *Procter & Gamble* (liquid bleach) and *General Foods, supra* (household steel wool) where prior to the acquisitions the leading companies were relatively small and the entry by acquisition of the nation's leading advertisers destroyed any competitive balance and threatened to deter new entry.²³ Here, although there are small institutional wholesalers, the industry is not composed exclusively of small businesses, but includes large wholesalers and "conglomerate" food companies that are equal to Beatrice in terms of financial strength such as Kraftco, Consolidated Foods and National Tea. These companies with their vast resources are not likely to take a back seat to Beatrice or be hesitant to compete with it. No evidence was introduced that competitive vigor has in fact lessened or that entry barriers have been raised as a result of this acquisition.²⁴

C. Alleged Elimination of Competition in Institutional Frozen Food Wholesaling

Complaint counsel argue that there is a violation of Section 7 on the ground that the acquisition removed Sexton as a potential entrant into the institutional distribution of frozen foods. The record shows that although Beatrice did not engage in institutional wholesaling

²² See *Procter & Gamble*, 63 F.T.C. at 1548:

"* * * In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probable anti-competitive effect. Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se* unlawful. In every case the determination of illegality, if made, must rest upon specific facts. * * *"

²³ Compare *Procter & Gamble, supra*, and *General Foods Corp.* [1965-1967 Transfer Binder], Trade Reg. Rep. ¶ 17,465 (FTC 1966), *aff'd* 386 F.2d 936 (3d Cir. 1967), where *Procter & Gamble* and *General Foods* each spent more than \$80 million annually on consumer-oriented grocery store products, which amounts could be used to advertise jointly the product-lines acquired.

²⁴ In *Reynolds Metals Co.*, 56 F.T.C. 743, *aff'd* 309 F.2d 223 (D.C. 1962), also relied upon by counsel, it was shown that as a direct result of the acquisition by a large aluminum company, a previously small manufacturer of florist foil engaged in below-cost pricing which injured the other small manufacturers of florist foil (56 F.T.C. at 775). See also *Elco Products Co. v. Federal Trade Commission*, 347 F.2d 745, 751-752 (7th Cir. 1965) (evidence showed that the acquisition enabled acquiring firm to eliminate a competitor which, but for the acquisition, it would not have been able to do).

of frozen foods outside of Chicago, it did operate two institutional frozen food distributors in Chicago at the time of the merger.

There is no data in the record, however, as to market shares, degree of concentration, or conditions of entry in this line of commerce. The hearing examiner made no findings on this aspect of complaint counsel's case. In the absence of such market facts we cannot infer that competition will be adversely affected in this line of commerce.

D. Other Arguments of Complaint Counsel on Appeal

Vertical Aspects

Complaint counsel argue that the hearing examiner disregarded evidence that "the Beatrice-Sexton merger may adversely affect competition among suppliers to wholesalers of institutional dry groceries in an industry where there is an increasing trend toward concentration." They point to evidence in the record showing that two Wisconsin canners of vegetables who had made sales to Sexton for a number of years were dropped by Sexton right after the acquisition as suppliers, and it appears that Sexton started purchasing at least one of the items from "Aunt Nellie's Foods," a division of Beatrice which processes and sells canned vegetables.

Respondent points out, however, as it has done throughout the proceeding, that the Commission's complaint in this matter alleges only that competition will be adversely affected in *institutional wholesaling*. It has not been shown by complaint counsel how possible foreclosure of food manufacturing companies from ability to sell to Sexton will adversely affect competitive processes in institutional wholesaling.

Nevertheless, we have examined the record from the point of view of determining whether there is sufficient basis upon which to infer that entry barriers into institutional dry foods wholesaling have arisen from vertical aspects of this merger and/or whether possible foreclosure of *Beatrice* as a source of *supply* has injured competition in that line of commerce.

Less than \$1 million in dry groceries was sold to Sexton by Beatrice divisions prior to the merger and most of this amount was by its Aunt Nellie's Foods Division. This division does most of its business in supplying consumer packs of canned vegetables and fruit juices to the retail grocery trade (*i.e.*, grocery stores), and the record shows that they recently discontinued all institutional production at one of their main plants and have informed Sexton that they are no longer interested in supplying institutional packs (Tr. 1467-69).

Although other acquisitions between food processing companies and institutional wholesalers are cited by complaint counsel, it is not shown

whether and to what extent these food processors engage in packing to the institutional trade and what impact on market foreclosure these acquisitions may have had if any. No independent wholesaler testified that he has not been able to buy needed sources of supply because of this acquisition or other acquisitions. In fact, after this acquisition took place some institutional wholesalers on their own stopped buying from Beatrice, switching their purchases to other food suppliers because they preferred not to buy from a "competitor" (i.e., Beatrice-Sexton). This would indicate that wholesalers have had no trouble getting supplies of comparable dry food institutional packs from other sources. That this is the case is further supported by brokers who testified that distributors have adequate sources of supply to turn to (Tr. 1881-82, 1948-49, 1959).

Even if, contrary to what has happened so far after the merger, Beatrice's entire annual production of institutional packs (\$13 million per year in 1968) were nevertheless *all* channeled through Sexton, this would probably represent about 1 percent of total sales by dry food processors to the institutional market. We cannot find on the basis of such a *de minimis* foreclosure effect alone that sources of supply to the institutional trade will be lessened by sales between Beatrice's food divisions and Sexton.

Elimination of Competition in Manufacturing Dry Foods

Finally, complaint counsel argue that the Beatrice-Sexton merger eliminated significant competition in the manufacture of institutional dry groceries. Again, however, we are confronted with the fact there is no allegation in the complaint that competition in manufacturing or processing of foods as a line of commerce has been adversely affected by this acquisition. Although respondent noted this variance and consistently objected to this line of argument throughout the proceeding on that basis, complaint counsel did not seek to have the complaint amended. The hearing examiner, after reviewing complaint counsel's proposed tabulations concerning canning statistics, held that "even if these figures are accepted, the examiner is at a loss to know what finding of adverse effect could be made to the dry grocery wholesale trade." We have not been presented with any reasons to disagree with that view.²⁵

²⁵ Accordingly, we do not need to reach complaint counsel's assertion that the hearing examiner erred in his alternative holding that "Beatrice and Sexton were not really competitors at the time of the acquisition, although both manufactured a few of the same products, each sold to a separate and distinct market, and were not seeking any of the same customers" (I.D., p. 21 [p. 502, herein]). However, we note that it is undisputed that what items Sexton did manufacture, it did so only for sale to its own institutional customers, whereas Beatrice was oriented to the supermarket trade with about 2 percent of its total processed foods packed for the institutional market (Tr. 1861).

Motion for Remand

During oral argument before the Commission, complaint counsel renewed a motion, previously denied without prejudice, to remand this case to the hearing examiner for the purpose of considering the admission of newly available evidence. The motion states that the evidence will consist of a recently available survey of the Department of Agriculture on the food service industry for 1969 that focuses on food costs and related matters and will corroborate complaint counsel's projections of the growth of institutional food purchases and their estimates of total dry food sales in national and Chicago SMSA markets for 1969. Since our decision in this matter does not turn on the validity of those original estimates and projections, no purpose would be served by a remand and the motion will be denied.

V. CONCLUSION

We find that the evidence is insufficient to support the hearing examiner's finding that a violation of Section 7 has been shown in the "national market" of institutional dry foods wholesaling. We further find that alternative grounds for finding a violation, as submitted in complaint counsel's appeal, are either not supported by the evidence or are outside the scope of the complaint in this matter. Accordingly, the initial decision in this respect will be vacated and the complaint dismissed. An appropriate order accompanies this opinion.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of and in opposition to (1) the appeal of respondent from the hearing examiner's initial decision finding a violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and (2) the cross-appeal by counsel supporting the complaint from failure of the hearing examiner to enter certain findings of fact and conclusions of law in further support of a finding of violation of law; and the Commission, for the reasons stated in the accompanying opinion, having concluded that the respondent's appeal should be granted and complaint counsel's cross-appeal should be denied and that the hearing examiner's initial decision should be modified to conform with the views expressed in said opinion:

It is ordered, That the hearing examiner's initial decision as so modified be, and it hereby is, adopted as the decision of the Commission, and

EASTMAN KODAK CO.

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Complaint

It is further ordered, That the motion of counsel supporting the complaint to remand this matter to the hearing examiner for the pur-